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# Can We Make the Constitution More Democratic?

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# CAN WE MAKE THE CONSTITUTION MORE DEMOCRATIC?

*Ilya Somin\* & Neal Devins\*\**

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## I. INTRODUCTION

Recent years have seen renewed calls to revise the Constitution to make it more democratic.<sup>1</sup> We do not necessarily disagree with those who argue that some parts of the Constitution are flawed and should, if possible, be reformed. However, efforts to alter the Constitution in order

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1. The most prominent is probably SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006). See also ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION* (2d ed. 2003); DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* (1996).

to make it more democratic face serious obstacles that advocates of reform have largely ignored. In particular, they have failed to grapple with the reality of widespread political ignorance, which both reduces the extent to which the Constitution can ever be fully democratic and makes the reform process more difficult.

Part II of this Article notes that advocates of "democratizing" the Constitution rarely specify the theory of democratic participation to which they would like the Constitution to conform. This is a very significant omission. There is more than one theory of democratic participation, and different theories have widely divergent implications for constitutional reform. Moreover, some approaches, such as "deliberative democracy," imply a much higher level of political knowledge in the electorate than is likely to be feasible in the foreseeable future. Advocates of constitutional reform must specify what kind of democracy they have in mind and how it can be achieved given the reality of widespread citizen ignorance.

In Part III, we provide examples of how elected officials and interest groups employ pro-democracy rhetoric to cloak reform proposals. Examples include the Twenty-Second Amendment, term limits, the 1994 Contract with America reform proposals, voter initiatives and referenda, the constantly changing positions of leading political actors on the scope of executive power, and battles over the composition of the federal courts, including FDR's Court-packing plan and the recent fight over judicial filibusters. By highlighting the exploitation of political ignorance by elites, Part III suggests that substantive visions of democracy—as structured by ignorance—have significantly affected constitutional debates throughout our history.

In Part IV, we consider the implications of political ignorance and substantive concerns for the actual process of constitutional change. Widespread ignorance is likely to reduce the quality of constitutional reforms that can be instituted because it might lead voters to support deeply flawed institutional reforms and create opportunities for manipulation by political elites. These dangers are heightened by the fact that any major constitutional changes are likely to occur as a result of a major political or economic crisis. Even relatively well-informed voters might be tempted to approve measures that promise relief from the immediate crisis without considering their potential long-term effects. To some extent, this is exactly what happened during the Great Depression.

These dangers may be mitigated to some extent if large-scale constitutional change is kept within the confines of Article V of the Constitution. As one of us has argued elsewhere, the stringent

supermajority requirements of Article V make it difficult for political elites to force through constitutional change by manipulating voter ignorance.<sup>2</sup> However, Article V has the defects of its virtues, which include the near-impossibility of quickly enacting any controversial amendment. As a result, many advocates of large-scale constitutional reform argue for a process that circumvents the usual Article V procedure.<sup>3</sup> Circumventing Article V may be an idea whose time has come. But we must recognize an important weakness of circumvention: it tends to exacerbate the dangers posed by the combination of a crisis atmosphere and widespread political ignorance.

## II. WHAT KIND OF DEMOCRACY DO WE WANT?

Those who advocate the democratization of the Constitution rarely specify in any detail what kind of democracy they have in mind. Yet there is more than one normative theory of democratic participation, and the differences between them matter. Particularly important for our purposes are the huge differences among competing theories over the degree of political knowledge and deliberation required of voters. Unfortunately, pursuing many of these options is unrealistic in light of the deep and rational ignorance of most citizens. Reformers seeking to make the Constitution more democratic will have to specify which theory of democratic participation they have in mind and how they intend to address the challenge to its implementation posed by widespread political ignorance.

### A. *Competing Theories of Democratic Participation*

Theories of democratic participation can be ranked on a continuum regarding the degree of political knowledge that they require.<sup>4</sup> At one

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2. See Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 667–68 (2003) [hereinafter Somin, *Voter Knowledge*].

3. See, e.g., LAZARE, *supra* note 1, at 291–92 (suggesting that the House of Representatives might initiate constitutional reform on its own initiative); LEVINSON, *supra* note 1, at 168–77 (calling for a new constitutional convention to draft a document that could be approved in a national referendum); cf. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 295–99 (2005) (arguing that such an approach would be consistent with the Constitution); Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 89 (Sanford Levinson ed., 1995) (same).

4. For a more detailed analysis of major theories of political participation and representation, see Ilya Somin, *Political Ignorance and the Countermajoritarian*

extreme are advocates of deliberative democracy, who want voters to not only understand specific policy issues but also be able to deliberate about them in a sophisticated manner.<sup>5</sup> In some versions of the theory, citizens are expected to accept complex restrictions on modes of deliberation of a sort that are normally the province of professional political philosophers. For example, some leading advocates of deliberative democracy claim that the deliberative process must be limited to arguments based on "impartiality" between citizens and incorporating the "mutual recognition of competent subjects."<sup>6</sup> Others contend that citizens should only be allowed to "appeal to reasons that are recognizably moral in form and mutually acceptable in content" and only make empirical claims backed by reliable scientific evidence.<sup>7</sup>

At the other end of the spectrum lies Joseph Schumpeter's minimalistic approach, which only requires that voters be able to periodically remove incumbents they dislike.<sup>8</sup> So long as voters have even minimal knowledge and understanding, they can still punish incumbents for egregiously poor performance or for flagrant deviations from majority opinion.<sup>9</sup>

In between these two extremes lie several other approaches that require varying degrees of voter sophistication. For example, the theory of retrospective voting is a relatively modest extension of the Schumpeterian approach, requiring voters to assess incumbents on the basis of their

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*Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1296–1304 (2004) [hereinafter Somin, *Political Ignorance*].

5. For recent defenses of deliberative democracy, see AMY GUTMANN & DENNIS F. THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004); ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA* (2004). For citations to other literature in this area, see Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 438–42 (1998) [hereinafter Somin, *Voter Ignorance*]; Somin, *Political Ignorance*, *supra* note 4, at 1303–06.

6. JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 75–76, 100 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) (1983).

7. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 57–58 (1996).

8. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 272 (3d ed. 1950).

9. For a modern endorsement and elaboration of Schumpeter's theory, see RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 14–19 (2003); for a critique, see Ilya Somin, *Richard Posner's Democratic Pragmatism*, 16 CRITICAL REV. 1, 17–18 (2004). See also Richard A. Posner, *Law, Pragmatism, and Democracy: Reply to Somin*, 16 CRITICAL REV. 465 (2004); Ilya Somin, *Pragmatism, Democracy, and Judicial Review: Rejoinder to Posner*, 16 CRITICAL REV. 473 (2004).



records in office and “punish” them at the polls if those records seem poor.<sup>10</sup> However, retrospective voting may still impose a substantial information burden on voters if they are to be able to accurately assess the quality of incumbents’ policies. They need to know which officials are responsible for which issues, and also be able to tell how well the issue in question is being handled.<sup>11</sup>

A comparable, but perhaps greater, knowledge burden is imposed by theories of democracy that require voters to assess specific policy issues and exercise meaningful choice over the options available to them. This is the model embraced by numerous political scientists.<sup>12</sup> It is also probably the one that most laypeople have in mind when speaking of democratic control of government.

Finally, there are a variety of other theories of participation, not all of which can be considered in detail here. Perhaps the best known is that of “Burkean trusteeship,” which requires that voters judge not the merits of competing policies, but those of competing candidates.<sup>13</sup> Edmund Burke, the eighteenth century British statesman who played a key role in developing the theory, claimed that voters should choose representatives of superior judgment and virtue—a “natural aristocracy”—and then give them broad discretion to make policy.<sup>14</sup> Explicitly factoring voter ignorance into his theory, Burke argued that this is the best approach because most ordinary citizens lack sufficient sophistication to “think or act without direction.”<sup>15</sup> However, even Burkean trusteeship places a

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10. See Somin, *Political Ignorance*, *supra* note 4, at 1298–1300.

11. See *id.* at 1300.

12. See, e.g., ROBERT S. ERIKSON ET AL., *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* (1993) (measuring political responsiveness of state governments by their adherence to popular preferences on specific issues); LAWRENCE R. JACOBS, *THE HEALTH OF NATIONS: PUBLIC OPINION AND THE MAKING OF AMERICAN AND BRITISH HEALTH POLICY* (1993) (measuring popular control of health policy in the same way); LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON’T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* (2000) (criticizing political leaders for failing to follow centrist public opinion on important issues). For an assessment of some of this literature, see Ilya Somin, *Do Politicians Pander?*, 14 *CRITICAL REV.* 147 (2001) (reviewing JACOBS & SHAPIRO, *supra*).

13. See Somin, *Political Ignorance*, *supra* note 4, at 1300–02.

14. EDMUND BURKE, *BURKE’S POLITICS* 397–98 (Ross J.S. Hoffman & Paul Levack eds., Alfred A. Knopf 1949). For an analysis of the Burkean trusteeship theory, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 168–89 (1967).

15. BURKE, *supra* note 14, at 398. This brief summary deliberately ignores

substantial information burden on voters because it requires them to be able to judge the qualifications and virtue of competing candidates.<sup>16</sup>

Finally, there are more radical theories of direct democracy, which would require hands-on voter participation in everyday governance.<sup>17</sup> This approach is, of course, similar to the direct democracy of ancient Athens. It raises many of the same issues of voter competence as were debated in the ancient world.<sup>18</sup>

### B. *The Shadow of Rational Political Ignorance*

Any attempt to reform the Constitution in order to better approximate one's preferred theory of democratic participation must contend with the specter of widespread political ignorance. That ignorance is longstanding and is not primarily the result of intelligence or poor education.

Decades of survey research has established that most citizens have only minimal knowledge of politics and public policy.<sup>19</sup> Surveys conducted around the time of the closely contested 2004 presidential election showed that seventy percent of the public was unaware that the Bush Administration's prescription drug plan had been adopted—even though it was the largest and most expensive new domestic program in decades.<sup>20</sup>

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many internal contradictions and qualifications in Burke's own views because our interest is not in Burke per se, but in the knowledge requirements of the trusteeship theory of representation more generally. For a more nuanced analysis of Burke's theory of trusteeship representation, see PITKIN, *supra* note 14, at 127–31, 168–89.

16. See Somin, *Political Ignorance*, *supra* note 4, at 1300–02.

17. See, e.g., BENJAMIN R. BARBER, *STRONG DEMOCRACY* 117–38 (1984).

18. See JENNIFER TOLBERT ROBERTS, *ATHENS ON TRIAL: THE ANTIDEMOCRATIC TRADITION IN WESTERN THOUGHT* 25–92 (1994) (discussing ancient critiques of Athenian democracy, which, critics asserted, allowed ignorant and incompetent voters to be in control of public policy).

19. For citations to the literature and additional data, see Somin, *Political Ignorance*, *supra* note 4, at 1304–15. See also SCOTT L. ALTHAUS, *COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS: OPINION SURVEYS AND THE WILL OF THE PEOPLE* (2003) (examining voter knowledge of issues and events and how it relates to broader public opinion); BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* (2007) (reporting on over forty years of American political knowledge); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996) (documenting widespread voter ignorance and explaining the importance of political knowledge to the democratic process).

20. Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, CATO INST. POL'Y ANALYSIS, Sept. 22, 2004, at 4, 5–6 [hereinafter Somin, *Ignorance Isn't Bliss*].

Fifty-eight percent admitted that they had heard “very little” or “nothing” about the controversial Patriot Act.<sup>21</sup> Perhaps more telling, while only twenty-five percent of Americans can name more than one of the five First Amendment freedoms, more than fifty percent can name at least two members of the Simpsons cartoon family.<sup>22</sup>

Such widespread ignorance is not primarily the result of irrationality or intelligence. Since the 1950s, many scholars have recognized that voters are “rationally ignorant” about politics.<sup>23</sup> Because of the insignificance of any single vote, even voters who make the tremendous effort to become highly informed have almost no chance to swing the electoral outcome in favor of the better candidate or party.<sup>24</sup> The acquisition of political information is a classic collective action problem, a situation in which a valuable product—in this case, information—is undersupplied because any one individual’s possible contribution to its production is insignificant. Those who choose not to contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others.<sup>25</sup> Obviously, some voters acquire political knowledge for reasons unrelated to casting a better ballot—such as the possible entertainment value of politics. However, the evidence suggests that few acquire it in order to become better voters.<sup>26</sup>

In addition to acquiring relatively little knowledge about politics, rationally ignorant voters also have poor incentives to make good use of the information they do possess. They may limit not only the amount of information they acquire but also “how rationally they *process* the information they do have.”<sup>27</sup> Rational ignorance is exacerbated by

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21. *Id.*

22. *Aye, Carumba! U.S. Fails History*, *NEWSDAY*, Mar. 2, 2006, at A15.

23. For the pioneering early work on this subject, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238–76 (1957).

24. See William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 *AM. POL. SCI. REV.* 25 (1968) (showing the miniscule probability that one vote could actually determine the outcome of a national election).

25. For the classic general discussion of collective action theory, see MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965). See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) (extending Olson’s argument with various applications to political participation).

26. Even well-informed Americans may know very little about specific policy questions so much so that general knowledge about politics is not especially useful in sorting out one’s views on specific policy questions. See Martin Gilens, *Political Ignorance and Collective Policy Preferences*, 95 *AM. POL. SCI. REV.* 379 (2001).

27. Bryan Caplan, *Rational Ignorance vs. Rational Irrationality*, 54 *KYKLOS* 3, 5 (2001); see also CAPLAN, *supra* note 19, at 114–41 (explicating and defending the



“rational irrationality.”<sup>28</sup>

As one of us has argued in greater detail elsewhere, the fact that there is so little incentive for citizens to acquire political information in order to be a better voter implies that most of the political information we do acquire is in fact sought out for other reasons.<sup>29</sup> In particular, those who acquire political knowledge may do so because they are committed partisans of a particular party or ideology. Like sports fans, they follow politics primarily for the purpose of cheering on their team rather than seeking out the truth.<sup>30</sup> Other non-electoral motives for following politics may include the desire for entertainment, which could explain tremendous popular interest in political leaders' sex scandals and other human interest stories. Such events have great entertainment value, despite having little impact on policy.<sup>31</sup>

Many of these motivations may undercut the goal of rational assessment of candidates and policy proposals. Research shows that voters often do a poor job of assessing political information. For example, they tend to discount evidence that cuts against their preexisting views while overvaluing data that reinforces them.<sup>32</sup> Even experts on public policy suffer from these and other biases in their evaluations of political information.<sup>33</sup> Such mistakes are a natural consequence of acquiring political information for reasons other than the desire to cast a “better” vote. For this reason, “rational irrationality” stands as a major road block to rational democratic assessment of public policy.

Voters who possess little political knowledge can sometimes use information shortcuts to offset their ignorance. Possible shortcuts include: cues from respected opinion leaders,<sup>34</sup> knowledge about political parties,<sup>35</sup>

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theory of the “rational irrationality” of voters in greater detail).

28. CAPLAN, *supra* note 19, at 114–41.

29. Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 260–62 (2006) [hereinafter Somin, *Knowledge About Ignorance*].

30. *Id.* at 260–61.

31. For example, the most widely known facts about President George H.W. Bush were his distaste for broccoli and that he had a dog named Millie. DELLI CARPINI & KEETER, *supra* note 19, at 101.

32. See Somin, *Knowledge About Ignorance*, *supra* note 29, at 261 (summarizing this point and citing relevant studies).

33. See generally PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT* (2005).

34. See, e.g., Philip E. Converse, *Popular Representation and the Distribution of Information*, in *INFORMATION AND DEMOCRATIC PROCESSES* 369 (John A. Ferejohn & James H. Kuklinski eds., 1990).

and politically relevant information from everyday life.<sup>36</sup>

No doubt, rational ignorance is partially mitigated by the availability of shortcuts. But shortcuts have significant limitations as substitutes for actual political knowledge.<sup>37</sup> For example, effective reliance on opinion leaders requires that voters have enough knowledge to do a good job choosing which leaders to follow.<sup>38</sup> Even worse, the problem of rational irrationality implies that voters may systematically choose poor information shortcuts rather than good ones, if the former cater to their desire for entertainment or reinforcement of pre-existing prejudices.<sup>39</sup> A major recent study by economist Bryan Caplan shows that information shortcuts have apparently not prevented the majority of citizens from making major systematic mistakes in their evaluations of economic policy.<sup>40</sup> Shortcuts can sometimes partially alleviate the problem of rational ignorance. But they are not a complete solution for it, and may in some cases make the situation even worse.

The combination of rational ignorance and rational irrationality poses an important challenge for would-be constitutional reformers, particularly if they embrace a theory of democratic participation that requires significant voter knowledge and sophistication.

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35. See, e.g., JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 47–49, 170–74 (1995); V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 298–311 (1949); Morris P. Fiorina, *An Outline for a Model of Party Choice*, 21 *AM. J. POL. SCI.* 601 (1977); DOWNS, *supra* note 23, at 96–141.

36. For the leading advocate of the efficacy of this shortcut, see SAMUEL L. POPKIN, *THE REASONING VOTER* (1991) and Samuel L. Popkin, *Information Shortcuts and the Reasoning Voter*, in *INFORMATION, PARTICIPATION, AND CHOICE* 17 (Bernard Grofman ed., 1993). See also DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE* 1–6 (1995). Examples of politically relevant information from everyday life may include experience serving in the military (which could provide insight into policy decisions related to war), experience of being unemployed (which may help the citizen understand some aspects of economic policy), or experience of inflation (which alerts the citizen to the possibility that inflation is rising and has therefore become a more serious public policy problem).

37. Somin, *Ignorance Isn't Bliss*, *supra* note 20, at 5; Somin, *Voter Ignorance*, *supra* note 5, at 419–31.

38. Ilya Somin, *Resolving the Democratic Dilemma?*, 16 *YALE J. ON REG.* 401, 410–11 (1999) (reviewing ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998)); see *infra* Part III (highlighting ways that elected officials and interest groups often seek to conceal true purpose of reform proposals).

39. Somin, *Knowledge About Ignorance*, *supra* note 29, at 262–65.

40. CAPLAN, *supra* note 19, at 50–93.

### C. Implications for Constitutional Reform

If we are to make progress in the debate over constitutional reform, those who advocate changing the Constitution to make it more democratic must specify which theory of democratic participation they have in mind. Different theories may imply very different changes to the constitutional structure.

For example, deliberative democracy—if feasible at all—likely requires a major effort to increase voter knowledge and understanding of public policy. Retrospective voting, by contrast, may require making it easier for voters to trace particular policies to specific officeholders. This might increase a voters' ability to identify politicians who deserve credit or blame for particular policy outcomes.

The relatively minimalistic Schumpeterian approach probably requires less radical changes than the other models. However, if we are truly committed to the idea that voters should be able to remove incumbent policymakers if they are dissatisfied with them, we may wish to do away with life-tenured judges, the Federal Reserve and other institutions in which key policymakers are insulated from punishment at the ballot box. Moreover, even the Schumpeterian model has knowledge prerequisites that the majority of citizens often fail to meet.<sup>41</sup>

We can easily imagine numerous other implications of the various theories of political participation for particular reform proposals. Here, it is important to stress the more general point that we cannot make the Constitution more democratic without knowing what kind of democracy we have in mind and how that form of democracy can be achieved in the face of widespread ignorance.

In addition to explaining which theory of democratic participation they seek to implement, constitutional reformers must also show how they intend to cope with the problem of widespread rational ignorance. Some theories of participation require vastly greater knowledge about politics than most citizens currently possess. This is particularly true in the case of deliberative democracy, which imposes a very steep information burden on voters.<sup>42</sup> But even more modest theories, such as retrospective voting and Burkean trusteeship, have information prerequisites that the majority of citizens often fail to meet.<sup>43</sup> If constitutional reform is to provide genuine

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41. See Somin, *Political Ignorance*, *supra* note 4, at 1315–16.

42. See Somin, *Voter Ignorance*, *supra* note 5, at 438–42.

43. See Somin, *Political Ignorance*, *supra* note 4, at 1298–1302.

increases in democratic participation, advocates must explain how their proposal will either increase voter knowledge or facilitate democracy even in spite of widespread political ignorance.<sup>44</sup>

Bruce Ackerman and James Fishkin have put forth a proposal to try to circumvent the political ignorance that otherwise blocks implementation of deliberative democracy.<sup>45</sup> They contend that political ignorance can be alleviated by requiring voters to spend a day deliberating on public policy issues prior to each presidential election.<sup>46</sup> We are skeptical that a single day of discussion can do much to alleviate massive ignorance—much less alleviate rational irrationality. Nonetheless, Ackerman and Fishkin are right to focus on the problem of ignorance and to look for a possible solution. Unfortunately, most of the debate over constitutional reform has proceeded without consideration of the problem of ignorance. That neglect should be remedied.

### III. THE RHETORIC AND REALITY OF PRO-DEMOCRACY REFORMS

Elected officials and interest groups often mask their pursuit of substantive policy goals when advancing structural reform proposals. Seeking to capitalize on widespread voter ignorance, reform proposals are packaged in ways calculated to garner public support, shifting the emphasis away from contested policy outcomes and toward good government reforms. This Part provides some examples of this practice. In doing so, we do not mean to suggest that all proponents of structural reform are untrustworthy, seeking to cloak their true agenda from voters.<sup>47</sup> Our point,

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44. We do not doubt that structural changes intended to make the Constitution more democratic will create incentives for voters to pay more attention to policymaking. Nevertheless, rational ignorance and rational irrationality are tied to the fact that a single vote is unlikely to make a difference in shaping public policy, and proposals intended to make the Constitution more democratic will not change that reality. For similar reasons, one of us has argued that proposals to take the Constitution from the Court by eliminating judicial review would not create sufficient incentives for lawmakers, interest groups, and the American people to pay greater attention to constitutional questions. Neal Devins, Commentary, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 365–67 (2000); see also Joan L. Larsen, *Constitutionalism Without Courts?*, 94 NW. U. L. REV. 983, 990–92 (2000) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) and arguing for retention of judicial review in light of the relative economic, legal, and social costs associated with removal).

45. BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004).

46. *Id.* at 17–39.

47. For example, we think that Sandy Levinson and many other academic proponents of structural reform are motivated by a desire to make our government



instead, is that there is a mismatch between the public debate over structural reform proposals and the true purpose of these reforms—a mismatch that is fueled by political ignorance.

A disjunction between the public justification and rhetoric of constitutional reform is not in and of itself harmful. As basic economics shows us, firms seeking profit for themselves can simultaneously benefit consumers. Profit-seeking entrepreneurs have incentives to create products with lower prices and higher quality than those of their competitors, thereby improving consumer welfare. However, there is no comparable, necessary connection between institutional reforms motivated by substantive policy agendas and increases in democracy, however the latter is defined. Thus, there is a real danger that constitutional reforms packaged as democracy-enhancing will have no such effect.

Before turning to examples of proposals to alter the federal structure, we set the stage for this Part by discussing state voter initiatives and referenda. A majority of states, especially in the West and South, allow voters to shape constitutional values by placing legislative and constitutional reform on the ballot. Supporters of this practice extol its democratic virtues, namely that initiative and referenda encourage voters to be more engaged in policymaking and that direct democracy is a more accurate measure of voter preferences than the laws and regulations produced by elected officials.<sup>48</sup> Proponents of initiatives and referenda likewise argue that special interest politics play a smaller role in direct democracy campaigns than they do in the state legislative process.<sup>49</sup>

But the promise and reality of direct democracy are two very different things.<sup>50</sup> There is good reason to think that interest groups also

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more democratic.

48. See HARLAN HAHN & SHELDON KAMIENIECKI, REFERENDUM VOTING: SOCIAL STATUS AND POLICY PREFERENCES 16–19 (1987); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 25 (1984).

49. See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 10–11 (1989).

50. This is not to deny that some initiative campaigns reflect popular sentiment more accurately than the state legislative process. For example, property rights reform in the aftermath of the Supreme Court's *Kelo* decision has been much more meaningful when pursued by citizen initiative than when pursued by the legislative process, where lawmakers in many states have capitalized on voter ignorance to push reforms that give the appearance of change while actually accomplishing very little. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo* (Mar. 2007) (unpublished manuscript), available at

have a strong influence over referenda, just as they do over ordinary legislation.<sup>51</sup> For example, interest groups often sponsor initiative and referenda campaigns with national groups writing ballot initiatives, collecting signatures, and launching public relations campaigns to secure the enactment of their favored policies.<sup>52</sup> Similarly, they sometimes organize to defeat a popular initiative by advancing competing initiative proposals that are intended to confuse voters (so voters will maintain the status quo by defeating the popular initiative).<sup>53</sup> More generally, voters—by a six to one majority in a 1990 California poll—question their ability to “make an intelligent choice” when casting their ballots.<sup>54</sup> And if that is not enough, initiative sponsors often sell measures that voters disapprove of by packaging them with measures that voters support—for example, limits on the contractual rights of same-sex couples (which the majority of voters may oppose) are bundled with generally popular prohibitions of same-sex marriage.<sup>55</sup>

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=976298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298):

51. See Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17 (1997); Thad Kousser & Matthew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005).

52. See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 102–09 (2002); Garrett, *supra* note 51, at 19; HAHN & KAMIENCKI, *supra* note 48, at 20. More than that, interest groups sometimes take over populist initiatives by using their deep pockets to see to it that their own interests were served in the initiative campaign. See, e.g., DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 154 (2000). At the same time, initiative opponents sometimes mischaracterize the role of special interests. For example, when Colorado passed an anti-gay rights initiative, initiative opponents miscast “the proponents of Amendment 2 as a loose conspiracy of national organizations—a web of right-wingers and religious fanatics with a far-reaching agenda.” Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 171 (1997).

53. See, e.g., John Garamendi, *California's Ballot Industry*, N.Y. TIMES, May 7, 1990, at A15 (discussing the insurance industry's sponsoring of “initiatives designed to neutralize consumer-sponsored initiatives on the same ballot”). Special interests, moreover, launch television campaigns to defeat initiatives they dislike. See, e.g., Evan Halper, *Tobacco Firms Light Up Airwaves*, L.A. TIMES, Oct. 5, 2006, at B1 (discussing tobacco interests' efforts to characterize an initiative on cigarette taxes “as a ploy by bottom line-driven hospitals and HMOs to boost profits”).

54. See George Skelton, *Voters Say Initiatives are Out of Control*, L.A. TIMES, Nov. 4, 1990, at A1.

55. See Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1633 (2005); Thomas Oliphant, *The Gay Marriage Deception*, BOSTON GLOBE, Nov. 7, 2004, at D11.

Direct democracy is revealing for another reason—one that is central to the other examples in this Part. The inclusion of voter initiative and referenda provisions in state constitutions is largely tied to progressive efforts to pursue “social reforms of regulating industry, creating progressive taxation, and enacting programs to combat poverty.”<sup>56</sup> In other words, direct democracy was seen as a mechanism to advance a particular substantive policy agenda, not as a mechanism to empower citizens to shape policy outcomes through democratic discourse. The other examples highlighted in this Part follow a similar script—that is, federal structural reform proposals are not pursued as ends in themselves. Instead, proponents of structural reform invariably are pursuing some substantive policy agenda.

Consider, for example, various proposals to change the composition of the Supreme Court and the process by which federal judges are confirmed by the Senate. When President Franklin Delano Roosevelt introduced his Court-packing plan, he did not mention his frustration with Supreme Court decisions limiting New Deal initiatives.<sup>57</sup> Instead, Roosevelt emphasized the problem of “aged or infirm judges” and claimed that super-annuated Justices lacked the “mental or physical vigor” to examine “complicated and changed conditions.”<sup>58</sup> In other words, the Supreme Court needed new, younger blood to function effectively. This claim was quickly rebuffed by Chief Justice Hughes, who wrote to the Senate that “apart from any question of policy” an increase in the number of Justices “would not promote the efficiency of the Court.”<sup>59</sup> For his part, Roosevelt was eventually forced to admit the true purposes of his plan, namely that the Court was standing in the way of the “modern movement for social and economic progress through legislation.”<sup>60</sup>

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56. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 23 (1997).

57. For an excellent treatment of the subject, see WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). For FDR’s strategy in the Court-packing battle see also Somin, *Voter Knowledge*, *supra* note 2, at 659–61.

58. Franklin D. Roosevelt, President of the United States, *The President Presents a Plan for the Reorganization of the Judicial Branch of the Government* (Feb. 5, 1937), in 6 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 53–55 (Russell & Russell 1969) (1941).

59. S. REP. NO. 711, 75-711, at 40 (1937).

60. Franklin D. Roosevelt, President of the United States, *A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary* (Mar. 9, 1937), in 6 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 125 (Russell & Russell

Recent skirmishes over judicial appointments are cut from a similar cloth. The most striking example is the flip-flopping rhetoric of Democrats and Republicans over filibusters. During the George W. Bush presidency, Republicans condemned the filibuster as anti-democratic. Demanding that judicial nominees be allowed an up-or-down vote, Republicans threatened to amend Senate rules to do away with filibusters of judicial nominees.<sup>61</sup> For their part, Democrats defended the filibuster as a pro-democracy measure; then House Minority Leader Nancy Pelosi demonstrates: "We will not let them undermine one of the tenets of democracy: the rights of the minority."<sup>62</sup>

When Bill Clinton was President, however, both Democrats and Republicans sang much different songs. Democrats decried Republican abuses of the filibuster, threatening to adjourn the Senate Judiciary Committee in retaliation for Republican refusals to allow votes on Clinton nominees.<sup>63</sup> Republicans, in contrast, defended the filibuster and other delaying strategies.<sup>64</sup>

The fact that Democrats opposed Bush nominees on ideological grounds and Republicans opposed Clinton nominees for similar ideological reasons was downplayed in these filibuster fights. The reason: lawmakers thought neutral sounding rhetoric about democratic values and potential abuses of power were a better way to advance their partisan objectives than an outright defense of their practices on ideological grounds. Indeed, focus group interviews conducted by Democratic strategists in 2005 revealed that voters would not embrace a partisan attack on Bush's judicial nominees; in contrast, voters did think it was wrong for Republicans to "chang[e] the rules in the middle of the game" and do away with the filibuster in order to force up or down votes on Bush's judicial selections.<sup>65</sup> A knowledgeable

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1969) (1941).

61. See 149 CONG. REC. S14528 (daily ed. Nov. 12, 2003) (statement of Sen. Frist).

62. Carolyn Lochhead, *Senate Hearings Halted in Hint of Battle to Come*, S.F. CHRONICLE, May 19, 2005, at A1.

63. See Lloyd Cutler, *The Way to Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23 (condemning Republican use of filibusters in blocking legislation backed by President Clinton).

64. For a general defense of the filibuster (both with respect to judicial nominees and legislation), see 139 CONG. REC. S5719 (daily ed. May 7, 1993) (statement of Sen. Dole).

65. Matt Bai, *The Framing Wars*, N.Y. TIMES MAG., July 17, 2005, at 38, 41. Interest groups opposed to the 1987 Robert Bork Supreme Court nomination likewise made use of focus groups to sort out how best to frame their message. In particular, after learning that the abortion issue would not work with most voters, pro-choice



and attentive electorate would likely see through such transparent strategies. Not so a rationally ignorant electorate in which many voters can be easily influenced by misleading rhetorics.

That Republicans and Democrats alter their positions on filibusters whenever there is a change of party in the White House underscores the fact that ideology, not views about democracy, defines lawmaker attitudes on the appropriate and inappropriate uses of the filibuster. Moreover, the strategic use of pro-democracy rhetoric makes clear that lawmakers do not see reform proposals as a way of engaging the American people in constitutional or policy discourse; instead, lawmakers and interest groups are interested in advancing a substantive agenda, and the rhetoric of democracy is simply a tool that allows partisans to advance their positions.<sup>66</sup>

Congressional positions on separation of powers issues follow a nearly identical script: Republican and Democratic attitudes toward presidential power vary depending on who sits in the White House. When Bill Clinton was President, Republicans viewed congressional oversight of the Executive branch as integral to a well functioning democracy. Reflecting the view that power should not be centralized in a too powerful president, Republican Jim Leach said in 1994 that it was "indefensible that a [Democratically controlled] Congress charged with oversight lacks the backbone to investigate the executive branch, even if it may be embarrassing to their party's President."<sup>67</sup> For their part, Democrats

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interest groups and Democratic Senators shifted their message away from abortion and to a broader attack on privacy. MARK GITENSTEIN, MATTERS OF PRINCIPLE 112-17 (1992). In one full page newspaper ad, anti-Bork interests claimed that "[y]our personal privacy . . . has never been in greater danger," including "your freedom to make your own decisions about marriage and family, childbearing and parenting." Planned Parenthood Fed'n of Am., WASH. POST, Sept. 14, 1987, at A9 (Advertisement). The fact that lawmakers were unlikely to enact politically unpopular restrictions on marriage, parenting, and the like did not matter. What mattered was that the abortion issue would not play and, as such, a bit of misdirection was needed.

66. Much the same can be said of recent efforts of Democratic Senators to insist that Supreme Court nominees be in the "judicial mainstream" and that the Court be ideologically diverse. For example, rather than simply say that he opposed Bush Supreme Court nominees Roberts and Alito on ideological grounds, Senator Charles Schumer said that: "a Supreme Court with one Scalia and one Brennan would be a vibrant and interesting Court; but five of either would be utterly imbalanced." *Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1287 (2005) (statement of Sen. Charles Schumer, Member, S. Comm. on the Judiciary).

67. Keith Bradsher, *House Inquiry Is Urged on Clintons' Land Deals*, N.Y. TIMES, Jan. 12, 1994, at A16.

accused Republicans (after their 1994 takeover of Congress) of “misusing Congressional oversight powers to harass and intimidate the Administration.”<sup>68</sup> But when Democrats took over Congress in 2006, at a time when the presidency was controlled by the Republicans, oversight was considered a necessary part of our system of checks and balances. Complaining that “up until now the Republican Congress has given [President George W. Bush] a blank check with no oversight, no standards, no conditions,”<sup>69</sup> Democrats made oversight reform a top priority. Democrats accused Congressional Republicans of “having abdicated their responsibility for oversight.”<sup>70</sup> Indeed, Senator Hillary Rodham Clinton blamed much of “the Iraq crisis on a ‘Congress [that] was supine under the Republican majority, failing to conduct oversight and [demand] accountability.’”<sup>71</sup>

Lawmaker attitudes toward the federal-state balance are likewise tied to the substantive agendas of Democrats and Republicans. In particular, there is no federalism constituency as such in Congress. Lawmakers and interest groups regularly trade off federalism in order to pursue first order policy priorities.<sup>72</sup> This was true when Jeffersonians and Federalists flipped their normal positions in a fight over the Louisiana Purchase.<sup>73</sup> And it is true today—when Republicans eschewed and Democrats embraced states’ rights in the Terri Schiavo case, in which the Republican Congress enacted legislation calling upon federal courts to reconsider a state court order terminating Ms. Schiavo’s life support.<sup>74</sup> Against this backdrop, it is not

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68. Jerry Gray, *G.O.P. Accuses Administration of Political Improprieties*, N.Y. TIMES, Apr. 8, 1995, at A10. Republicans defended their increasing oversight of federal agencies. See Ellen Messmer & David Rhode, *Republicans Promise New Outlook on Telecom Reform*, NETWORK WORLD, Nov. 14, 1994.

69. Michael R. Gordon & Jeff Zeleny, *Latest Plan Sets a Series of Goals for Iraq Leaders*, N.Y. TIMES, Jan. 8, 2007, at A1 (quoting House Majority Leader Nancy Pelosi).

70. Philip Shenon, *As New ‘Cop on the Beat,’ Congressman Starts Patrol*, N.Y. TIMES, Feb. 6, 2007, at A18.

71. David S. Broder, *Clinton’s Presidential Posturing*, WASH. POST, Jan. 28, 2007, at B7.

72. See Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131 (2004) [hereinafter Devins, *Judicial Safeguards*]; John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004).

73. Jeffersonians, who had consistently advocated for states’ rights backed the Louisiana Purchase; Federalists, making use of states’ rights arguments, opposed it. FORREST McDONALD, *STATES’ RIGHTS AND THE UNION* 58–62 (2000).

74. See Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHI. KENT L. REV. 1055, 1062–67 (2006) (discussing the political battle over Terri Schiavo and the

surprising that pro-federalism reform proposals are much more about substantive policy objectives than the pro-democracy rhetoric of the federal-state balance.

Consider, for example, the 1994 Republican Contract with America. Like many pro-federalism reform proposals, the Contract was couched in pro-democracy ideals—a promise “to restore the bonds of trust between the people and their elected representatives.”<sup>75</sup> Among other things, the Contract embraced the idea that states and localities are closer to the people than the federal government and, consequently, decentralized federalism is a better mechanism to satisfy voter preferences than a unitary federal policy.<sup>76</sup> By turning grants for hundreds of domestic programs into a few block grants, Republicans argued that state governments would benefit from fewer strings attached to the money and greater flexibility in how they chose to spend the money.<sup>77</sup> Republicans also promised to “curb[] the congressional propensity to create new programs and make states pay for them” and bring an end to unfunded mandates.<sup>78</sup>

A closer look at what the Republican Congress did and did not pursue, however, suggests that lawmakers were far more interested in advancing first-order policy preferences than in making the government more responsive to voter preferences. Block grants were pursued in an effort to scale back programs that the new Republican majority disfavored.<sup>79</sup> Most significantly, the new Congress pursued welfare reform, abolishing more than a hundred social programs and replacing them with block grants that would reduce federal government spending by as much as

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possible underlying impetuses).

75. Republican Members of the House of Representatives, Republican Contract with America, <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Aug. 24, 2007).

76. See Richard L. Berke, *Dole and Gingrich Embrace Before Republican Governors*, N.Y. TIMES, Nov. 23, 1994, at A18; Associated Press, *Mandate Limit OK'd in Senate: Bill Would Make U.S. Help State Pay Way*, CHI. TRIB., Jan. 28, 1995, at 3 (quoting Senate Majority Leader Bob Dole describing federalism as “[t]he idea that power should be kept close to people”).

77. Robert Pear, *G.O.P. is Detailing Broad Proposals to Trim Welfare*, N.Y. TIMES, Dec. 18, 1994, at A1.

78. Associated Press, *supra* note 76, at 3.

79. For a discussion of how the Reagan Administration employed the rhetoric of federalism while pushing its substantive policy agenda through block grant programs, see Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243 (1984).

twenty percent in food, job training, child care, and foster care.<sup>80</sup> And while welfare and other block grant reforms allowed states significant power to re-fashion existing programs, Republicans in Congress nevertheless sought to further favored policies by placing conditions on the states.<sup>81</sup>

Unfunded mandate reforms were largely symbolic because Republicans and Democrats were both willing to impose unfunded mandates on the states in order to pursue favored policies.<sup>82</sup> Consequently, even though Congress enacted legislation disapproving of unfunded mandates, Congress did not place meaningful limits on its power to impose unfunded mandates.<sup>83</sup> For similar reasons, Republicans in Congress did not pursue another plank of their Contract with America—term limits.

Term limit reforms were intended to make members of Congress more accountable to the people who elect them and to reduce the size of the federal government, under the view that career politicians lose touch with their constituents and, instead, shift their allegiances to inside-the-Beltway special interests. In reality, “[t]he term-limits movement was originally inspired by conservatives, who thought the only way to unseat the long-entrenched Democrats would be through a constitutional amendment to limit their terms.”<sup>84</sup> When Republicans took over the House in 1994, a vote on term limits was put off for lack of support and

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80. Jason DeParle, *House G.O.P. Would Replace Scores of Programs for the Poor*, N.Y. TIMES, Dec. 9, 1994, at A1. For an extensive examination of how welfare block grants furthered the substantive agenda of many Republicans, see DEMETRA SMITH NIGHTINGALE ET AL., THE URBAN INSTITUTE, THE STATUS OF THE WELFARE-TO-WORK (WTW) GRANT PROGRAM AFTER ONE YEAR (1999), [http://www.urban.org/UploadedPDF/wtw\\_labor.pdf](http://www.urban.org/UploadedPDF/wtw_labor.pdf).

81. Conservative Republicans wanted to regulate the use of federal money to reduce out-of-wedlock births and penalize welfare recipients who refuse to work. Robert Pear, *Republicans' Philosophical Discord Stalls Plan for Changes*, N.Y. TIMES, Jan. 12, 1995, at A20. Other examples of Republican efforts to condition block grants include reducing block grants in the Fair Labor Standards Act and the Boren Amendment to Medicaid. See Daniel H. Cole & Carol S. Comer, *Rhetoric, Reality, and the Law of Unfunded Federal Mandates*, STAN. L. & POL'Y REV., Summer 1997, at 103, 114.

82. See McGinnis & Somin, *supra* note 72, at 106–07 (explaining why Congress has incentives to pursue favored programs and not to pursue a pro-federalism agenda that would curtail federal power).

83. See Louis Fisher, *The 'Contract with America': What It Really Means*, N.Y. REV. OF BOOKS, June 22, 1995, at 20.

84. Katharine Q. Seelye, *Term-Limit Gamble*, N.Y. TIMES, Mar. 31, 1995, at A26.



Republicans, more generally, downplayed the need to limit their terms.<sup>85</sup> By 1998, several Republicans backed away from their pledge to serve no more than three terms in Congress.<sup>86</sup>

The rise and fall of term limit reforms exemplifies several points made throughout this Part: the propensity of politicians to curry favor with voters by claiming to be pursuing good governmental reforms when, in fact, they are pursuing their partisan agendas; the unwillingness of politicians to truly embrace democracy-enhancing reforms that might limit either their power or their substantive agendas; and the willingness of lawmakers to flip their positions on structural questions whenever there is a change in party leadership in either Congress or the White House. Such maneuvers feed on the reality of widespread political ignorance, which makes it easier for political leaders to cloak their substantive agendas in misleading rhetorics emphasizing process value.

One final example is the Twenty-Second Amendment: approved by Congress in 1947 and ratified by the states in 1951, the Twenty-Second Amendment limits a president to two terms in office.<sup>87</sup> The fight over the amendment largely broke down along party lines, with Republicans uniformly supporting the measure and Democrats mostly opposed to it.<sup>88</sup> Republican proponents defended the amendment as a pro-democracy measure, claiming that the two term limit

“would strengthen and safeguard democracy from what they believed to be its greatest danger: the aggrandizement, consolidation, and even usurpation of political power by the executive branch of government.” For them, “the Twenty-Second Amendment was not an undemocratic restraint upon the popular will, but a democratic restraint upon any future, dangerously ambitious demagogue.”<sup>89</sup>

Democratic opponents of the measure claimed that “‘real democracy in action’ was for the people to have the privilege of choosing whom they

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85. Katharine Q. Seelye, *Term-Limits Advocates Take a Bad Thrashing*, N.Y. TIMES, May 21, 1998, at A14 [hereinafter Seelye, *Term-Limits Advocates*]; see also Katharine Q. Seelye, *Term Limits: Change Nobody Wants*, N.Y. TIMES, Mar. 12, 1995, at A28.

86. Al Kamen, *Sunday in the Loop*, WASH. POST, Dec. 13, 1998, at W6; Seelye, *Term-Limits Advocates*, *supra* note 85, at A14.

87. Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?* 7 CONST. COMMENT. 61, 69–70 (1990).

88. *Id.*

89. *Id.* (quoting ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 122 (1978)).

please as President,” that to prohibit the reelection of “an experienced and popular President in a time of extreme national emergency” would invite dictatorships, and that, ultimately, the amendment was a thinly veiled attempt to attack the legacy of Franklin Delano Roosevelt, who had died in 1945, shortly after being elected for a fourth term.<sup>90</sup>

Whether the Twenty-Second Amendment furthered or undermined democratic values, there is little doubt that Republicans pursued this constitutional reform for partisan reasons. In both 1940 and 1944, the Republican Party platform (in an effort to derail Roosevelt’s re-election bids) called for constitutional amendments to limit the president to two terms.<sup>91</sup> Campaign literature in 1940, for example, “railed against the dangers of allowing a President to serve as a would-be dictator and made thinly veiled comparisons between Roosevelt and the Axis powers leaders.”<sup>92</sup> And when Republicans took over Congress in 1946 (the first Republican Congress since Hoover), they saw passage of the Twenty-Second Amendment as an excellent vehicle to both increase the power of the Republican Congress and to discredit the policies of Roosevelt and then-president Harry Truman.<sup>93</sup>

When the Twenty-Second Amendment was sent to the states for ratification, the presidential tenure issue held little interest for voters and the press. “There was only spotty coverage in the local press, virtually none in national periodicals, and little public participation. Even interest groups most directly affected by the change in presidential tenure paid little attention to the ratification process.”<sup>94</sup> This lack of interest is to be expected. Without knowing who sits in the White House and in Congress, voters and interest groups could not predict whether the Twenty-Second

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90. GRIMES, *supra* note 89, at 122; see also John D. Morris, *Limit of Two Terms for Any President Approved by House*, N.Y. TIMES, Feb. 7, 1947, at 1; Richard L. Strout, *The 22d Amendment: A Second Look*, N.Y. TIMES MAG., July 28, 1957, at 5.

91. Republican Platform for 1940, in NATIONAL PARTY PLATFORMS 389, 394 (Kirk H. Porter & Donald Bruce Johnson eds., 1956); Republican Platform for 1944, in NATIONAL PARTY PLATFORMS 407, 412 (Kirk H. Porter & Donald Bruce Johnson eds., 1956).

92. Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 586 (1999).

93. See Strout, *supra* note 90, at 5. Not surprisingly, all Republicans voted for the amendment. Southern Democrats who disapproved of some of the policies of Roosevelt and Truman also voted for the amendment, giving it the two-thirds majority necessary for it to be sent to the states. Stathis, *supra* note 87, at 67.

94. Stathis, *supra* note 87, at 71.

Amendment would prove useful or harmful to their favored policies.<sup>95</sup> In contrast, during the 1940 election campaign, there was widespread public interest in the third term issue. That concern was "tied to the outcome of the election rather than any fundamental principle."<sup>96</sup> Stated differently, voters will pay scant attention to structural reform proposals unless those proposals are directly linked to policy questions that they care about.

Voter ignorance and apathy is a problem that limits democratic discourse about structural reform proposals. Unless first-order policy priorities are clearly in view, most voters will largely tune out. Thus, interest groups and politicians can advance their own agendas without substantial ballot box checks. More generally, as this Part has shown, there is a significant gap between rhetoric and reality in structural reform proposals, especially supposed pro-democracy reforms. In particular, elected officials and interest groups may pursue pro-democracy reforms that are smokescreens for the pursuit of substantive policy goals. These reforms may, ultimately, do little to advance their pro-democracy objectives. Instead, by capitalizing on political ignorance, lawmakers and special interests may see pro-democracy rhetoric as a convenient way to pursue partisan priorities.

#### IV. POLITICAL IGNORANCE AND THE PROCESS OF CONSTITUTIONAL CHANGE

The problem of political ignorance impacts not only the goals of constitutional change, but also the process by which those objectives can be achieved. Political ignorance has three major implications for the process of constitutional change. First, it is likely to reduce the average quality of the changes enacted. Second, it will probably exacerbate the negative consequences of the crisis atmosphere from which large-scale constitutional change is likely to arise. Finally, the problem of political ignorance is an important, though far from decisive, consideration counseling against bypassing the amendment procedures of Article V of the Constitution.

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95. For similar reasons, there is no federalism constituency in Congress. See Devins, *supra* note 74, at 1058 (linking the absence of federalism-based interest groups to the fact that interest groups cannot predict whether a broad or narrow view of federalism will serve first-order policy preferences).

96. Paul B. Davis, *Presidential Tenure: A Review and Reappraisal* 147 (1978) (unpublished Ph.D. dissertation).

### A. Reducing the Quality of Constitutional Change

Political ignorance and irrationality could easily reduce the quality of constitutional change. The most obvious scenario for this to happen is that ignorant voters might simply allow a flawed constitutional change to slip by without noticing. While this possibility may seem far-fetched in the case of constitutional changes that affect important issues, it is not completely implausible. After all, nearly seventy percent of the public was unaware of the passage of the 2003 prescription drug bill, which created the biggest new government program in almost forty years.<sup>97</sup> It is potentially possible that the same could happen with a flawed constitutional amendment.

Some of the more technical issues raised by constitutional reformers could potentially be vulnerable to this kind of near-total ignorance. For example, efforts to change the electoral rules by which members of Congress are selected, to abolish life tenure for federal judges, and to revise Article V itself are unlikely to engage widespread public attention because of their unexciting nature and the difficulty of connecting them to policy outcomes.<sup>98</sup> For this very reason, the ratification of the Twenty-Second Amendment went largely unnoticed by the general public. According to *The Nation*, the Amendment “glided through legislatures in a fog of silence—passed by men whose election in no way involved their stand on the question—without hearings, without publicity, without any of that popular participation that should have accompanied a change in the organic law of the country.”<sup>99</sup> Likewise, the press, the public, and interest groups were equally lax, with next to no press coverage, little public participation, and limited interest group involvement.<sup>100</sup>

The public’s lack of awareness of a constitutional change reduces the chance that the amendment process will be under any meaningful democratic control. This thereby increases the likelihood that changes will

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97. Somin, *Ignorance Isn’t Bliss*, *supra* note 20, at 5–6.

98. Sanford Levinson urges reform of all these areas in *Our Undemocratic Constitution*. For this very reason, Cass Sunstein and (to a lesser extent) Mark Tushnet have criticized Levinson for not taking into account the realities of a populist constitutional convention. Specifically, Sunstein and Tushnet both argue that a populist convention might not focus on the types of structural changes that Levinson embraces but, instead, might veer towards controversial social policy issues. See Cass R. Sunstein, *It Could Be Worse*, *THE NEW REPUBLIC*, Oct. 16, 2006, at 32; Mark Tushnet, *The Politics of Levinson’s Constitutional Convention*, 1 *HARV. L. & POL’Y REV.* (Online) (Dec. 4, 2006), [http://www.hlpronline.com/2006/11/tushnet\\_01.html](http://www.hlpronline.com/2006/11/tushnet_01.html).

99. *The Two-Term Limit*, *THE NATION*, Mar. 10, 1951, at 216, 217.

100. Stathis, *supra* note 87, at 71.



be made that benefit narrow interest groups at the expense of the general public. Unfortunately, most proposed reforms that seek to make the Constitution more democratic are difficult for the public to connect to important policy outcomes, and thus unlikely to attract a high degree of public attention.

A more likely scenario than total ignorance by the majority of the public is a combination of ignorance about the details of proposed changes and rational irrationality in gauging their likely effects. Rationally ignorant voters might lack the detailed knowledge needed to accurately gauge the impact of proposed constitutional reforms, and instead assess them on the basis of heuristics that cater to preexisting prejudices or other irrational impulses.<sup>101</sup> This may have happened in the case of the enactment of the Eighteenth Amendment, which voters may have supported as a result of general hostility to alcohol consumption without giving much consideration to the dangerous indirect effects of prohibition.<sup>102</sup>

Finally, public ignorance makes voters more vulnerable to elite manipulation. If voters do not understand the details of proposed constitutional revisions or their likely effects, political elites may be able to manipulate those voters into supporting reforms that benefit organized interest groups at the expense of the general public.<sup>103</sup>

Some of the major policies enacted as a result of the New Deal constitutional revolution likely took this form. For example, the National Industrial Recovery Act of 1933 (NIRA), the most far-reaching new legislation enacted during the New Deal, established a system of price and wage-fixing cartels that covered "almost the entire private, nonagricultural economy."<sup>104</sup> As standard economic theory would predict, the cartels had

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101. For a discussion of "rational irrationality" see *supra* Part II.B.

102. See MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 89-138 (1991) (summarizing evidence that alcohol prohibition led to increases in crime and police corruption, and to the substitution of more dangerous drugs for alcohol by consumers). For the politics of the Eighteenth Amendment, see RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT* (1995).

103. Our position does not rely on the possibly controversial claim that the most ignorant voters are necessarily the most manipulable. Some research suggests that voters with middle-range knowledge (which is still very low in an absolute sense) are more responsive to elite cues (and thus are potentially more manipulable) than those with the very lowest knowledge levels. See JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 127-28 (1992) (providing evidence that "moderately aware conservatives and centrists" are more susceptible to changing their attitudes based on a liberal message than their lower knowledge-level counterparts).

104. MICHAEL M. WEINSTEIN, *RECOVERY AND REDISTRIBUTION UNDER THE*

the effect of raising prices and increasing unemployment at a time when the economy was already reeling from the effects of the Great Depression.<sup>105</sup> The enactment of the NIRA may have caused the United States's already shrunken GDP to constrict by another six to eleven percent.<sup>106</sup> However, the NIRA probably did benefit labor union and industry cartel members who sought to eliminate competition from lower-cost competitors—a principal reason for the support NIRA attracted from key corporate and labor movement elites.<sup>107</sup>

Despite these traumatic and partly foreseeable results,<sup>108</sup> New Deal era voters failed to understand the true impact of the NIRA. The Roosevelt Administration and other NIRA supporters likely exploited political ignorance in their efforts to win public support for the legislation and downplayed its departure from preexisting constitutional norms, which denied Congress the power to engage in such far-reaching regulation.<sup>109</sup>

Such problems could arise with constitutional changes intended to promote democracy, as well as those enacted in pursuit of other objectives. Consider, for example, voter initiative and referendum. Although initiatives and referenda are intended to empower voters, interest groups and elites often manipulate this process, arguably preventing any increase in democratic control.<sup>110</sup> The nature and degree of the risk of manipulation will vary from case to case. But any effort to make the Constitution more democratic must take due account of this risk.

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NIRA 1 (1980).

105. *Id.* at 146–47.

106. *Id.* at 146.

107. See Somin, *Voter Knowledge*, *supra* note 2, at 651 n.183 (citing relevant literature).

108. For example, black leaders understood that the NIRA would increase unemployment for poor black workers. See DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 88–89, 92–93 (2001); see also H.C.W., Book Note, *The National Industrial Recovery Act*, 33 COLUM. L. REV. 1092, 1092 (1933) (noting absence of strong opposition to the NIRA). By 1935, however, the NIRA had become more unpopular and Congress did not renew its two year charter. See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 33–34 (2002) (noting contradictory poll results on the popularity of the NIRA between 1935 and 1939).

109. Somin, *Voter Knowledge*, *supra* note 2, at 649–54.

110. See discussion *supra* Part III.

B. *Political Ignorance and Constitutional Change in a Crisis Atmosphere*

Students of constitutional evolution have long recognized that large-scale change is most likely to occur as a response to a major crisis.<sup>111</sup> The three most important periods of constitutional change in American history—the Founding Era, the post-Civil War period, and the New Deal—all probably would not have happened in the absence of crisis. Modern proponents of constitutional reform recognize that their proposals are most likely to be seriously considered in the event of a crisis such as a war or economic depression.<sup>112</sup>

Unfortunately, a crisis atmosphere could easily exacerbate the dangers of political ignorance. In the midst of a crisis, voters could easily neglect or lose sight of the long-term effects of constitutional change as a result of focusing on the immediate crisis at hand. Critics of the Bush Administration's policies in the War on Terror fear that this is happening as a result of overreaction to the immediate threat posed by terrorism.<sup>113</sup> Rationally ignorant voters who lack the knowledge necessary to weigh long-term impacts are more likely to fall prey to this error than those with greater knowledge and sophistication.

This dynamic may have occurred during the New Deal period, when the Roosevelt Administration succeeded in pushing through constitutional changes that gave Congress virtually unlimited regulatory authority, despite the fact that—according to surveys—the majority of voters probably opposed this outcome.<sup>114</sup> Although the majority of citizens opposed giving Congress virtually unlimited regulatory authority, this result occurred anyway, probably because voters focused on the immediate economic crisis and either were unaware of or did not consider the long-

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111. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1987).

112. See, e.g., LAZARE, *supra* note 1, at 293–96.

113. For general treatments of how civil liberties are curtailed during war time, see generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005). For a detailed account of the 2001 Patriot Act, highlighting how national securities concerns overwhelmed civil liberties interests, see Robert O'Harrow, Jr., *Six Weeks in Autumn*, WASH. POST MAG., Oct. 27, 2002, at 6.

114. Somin, *Voter Knowledge*, *supra* note 2, at 624–28.

term effects of the New Deal constitutional revolution.<sup>115</sup> The very outcome that voters opposed occurred because most may not have realized that it had happened.

Moreover, a crisis atmosphere may increase the danger that rational irrationality will lead citizens to endorse dubious and dangerous constitutional changes whose proponents effectively cater to prejudice and irrational thinking. The best known historical example is the success of the Nazis in winning public support for their ideas by focusing on the grave crises besetting the Weimar Republic.<sup>116</sup> Nazi leader Adolf Hitler specifically emphasized the importance of exploiting voter ignorance and irrationality in order to get citizens to support the Nazi program. He stressed that “[t]he receptivity of the great masses is very limited, their intelligence is small, but their power of forgetting is enormous.”<sup>117</sup> As a result, effective “propaganda must follow a simple line” and must appeal to “emotion and feeling” instead of “sober reasoning.”<sup>118</sup> Some Germans voted for the Nazis because they were convinced of the validity of the Nazi program through this kind of simplistic propaganda. Others simply cast a “protest vote” against the Weimar Republic without giving much consideration to the likely effects of the Nazi program if the party came to power.<sup>119</sup>

The Nazi case is an extreme example of the exploitation of popular political ignorance in a crisis atmosphere. In the United States, we are unlikely to enact a comparably disastrous policy agenda. Nonetheless, the combination of political ignorance and crisis could lead voters to approve dangerous constitutional innovations. Some scholars fear that this will happen as a result of the ongoing War on Terror, which might tempt voters to approve excessive restrictions on civil liberties.<sup>120</sup> During the New Deal constitutional revolution, the disastrous NIRA was deceptively sold to the public as a temporary emergency measure intended to overcome the crisis of the Great Depression.<sup>121</sup>

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115. *Id.*

116. *See generally* RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* (2004).

117. ADOLF HITLER, *MEIN KAMPF* 180 (Ralph Manheim trans., Houghton Mifflin 1999) (1925).

118. *Id.* at 181, 183.

119. Evans, *supra* note 116, at 447–60; *see also* RICHARD F. HAMILTON, *WHO VOTED FOR HITLER?* (1982).

120. *See, e.g.,* BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006).

121. Somin, *Voter Knowledge*, *supra* note 2, at 652–53.



These points are more suggestive than definitive. Much scholarly labor remains to be done before we have anything approaching a complete understanding of the interaction between crisis atmospheres, political ignorance, and constitutional evolution.<sup>122</sup> Nonetheless, the dangers posed by this combination deserve careful consideration from those who seek to reform the Constitution to make it more democratic.

*C. A Limited Defense of Article V*<sup>123</sup>

The dangers posed by political ignorance provide a partial justification for abjuring constitutional change that bypasses the supermajority mechanisms of Article V of the Constitution, which requires the support of two-thirds of both houses of Congress and three-fourths of state legislatures.<sup>124</sup> Through much of American history, Article V has been reviled for allegedly undermining democracy by making constitutional change too difficult to enact.<sup>125</sup> Current constitutional reformers have argued that Article V should be eliminated,<sup>126</sup> or at least not be considered the sole legitimate mode of constitutional change.<sup>127</sup>

But the much-criticized supermajority requirements of Article V may help mitigate the dangers of political ignorance. Although studies of voter knowledge have historically found that most of the public is severely

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122. But cf. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091 (2006) (arguing that governments are no more likely to enact harmful policies during a crisis than during ordinary times). Unfortunately, Vermeule's analysis does not consider the possible impact of political ignorance during an emergency.

123. The argument of this section is adapted and revised from Somin, *Voter Knowledge*, *supra* note 2, at 667–69.

124. U.S. CONST. art. V.

125. See generally JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* (1992) (describing two centuries of criticism of Article V).

126. See, e.g., Stephen M. Griffin, *The Nominee Is . . . Article V*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); LEVINSON, *supra* note 1, at 159–66.

127. This view has been repeatedly advanced by Bruce Ackerman and Akhil Amar. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter, ACKERMAN, *FOUNDATIONS*]; AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* (1998); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); ACKERMAN, *TRANSFORMATIONS*, *supra* note 111.

ignorant,<sup>128</sup> they have also found that an important minority of voters, ranging from five to perhaps as many as fifteen or twenty percent, is much better informed than the average citizen.<sup>129</sup> Some evidence suggests that the most-educated and best-informed citizens are also less likely to fall victim to "rational irrationality."<sup>130</sup>

By requiring a massive supermajority to enact constitutional change, Article V effectively prevents enactment of any amendment that fails to win the support of at least a high proportion of this informed minority. In turn, this makes it difficult to enact an amendment merely through the manipulation of voter ignorance. Even if only a small minority of voters is informed enough to see through the amendment's advocates' campaign of deception, that minority may well be large enough to block its enactment.<sup>131</sup>

This consideration falls well short of proving that Article V is the ideal procedure for constitutional amendment. In some cases, the need for change may be so great that we would be justified in taking the risk of circumventing it. In reality, the problem of political ignorance is less a justification for Article V's specific procedures than a more general argument for requiring supermajority assent to constitutional change. Nonetheless, it is an important consideration that advocates of

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128. See discussion *supra* Part II.B.

129. See, e.g., W. RUSSELL NEUMAN, *THE PARADOX OF MASS POLITICS* 186 (1986).

130. See CAPLAN, *supra* note 19, at 7–14.

131. Defenders of supermajority requirements advance a similar argument in explaining why these requirements "protect the interests of popular, rather than legislative, majorities and protect the exercise of individual rights." John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 509 (1995). With reference to a 1995 House rule requiring a three-fifths majority of those voting to pass an increase in income tax rates, the need to persuade wavering lawmakers about the bill's merits (and the concomitant need to win the backing of three-fifths of lawmakers) would ensure that tax increases be enacted for the public interest and not special interests. Critics of such supermajority requirements, in contrast, see such demands as little more than a smoke screen to secure a favored policy agenda. See *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1542 (1995) (arguing that the three-fifths rule was "based upon substantive and selective judgments that income tax increases—and only these increases—are unwise and should not be encouraged"). For additional discussion, see *supra* notes 61–65 and accompanying text (discussing the need for a super-majority of Senators to overcome the filibuster of judicial nominations) and *supra* notes 75–86 and accompanying text (discussing the gap between the rhetoric of the Contract with America and the reality of the 1995 Republican Congress's commitment to structural reforms, such as the three-fifths rule).

circumventing Article V should consider.<sup>132</sup>

#### V. CONCLUSION

Advocates of efforts to reform the Constitution to make it more democratic should make clear exactly what kind of democracy they have in mind. The answer to this oft-neglected question is crucial. Reform efforts should also give serious consideration to the reality of widespread political ignorance and irrationality. These forces both limit the effectiveness of proposed reforms and affect the process by which constitutional change is enacted.

It is certainly possible that the Constitution can and should be reformed to make it more democratic. By no means do we rule out such a possibility. But it is difficult to promote beneficial reforms without a more realistic assessment of both their goals and the methods by which they are to be achieved.

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132. See, e.g., LEVINSON, *supra* note 1, at 167-78 (arguing for enacting change through a constitutional convention).

## DISCUSSION

**PROFESSOR LEVINSON:** The natural born citizen clause, which most of the time is interesting only to academics, in fact may very well explain our particular politics right now because does anyone have any serious doubt that Arnold Schwarzenegger would be a very considerable candidate either as a Republican or an independent? Were it not for the fact that, from my perspective, he is non-supportive, I do think that it is unjustifiable that he is prevented from running because of what I do think this is the second-class citizenship clause. It is the only thing I can think of off hand where the clause really has some bite. And in the book I am actually very critical of congressional Democrats who did not support Orrin Hatch's proposal seven years ago to eliminate this particular clause, and it may well be that one of the sources of lack of enthusiasm of getting along because it would seem to me that in what I would like to think of as the principles of the Democratic party to be impossible to defend this clause, I assume that part of the calculation is that it would help out Governor Schwarzenegger.

Two other quick points—I disagree with you that the last period of substantial extra-Constitution change was the New Deal. I think that what we are going through right now is a deep and fundamental debate about the extent of non-Article V constitutional change with regard to the powers of the presidency, that the claims made by the Bush administration to some of us are well beyond what the constitution would sustain, but then of course so are claims about the New Deal. There are some very, very able lawyers who are defending the Bush Administration on a common law basis in part, saying, “Look at this case, look at that case, look at the emergency we are in,” and so the President can in fact do whatever he wants just as, I will accept for these purposes as a quick summary of the New Deal, the Congress can do whatever it wants. So it seems to me that this is an extraordinarily important debate. Even if you think that the President does not have quite the powers that the Bush Administration claims, it is still undoubtedly the case that we have seen significant breach of presidential powers, particularly with regard to war and military over the last twenty years, and I think this is of fundamental importance and a worthy successor to the New Deal as an example of non-Article V



amendment. The very last point is Ilya's argument is not that the citizenry is dumb or ignorant in the sense of educated. I do not know how we compare to Sweden, but among large countries we have to compare very well in terms of having a literate, educated citizenry citizenry. Ilya is really making it a common school that I tend to agree with, actually. That once the county is sufficiently large, then a very smart, rational person will not allocate his or her scarce time, money, and energy in ventures where there's really no particular reason to do it other than a kind of civic duty that you can easily free-load off the people who will get engaged. I think this is a very serious problem and in the fourteenth Federalist paper, Madison confronted the critics who said, "You cannot have a republican political order except in a small homogeneous country or state." This was David Hume and Montesque. The Federalist number fourteen is famous in part because Madison makes the argument first of all that states are going to be greater menaces in individual liberty than would be a federal government because it is so much easier for factions to hatchet control of the states. But his other argument is you can have an extended republic, and he makes the argument, I will not rehearse it here. But Madison was writing at a time when the entire population of the then United States was about three million people. Most of them of course could not vote. You start off with women and certain slaves and in most states newly freed blacks, so you had a rather small electorate. Geographically we were from Maine to Georgia going down vertically and over to the east coast of the Mississippi going horizontally. Now we are a country of somewhere in the 300 millions going up very rapidly to 400 million, we extend from Maine to Hawaii, and depending on your view of Puerto Rico, into the Caribbean.

I really do think that a fundamental question, which I do not have the beginning of an answer for, is how one has a flourishing civic republic, what the constitution says in Article IV is a republican formed government, which I think does mean a participatory government of active citizens. How does that survive when most people rationally believe that, even putting aside questions of constitutional difficulty, even if we had a much more wonderful Constitution than we do, it still would not make sense for most people to spend their scarce time, money, and energy being one of a million voters, or a million contributors. This was the fundraising week on public radio in Austin, and Ira Glass gave a wonderful, wonderful fundraising pitch and he said look, "You know and I know that KUT is going to go on whether or not you contribute so anybody who says, 'we are going to go off the air if you don't send us forty dollars,' they are lying to you. We will stay on the air even if you do not send in forty dollars. The reason you ought to contribute to KUT is because you benefit from what they are doing, and because you were told by your parents that you should

be involved and that you should not take things you benefit from for free. But trust me, KUT will go on even if you do not contribute.” And that is the real war, with all due respect, between the economists’ perspective. Economists point out that it is irrational to contribute to public radio; my favorite example is that they point out that it is irrational to tip if you are never going to go back. If you are a regular you should tip, but if you are not a regular it is irrational to tip and to engage in all sorts of the amenities of civilized life. And I think that is a fundamental problem of politics. I do not have a good answer for it.

**PROFESSOR SOMIN:** Very briefly, the first two points that Sandy made I mostly agree with. I definitely agree it would be good to get rid of the naturalized citizen provision. I would only note that the way it is played out is an example of my point about substance and that before there was a serious potential candidate who would be a naturalized citizen, there simply was not much incentive for people to invest in making that change because neither party saw a substantive benefit to themselves for making it. Now that there are those people who like Arnold Schwarzenegger, as Orrin Hatch does, they say, “yes let us push ahead with it,” but by the same token those people who do not say . . .

**PROFESSOR LEVINSON:** Like John McCain.

**PROFESSOR SOMIN:** Yeah like John McCain perhaps, if those people who do not, even if they at some level agree with the general principle behind the movement, they are going to be hesitant to support it. On the big question that Sandy raised, and I have also raised in my own work a lot, about this question of sort of rational ignorance and incentive to participate, I also agree with a lot of what he said. I agree that the amount of participation and knowledge is somewhat higher than sort of a pure adherence to rational choice theory by individuals who you would expect. However, it is still the case that there is far less contribution to this sort of public good causes, I mean public good in the economic sense of the term, than you would have absent the rational ignorance problems or other problems of contribution. And certainly in the area of political knowledge most people do in fact have very little political knowledge when you take into account that some people have reasons for acquiring knowledge other than the reason of becoming a good voter it is not clear that there is very much acquisition of knowledge that can be traced simply to people that desire to be a good voter as opposed to some people who are just interested in politics, much the way that I know a lot about baseball statistics because I love baseball and not because I feel like I can affect the outcome of baseball games. And so similarly there are also political fans and I am also a political fan as I am sure Sandy probably is. I do not think

there is a definitive answer to the problem, but I do sketch out a partial answer in some of my works which is that we should want more decisions to be made by the types of social institutions where you do not have rational ignorance; in other words, by civil society and market institutions than by institutions where we do have rational ignorance problems such as electoral systems. Now I do not think I can fully justify libertarianism by this, even though I am libertarian, I certainly do not claim that this consideration alone justifies it, but I would suggest that it is an important reason to move in a more libertarian direction. I should also note that this is my argument I am sharing and this argument will not be in the paper and I am not sure if Neil Devins fully agrees with it, but he, like David Mayhew, is more moderate than I am and also probably more moderate than Sandy. But I think it is an important point to consider that maybe one reason why we want a strong Constitution which limits the powers of government and is difficult to amend is so that we can have more decisions made by the types of institutions which do not give people incentives to be rationally ignorant about the things they are deciding about.

**PROFESSOR HOROWITZ:** I just wanted to call attention to one big difference between the 1787 constitutional convention and the convention of 2010 or whatever the year. The 1787 constitutional convention preceded the emergence of political parties, and so while there were interests represented at the convention—commercial and agricultural, big states, small states, slave owning states, non-slave owning states—the interests were not party interests. The presence of partisan interests changes everything because it gives rise to partisan visibility of the likely effects of various provisions of the proposed constitution on the fortunes of the parties. Take for example how the President should be elected. My guess is if this played out according to what I think would be the scenario, there would be a conspiracy at the convention between representatives of the two major parties to keep third parties out. That is the one thing on which they would really agree. And so you would not get the runoff because the runoff gives a tremendous boost in power to the third party. Neither would you get the alternative vote, of which by the way, I am probably the leading American proponent. I like the alternative vote and I think it would be a very good way to elect the President. But, it would seem to be a way that third parties could have an influence on the outcome of that election. And there would be many other ways in which partisan visibility would play a role that it absolutely did not play in 1787, and could easily get factored into this contemplation.

**PROFESSOR LEVINSON:** Well I think that is one of the virtues of convention by lottery. Even though people might bring into the

convention that they are Democrats or Republicans, the odds, I think, are overwhelmingly less partisan.

**PROFESSOR HOROWITZ:** The parties would organize the members of the convention.

**PROFESSOR LEVINSON:** Well, they will try, but you do not know. One of the big differences, of course, between 1787 and 2012, at the earliest, is that there was no transparency whatsoever in 1787, whereas it has to be preserved and of course I would regard this as a good thing that the convention be covered by C-SPAN and that there would be no possibility for the kind of private dealmaking that was made. One of the wackier features of the temporary administrative law in Iraq was one that, at least on the face of it, required transparency. That everything that negotiators were doing not only had to be done in public, but they also had to create feedback mechanisms in order to get responses from ordinary Iraqis. Now there are a lot of reasons that did not work out very well, but I think all of us agree that there never would have been a Constitution of 1787 if the drafting conditions had required this sort of this sort of transparency.

**PROFESSOR SOMIN:** Can I say one very brief comment on what Sandy said about Bush and his claims of executive power? I do agree that if those claims were fully vindicated and institutionalized it would be a significant constitutional revolution and I do not mean to deny that. All I am saying is that the New Deal is the last creative way a major structural change of this sort was successfully carried through. I think Bush may want such a thing, he has received considerable pushback from the courts and from Congress and other sources, and if possible, counterfactually, if he had been much more successful with the war in Iraq or some of his other initiatives, maybe he would have prevailed on these things. Right now, it does not look like he is going to, but there is a potential future issue here, which I set out as sort of a crisis atmosphere can lead towards sort of large changes where the long-term considerations are not factored in, and that is if you think about if there is another attack on the scale of 9/11 or even larger, and another more popular President, more popular than Bush is right now, in his office at that time, then you might see a significant expansion of executive power that could be made to stick in a way that Bush, I think, has not been able to fully institutionalize the sorts of powers that he has claimed. I think that by claiming virtually absolute power, he has perhaps even done himself political harm. He has raised people's hackles and he has in effect forced the Supreme Court into a position where the Supreme Court felt they had to slap him down, even though I think they would have probably preferred to temporize and not have a



direct confrontation with him.

**GOVERNOR VILSACK:** It seems to me that in this discussion of political ignorance that you have made a pretty good case for maintaining small states starting the political and election process. Because if we move toward a national primary, which appears to be where we are headed, I think we would basically fall back into the same trap you alluded to in your presentation—that the larger the audience, the less significant your vote becomes, the less engaged you are, which is why in Iowa sometimes it is difficult for candidates to know the difference between reporters and citizens. They all bring note cards in and make notes.

**PROFESSOR SOMIN:** I do not necessarily disagree. I do think maybe, and I have not thought this through completely, certainly not near as much as Governor Vilsack has probably thought about it. But, it may be that we should start out with small states or perhaps which small state is the one that does it should rotate rather than always being Iowa and New Hampshire. Maybe some year Vermont should do it, or Montana, or Alaska, but it may be desirable to start off with small states.

**PROFESSOR GERKEN:** The thing that I have in reaction to your paper Ilya is that it is true the citizens are ignorant but they also use heuristics, so parties provide a pretty good proxy for figuring out what their interests are. Not perfect, but a rough proxy. So parties do the work and then you vote, and you know that when you vote Democrat, you are voting for a particular set of ideas, and same thing for Republicans. On the constitutional convention end, if we worry about parties being the proxy because they are self-interested, Sandy's idea, while seemingly nuts, has actually worked once. In British Columbia, and now maybe we can just say the Canadians are a different and better people than we are. But in British Columbia they had a citizen's commission that designed electoral reform, and the thing that was remarkable about it is that even though there was no education campaign—people knew nothing about why they were voting—they saw the words "citizen commission," and fifty-seven percent of them voted for it. And you have to think that was a heuristic, the same heuristic we use when we say, "look if it was good enough for Iowa and New Hampshire then it looks like the candidate we want." These are the same people whom we admire and will use Iowa and New Hampshire as a heuristic for voting. Sandy's citizen commission strikes me as a pretty powerful heuristic and contra Don's instinct that the parties would organize it, citizens do not like parties; they hate them in fact, so when the parties tried to organize the citizen commissions of British Columbia, there was pushback. They were actually pushed away from that process so just to let you know, I hate to endorse such a Kumbaya proposal as Sandy's,

but I will just say that both on the sort of hardcore realists of using heuristics for constitutional conventions and on sort of the general worry about voter ignorance, I think that Sandy's commission is not a crazy idea.

**PROFESSOR LEVINSON:** One quick further point about the parties, that one of the reasons that I actually think this is an appropriate time to generate the kind of discussion I am interested in, is precisely because the two parties are sufficiently divided in terms of electoral strength. That we are as close in the real world to being behind a veil of ignorance as we are likely to get, that is, we do not know who is going to be president in 2012, we might be able to predict, given the current political situation, what might happen in 2008, but I think it would be a fool's bet to say "oh yeah, I am confident this is the president in 2012. I am confident I know who is going to control Congress, I am confident in this, that and the other." So even if you have rabid partisans, if you invited Chuck Schumer and Newt Gingrich into a room and said look, we are not going to talk about affirmative action, guns, abortion—we are going to talk about whether the president should have a veto. I do not know what the Republican position is on whether the President should have veto power or a Democratic Party position, and going down the whole list of things that I am most interested in, I am a political partisan in a number of ways, but naively or not, I view the book as a non-partisan book because for the life of me, I cannot really figure out why conservatives should love the Electoral College in 2012 and liberals should not or vice versa. Why it is that liberals should think policy-based presidential vetoes are just terrific or conservatives should say, "oh no, we really think it is very important that Hillary Clinton have a policy-based veto but also have a policy based veto if she becomes President." I think this is the perfect time, so that even if political parties try to organize around some of these issues, I am not sure what it would lead to, but I also take a certain comfort, I think you are right that the people who would be selected by this wacky scheme that has worked in some countries, would look from a perspective of public interest because there is no partisan alternative. If you have a partisan alternative it would say how does this help my people so I know whether to go. But here who knows what's going to help the Republican Party or the Democratic Party, except with Don's point that you might want to suppress third parties which would be a real shame in my belief. But I wonder if most ordinary Americans share that view of the Democratic and Republican national chairs.

**PROFESSOR SOMIN:** Just quickly two seconds on heuristics—I agree that heuristics can be useful, but there are two big problems. One is to use heuristics effectively you need some pre-existing base of knowledge,

which many people lack such as knowledge about the parties and how they operate. Second, heuristics may be more difficult to use with big long-term constitutional changes than with issues of ordinary politics because a big long-term structural change will have many more potential unforeseen and difficult to gauge consequences than simply an ordinary policy change, and so ignorance to heuristics may make it more difficult-to-use heuristics to overcome ignorance in that situation than in many other situations, although I also think it is tougher than a lot of scholars believe even in ordinary political situations.