

DRAFT:

Antidemocrats and the Right to Participate

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On the very first page of his book, *The Republican Experiment*, the historian Maurice Agulhon notes that many participants in the French Second Republic held no affection for self-government. Unlike those who had cultivated deep and abiding allegiances to republicanism, opponents of the new dispensation were sarcastically referred to as “republicains du lendemain” or republicans on the day after—i.e. the day after the revolution.¹ Agulhon brands disloyal participants with a different moniker: they were republicans through the force of circumstance. These citizens participated not because they accepted the republic’s legitimacy, but because, for the moment, the republic was the only game in town. It is not uncommon for students of democratic revolution, whether they are classicists, historians, or political scientists, to describe democracy as a sectional form of government, a form of government that one part of the populace imposes on another. Practically speaking, many of a democracy’s members will have no choice about whether they would like to members of that society or that regime. This fragment of democratic wisdom was neatly captured in the French epithets described above, but it remains more or less latent in contemporary discussions of democracy’s moral value.²

In contrast to the considerable tolerance extended to the “republicains du lendemain,” democratic regimes disqualify or sanction citizens and their political organizations for a remarkably diverse array of reasons. The Israeli Basic Law stipulates that political parties can be kept from competing merely if those organizations do not accept the democratic or Jewish character of the Israeli state. Turkey has consistently sidelined parties that question the state’s secular identity or its territorial integrity. And Spain has banned and seized the assets of the Batasuna Party, an organization accused of fostering an unacceptably close relationship with the terrorist organization, ETA. In this brief essay, I want to explore whether it is democratically legitimate for a state or a

¹ Maurice Agulhon, *The Republican Experiment, 1848-1852*, trans. Janet Lloyd (Cambridge Cambridge University Press, 1983): 1.

² Scholars interested in investigating the authority of the state—like John Simmons, Leslie Green, and Robert Paul Wolff—often discuss this fact in the context of consent-theories. But democratic theorists typically argue that fair or legitimate democratic procedures obviate the need for mechanisms of consent.

society to limit the participation of members because they object to democratic practice writ large or an essential or defining element of the practice (the right of women to vote, for example). These individuals are not merely ambivalent about a democratic regime, they would prefer to see it replaced by another, non-democratic form of government. When these citizens play the game of democracy, they do so because they have no alternative; if they could change the nature of the regime, they would do so.

In the contemporary theoretical literature on democracy there are two schools of thought concerning the rights of the intolerant or the unreasonable. One prominent argument is that intolerant are owed respect, unless they infringe on or violate the rights of others (or will do so imminently).³ The second argument is that antidemocrats, or the unreasonable more broadly, can be exposed to various forms of censorship and disenfranchisement because their beliefs or activities are inconsistent with our reasons for valuing democratic participation. In this essay, I aim to add credence to the first thesis by disparaging the latter.

The essay has five sections. The first outlines some basic assumptions and provides a paint-by-numbers defense of democratic decision making and the value of democratic participation. The subsequent sections counter three different strategies for arguing that antidemocrats' participation ought to be restricted. The strategies are based, respectively, on the idea that opponents of self-rule cannot advance legitimate interests while they pursue non-democracy, that antidemocrats' beliefs and actions clash with the moral idea of reciprocity, and finally, that antidemocrats act in bad faith when they play the democratic game. Each of these theories, I contend, fails and offer, in the last section, an example intended to illustrate why. If persuasive, my arguments suggest that the core justification for restricting the participation of antidemocrats is the same as the justification for

³ For example see: John Rawls, *A Theory of Justice*, (Cambridge, MA.: Harvard University Press, 1971), 126-221.

restricting the participation of anybody else: that the participation in question is likely to invidiously infringe on the rights of others.

Section 1: The Value of Democracy and the Right to Participate

A. A Toy Justification of Democracy

Under what conditions can governments justifiably restrict political participation? To what extent are governments and citizens obliged to respect the rights of those who would use representative institutions to undermine democracy? To answer these questions, we require some sense of why political participation matters. In this section I offer an interest-based account of the right to participate, an account describing the morally important benefits the right secures. By participation, I mean not just voting, but office holding, speaking, and associating with others.⁴

Before moving forward, however, I need to outline a set of background arguments and assumptions.⁵ First, I assume that a person's interests deserve the same moral consideration as any other person's—i.e. the same interest requires the same consideration. Second, I assume that adult citizens are competent but imperfect. By competent, I mean that these individuals are capable of reflection about the dictates of morality and the common good and that they are also the most reliable guardians of their interests, projects, and plans.⁶ By imperfect, I mean that individuals are fallible, capable of shortsightedness, narcissism and all manner of evil. Third, I will assume that to be legitimately authoritative a political system's basic institutions and rules must, in principle, be

⁴ Joshua Cohen, "Money, Politics, Political Equality," in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, MA.: Harvard University Press, 2009): 270.

⁵ This section is intended to synthesize a number of approaches to the right to equal participation. Nonetheless, I draw heavily from Thomas Christiano's enlightening account of political equality in his *The Constitution of Equality* (Oxford: Oxford University Press, 2008): especially 75-130.

⁶ See Dahl's discussion of competence: Robert Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1991) 105.

justifiable to all reasonable members of the community. Fourth, I assume that among the competent, there is considerable and endemic disagreement about how to characterize and to respond to the vast majority of political issues they face. The political issues to which reasonable disagreement extends includes most matters of moral and political import. But because I am interested in how democracies ought to respond to antidemocrats, not whether democracy itself is justified, I will also stipulate that reasonable disagreement does not extend to the relative superiority of democracy, as, ideally, a fair system of allocating opportunities to exercise political power.⁷ If these assumptions do not hold, then the conclusions I reach are necessarily suspect.

I think it is trivial, but true that if one accepts the preceding assumptions one would be well on their way to acknowledging both that democratic political systems can be legitimately authoritative and that other forms of political organization generally cannot (there may be exceptions during moments of state failure, natural disaster, etc...). Political communities face questions of pressing import and members of those communities will harbor good faith disagreements about the best answers to those questions. In the face of this disagreement, a method of decision-making is required that is justifiable to all reasonable members of the community. Decisions that are not made via such a procedure are imposed and illegitimate. Those who impose such decisions have no right to do so and those subject to the decision have been imposed upon and harmed. Because I have assumed that reasonable disagreement does not extend to the legitimacy of a broadly defined set of democratic procedures, those procedures can be employed as a legitimate means for making decisions about which there is widespread good faith disagreement. Those institutions would, in other words, gain the assent of reasonable citizens.

⁷ On disagreement, see: Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999). Christiano, *The Constitution of Equality* 58, and Laura Valentini, "Justice, Disagreement, and Democracy," *British Journal of Political Philosophy*, 42 (2012).

It is worth briefly treating a concern that might be raised by the schematic justification of democracy that I have outlined above. David Estlund has recently argued that if democracy is justified on the basis of its fairness, the equal respect instantiated in the process of democratic decision-making, then there is no reason to prefer electoral democracy to a fair lottery.⁸ Lotteries were employed to select decision-makers in ancient Athens and they indisputably treat participants fairly. Deploying an ingenious and intricate argument, Estlund contends that to seriously prefer voting-based conceptions of democracy to lotteries, one must be satisfied that elections are more likely than a random procedure to produce the correct decisions. Estlund's provocative claims have sparked a lively debate, but for our purposes it is important to see that the outcome of that debate has little to no impact on the questions considered herein. That is because lotteries only stand in for the act of voting.

Imagine, taking an extreme version of the use of lotteries, that instead of electing representatives, we used a random procedure to select an individual, call him a Queen, to make decisions for the rest of us. Imagine, plausibly I hope, that despite our shift from elections to lotteries, in this new world, power and political relations would still exist. Those subject to the Queen's edicts would try to influence his decisions. To prepare for the lottery, they would form party-like organizations and run campaign-like television advertisements, all in the name of increasing the likelihood that the new Queen would favor their causes. Presumably, some individuals would object to the egalitarian character of the lottery and would work to invidiously exclude members of the community from being considered by the random procedure. Accordingly, this society would still face the question of whether opponents of fair lotteries should be allowed to participate. In other words, even in a world in which the characteristic practice of democracy was

⁸ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton NJ: Princeton University Press, 2007).

not elections, but some other procedure, we would still have to confront questions concerning the rights of the intolerant.

B. A Right to Participate

Is the right to participate a critical element in the formula for legitimate government? Yes, because the liberty to participate advances interests that underwrite individuals' fundamental well-being. The duty to respect the participatory rights of others depends on the idea that when those rights are not respected the basic interests of affected individuals will predictably and unjustifiably suffer. It is the avoidance of that suffering which would lead reasonable members of the community to embrace this right.

To understand the impact of laws and activities that restrict participation we need a better grip on the interests at stake. For convenience, I divide the basic interests that ground the right into two categories—active and passive. By active interests, I mean the ways in which individuals suffer if they fail to effectively participate in the political process, whether that failure is voluntarily or not. The satisfaction of passive interests, by contrast, merely depends on having the option to effectively participate. For example, consider a case in which I am disenfranchised because the rest of the community takes me to be an idiot. Being deemed inferior harms my passive interests even if I never intended to vote.

The prime example of an active interest is the likelihood that one's basic causes or concerns will be harmed if one does not participate. As Charles Beitz argues: “[t]he basic idea is that citizens might reasonably refuse to accept institutions under which it was predictable that their actual interests—that is the satisfaction of their needs and the success of their projects—would be unfairly

placed in jeopardy.”⁹ Generally, we expect political participants to be flawed and somewhat self-oriented; we believe they will prioritize their own approach to the common good and their own projects. Even under the best of circumstances, participants are unlikely to adequately defend the concerns of non-participants; differences in experience, principle and psychological make-up mean that every individual is likely to be the most faithful interpreter of what she requires to lead a valuable life. As a result of these tendencies, individuals who do not participate may not be able to advance their basic concerns and projects.¹⁰

There is a second order or indirect way in which political rights protect one’s basic causes: they allow individuals to defend their rights, including the right to participate. So for instance, if a group seeks to undercut my rights, participatory or otherwise, I can speak out, organize, protest, and, of course, attempt to pass legislation securing my claims. Moreover, the political process itself is used to determine which the rights the community will recognize, as well as the practical contours of those rights. Some people believe that the right to property is a natural right, a right possessed by individuals on the basis of their nature and not because they are granted this right by the legal system. But the way in which that right is instantiated, whether, for example, the government can tax one’s property at death or remove it under the guise of eminent domain, depends, in part, on the game of politics itself. In this important respect, individuals’ ability to defend their full portfolio of rights rests on right to participate.

One could identify many other potential active interests that are advanced by political participation—e.g. the cultivation of civic virtue—but now I will turn to the other category interests that are advanced through the political process: passive interests. Equal recognition is one of the two most important of these concerns.¹¹ When individuals are disenfranchised, they are

⁹ Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton NJ: Princeton, University Press, 1990) 110.

¹⁰ Christiano, *The Constitution of Equality* 59.

¹¹ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999) 70-73.

being treated as if they are not as capable and not as worthwhile as other members of the political community. Narrowly, this exclusion may cause emotional or psychological harm. More broadly, radical disrespect of this kind may impact individuals' pursuit of their political and non-political ends. For instance, those who face discrimination may be less likely to apply for or be accepted by certain schools and employers.¹² Citizens who are effectively disenfranchised should not recognize the decisions emanating from political institutions as their own; nor should they identify with the political community. Acknowledging other citizens' right to share in the task of determining a society's common goals is simply the paradigmatic way in which members of a political community validate each other's equal standing.¹³

A second and closely related passive interest is the contribution to one's well-being that is played by conceiving of oneself as an author of one's life. Traditionally this interest has been connected to the value of personal autonomy, the notion that individuals can be effective agents, that one's choices matter, not just with respect to their outcomes, but because the making of those choices gives shape to one's identity and self-constitution. The ability to participate politically allows individuals to weigh in on issues of lasting import. I can decide the projects, missions and movements that I will throw myself into. Perhaps just as importantly, I can switch positions. We rightly regard this interest as passive because the choice to participate or not, to canvas for votes on a rainy day or to stay at home and drink a beer, is of fundamental import in politics. The interest in self-governance is not simply satisfied through participation itself, but at a minimum, by the option to participate.

Of course, even those who lack effective rights to participate can make fateful political decisions. Opponents of non-democratic regimes must determine whether to publish a critical essay, to contest an unfair election, to join a protest or even an insurgency. But non-democratic regimes

¹² Claude Steele, *Whistling Vivaldi and Other Clues About How Stereotypes Affect Us* (New York: W.W. Norton, 2010).

¹³ Beitz, *Political Equality: An Essay in Democratic Theory* 110.

create uncertainty about what is and isn't allowed. And they attach oppressive costs to a vast array of political activities, generating an intense, narrowing pressure. In the face of this pressure, many if not most individuals will cede their political autonomy, in effect surrendering a portion of themselves. The freedom to choose is thus an essential interest protected by the right to participate.

The interests I have described ground individuals' rights to participate and they can only be consistently satisfied and protected through a democratic political process. Restricting a group's access to the political arena seriously jeopardizes their well being. And given the basic interests at stake, individuals have a duty to respect each other's ability to engage in meaningful political activity. If I violate your rights to participate, I harm and wrong you.

Naturally, members of society have different interests at stake depending on the question raised. Should we then really speak of an equal right to participate? Some questions addressed by political institutions, such as whether smoking is allowed in public parks, will have a relatively greater impact on the lives of discrete minorities, like park users. In this case, it may be appropriate to manipulate the set of eligible voters or give different weights to individuals' votes so that the decision-making procedure gives due consideration to the opinions of the affected. But questions involving the steps a regime should take to defend itself against antidemocrats impact the entire political system and therefore concern each member of the political community. By implication, all members' have a roughly equivalent interest in the kind of regime they live in.¹⁴

C. No Right to Violate the Rights of Others

It bears explaining why forms of participation that are typically covered by political rights do not do so when those activities curtail others' ability to advance basic political interests. I focus on

¹⁴ Christiano, *The Constitution of Equality* 81. See also: Harry Brighouse and Marc Fleurbaey, "Democracy and Proportionality," *Journal of Political Philosophy* 18, no. 2 (2010).

the violation of political rights because, presumably, those are the kinds of rights that antidemocrats would be most likely to infringe upon. Consider a school board election. Imagine that I have children in the school system and that I take the election very seriously, reading up on the candidates and engaging in extensive, perhaps punishingly extensive, political deliberations with my peers. What if I cast a thousand ballots and everyone else casts a single vote? In this case there is no question that I am advancing important active and passive interests via my participation. Yet I believe that other members of the community would be justified in complaining about my outrageous political advantage and that my ballots should not be counted. Why is that so?

Perhaps the concerns of the other voters in this election simply outweigh my own? Taken together, their interests in the outcome and in being treated as equal members of the community likely exceed mine. Now imagine that three-quarters of the community were granted extra votes with the remaining quarter of the community stuck with just one vote each. In this case, my earlier arithmetic might not hold—the interests of advantaged members of the population might indeed outweigh, in some numerical sense, the interests of the disadvantaged.

A more fundamental reason the right to participate does not generally afford the advantage of extra votes, is that the interests of the disadvantaged are likely to suffer if part of the community is granted extra voting power. Those with a thousand votes are likely to advance their own causes and projects at the expense of others. And precisely because a certain group of voters is now politically disempowered, members of that group will now have greater difficulty rectifying a setback to their interests. If single-vote members asked why their interests should carry less weight, we would be unable to offer them a reasoned response. Both harmful and invidious, the diminution of one's group's political status would leave the polity less legitimate and less democratic.

The example of a school board election gone awry is silly. But the principle is not. If citizens use the common instruments of democracy--speech-making, partisan mobilization, and

legislative action--to undercut participation; if, for example, members of an important political party exclude citizens on the basis of their race, unreasonably limiting the ability of those citizens to satisfy core interests, then the party member's activities are not due respect.

How can we tell whether a particular activity or policy violates an individual's right to participate? Would a policy requiring citizens to vote on a particular day or through the mail meet this standard? As Thomas Christiano argues, we can identify unjustified limitations on political rights by focusing on whether rules limit the ability of citizens to advance the core or central interests which the right protects. My active interest in advancing my projects or concerns is not substantially jeopardized by a restriction on when I can vote (even if this set-up does pose an inconvenience). Indeed, the establishment of constitutive procedural rules, rules setting out how the political process will function, is necessary for me to exercise my rights. By contrast, a blanket restriction on my ability to vote sets back basic or core interests.¹⁵

At the margins it may prove difficult to distinguish between the core and periphery of the right to participate. One heuristic for determining whether core interests are at stake is to consider whether individuals can effectively challenge the offending rule or activity via the democratic process. Disenfranchisement, for example, not only harms me, it limits my ability to rectify the harm done. Another familiar way to identify a limitation that violates the core of a right is to consider whether reasonable people could agree that citizens' could not longer satisfy their basic democratic interests.¹⁶

¹⁵ Christiano, *The Constitution of Equality* 166.

¹⁶ Corey Brettschneider, "When the State Speaks What Should It Say," *Perspectives on Politics*, (2010), <http://ssrn.com/abstract=1681305> Last Accessed: December 25, 2010: 20.

3. Antidemocrats have No Legitimate Interests in Participation

When political theorists discuss unreasonable or antidemocratic citizens they often make use of pantomime villains, thoroughly evil types like Nazis or members of the Klu Klux Klan. Do Nazi's have a right to participate? Are efforts to undermine democracy, to weaken the political foundation on which the right to participate stands, worthy of respect? In an essay on the relation between interests and rights, Jeremy Waldron suggests that it would be legitimate to ban the speeches of Nazis who propose "to make inflammatory speeches calling for the suppression of another group of people (call them Communists)." Waldron stipulates that in this hypothetical, "there is a real danger" that the Nazis speeches will be successful, causing Nazi supporters to attack and suppress the Communists. But he insists nonetheless that this fact is surplus for our consideration of the Nazi's speeches. The Nazis, he argues, are not exercising their rights by seeking to suppress other members of society. "To count as a genuine exercise of free speech, a person's contribution must be related to that of his opponent in a way that makes room for them both....The speeches [the Nazis] claim the right to make are calculated to bring an end to the form of life in relation to which the idea of free speech is conceived. We may ban their speeches, therefore, not because we think we can necessarily safeguard more rights by doing so, but because in their content and tendency the Nazi's speeches are incompatible with the very idea of the right they are asserting."¹⁷ If Waldron's argument were persuasive we would have to admit that seeking to harm others, not actually doing so, is the essential boundary of the right to participate. Merely joining an antidemocratic party or protesting against the claims of other members of society would place one beyond the democratic pale.

¹⁷ Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) 223.

But there is a problem with Waldron's argument. What makes this hypothetical tick, what gives it intuitive grip, is the evident "tendency" of the Nazi speeches in question, not their "content." We may silence the Nazis in this case not because they are acting hypocritically, but because of "the real danger" that they will cause a rights violation.

Consider the case of a professor of economics; let's call him Habsburg. Professor Habsburg is an elitist. He believes that democracy is not an efficient or a productive way of organizing political power. He joins a monarchist party and speaks out against popular self-rule, ridiculing the principles most closely associated with the practice. Though there is little chance his diatribes or his other political activity will succeed, his real intention is to persuade others to join his pursuit of non-democracy. Habsburg's actions are aimed to close off the freedoms he is taking advantage of, to bring an end to a democratic form of life. On Waldron's view, if the state banned his speeches, the professor could not claim, in response, to be exercising his fundamental political rights.

Waldron's argument is kept in place by a single argumentative buttress: if individuals have an interest in free speech and free participation then they cannot have an interest in achieving a society in which citizen's may not speak or participate freely. There exists, therefore, a direct relationship between our reasons for acknowledging a right and the extent of that right. By implication, one's pursuit of non-democracy should not be accorded the same democratic weight as one's pursuit of other ends.

In this case, I think Waldron takes too narrow a view of the concerns advanced by political action. First, it is possible to have legitimate interests in living in a nondemocratic regime. Perhaps such a regime is more consistent with one's religious beliefs or political skills; one might feel more at home in a non-democracy. More importantly for our purposes, Habsburg may have a variety of legitimate interests at stake in his pursuit of non-democracy. For example, he exercises his political

autonomy by considering what the best form of government would be and acting upon it. And he may benefit from working with others to achieve ends they all value.

It is gratingly hypocritical when the Habsburgs of the world complain about censorship. But in a scenario such as this, a scenario in which Habsburg's antidemocratic aims are unlikely to be achieved, the claim that other members of society no longer have a duty to acknowledge his political interests gets the balance wrong, placing too much emphasis on the professor's hypocrisy and not enough emphasis on what Waldron refers to as "the idea of the right" to participate. The idea of the right, as I understand it, is grounded in the respect owed to individuals and by implication to their basic interests. A society does not have much to gain by limiting acts of participation that advance core democratic interests but do not infringe on the rights of others. If this is correct, a state might legitimately restrict the Nazi's efforts to foment violence, while allowing Professor Habsburg to publicly catalog democracy's many disappointments.

It is important to note that even if we were persuaded by Waldron's argument, it would show only that individuals lack a right to attack the rights of others, not that they lack a right to participate, *tout court*. To arrive at this latter claim we would not only have to conclude that the pursuit of non-democracy furthers no valid interests, but also that antidemocrats have no other interests at stake in the political process. In our collective imaginations, Nazis are ascetics, individuals whose lives are focused on one goal: the destruction of legitimate institutions and just societies. And if antidemocrats' sole political priority is antidemocratic revolution, then it might be the case that they do not possess a right to participate.

Personally, I find the idea of the ascetic antidemocratic cartoonish and implausible. Citizens who reject democracy, even Nazis and Klansmen, possess a broad portfolio of concerns and preferences, many of which have nothing to do with their favored regime type. Imagine, for instance, that in a particular country, many farmers hate democracy. These antidemocratic

agriculturalists prefer to live under an authoritarian government. Because they earn their living raising crops, they probably also believe that it would be in the best interests of the political community if the state increased its support for the production of corn-based food and energy products. There is nothing especially illegitimate about farmers pursuing government subsidies for agricultural production. Showing that individuals have no defensible interest in undermining representative institutions does not demonstrate that antidemocrats have no legitimate projects that might be advanced in the democratic process. So far, it would seem, it makes sense to treat antidemocrats as rights holders.¹⁸

3. Reciprocity and the Claim to Participate

Antidemocrats who participate in the democratic process have a shockingly underdeveloped sense of reciprocity. And people are often puzzled by the claim that they have a duty to respect the rights of those who would deny them the very same rights.¹⁹ One reciprocity-based argument against the participation of the intolerant rests on the idea that the beliefs of antidemocrats stand in serious tension with the reciprocity-based arguments that are often used to ground democratic legitimacy, justice, and morality, more generally.²⁰ Given this tension, one might argue that those who reject others' legitimate claims lack meaningful political rights of their own.

I will explore the feasibility of this argument by briefly examining Joshua Cohen's influential, reciprocity-based conception of deliberative democracy. In an early iteration of his theory, Cohen argues that participants in an ideal deliberative procedure share "a commitment to coordinating their activities within institutions that make deliberation possible and according to norms that they arrive

¹⁸ Discussions with Amelia Hoover-Green inspired this example.

¹⁹ For an argument of this sort, see: Benjamin Lippincott, *Democracy's Dilemma: The Totalitarian Party in a Free Society* (New York: Ronald Press Company, 1965).

²⁰ See, for example: Thomas Scanlon, *The Importance of What We Care About* (Cambridge, MA: Belknap Press, 2000).

at through their deliberation. For them, free deliberation among equals is the basis of legitimacy.”²¹ In later works, Cohen endorses a stronger principle of reciprocity-based public reason: participants in the ideal procedure “are reasonable in that they aim to defend and criticize institutions and programs in terms of considerations that others, as free and equal, have reason to accept, given the fact of reasonable pluralism and on the assumption that those others are themselves concerned to provide suitable justifications.”²² Plainly, antidemocrats are not committed to these liberal-egalitarian ideas; indeed, they reject them. On these terms, opponents of democracy are unreasonable, they are unwilling to offer or abide by reasons that other suitably motivated citizens could accept. In Cohen’s ideal situation, the unreasonable are simply not present. Can we therefore infer that antidemocrats have no claim to participate?

It seems unlikely. We have to be careful as we move from Cohen’s abstract conception of political discourse to the real-life circumstances in which those who reject democracy are subjects of political concern. Cohen’s conception of deliberative democracy is an ideal-type; political institutions, on his view, become more legitimate as they more closely approximate the ideal. But we should not assume that because antidemocrats are, by definition, absent from a model deliberative procedure that they therefore lack a right to participate. In defending Rawls’ notion of an overlapping consensus, Cohen suggests that arriving at reasonable agreements depends on the exclusion of the unreasonable. Yet he also holds that: “the exclusion is of a special kind. It does not amount to a deprivation of liberties or of what are conventionally understood to be the advantages of social cooperation. Instead, exclusion lies in the fact that the agreements used to justify the exercise of power depend on norms, values, and ideals that are rejected by some people

²¹ Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Philosophy, Politics, Democracy: Collected Essays* (Cambridge, MA: Harvard University Press, 2009).

²² Joshua Cohen, "Democracy and Liberty," in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, MA: Harvard University Press, 2009): 233.

whose views will as a consequence not belong to an overlapping consensus.”²³ In other words, antidemocratic views are not given weight in the justificatory process that identifies rights and just institutions. But there is no reason to surmise that the substantive outcomes of that ideal process would include the denial of rights to people who hold unreasonable views. Indeed, the unreasonable are not deprived of their liberties because reasonability is not the relevant qualification for possessing rights. For Rawls, a capacity for moral reflection, not reasonability, was the benchmark for rights holders. And even antidemocrats are likely to be endowed with this capacity.²⁴ Accordingly, participants in a justificatory procedure will regard antidemocrats as free and equal and as potential political participants.

Cohen’s discussion of laws that infringe on religious liberty supports my reading of his work. Religiously-motivated laws lack democratic legitimacy, on Cohen’s view, because their justification depends on moral or religious philosophies which those who do not subscribe to those philosophy’s could reasonably reject. When individuals are forced to follow laws they were given no reason to accept, Cohen argues, “[w]e have denied them full membership by failing to provide a justification for the exercise of collective power by reference to considerations that all who are members of the sovereign body that authorizes the exercise of power and who are subject to that power, and are prepared to cooperate on reasonable terms can accept. There are many ways to exclude individuals and groups from The People, and this surely is one.”²⁵ Though he regards the passage of religiously inspired law as exclusionary and unreasonable, at no point does Cohen suggest that those who favor exclusionary laws should themselves be removed from democratic arena. Holding unreasonable

²³ Joshua Cohen, "Moral Pluralism and Political Consensus," in *Philosophy, Politics, Democracy* (Cambridge: Harvard University Press, 2009): 57. For an illuminating discussion of some of these issues, see: Quong, "The Rights of the Unreasonable Citizens," 315-322. See also: Erin Kelly and Erin McPherson, "On Tolerating the Unreasonable," *Journal of Political Philosophy* 9, no. 1 (2001).

²⁴ Rawls, *A Theory of Justice*, 77.

²⁵ Cohen, "Democracy and Liberty," 246.

positions or exercising one's political rights in ways that are inconsistent with a reciprocal vision of political legitimacy just does not leave one bereft of legitimate interests, and therefore, of rights.

4. Antidemocratic Parties Participate in Bad Faith

The most compelling justification for restricting the activity of parties or individuals just in case they are ideologically opposed to democracy is that such groups act unfairly or in bad faith. Rejecting the legitimate authority of the democratic process, democrats through the force of circumstance would, if given the opportunity, topple the regime. When they play the game of democracy, they therefore signal a commitment to obey which they are not, in fact, committed to fulfilling. And by engaging in pernicious acts of deception, they relinquish their claim to participate. As the respondent in the 1973 Supreme Court case, *Communist Party of Indiana et al. v. Whitcomb*, argued: "It is fraudulent for a group seeking violent revolution to...disguise itself as a political party and use the very forms of the democracy it seeks to subvert, in order to gain support and carry on its nefarious ends."²⁶

Peter Singer's *Democracy and Disobedience* offers the clearest and fullest exposition of this justification.²⁷ He argues that antidemocrats are subject to sanction because they would refuse to follow the outcome of democratic procedures if they had a choice, but they nonetheless expect democrats to take their preferences seriously. Modeling his argument on the legal doctrine of estoppel, Singer holds that "participation in the decision making process can be said to give rise to reasonable expectations which will be disappointed by his refusal to accept the verdict of the

²⁶ *Communist Party of Indiana v. Whitcomb* 414 U.S. 441 (1973), Quoted in Nancy Rosenblum, "Banning Parties: Religious and Ethnic Partisanship in Multicultural Democracies," *Law & Ethics of Human Rights*, 1, No.1 (2007) 22.

²⁷ I should note that Singer's chief concern is the nature of an individual's obligation to obey democratic law, not the boundaries of legitimate participation. Peter Singer, *Democracy and Disobedience* (Oxford: Clarendon Press, 1973). For a similar argument see: Thomas Scanlon, "Promises and Practices" *Philosophy and Public Affairs* 19, no. 3 (1990).

majority.”²⁸ The willing creation of an expectation that one will carry out an action carries considerable normative bite. Having raised this belief, one ought to take the action, whether one wants to carry the action out or not. Antidemocrats thus mislead their fellow citizens when they vote.

Singer is well aware that some groups publicly declare their opposition to democracy. If one disavows the political system before one participates, has one still raised the expectation of compliance? Publicly denouncing democracy will not resolve the problem. Groups, even antidemocratic groups, participate with the expectation that their votes will be counted, representatives seated, and so on. Even if a party’s members publicize their opposition to self-government, their democratic activity may cause others to believe that antidemocrats will follow the rules of the game. “[T]he Dissenter is clearly taking an unfair position, a position which allows him to have a say in the decision, and yet not be obliged by any decision opposed to his views,” Singer contends. “To vote, and yet refuse to be in any way obliged by the result of the vote, is to take an advantage over those who are prepared to accept the majority decision.”²⁹

According to Singer, bad faith requires electoral exclusion. One need not fulfill a contract made with someone who explicitly refuses to satisfy her end of a bargain. And if individuals were only willing to accept democratic outcomes when doing so furthered their narrow self-interests, democracy could not be sustained. “There would be for this reason, a strong case for barring from participation in the democratic process those who announce beforehand that they do not regard the result of the election as obliging them to the smallest degree, or that the majority has no right to decide the matter on which they are voting.”³⁰ Only those who accept the legitimacy of democracy participate legitimately.

²⁸ Singer, *Democracy and Disobedience* 47.

²⁹ Singer, *Democracy and Disobedience* 55.

³⁰ Singer, *Democracy and Disobedience* 55-56.

The argument from bad faith depends on the possibility of voluntary choice. If I can choose whether or not to make a contract with you, you can regard my saying “I agree” as evidence of my intentions. But if I am forced to enter into a contract with you, the intention to fulfill the contract is not my own. Singer acknowledges this important requirement. He praises those who openly reject the democratic system and therefore refuse to vote. The ability to abstain, to withhold one’s participation, hints at the possibility of voluntary choice. If I can stay at home instead of voting, democrats can justifiably infer that I intend to follow the outcome of the democratic procedure on the basis of my participation.

The argument from bad faith collapses, however, because voting is not a normatively relevant signal of one’s acceptance of the democratic process. Individuals are affected and obligated by decisions whether or not they decide to formally participate; they cannot abstain from the collective enterprise which the democratic process ostensibly guides. Accordingly, democrats are in no position to assume that participation indicates acceptance. Lacking the opportunity to choose how to make authoritative decisions, citizens cannot be understood to have offered a voluntary signal of their commitment to democracy by voting or seeking political office.

An example will illustrate the preceding point. Imagine that three brothers—Ryan, Jody and Shawon *must* make a collective decision which will affect them all (the necessity of the decision is akin to the necessity of making collective choices in a democracy—it is, in Rawlsian terms, a circumstance of politics).³¹ Let’s assume, for the sake of argument, that the brothers must decide whether to have their home painted. Shawon insists that he should make the decision because he is the oldest of the three. The other two brothers, Ryan and Jody, demand a fair vote to determine their collective choice. Since they are bigger than Shawon, their preference prevails. Shawon must live in the house regardless of which decision is made and he cannot change the voting procedure.

³¹ Rawls, *A Theory of Justice* 126. Waldron, *Law and Disagreement* 101-106.

He might communicate his rejection of the process by refusing to vote. But Shawon cannot simply walk away. He is forced to comply. His brothers cannot draw any inference about whether Shawon accepts the process should he vote.

The preceding example raises the following question: is Shawon morally obligated to obey the outcome of a legitimate procedure he adamantly rejects? The answer is yes. Regardless of whether someone votes, he won't just be affected by a democratic decision, he will have a duty to adhere to obey it. This duty arises because a democratic procedure embodies each brother's equal moral status and because they *must* make a decision about the color of the house. Shawon, of course, does not see the value in democracy. But the only basis for his claim not to be bound by the process would be that he was superior in some way. And a claim of that sort carries little democratic weight.

When citizens are morally and legally obligated to obey a decision regardless of whether they believe in democracy, then they are, in a narrow but important sense, participating regardless of whether they vote. Despite prior commitments, any individual who is forced to obey democratic outcomes possesses an equal claim to participate in the democratic process. As long as Shawon's brothers expect him to comply with the outcome of a fair procedure, they must allow him to play a role in making that decision.

In sum, defenders of the good faith argument fail to recognize that democracy is a justifiably sectional form of government. Democratic institutions and democratic decisions are imposed by one group on another. But those institutions remain legitimate and authoritative despite their imposition. We tend not to think of antidemocrats in democratic regimes as being democrats through the force of circumstance. Yet as long as individuals cannot choose the kind of regime they live in, then the extant regime, no matter how admirable, has been imposed. Accordingly, democrats may not assume

that participation signals acceptance. And antidemocrats can not be charged with acting in bad faith when they play the game of democracy.

5. A Final Example

I want to offer a final hypothetical example to support the argument that antidemocrats possess a right to participate. The argumentative force of the hypothetical relies on what I believe is a widely shared intuition about democratic legitimacy. Imagine that you are the successful leader of a movement to topple an authoritarian government. After spending many years in prison and organizing underground efforts to build a democratic society, the leaders of the undemocratic regime have decided that they can no longer keep the lid shut on your movement. You and your fellow democratic partisans are finally in a position to establish representative institutions. There is only one problem. Many citizens, let's say a quarter of the adult population, prefer authoritarianism to democracy; these individuals prospered under the old system and they have no desire to live in a representative polity. Given the opportunity, they would push for a return to dictatorship. For the sake of argument, let's assume that you have access to a technology that will allow you to reliably distinguish those who oppose democracy from those who do not. There is no threat that you will mistakenly accuse democrats of being antidemocrats.

If you believe that the right to participate depends on one's acceptance of the moral legitimacy of democracy, then it would be normatively unproblematic to disenfranchise a quarter of the adult population. On this view, antidemocrats have the same claim to participate as those who are not affected by a political decision; no claim at all. There would be no loss of legitimacy if your movement, now in control of the government, shut out this large segment of the community. Indeed, imagine that your new regime met all the other possible conditions of a perfect democracy

(whatever perfection consists of). If we admit that antidemocrats lack a right to participate, we are also committed to the view that this polity is a perfect democracy.

My own intuition is that a regime which has disenfranchised a quarter of its adult population is not fully democratic; antidemocratic citizens would be justified in complaining because they were being forced to obey political outcomes which they had no possibility of influencing. Yet my intuition only makes sense if I believe that opponents of democrats possess basic democratic interests and therefore a right to participate. And if antidemocrats have morally important interests at stake in the political process, they have a claim to advance those interests. When they are unreasonably excluded, they have been harmed and wronged. As a result, the regime is less legitimate.

It is important to note that treating antidemocrats as if they possess democratic rights does not mean that they are immune from regulations or efforts aimed at limiting their ability to undermine a representative regime. It means that democrats will reject the conceptual possibility of a democratic apartheid; a situation in which a group of competent adults are unconditionally and indefinitely excluded from the political process.

6. Conclusion:

In this essay, I have considered three arguments for restricting the participation of democrats through the force of circumstance. The first argument hinged on the idea that antidemocrats lack legitimate interests in participation. The second turned on antidemocrats' hypocrisy and the third on the fact that when opponents of self-government play the game of democracy they do so in bad faith. In each case, I found the arguments lacking. There are, of course, many other potential reasons to limit the participation of antidemocrats. For instance, some

might point out that efforts to undermine democracy are immoral and courts have held that antidemocrats' activities, no matter how inconsequential, constitute evidence of a conspiracy that might lead to the destruction of a democratic regime. But I believe these arguments are less persuasive than those I surveyed. If the conclusions I have drawn are correct, then we should gain confidence that the right standard for limiting participation does not track ideologies, but actions—specifically, whether an individual's actions will violate the rights of others.

Does this mean that being a democrat, being a loyal member of a legitimate and authoritative regime doesn't matter at all? It may be the case democracy could not survive without democrats through the force of reason or allegiance. And it may also be the case that democratic societies should be healthier if citizens chose leaders who were faithful to the regime. Loyalty to democracy might be a criteria, like character, that one would look for in political leaders. But if the analysis I have provided is persuasive, disloyalty is not itself a reason to disenfranchise someone. In other words, political opposition might be legitimate even if it is disloyal.