Introduction

Under cover of darkness and disguise, a carefully orchestrated band of protesters intentionally and systematically destroyed private property. On a different occasion and in a discreet context, a large, peaceful protest was marred by a handful of rioters who engaged in some destruction of private property, despite other protesters’ efforts to stop them. The former episode we praise as the “Boston Tea Party” (1773), and twenty-first-century political movements have been named after it; the latter incident we denigrate as the “Battle of Seattle” (1999), that is, if we remember it at all.

While this stark comparison is perhaps unfair in certain respects, it does tell us a great deal about the way in which American thinking about popular disorder, and political dissent more generally, has changed since our founding era. When a modern political protest aims to respect private property but does not quite live up to its goals, we call it a “battle”; our eighteenth-century forebears, on the other hand, celebrated a concerted effort at intentional, forcible destruction. Indeed, they would find it remarkable, even unfathomable, that we modern Americans do not make such disorder more central to our democratic theory and practice. We are, after all, a nation that was literally created by riotous refusal.

Whether this is intentional oversight or collective amnesia, we are hardly alone in our failure to appreciate the centrality of dissent to democracy. Past political theorizing has focused on the issue of dissent episodically at best. From its very beginnings in John Locke’s Second Treatise of Government (1689), the theory of “government by consent” has presumed consent and marginalized dissent. When other political philosophers have examined the nature and place of dissent, it has been primarily as a dynamic of individual expression (e.g., John Stuart Mill, Henry David Thoreau) rather than as the core of democratic life. And America has a checkered history of silencing, or at least minimizing, dissent. From the Sedition Act of 1798 to the McCarthy
era in the 1950s to the White House press secretary Ari Fleischer’s post-9/11 declaration that we all must “watch what [we] say,” dissent has been seen as suspect, especially in times of danger and uncertainty. But there have also been, from the very beginning, philosophical and practical efforts to permit and even privilege dissent. It is these latter efforts that this book recovers and explores.

Studying dissent “goes against the grain of contemporary political theory,” the distinguished legal scholar Cass Sunstein has recently observed. Researchers have instead been preoccupied with the kind of rationality and discourse—public thinking and political talk—that is required for legitimate democracy. These are important topics, and dissent is often a kind of discourse. Yet these research preoccupations have tended to obscure rather than clarify the nature and role of democratic dissent. This book counters these trends by analyzing some of the earliest theories of dissent in American democracy. Dissent has rarely been the mainstream of American politics, but it has often been a critical crosscurrent and has always been an essential undercurrent. It has been with us since the earliest efforts to form a democratic politics. The quasi-official mobs of the pre-Revolutionary era became the official, if Revolutionary, Committees of Safety and Correspondence, which in turn gave rise to state governments; these governments joined together in the Articles of Confederation and ultimately sanctioned the ratification process for the Constitution. As we shall see, the first struggles over the meaning of that Constitution were ultimately struggles over the place of dissent in democracy.

Drawing on largely forgotten early models—real and proposed institutions as well as philosophical constructs—I explore and substantiate a theory of what I call “dissentient democracy,” that is, a democracy that values dissent as an essential core element. With this phrase, I have adapted a term that eighteenth-century writers sometimes used to describe those who disagreed with the prevailing view. A renewed appreciation of dissentient democracy suggests the need for new popular attitudes that value dissent and public institutions that nurture it. The broader challenge—for all of us—is to restore the centrality of dissent to our inherited tradition, our current political theory, and our future democratic practice.

Dissent can be easy to take for granted, however. Sometimes it hides in plain sight, as we expect and can thus ignore it: the candidate’s stump speech, an impassioned letter to the local newspaper, or the lonely dance of las madras—the women whose sons or husbands have “disappeared” at the hands of a dictator’s thugs. But dissent also flies below our radar screens: two friends arguing over coffee or consumers’ silent refusal to buy food made
from genetically modified organisms. Dissent is any practice—often verbal, but sometimes performative—that challenges the status quo (the existing structure of norms, values, customs, traditions, and especially authorities that underwrite the present ways of doing things). Thus, the religious “dissenters” of eighteenth-century England—Unitarians, Baptists, Quakers, and many others—are an example, a sectarian subset, of the general practice. Politically, dissent opposes the status quo, but it is more than “the opposition.” It is more than—though inclusive of—“the opposition” because opposition has often been thought of, at least since the nineteenth century, as the “loyal opposition,” and dissent need not be, and occasionally is not, unquestioningly loyal. Furthermore, “opposition” is generally conceptualized as political in the strict sense of governmental and institutional (e.g., “the opposing party,” “Her Majesty’s Opposition”). Dissent is better understood as political in a much broader sense; indeed, one of the norms it often opposes is precisely the cramped view of what is political.

Dissent, then, is a broad category. What makes it even more complicated (from an analytical standpoint) is that it is also relative. It is a matter of degree but also is contextual. For instance, in a world order of global capitalism, socialist views constitute dissent. Yet in some contexts (certain enclaves of academia, say) defending capitalism is a practice of bold dissent. Complicating matters, of course, is the fact that the academy is part of that larger, capitalist world. As even this one instance suggests, it will be more helpful to avoid narrowing definitions and to stick to powerful examples; that is how we will proceed.

What matters most is how genuine dissent acts, what it does. Rarely do even the most impassioned and insightful acts of dissent prove to be substantively effective; dissenters often fail to bring about the changes they seek. More important from the perspective of democratic theory, though, is dissent’s procedural efficacy: its ability to oblige people to rethink their own views, conceptions, and underlying assumptions and to actively (re)consider other people’s views, conceptions and assumptions, especially when those other views challenge the status quo. But to be procedurally effective in this way, dissent must have some prospect of substantive success. Just as an election in which there is only one candidate is not truly democratic, so a challenge to the status quo that is genuinely hopeless is scarcely dissent.

Dissent, like the electoral process, is not always perfect or perfectly just. They both can be manipulated by defenders of the status quo; they often are. Nevertheless, genuine dissent, like a genuine election, is a necessary but not sufficient condition for democracy. This may seem obvious, or even tautological, and thus of little import. But it is not. The eighteenth-century
political theorist Jean-Jacques Rousseau famously envisioned a democracy—an active, egalitarian, and participatory democracy, no less—that was meant to be free of dissent; indeed, dissent was, for Rousseau, antithetical to democracy. Similarly, many early American theorists such as Alexander Hamilton defended a version of representative democracy in which elections were essential but dissent inimical.

This is not to say that Hamilton did not dissent—he did, sometimes loudly—but rather that he did not value dissent as a necessary feature of popular government. Any theory that values and even privileges dissent per se I call dissentient. The Anglo-American religious dissenting sects were certainly dissenters because they actively refused to follow the existing religious orthodoxy, a powerful pillar of the status quo. But I do not consider them to be dissentient as they did not espouse the principle of dissent. Puritans in America, for example, championed their own dissenting view, without valuing dissent itself, but rather in the conviction that their unorthodox faith was the only truth. Accordingly, any opposition to their correct view was by definition misguided and therefore forbidden. Even nondissentient dissenters like the Puritans and Hamilton will play a role in this analysis because they often provided a first step in opening up needed challenges to the status quo, and also because they sometimes proffered important objections to those thinkers developing genuinely dissentient theories.

The nineteenth-century English political philosopher John Stuart Mill is often understood as the paradigmatic example of a theorist of the principle of dissent. In On Liberty (1859), Mill defended unorthodox, and even dangerous, dissent on the grounds that its consequences are virtually always advantageous to society. Even the false views of a dissenter are, on balance, productive because they make the rest of us reevaluate our own views, making what would otherwise be “dead dogma” into “living truth.” As we will see, theorists of the early American republic anticipated many of Mill’s arguments over a half century before his famous essay. More important, the thinkers recovered and analyzed here developed a theory of dissentient democracy. The main thrust of On Liberty, on the other hand, is that individual liberty is threatened by, and thus always in tension with, an empowered democracy. The problem is not simply Mill’s elitism, which is perhaps most evident in his later theory of “plural voting,” whereby educated citizens get more votes than uneducated ones. The deeper issue, from our perspective, is Mill’s moral goal: not democracy, but the “permanent interests of man as a progressive being,” that is, human social progress. A laudable goal, to be sure, and, according to Mill, representative democracy should be part of this
goal, but only a part. He is thus best understood as a theorist of dissentient society, but not of dissentient democracy.

Nevertheless, Mill highlighted some of the challenges faced by dissent, especially a majoritarian culture that sees all dissent as threatening rather than enlightening. As we shall see, some political radicals in eighteenth-century America understood that popular government needs to make room for dissent and even to privilege it. Though necessary, providing ample space for dissent was arduous, they maintained, because “whoever sets up for a Reformer of public Abuses, must expect to encounter innumerable Difficulties,” not least from those who “swim with the Current; [who] believe as others [do], and act, if at all, with the prevailing Majority.”

Developing a theory of dissentient democracy requires an appreciation not only of the critical role dissent plays in democracy, but also of the myriad obstacles placed before all challenges to the status quo. There is, for a start, the power of social inertia: human life is often demanding, and simply going along with the current arrangements is almost always the easier, more comfortable path. Related to this is our tendency to defer to the status quo, to accept it and even to commend it as tried and therefore true. Political deference was especially problematic for the plebeian dissenters of the early American republic, who faced continuing claims that the existing elite had special access to the truth and was the only class capable of being “disinterested,” that is, unbiased. Challenging these norms and notions required a theory of popular government that went well beyond periodic elections, one that was centered on a conceptual space, the democratic public sphere, where public debate over policies and philosophies could inform and transform the views of citizens and policymakers alike. However, such debates could only be genuine—more than mere rituals of assent—if there was an appreciation for the irreducible diversity of political views and a willingness to take up the uncomfortable task of self-examination. This self-reflection is difficult because it unsettles our inclination to see our own perspective as disinterested, and thus not really a perspective, but the objective “truth of the matter.” Finally, beyond these theoretical and cultural challenges, dissenting views generally have to contend with a host of serious practical disadvantages structured by the myriad powers of the existing order, which has privileged access to the government, the press, wealth, legal influence, and educational advantages. As we shall see, thinking through all these typical resources of the status quo was the burden placed on the first theorists of dissentient democracy, a burden they shouldered willingly because they saw dissent as essential to the democracy they envisioned.
Current Democratic Theory

“Strikingly absent from [recent theories of democracy],” the political theorist Holloway Sparks aptly observes, “is sustained attention to the role of dissent in democratic life.” Indeed, a major weakness of recent democratic theory is how its debates have drawn attention away from the centrality of dissent, focusing instead on a number of issues that have been largely unproductive, distracting at best, misguided at worst. The overarching debate here is captured succinctly by the title of an essay by the political theorist Chantal Mouffe, “Deliberative Democracy or Agonistic Pluralism?” Deliberative democrats argue that the normative legitimacy of democracy—the quality that makes it more morally valid than, say, monarchy or oligarchy—lies in its approximation of an ideal wherein everyone engages in an actual discussion leading to a consensus decision based solely on the “forceless force of the better argument.” Elections are not essential, and interest-group power politics is anathema. What is troubling about deliberative democracy for Mouffe and many other theorists is the extent to which this approach valorizes consensus and agreement at the likely expense of difference and the genuine disagreement it occasions. Indeed, Mouffe’s main target, the preeminent deliberative theorist Jürgen Habermas, has been faulted by many critics as stressing consensus. Mouffe and like-minded thinkers see politics as a contest over differences; this “agonistic pluralism” is the only alternative to a politics of consensual deliberation (hence the “or” of Mouffe’s title). She is hardly alone. Aspects of this divide have continued for at least two decades.

Deliberation and Rhetoric. There are real and important disagreements here, but they have tended to ignore or obscure the centrality of dissent to democracy. This can perhaps be more clearly seen in the related disputes over the type of discourse that is appropriate to democratic debate. Writers such as Seyla Benhabib, who defend a Habermasian deliberative democracy, have argued for the power of rational deliberation to counter self-interested claims and demagogic rhetoric, thus underwriting the normative legitimacy of the reasoned agreement that emerges from such dialogue. These views are countered by those, like Iris Marion Young, who share Mouffe’s concerns for plurality and difference and who fear the exclusions that come with a norm of dispassionate, “rational” deliberation. Accordingly, Young argues for an alternative set of communicative norms, including rhetoric and storytelling, that have often been used by marginalized groups to get their dissenting voices heard. Not surprisingly, Benhabib fears that such discursive modes will induce “arbitrariness” and “create capriciousness.”
Exchanges like these overlook the centrality of dissent to democratic dialogue of all kinds. To be sure, Benhabib’s concerns are well founded. Rhetoric and stories can encourage us—especially in group decisions—to make choices that we later come to realize were misguided, unfair, or irrational. But then again, so can specious rational argument, when it is not chastened by informed, thoroughgoing dissent. We do need rhetoric, storytelling, and appeals to authority in democratic discourse, even though they are sometimes ways of “lying.” As Mark Twain reminds us, there are “lies, damned lies, and statistics.” So even the most rationalized, statistical approach can distort, intentionally or unintentionally, public debate. What matters is the robust dissent that provides multiple perspectives, thus ferreting out ignored aspects, outright manipulations, and spurious conclusions. As we shall see, early Americans intuitively understood this: They effortlessly blended rhetoric, narrative, and reasoned argument, all in the service of dissent.

Contemporary political theory, to the contrary, has remained preoccupied with this debate over the proper nature of legitimate democratic discourse, and this fixation has led to two interconnected weaknesses, as the political theorist Simone Chambers has observed. First, the stress on an idealized notion of “reasonable deliberation” has led theorists to focus on carefully controlled settings for democratic talk, which are structured to avoid or at least minimize rhetoric and the distortions of various kinds of power (e.g., economic, social, or cultural power). This has led to copious research on “mini-publics,” such as citizen juries and deliberative polls, and thus has brought about a general retreat from theorizing democracy for mass publics. Second, there has been a misunderstanding of what is wrong with rhetoric. To be sure, Young and others have demonstrated that rhetoric can have democratic advantages and that the claim to being “reasonable” is often itself a powerful rhetorical tactic. But this does not address the lingering dangers of rhetoric. The problem posed by rhetoric, Chambers explains, lies not in the style of speech but in the asymmetry between orator and listeners. Rhetoric is principally about a single speaker persuading a mass audience; as such, rhetoric does run the risk of manipulative demagoguery.

It is the deliberativists’ understandable rejection of the mass politics of the demagogue that has led democratic theory to take “an institutional turn” toward idealized mini-publics. But here our focus on the early American republic promises to be instructive for a number of reasons. First, this was the moment when the trajectory was set for so much later American democratic evolution. But it is more than that. The society of the time was at some (very rough) midway point between the face-to-face politics of ancient Athens and the mass democracy of today, in terms of population, inclusiveness,
and “media development.” As we shall see, James Madison was hardly alone in trying to theorize how “mass” democracy on that scale could be morally legitimate. What is more, because it was really the first time modern democrats faced these questions, they worked through the options with no ideas foreclosed. While current democratic theory risks trading a concern with the mass public for what Chambers rightly calls “participatory elitism,” this seemingly unavoidable trade-off is precisely what the democratic radicals of the 1790s were trying to avoid.

These radicals were also well aware of the dangers of rhetoric—not least because their opponents never ceased characterizing them as demagogues. But as Chambers insightfully reminds us, if the asymmetric structure of rhetoric is problematic, it is also unavoidable (in mass democracy) and yet potentially redeemable. That is, rhetoric can be deliberative if it “engages citizens’ practical judgment” and respectfully treats the audience as “autonomous deliberators.”\(^{26}\) The problem arises when instead an orator uses “plebiscitary rhetoric,” in which pandering and priming are the tools, citizens are merely a means to power, and “there is no attempt to engage, persuade, or trigger reflection.”\(^{27}\) The real issue, then, is that rhetoric’s structural asymmetry creates a “lack of dialogical accountability,” which produces the “plebiscitary tendencies” of the elite/masses relationship. A theory of deliberative rhetoric, Chambers concludes, “postulates” that this relationship can be deliberative “even when the audience does not have the immediate possibility of responding and calling the speaker to account.”\(^{28}\)

But if this is where Chambers leaves off, it is precisely where our analysis picks up. Because it is opposing views—actual or anticipated—that force the speaker to account for her claims and defend them against contrary opinions. It is a dissentient democracy that encourages the necessary dialogue of accountability. It is that practice of discursive accountability, let us recall, that underwrites the moral legitimacy of democracy. “The democratic process,” Habermas emphasizes, “bears the entire burden of legitimation.”\(^{29}\) Yet neither Habermas nor Chambers nor political theory more generally has much to tell us about how we might redeem that claim of legitimacy. “In a nutshell,” Habermas summarizes, “the deliberative model expects the political public sphere to ensure the formation of a plurality of considered public opinions.”\(^{30}\) As the “most important trait of the public sphere . . . [is] its reflexive character,” we need to theorize more robustly the role of dissent in democracy.\(^{31}\)

One problem of our unavoidably mass and mediated discourse that Habermas and Chambers have noted is the lack of a sufficiently independent media. The “pathology of political communication” was evident, Habermas has observed, in the effective framing of the second Iraq War by the
Bush administration and, especially, in “the absence of any effective counterframing” by the mass media. The problem, Chambers concedes, is that the necessary framing of public information by various media is often aimed at “pleasing elites” and “maintaining the status quo,” among other imperatives. But if we are going to counteract the “selective pressure of social inertia,” Habermas observes, we need to make “the structures that actually support the authority of a critically engaged public begin to vibrate.” We need dissent.

*The Paradox of Founding.* Dissent is valuable, then, for its tendency to force us to reflect on competing discourses, be they rational or rhetorical, and to assess their validity in a form of deliberation that gives democracy its normative value. But the question of democratic legitimacy goes even deeper than ensuring fair and reasonable terms of debate, as pivotal as that is. In a second, related problem, theorists have explored the inevitably dubious legitimacy of democracy’s moral foundations. At issue here is a logical paradox that gives rise to a kind of vicious circle of justification, or an infinite regress of reasons. The result is often called the “paradox of founding” and it points to an invalid grounding for democracy.

“If it takes a legally constituted democratic procedure to bring forth valid fundamental laws,” the legal scholar Frank Michelman explains, “then the (valid) laws that frame *this* lawmaking event must themselves be the product of a conceptually prior procedural event that was itself framed by (valid) laws that must, as such, have issued in their turn from a still prior (properly) legally constituted event. And so on, it would appear, without end.” Hence the infinite regress. A half century ago, Hannah Arendt captured this problem of legitimacy more bluntly: “Those who get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they have set out to achieve.” The contemporary political theorist Bonnie Honig is even more succinct: “The grounds of legitimation are always themselves in need of legitimation, all the way down.”

We might try to provide some kind of grounding to stop this infinite regress by appeal to some extraneous source of authority: natural law, Divine Will, or perhaps “Nature’s God.” We would be in good company. But this only deflects the question of authority elsewhere. Worse yet, it fails in deflecting it fully, for even these sources would have to be interpreted, and to do so democratically would require the use of procedures or practices that would themselves need to be justified (and so on). Similarly, ordinary lawmaking is not immune from this moral failing, contra Arendt, since it, too, needs to be interpreted via democratically justified procedures that would establish them as “ordinary” and “laws.”
There is, however, a way out of this moral problem and it requires that we reorient our thinking from backward-looking to forward-looking; that is, this seeming conundrum is only problematic because we have considered it in the wrong way. The paradox resolves itself, Habermas explains, “in the dimension of historical time, provided one conceives of the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations.” As succeeding generations interpret and even amend the Constitution, they justify its legitimacy as part of “a self-correcting historical process.” While any democratic founding, as an isolated historical moment, necessarily involved some undemocratic maneuvers, the regime can potentially be justified by never-ending efforts of moral improvement. Present and future legitimacy, then, inheres in our continuing efforts to approach the laudable ideals of the Constitution.

Understood in this way, we can appreciate the (potential) moral legitimacy of democracy, but we also see very clearly the considerable normative burden placed on the “self-correcting learning process” inherent in such a politics. And this only serves to bring us back to the irreducible centrality of dissent. At every moment, our democratic practices bear the traces of the original and ongoing illegitimacy of imperfect democratic agreements and procedures, such that there is always a burden on the present generation to redeem their democracy. Dissent, by challenging the powerful but always insufficiently legitimate status quo, is a necessary (but not sufficient) condition for that process of legitimation, that ever-incomplete redemption.

Nor is this merely a theoretical model. Let us not forget, the American Constitution of 1787—the very Constitution that is seen as inaugurating the modern project of democratic constitutionalism—was itself unmistakably illegitimate, or, as Michelman euphemistically puts it, “semilawlessly enacted.” The prior constitution, the Articles of Confederation, had been ratified by all thirteen state legislatures in 1781 and was to be perpetual, allowing for amendment (but not replacement) by congressional approval and unanimous ratifications of the state legislatures. Nevertheless, attendees at the Philadelphia convention—quickly, and with remarkably little debate—decided to exceed their mandate, which was limited to proposing revisions, and instead scrapped the “perpetual” Articles and proposed a replacement constitution to become effective upon the ratifications of only nine of the thirteen states. The “framers,” as Arendt put it, had “no authority to do what they . . . set out to achieve.”

This is not to say that the Articles had been fully legitimate. Of course not; they could not be: That is the whole point. Adopting the historical, backward-looking perspective, we see that the Articles were the product of the “Continental Congress” that simply declared itself into existence based on
the authority of the rebel organizations that had evolved into “committees of safety” and then into state legislatures. Who authorized these usurpations of power? Not those who remained loyal to the British Crown, or those in Vermont, which was not yet a state. And certainly not women or African Americans, either enslaved or free. Indeed, much research has explored those who were silently excluded by the Constitution’s (then-illegitimate) attempt to ground its authority in “We the People.” If we think of democracy as “rule by the people,” then who gets excluded from that “people” and who gets to establish those exclusions are monumental questions. No less important, but much less noticed, is the question of what it means for a people—however defined—to “rule.” For example, scholars are well aware that propertied women in New Jersey were legally empowered to vote—and did—from 1776 until 1807, when a statute disenfranchised them (in a clear violation of the state constitution). What is less well known is that the very definition of citizenship—of what it means to “rule”—was conceptualized broadly and robustly during the 1790s, only to be sharply restricted after 1800. Various practices and institutions of a dissentient politics were marginalized, and we are the heirs of that enervated democracy. Today, universal suffrage is broadly understood, but citizenship is narrowly construed.

Dissent and Democracy. If current democratic theory has left us with little guidance in thinking deeply about the nature and place of dissent, it is not the case that we are entirely without theoretical assistance. The political theorist Gary Shiffman has recently focused more directly on the important place of a norm of dissensus. “Good democrats,” he maintains, “should realize that the norm of dissensus is a profound achievement, one well worth celebrating.” Yet “deliberation theorists tend to discount the normative quality of dissensus.” In fact, Shiffman demonstrates that in democracies our everyday “normal politics is governed by a norm of dissensus.” The distinctive “constitutional politics” of major, fundamental issues, however, puts the “norm of dissensus . . . on shaky ground.” On the basis of a particular interpretation of ancient Athens and of Demosthenes’s speeches in particular, Shiffman argues that constitutional politics unavoidably favors the norm of consensus and, with it, exclusionary invective (since those who do not share our understanding of the very basis of our polity are thus against us, even traitors). Shiffman is correct that at the foundation of a properly dissentient democracy lies some consensus about political legitimacy, at least an agreement to disagree. But, I would argue, we must avoid too quickly bracketing the norm of dissensus even when we conceptualize constitutional politics. As we shall see, our radical theorists knew they were in the midst of a constitutional crisis, yet they argued—with imperfect success—against exclusionary language and action.
Sparks perhaps takes us furthest in theorizing what she calls “dissident citizenship.” “Dissent is not simply resistance,” Sparks explains. “To dissent is to maintain a principled oppositional stance against a more powerful group while remaining politically and publicly engaged.” Dissident citizenship involves the public contestation of the status quo by marginalized citizens “through oppositional, democratic, noninstitutionalized practices that augment or replace institutionalized channels of democratic opposition when those channels are inadequate or unavailable.”

Focusing on Rosa Parks’s bold refusal to give up her bus seat to a white passenger, Sparks elucidates the role of political courage in dissident citizenship. Understandably, she excludes institutionalized participation from her definition of dissident citizenship. Institutional modes like voting, lobbying, and bringing legal cases are not “dissent in the broader sense,” Sparks argues, because “citizens (in theory) engage in these institutionalized practices as participatory equals.”

I include this institutionalized contestation in my account of the rise of democratic dissent in part because, as even Sparks admits, often the real, practical inequality of supposedly equal modes of participation is precisely the issue that has been taken off the table by political elites, established hierarchies, and traditional ways of thinking. For eighteenth-century radicals, making real the formal equality of now-standard avenues of participation was a crucial and difficult preliminary step toward robust dissent.

I doubt Sparks would disagree with this broadening of the notion of dissent, especially given our purposes here. But things get trickier—for all of us—when the mode of dissent is less clearly democratic. “Exit, separation, and silence are . . . not democratic practices,” for Sparks, “because they involve the failure to participate in collective political engagement at all.”

Here again, I believe we need to take a broader view of dissent, even as we recognize that we are at the margins of democratic activities. Forms of exit and separation were occasionally used by early radicals in town meetings and political clubs in order to demonstrate—democratically, I would argue—their refusal to be party to a misguided decision or to deprive the relevant meeting of a legitimating quorum. Similarly, though silence can be democratically suspect and is often a type of disengagement, it is sometimes necessary for the political power of certain forms of dissent: the Boston Tea Party would have been less effective—because it would have seemed less public—if not for the silence of the Partygoers concerning the names of their fellow conspirators (despite the fact that these were widely guessed at publicly). Precisely because the membership and scale of the Party could not be known for certain, its “public” character had plausibility.
But the mention of this storied example of effective public dissent raises an issue that is trickier still and that must be an early focus of this study: force. Central to the story of the Boston Tea Party is the claim that no person was harmed by the public vandals, and property damage to materials—aside from the offending tea—was gladly and promptly recompensed. But public demonstrations are rarely this tidy, as the Battle of Seattle in November 1999 reminds us. Many of the (peaceful) demonstrators claimed—nay, chanted at the tops of their lungs—“this is what democracy looks like!” But is it really? When is property damage and even violent harm to citizens, even if incidental and unintended, justifiable as part of legitimate dissent? And what if some property destruction is precisely the point, as it was at the Boston Tea Party?

These are difficult issues that we will investigate further in the next chapter, but a few preliminary comments here will serve to focus us on some important issues. We might, for a start, conceptualize dissent along a sliding scale, a kind of democratic continuum we might call the dimension of dissent. At one end are practices that are clearly democratic, but often anemic, such as voting and partisan scutwork. Toward the middle of the continuum we might place some core practices of dissentient democracy, such as petition drives, protest movements, and independent, grass-roots organizing. Exit, separation, and silence would then be toward the other end of the spectrum, by virtue of their sometimes powerful but often undemocratic effects. In this model, the practices of “loyal opposition” parties would be somewhere between voting and petition drives.

Ian Shapiro takes the concept of a loyal opposition to be essential to democratic life in part because it stabilizes democracy by focusing attacks on bad officeholders, not on the democratic system itself, or even its foundations or legitimacy. This is certainly important, because it allows our everyday forms of dissent—what Shiffman calls “normal politics”—to focus on problematic areas without challenging a basically sound system. But this is also loyal opposition’s weakness. I said at the outset that dissent is more than “opposition” precisely because dissent is not always perfectly loyal. When the problems at hand do directly implicate the very foundations of the system, then the loyalty of the opposition risks taming its oppositional power, rendering it unable to address the core issue of legitimacy.

Dissent, on the other hand, must go further, or at least it should contemplate the possibility of going further. To be sure, this is very serious business. The line between spirited political protest and violent disorder is often a murky one, as disparate examples such as the Boston Tea Party and the Battle of Seattle demonstrate; we risk falling off our continuum altogether. But as the political theorist Jennet Kirkpatrick has reminded us, “Uncivil
disobedience is a particular kind of dissent,” and it is frequently practiced by citizens attempting to achieve democratic goals.\textsuperscript{56} Thus, we must avoid the “common conflation of the expression of anger with the performance of violence.” Political anger, Sparks explains, creates a “creative tension” that “subsequently opens the door to more traditional modes of democratic communication,” as did the American civil rights movement of the 1950s and ’60s.\textsuperscript{57} Properly used, political anger “can provide critical information to the parties in a debate, and can serve to level a playing field that is out of balance under the dominant norms of civility.” Precisely because these extreme forms of dissent force a hearing for the silenced and their views, these actions are sometimes necessary, indeed, democratically necessary. Of course, “dominant groups thus have every incentive to convince subordinates that anger is inappropriate, dangerous, or even just unbecoming.”\textsuperscript{58}

Sometimes these dominant groups are right. We have fallen off the democratic continuum: The political anger was inappropriate, because it was democratically unnecessary, and the risk of violence too stark. The cure can be worse than the disease. To make this all-important distinction, Sparks can provide no “magic rules.”\textsuperscript{59} Neither can I. But we must learn to evaluate more cogently such extreme dissent and increase our collective tolerance for it. Since much of this training is cultural, Sparks follows Martha Nussbaum in suggesting that this will involve the “unwriting” of the old stories we tell ourselves and writing some new ones.\textsuperscript{60} Perhaps, then, this book is a new “rewriting” of a forgotten chapter in an old story—America’s story.

America’s Dissentient Past

America was born of dissent. There were no political “truths” more firmly established in the Anglophone world of 1760 than that democracy was a sure path to anarchy (and then tyranny) and that the rights of Englishmen were, thanks to the limited monarchy, the most expansive body of liberties the world had ever seen. Yet almost in spite of themselves, the British colonists in what would become the United States challenged and undermined this powerful ideological status quo. Even getting to the point where Revolutionary committees could baldly assume the powers of a government (and then ratify the Articles of Confederation) required a complete rethinking of previously unimpeachable axioms including the indivisibility of sovereignty and the propriety of “virtual” (rather than “actual,” territorial) representation.\textsuperscript{61} The supremacy of the British Parliament, the treasured principle achieved in the Glorious Revolution of 1688, had to be theoretically and practically upended.
And then something had to be put in its place. As we have seen, establishing a government, by recognizing some people as citizens and some procedures as authorized, inevitably involved excluding some people and some practices. When many state legislatures sought to pay off hefty debts with massive, unprecedented tax hikes during the depression following the Revolutionary War, many backcountry people came to see the newly established procedures of representation as illegitimate. Though the discontent was widespread, it was the yeomen of western Massachusetts in 1786 who most clearly opted instead for the political practices validated only a decade earlier: They simply took over the local institutions of government, by force when necessary. Though many of them had been Patriot soldiers only a few years before, they were now labeled “rebels.”

They preferred the term “regulators,” because they sought to regulate illegitimate policies. But Boston elites came to see the movement as “Shays’s Rebellion” and moved quickly to put down the insurrection. When local militias simply ignored the call to muster and march against the protesters, a private army had to be formed. This palpable weakness of a state government was in turn an important impetus for the emerging movement for a revised and empowered national government.

When that movement culminated with the Philadelphia convention’s proposed, all-new Constitution, America witnessed the “Great Debate” or “Great National Discussion” over ratification. As we shall see, this political struggle was far from an open exchange; the opponents of the Constitution, those denigrated as “Anti-Federalists,” were silenced or marginalized in various ways. Since they were defending the existing form of government, we might think of them as advocates of the status quo and thus not really “dissenters” in my sense. But once the convention of luminaries such as George Washington and Benjamin Franklin had issued the new plan, the Anti-Federalists were on the defensive.

Mounting the offensive, Alexander Hamilton, James Madison, and John Jay wrote newspaper essays in the pivotal state of New York, writing them independently but signing them all “Publius” after a great founder of the Roman republic. The famed Federalist Papers (1787–88) may have played a minor role in the actual ratification struggle, but they provided—then as now—the most penetrating and insightful defense of America’s “complicated system” of popular government. Once the ratification was achieved, Madison took up the task of proposing a series of amendments that become known as the Bill of Rights, including protections for freedom of speech and of the press. Though he had not previously been an advocate for amendments (partly out of fear that demands for them would derail ratification of the
main document), Madison saw some advantages in them, especially assuaging Anti-Federalist concerns and thus reconciling a fractured country.

By 1791, when the Bill of Rights was ratified, it was becoming clear that Madison and Hamilton had agreed about the general outlines of the new government, but little else. Now serving his old commander, George Washington, as the nation’s first Treasury Secretary, Hamilton proposed and implemented a series of policies that he saw as sanctioned by the “necessary and proper” powers authorized in the Constitution. Madison, now a leader in Congress, vehemently opposed a number of these powers and he—along with his friend, Secretary of State Thomas Jefferson—cajoled a former college classmate into starting a newspaper that would provide a medium for dissenting views. While there was not yet an opposition political party, there was a loyal opposition.

Or, to be more precise, there was an opposition movement that claimed to be loyal. The whole idea was unprecedented, and Federalists such as Hamilton and Washington could make no sense of some citizens claiming to oppose legitimately the very officials the citizenry had just elected. The notion of the dissenters’ loyalty was further weakened by international developments. With war declared between the new French Republic and the English Crown in 1793, Jeffersonians wanted to aid the French, our allies during the War of Independence. The more conservative and trade-conscious Federalists feared aggravating our major trade partner, the British, and were horrified by the bloody turn of the French Revolution (the “Reign of Terror”). When Washington reassured the British by proclaiming neutrality, Madison dissented in newspaper essays by attacking this move as yet another stretching of constitutional limits. He lost that battle for public opinion, not least because the grand-standing French ambassador, Edmond Charles Genêt, had publicly sought to turn the American people against Washington, which only served to rally many people back to the revered old General.

Many others, however, remained committed to the egalitarian ideals they saw as the treasure won by the struggle for independence, and they were emboldened by France’s (now faltering) efforts to emulate this revolutionary move. Seeking ways to engage more fully in their own politics, some American radicals in 1793 started opposition political clubs, which acted as venues for plebeian dissent. Most of these clubs were called “democratic societies.” Then as now, the meaning of democracy was contested, but members often used the term for its more populist connotations. The more common term at the time for popular government (as opposed to a monarchy or hereditary aristocracy) was “republican.” This term, too, was widely debated, but
it generally drew on the notion that political power should serve the public good ("res publica," the public thing), rather than the narrow interests of a king or the nobility. This generally implied some greater role for more of the people, but in practice it meant an exalted role for the learned and generally wealthy elite (the so-called natural aristocracy). The yeomen farmers and middling lawyers that made up the bulk of the democratic societies were forced to defend their right to dissent, and they provide—in theory and practice—some early developments in the emergence of dissentient thought.

These clubs would not last long, however. When the political marginalization of the western backcountry was exacerbated by one of Hamilton’s new policies, a tax on whiskey, many communities effectively nullified the law by pressuring or simply taking over any local office that might try to enforce it. When violence emerged in western Pennsylvania in 1794, these Regulators were also labeled “rebels.” Soon, Hamilton was marching with a federal army headed west to put down the “Whiskey Rebellion.” Once Washington publicly denounced the democratic societies for encouraging this opposition, they quickly fell out of favor and largely disappeared by 1795.

The clubs lasted long enough to participate in the widespread public opposition to the proposed new treaty with Britain, the Jay Treaty. It may well have been the best deal that the American negotiator John Jay could get, but it was decried in popular dissent throughout the summer of 1795. Washington signed the treaty and once again his immense public stature effectively cowed dissent, though this time it would take several months to quiet the furor. What the Federalist administrations proved unable to do, however, was remain unscathed in the middle of the fierce battle between France and Britain. By clearly siding with the British, the Federalists had only invited a hostile response from the French, which arrived in the form of naval skirmishes off the American coast starting in 1797, the undeclared “Quasi-War.” With the country soon on a war footing, President John Adams, having succeeded Washington after a close election against Jefferson in 1796, moved to create a navy, expand the army, and ensure loyalty at home. The latter effort gave rise to a series of draconian measures known as the Alien and Sedition Acts, passed by a Federalist Congress and signed by Adams in the summer of 1798. One of the Alien Acts empowered Adams to deport any foreign national he chose, summarily and without appeal; he never dared use this power. The Sedition Act was aimed instead at keeping citizens in line and included a prohibition on any expression that would bring the president or Congress into disrepute. This authority to censor was used, repeatedly, but only against newspaper editors on the “Democratic-Republican” (that is, Jeffersonian) side. The Sedition Act Crisis and its debate over the legitimacy of
political dissent would occasion some of the most penetrating analysis of the centrality of dissent to democracy; we will turn to these important theoretical advances in due course.

The crisis also gave rise to Pennsylvania’s Regulation of 1799, popularly known as “Fries’s Rebellion,” wherein the “rebels” conscientiously avoided violence. This development itself speaks to the practical emergence of a culture of democratic disorder and dissent. Mostly, the Regulators of ’99 (like those of ’94) engaged in popular nullification: a community deliberates, declares a law illegitimate, and binds its members to principled disobedience. Seeking to avoid this informal and not-necessarily-majoritarian approach, Madison and Jefferson instead sought to counter the laws through a movement of state legislatures, spurred by their Virginia and Kentucky Resolutions (1798), which argued for the invalidity of the laws and sought a congressional reversal.

Though that reversal never came, the laws lapsed by their own terms in March 1801, when Jefferson took office. In the political reformation that he labeled the “Revolution of 1800,” the Federalists also lost the majority in Congress to Jefferson’s fledgling Democratic-Republican party. This marked the first time when a modern democracy saw power handed from one party to another. Madison viewed this as a vindication of the “spirit of ’98,” which allowed a dissentient public sphere to dictate a new policy direction for the country. More radical democrats would see things differently, because the emergence of a party system funneled the robust popular spirit of the 1790s into the narrow channels of organizations that were regulated from the top down.

Throughout these years, radical theorists—both the famous and the forgotten—conceptualized a privileged place for dissent in the new democratic politics. Anti-Federalists like Samuel Bryan were forced to defend not just their critiques of the proposed Constitution, but also the very notion of legitimate opposition. The short-lived democratic societies institutionalized a focus on dissent, and a surprisingly radical James Madison placed genuine participation and deliberation at the core of his vision of democratic theory. The New York lawyer Tunis Wortman used a treatise critiquing the Sedition Act as an opportunity to formulate a theory of democratic discourse that stressed the need for a “collision of ideas” to achieve truth. A radical Massachusetts farmer and sometime tavern-keeper named William Manning was less sanguine that one political truth would ever emerge, expecting instead an ongoing contest of discourses, which would forever be skewed in favor of “the Few” unless dissent was welcomed. The lawyer and scientist Thomas
Cooper perhaps went the furthest, privileging all dissent—even false dissent—in the service of a radical democratic politics.

Despite all these efforts, after 1800 dissent was driven down below the calm surface of an ascendant Democratic-Republican party. Even today, dissent remains an undercurrent, surprising us when it bubbles up as a new kind of “Tea Party.” But we should not be surprised. Rather, we should return to this neglected element of our tradition, rediscover the centrality of dissent, and reconsider why, even now, we need to privilege it. Only then can we rethink how we might, following the promising leads of some early radicals, seek to make our democracy more legitimate.