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TOWARDS A PRACTICE OF DELIBERATIVE DEMOCRACY: A PROPOSAL FOR A POPULAR BRANCH

*Ethan J. Leib**

Every page of *The Federalist Papers* is a call to the people of America to take its fate into its own hands and to fashion its institutions in the light of the best political science of the present rather than to look timidly to the past. The good citizen of today can do no less.¹

The truth is that no part of the present-day government is well suited, by virtue of practical capacity or political intervention, to undertake the job of structural and episodic reconstruction [of the political public sphere]. The mission lacks—as every novel and serious mission in the world does—its proper agent. The best response, then, is to forge the new agent: *another branch of government*, another power in the state, designed, elected, and funded with the express charge of carrying out this distinctive rights-ensuring work. Such a move, however, would demand the very openness to institutional experimentalism in which contemporary law and contemporary democracies have proved so remarkably deficient.²

I. INTRODUCTION: GETTING RIGHT DOWN TO THE BUSINESS OF DESIGN

Proposals for practical institutional reforms are notoriously absent from discussions about deliberative democracy. Joshua Cohen may be right that we will need a lot more data from political psychologists before we can reasonably take a stab at proposing such reforms.³ But it is also imperative to engage in the “nuts and bolts” debate of just what kinds of changes we

* Law Clerk Designate, The Honorable John M. Walker, Jr., Chief Judge, United States Court of Appeals, Second Circuit. B.A., Yale University; M. Phil., University of Cambridge; M.A., Yale University; J.D./Ph.D. Candidate, Yale University. I wish to thank Bruce Ackerman and the participants in the “Deliberation and Democratic Engagement” panel at the American Political Science Association’s Annual Meeting in August 2001, where the ideas in this Article were first presented to a deliberating public.

1. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 10 (1991).

2. ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 33 (1996) (emphasis added).

3. See generally Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67, 85 (James Bohman & William Rehg eds., 1997) (1989) [hereinafter *DELIBERATIVE DEMOCRACY: ESSAYS*].

discourse theorists or deliberative democrats want to effect. Amy Gutmann and Dennis Thompson claim that deliberative democracy is “in search of a theory.”⁴ I think it is in search of an operationalized practice. To this end, instead of the usual law review tactic of summarizing current research for fifty pages and then making my contribution on the final two, I will just get right to it. And the gist of the idea is to give some serious consideration to Unger’s idea that we need a new branch of government. He never provided any details; I hope not to provide too many.

Some theorists have not been so shy in suggesting some practical ideas on behalf of institutionalized deliberation. Robert Dahl has suggested that each citizen be required to serve on an advisory council to an elected official for a single year.⁵ The advisory board’s membership would be in constant electronic correspondence with one another and would serve as an institutional mechanism to check representatives at the legislative level. This is not substantially different from Peter deLeon’s endorsement of what he terms “Participatory Policy Analysis” (“PPA”), where randomly-selected citizens who might plausibly be affected by a particular policy are conscripted to meet expert policymakers and bureaucrats to give their input into administrative matters over the course of a year.⁶ Notoriously undemocratic, the administrative bodies who make critical governmental decisions might benefit from consultation and deliberation with some lay citizens. John Burnheim has more radically called for the end of representative democracy as we know it. Instead, he would like to institutionalize deliberation by having small random samples of citizens debate various political issues and set policy for the polity as a whole.⁷ And James Fishkin, less radically and with greater caution, has argued that public opinion polls should be replaced with (what he terms and trademarks) “Deliberative Polls,” where approximately 500 people gather to debate issues and come to more informed public opinions.⁸ The polls are designed

4. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1 (1996).

5. See, e.g., ROBERT ALAN DAHL, *AFTER THE REVOLUTION: AUTHORITY IN A GOOD SOCIETY* 149-50 (1970) [hereinafter *AFTER THE REVOLUTION*]; ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 340 (1989).

6. See generally PETER DELEON, *DEMOCRACY AND THE POLICY SCIENCES* (1997).

7. See JOHN BURNHEIM, *IS DEMOCRACY POSSIBLE?: THE ALTERNATIVE TO ELECTORAL POLITICS* 111-13 (1985).

8. See JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991) [hereinafter *DEMOCRACY AND DELIBERATION*]; JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1997) [hereinafter *VOICE OF THE PEOPLE*]; James S. Fishkin & Robert Luskin, *Bringing Deliberation to Democratic Dialogue*, in *A POLL WITH A HUMAN FACE: THE NATIONAL ISSUES CONVENTION EXPERIMENT IN POLITICAL*

to represent more accurately what an informed body would decide if it were equipped with relevant information to make a decision, precisely the kind of information voters often lack in all sorts of elections. By using random samples to make policy *recommendations*, Fishkin hopes to achieve deliberative input into governmental units while revitalizing civic participation more generally as citizens get themselves informed. But, in effect, he leaves all governmental institutions untouched by deliberation, or capable of ignoring popular will, because the deliberations are only involved in processes of opinion-formation.⁹

Here I would like to try to synthesize a reform proposal of my own based upon three major assumptions. Without argument, I assume a largely discourse-theoretic view of democracy that takes for granted the republican virtue of collective self-government as well as the Kantian claim that each citizen should be the author of his own laws. This democratic intuition has been aptly described as follows: "Popular political self-government is first of all the ongoing social project of authorship of a country's fundamental laws by the country's people in some nonfictively attributable sense."¹⁰ I further

COMMUNICATION (Max McCombs & Amy Reynolds eds., 1999); James S. Fishkin, *Reflections on Deliberative Democracy* (Paper delivered to the Yale Political Theory Workshop, October 5, 1999).

9. Fishkin's work—in conjunction with the work of Ned Crosby, who studies civic juries (a term he has trademarked)—has spawned a literature into which this Article neatly fits. My proposal is different from each of the ones offered in this literature, and I will have occasion elsewhere to outline some of those differences only once I sketch the general idea. The ones with a 'family resemblance' are BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); JOHN GASTIL, *BACK BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS* (2000); Ned Crosby et al., *Citizen Panels: A New Approach to Citizen Participation*, 46 PUB. ADMIN. REV. 170 (1986); Ned Crosby, *Citizen Juries: One Solution for Difficult Environment Questions*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 157 (Ortwin Renn et al. eds., 1995); and Simon Threlkeld, *A Blueprint for Democratic Law-making: Give Citizen Juries the Final Say*, 28 POL'Y 5 (1998). Though I developed my idea before finding Threlkeld's five-page comment, it turns out that the ideas there are remarkably similar to the ones here. Mine, however, is far more developed, less utopian, and respects the current regime of representation and separation of powers (something Barber assuredly does not do either). Moreover, Threlkeld and Barber suffer an infinite regress problem because they want to see citizen juries do everything, even though they pay virtually no attention to the agenda-setting problem. Nevertheless, when I found Threlkeld's work a year after I completed the first draft of this Article, I was struck with how little attention it has received. I hope that doesn't bode ill for the attention this Article is to receive.

10. Frank Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, in *DELIBERATIVE DEMOCRACY: ESSAYS*, *supra* note 3, at 145, 146-

assume that our constitutional democracy attempts to approximate this virtue for its citizenry by aggregating preferences and sanctioning some rule by majority, all while checking people's preferences by enforcing some basic norms of equality.¹¹ In this regard, I follow Jürgen Habermas: "[T]he democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy."¹² The last major assumption I make is that face-to-face interaction more closely embodies some democratic ideals than certain forms of representative bodies or virtual/electronic communication.¹³

I try to steer clear of clarifying the foundational defenses for fundamental rights that are inviolable by majorities—this is the task of much political theory and provides much of the justification for judicial review

47.

11. For an elaborate explanation of the uses and disadvantages of majoritarianism for life, see GUTMANN & THOMPSON, *supra* note 4, at 27-33. In this proposal, supermajorities play a role, which requires a somewhat different strategy of defense. See *infra* Part IV.H.

12. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 448 (William Rehg trans. & ed., 1996) (1992).

13. Iris Marion Young makes a good case for why face-to-face relations ought not necessarily be privileged. She claims that "[t]he ideal [of face-to-face democracy] presumes a myth of unmediated social relations, and wrongly identifies mediation with alienation It implies a model of the good society as consisting of decentralized small units which is both unrealistic and politically undesirable, and which avoids the political question of just relations among such decentralized communities." IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 232-33 (1990). She considers such a model "wildly utopian" and thinks "[a] model of a transformed society must begin from the material structures that are given to us at this time in history." *Id.* at 233-34. Last, she urges that "[p]olitics must be conceived as a relationship of strangers who do not understand one another in a subjective and immediate sense, relating across time and distance." *Id.* at 234. As will become evident here, I actually agree with (and account for) many of Young's perspectives and think my proposal addresses some of her concerns by keeping room for less 'direct-democratic' and more representative institutions, while ultimately endorsing a face-to-face deliberative model.

I am most convinced of the virtues of face-to-face democracy when considering what Elaine Scarry has called "the difficulty of imagining other people." Elaine Scarry, *The Difficulty of Imagining Other People*, in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 98 (Joshua Cohen ed., 1996) (1993). By insisting on the opacity of the other, Scarry's argument takes account of Young's critiques of liberalism. Of course, Scarry recruits this "difficulty" to establish a justification for constitutionalism over cosmopolitan largesse, whereas I see deliberative democracy as a potential source for helping us with this difficulty—the difficulty that we cannot act on behalf of others unless we know or confront them in some nonfictive sense. In his more romantic moments, Fishkin seems to justify deliberative democracy along similar lines, especially when telling us anecdotes of radical paradigm shifts in people's attitudes when they come to appreciate the situation of an other in the course of his polling weekends.

and the separation of powers.¹⁴ Instead, I want to focus upon the dynamics of how better to approximate our approximation of democracy, not upon the teleological arguments for where we should end up in some utopian world or ranting about why we should end up there. I want to find a tweak, a tinkering, for our current system that would make it more generally desirable, making the three assumptions above with respect to what counts as desirable. I expect that the proposal should be attractive to democrats and republicans (lowercase 'd' and 'r') of all colors as long as they are not big-government liberals, who are generally distrustful that people *should* be authors of their own laws. As long as "we the people" are not treated as a political fiction impossible to conceive or construct in reality, my proposal looks to give substance to what the rhetorical refrain could mean, in the best of cases. Even if William Riker is right that Americans are governed by institutions, and not themselves,¹⁵ American institutions can have more direct input from institutionalized deliberation, ensuring better levels of self-government. And the critics of deliberative democracy who see it as "rule by the articulate"¹⁶ or as insensitive to power relations,¹⁷ should see in my proposal mechanisms to allay their concerns, helping them trust the people, who they claim to want to help.

A. *The Proposal*

I propose a new branch of government to add to our system of checks and balances. In addition to the Executive, Legislative, and Judicial branches, the people need to have a more distinct voice in a branch of their own. Let us call such a branch *Popular* insofar as it aims to instantiate our

14. For a proposal on how better to ensure democratic values through the separation of powers, see Bruce Ackerman's defense of "constrained parliamentarianism" in Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634 (2000).

15. See generally WILLIAM RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982).

16. See Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1642 (1988). More recently, some have lashed out against "pluralistic logocracy." See Joshua Cohen & Charles Sabel, *Directly-Democratic Polyarchy*, 3 EUR. L.J. 313, 330 (1997). But as Cohen and Sabel astutely note, "the potential for deliberative failure is no argument against efforts at [deliberative] improvement." *Id.*

17. See Ian Shapiro, *Enough of Deliberation: Politics Is About Interests and Power*, in *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 28-38 (Stephen Macedo ed., 1999); see also YOUNG, *supra* note 13, at 233-34. For a comprehensive argument for why one should be suspicious of my entire enterprise, see Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347 (1997). Sanders's argument is well worth attention, though my project addresses many of her concerns with deliberative institutions.

ideas about popular sovereignty more concretely. As a practical matter, this branch would aim to replace the initiative and referendum processes; its institution would be established to address many of the shortcomings of those forms of direct democracy. Its functions could be brought about through national or state constitutional amendments,¹⁸ and its findings would enact laws—laws that could be repealed or vetoed by the relevant (state or federal) Executive or Legislative branch (with a two-thirds supermajority), or could be challenged in the Judicial branch. Though these vehicles for overruling deliberative decisions should be available in any conception of the institutional design, I would suspect that they would not often be exercised for fear of evidencing a patina of anti-democratic authoritarianism.

Composed of stratified random samples of 525 eligible—though not necessarily registered—voters, debating in groups of approximately fifteen, the Popular branch would take the form of small civic juries occasionally meeting in plenary sessions to get their “charge.” Such juries would debate political policies at assemblies convened for such purposes and would be modeled on the basis of Fishkin’s Deliberative Polls, administered with the degree of care that Fishkin takes to make his Deliberative Polls representative, unbiased, and informed. Such juries would be called in circumstances where ballot initiatives and referendums are called for arbitration now. In this paradigm, the Popular branch would have the authority to enact law, while the tasks of the Legislative and Executive branches would include help with agenda-setting, framing, administration, and tailoring the findings of the deliberative body into coherent written statutes. They would also be responsible, as they are now, for dealing with law-making processes so specialized as to have no substantial popular interest, or interest of the Popular branch.

Jurisdiction of the Popular branch would depend on the policy question at issue; both local and federal questions could be settled by representative samples of citizens, though each would have slightly different but analogous procedures to bring about “deliberative” settling of the question.¹⁹ In the

18. Ironically, I need to depend on the functions of the other branches to ‘create’ my newly-devised check on their authority. Of course, I never deny the legitimacy of non-deliberative governmental actions altogether, so this feature should become less ironic as the discussion proceeds.

19. I do not mean to suggest that Fishkin’s polls could not be used for many other purposes at the administrative level. I view my proposal as consistent with, though not dependent upon, such efforts. Most specifically, I am interested in seeing how Fishkin’s creation can be utilized to establish a better political public sphere, one more politically

case of national assemblies, it would probably be better to have several regional conventions where vote totals are aggregated, not weighted—one person, one vote. Even large states might require regional samples for their Popular activities.

Political concerns about which every citizen can have an informed opinion (for example, affirmative action, school desegregation, or presumed consent for organ donation) would be put to a group of random citizens to decide over the course of a few days either at the state or national level. Often these types of political opinions are remarkably uninformed, and since these are the issues likely to find themselves on the agenda, the deliberative assembly would help settle questions that demand more thoughtful consideration by the electorate.

I would impose a relatively high threshold for putting the question to a policy jury from the direct democratic route of agenda-setting (i.e., what could now be known as the Popular initiative process). Thus, ten percent of the relevant voting population would need to agree to place a proposal on the deliberative agenda (not agree to the proposal itself), and the signatures of those advocates would need to be geographically distributed throughout the state or nation in some equitable fashion.²⁰ Given the proliferation of e-correspondence, e-mail signatures could count for the direct Popular mechanism, but ways to curb corruption, a common problem with signature-gathering in general, would need to be implemented. Perhaps Colorado is exemplary: a random sample of the signatures representative of the whole list is drawn and only the selected names get verified.²¹

From the less direct democratic route, the referendum, a supermajority of one legislative house along with a simple majority of the other—another high threshold—could send an item onto the Popular agenda for adjudication. Because legislators are already trained in the ways of statute-drafting, it would be advantageous to have joint committees come together to draft a statute for Popular consideration. Since the drafters would know that their bills would ultimately be subject to the careful scrutiny of 525

significant than heightened attention to candidate horseraces.

20. In 1992, of the twenty-seven states that had some form of initiative and/or referendum, one-third of them had a signature threshold at ten percent or above. Of those nine, seven were at ten percent, so I arbitrarily follow those states. See David B. Magleby, *Governing by Initiative: Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 22 (1995). The geographic distribution criterion could be flexible depending on what locale is most affected by the policy at issue.

21. *Id.* at 22-23.

jurors, they would be forced to be clear and specific if they want to achieve Popular acceptance. Riders would fall off the wagon.

After achieving acceptance from the Popular branch, a law would need to be signed by the President (or Governor). To be sure, the Executive and Legislative branches (with an appropriate supermajority) could veto the Popular branch's decision, assuming they want to risk impeachment or recall for contravening the informed will of the people.

Finally, judges at the appellate level (in both the federal and state court systems) could, by a mere majority, *en banc*, convene a Popular assembly to settle a popular question. Of course, in the case of convocation by the Judiciary, the Popular branch has more of a recommending and informational capacity than a lawmaking one. The branch's decisions are not binding only because in this kind of affair, more similar to the Fishkin model, citizens are not debating law, but public opinion. In this manner, both representative and direct mechanisms could place an item on the Popular agenda and have input into all branches of government.

Such a new branch of government would necessitate a new body of administration in charge of regulating, organizing, and preparing the deliberative jury process. The body would process requests for adjudication by deliberative assembly, which could come from the legislatures, the judiciaries, or the people themselves. The administrative body would make sure the early stages of statute-drafting and signature-garnering proceed without corruption by moneyed interests. During the preparation of the informational and factual materials to be used as the bases for deliberation, the administrative body would help pare down and focus the debate, making it 'debatable' over the course of three or four days. But their contribution would be procedural, not substantive, assuming that such a distinction is tenable. As an example of what such a body might look like, consider Arne Leonard's vision of a statewide "Citizen's Commission on Constitutional Amendment" ("CCCA"):

An independent commission to consist of nine members . . . which shall be composed of six appointed members and three elected members. Each of the following state officials shall appoint one person to serve as a member of the CCCA: the Speaker of the House of Representatives; the President Pro Tempore of the Senate; the Governor; the Attorney General; the Chief Justice of the Supreme Court; and the Chief Judge of the Court of Appeals. No more than three of the appointed members of the CCCA shall be from the same political party. Registered electors shall elect three members of the CCCA [directly]. Elected members of the CCCA may not simultaneously hold

another elected state office. All members of the CCCA shall serve for a term of four years from the date they are elected or appointed . . . [and] shall prescribe its own rules of order and procedure in accordance with the State Administrative Procedure Act. The legislature shall provide suitable quarters for the CCCA, appropriate funds for its lawful expenses, and compensate its members for their services.²²

Mutatis mutandis, this kind of commission could be replicated at different levels of government (citywide, statewide, and nationwide) and could help administer deliberative assemblies and arbitrate among “stakeholders,” as well as maintain the integrity of the deliberative process. Leonard wants to institutionalize this commission to help make initiatives and referendums more deliberative; my proposal goes further to counteract the dynamics of mass democracy evidenced in the general initiative and referendum procedures currently in place. Because I do not rely strictly on the educative potential of deliberation, and because I care about its potential for popular will-formation, I require a much deeper reorganization of initiatives and referendums.

In my adaptation of Leonard’s council, I continue to allow parties to play some role and thus leave seats on the relevant commission for party appointments. The parties would be able to appoint members to the Popular branch, but no more than three appointees (of the nine sitting members at each level) may be from the same party. I expect that there would be state commissions for state and local questions and a national commission for federal questions, so the business of who gets to make the appointments would depend on the particular jurisdiction of the administrative body. Leonard’s proposal is for a statewide body, but, realistically, the general party structure would run the confirmation proceedings, regardless of what level of government the council oversees. Let the parties do the work of appeasing themselves and the public.

But the last three members (the swing votes, in a manner of speaking) would be elected directly by voters. The candidates for these offices would not be able to take money from any party for their campaigns. Instead, the citizens running for Popular office could only apply for public money to help run their campaigns after jumping through the usual hoops that candidates always must. Their campaigns could only be funded with public monies or personal fortunes, and no private interests would be allowed to

22. Arne R. Leonard, *Emerging Issues in State Constitutional Law: In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMP. L. REV. 1203, 1236 (1996).

use their weight for even independent expenditures. Maybe this would mean that only people like Jon Corzine (D), Steve Forbes (R), and Ross Perot (I) could run. But their role is mostly to shuffle through papers and proposals and summarize contents, work that their staffs would do with greater precision in any event. To be sure, my assumption that the administrations would be value-free is optimistic at best. But with wide measures to ensure the integrity of the branch and with the publicity associated with every step of the process, the scrutiny of the mass media and the general population would probably keep the administrative body in check.

Among the most preliminary and prominent problems with current initiative and referendum procedures is that, by and large, only groups with substantial financial backing can afford to garner the necessary signatures to get a proposal on the ballot or afford the media campaigns often necessary to force a legislative referendum.²³ Even in my model, special interest groups with a lot of cash will be more likely to be able to get their initiatives considered by a deliberative body. But one of the main purposes for my proposal is to take away some of the power of the purse by subjecting each proposed policy to deliberative bodies, not to an uninformed, unrepresentative minority of voters very susceptible to manipulation by efforts taken in the mass media. Mass democracy suffers from this problem, brought about by an undisciplined populism.²⁴ Consider this evidence:

Most voters face an informational vacuum . . . Previous research has demonstrated that significant numbers vote in ways inconsistent with their preferences on the issue generally. Take the case of a 1980 California rent control initiative Citing its exit poll, the *Los Angeles Times* concluded that "voters apparently ended up confused and suspicious of the proposition." Analysis of this exit poll demonstrates that more than half of all California voters were confused about what a 'yes' and 'no' vote meant. Over three-fourths of California voters did not match their views on rent control with their vote on the proposition: twenty-three percent wanted to protect rent control but incorrectly voted 'yes,' and fifty-four percent were opposed to rent control but incorrectly voted 'no.'²⁵

Providing voters with information pamphlets to help explain ballots has not met with great success either, since no one reads them. This renders voters

23. Magleby, *supra* note 20, at 36.

24. *Id.* at 37-40.

25. *Id.* at 38-39 (citing Roger Smith & Dorothy Townsend, *Proposition 10: Its Defeat Hailed and Lamented*, L.A. TIMES, June 5, 1980, at 1, 22).

particularly susceptible to influences in the mass media, usually funded by big money.

In the deliberative bodies of the Popular assemblies, sound-bites would be scrutinized. And advertising aimed at the mass public will always come up shy of its target because efforts to reach the randomly-selected jury (of 525) will always be unlikely at best. Demagogues who whip the masses into a froth might still be able to get items on the agenda in this possible world, but proposed policies would still have to pass deliberative scrutiny to get enacted Popularly. The proposal here is aimed at forcing Americans to be more responsible with direct democracy such that they are more likely to be able to enjoy its fruits.

The Judiciary could, on this model, make sure that the findings of the deliberative bodies cohere with the standards of “equal protection” in some substantial fashion. Since the actual deliberations would be preserved in transcripts (anonymously to protect privacy), judges would have access to the thought-processes of the relevant voters. In many cases of judicial review of direct democracy, judges try to interpret what they think the voters must have been thinking when they cast their ballots on a statute that they most likely could not possibly comprehend. In the case of judicial review of deliberative assemblies, judges would have transcripts to facilitate understanding more clearly the preferences of the ‘lawmakers.’ And administering post-deliberation surveys would help get more direct statements of the ‘intention of the lawmakers.’²⁶

Justices could still uphold basic constitutional provisions to avert tyranny of the majority and unacceptable deliberative findings. Instead of making the circular argument that all good procedures will produce fair results,²⁷ I appreciate the concern of the critics of deliberative democracy who rightly fear that, in practice, deliberation will often produce illiberal and ‘undemocratic’ outcomes that might further entrench already inegalitarian power relations. To be sure, this has been a problem with direct democracy in general. But I am not as worried about such outcomes, because I acknowledge the importance of the institutional mechanisms we already have in place that would curb, or at least work against, such outcomes. Yet the benefits of a better approximation of legitimacy suggest strongly

26. This advantage of deliberative assemblies is also relied upon by Cohen & Sabel, *supra* note 16, at 337.

27. For that argument, see generally HABERMAS, *supra* note 12; and Joseph Traub, *Discrimination in Plebiscites: Discursive Irrationality*, 6 TEMP. POL. & CIV. RTS. L. REV. 99, 112-14 (1996/1997).

deliberative input. Since I am not idealizing deliberation as the *only* source of legitimacy, I think I am on stronger grounds for demanding it.

But judicial opinions, while continuing their Herculean task of checking tyrannical majorities, would also be subject to some Popular constraints.²⁸ The courts would not be able to base their opinions on some tendentious assessment of popular will, without actually gauging Popular support in a deliberative body. Judiciaries could also call for deliberative juries at state and national levels, especially if they want to adhere to some of Richard Posner's enthusiasm for social science in judicial decision-making.²⁹ Indeed, they would be so required if they want to base a decision upon something "deeply rooted in this Nation's . . . tradition."³⁰ Traditions, particularly "national" ones, would be perfect topics for deliberative control; it seems obvious that only the people can testify to their traditions. Constituting a people should not only be a top-down affair.

1. Compulsory Service

I would expect service in deliberative bodies at both local and federal levels to be compulsory civic responsibilities, just as our society expects jury service of its citizenry. But the legal mandate to participate in deliberative bodies would be far more involved and involving than jury duty: endless deferments and excuses would not be tolerated. If one is *eligible* to vote, she is eligible to be conscripted for a deliberative assembly. Providing translation services for citizens who do not speak English, a reasonable stipend, and traveling expenses, would maximize response rates. Because the voluntary response problem is usually considered one of the most damning

28. Habermas, though critiquing Ronald Dworkin for his use of the Herculean judge in a hardly more responsible fashion than CLS, still seems slightly too judge-centric. See HABERMAS, *supra* note 12, at 211-22.

Alas, Habermas never makes the kind of 'nuts and bolts' recommendations I do here to allow the norm of discourse to trickle down into the sphere of popular will-formation. Instead, Habermas thinks deliberative democracy at the level of the judiciary is almost enough to guarantee equal concern and respect. As long as judges take account of what they think each citizen would say if each citizen had access to the forms of discourse, Habermas is willing to compromise and let a liberal constitutional democracy pass discourse-theoretic muster. I doubt we can be this complacent.

29. See, e.g., RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

30. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)); see also *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). ("[T]he statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.").

shortcomings of deliberative models and referendums,³¹ mandatory service—maybe not jail time, but serious repercussions in the form of fines or community service—could avoid that route of delegitimizing the Popular forum.

Moreover, mandatory service on policy juries could become a feature constitutive of American citizenship in an age where there are few aspects of political culture that unify citizens. By stigmatizing the act of not serving, by creating a political culture wherein actual citizens are called upon to make decisions that impact their lives in extraordinary ways, the costs of not taking part could become rather severe in civil society. But this is more sociological speculation than it is an argument.

2. The End of Tacit Consent

Since it may be that the aggregation of commodified private votes can never amount to consent (including the tacit sort we have grown so reliant upon), I have set up my schema to address this democratic dilemma. Yet I substitute a random sample for the population and expect each deliberator to cast a vote in private. Nonetheless, the deliberations should remain public; the deliberations would be recorded and transcribed to create a public document reporting not only the final vote tally but also what was said at the assembly. However, since each person *could* have been selected for the deliberative body, and each person *will* be drafted to serve multiple times, consent is generally made more explicit (and draft-dodgers would have to accept the decisions of the juries because they affirmatively refuse to be decision-makers). Substantive representation is more likely to be achieved in this paradigm than it is in our current representative regime where criteria for representation must always be formalistic and substitutional. Because the institutionalized bargaining function of representatives that often skews representativeness is largely shielded away from my deliberative institution, citizens can decide for themselves what is worth compromising. But the problems with representation are hardly definitively solved. I am only

31. Turnouts for special elections for ballot initiatives are stunningly low. And those who do turn out are “better educated, older, better off, and more ideological than voters in general elections.” Magleby, *supra* note 20, at 32. For more on why direct democracy cannot be trusted (giving further reasoning for the approach taken here), see Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998). Fishkin supposes that he circumvents the problem with stratified random samples that are representative of the public at large with respect to demographics and preferences, but he, too, experiences the voluntary response problem. See FISHKIN, *DEMOCRACY AND DELIBERATION*, *supra* note 8, at 81-104.

hoping to do better than we currently do in the quest of achieving the political ends that a thoughtful group would endorse.

3. Aggregation and Decision Procedures

Though deliberation is the primary form of decision-making in my model, an aggregating procedure will be necessary at the conclusion of the deliberations because I am concerned with popular will-formation, not only public opinion. Since all deliberative assemblies would be convened to decide binary questions (i.e., the jury is deciding Yes/No on some proposition), a simple mechanism necessitating a supermajority could be applied to each situation:³² After deliberation, a private vote is taken where jurors vote "Yes," "No," or "Abstain." If a two-thirds majority vote "Yes" (of those voting "Yes" or "No"), the bill under consideration would pass. If a three-fifths majority obtains, shy of two-thirds, I would call the jury hung, keeping the question on the Popular agenda for further deliberative assemblies to adjudicate.

Should the jury remain hung, those sponsoring the campaign would be entitled to amend their proposition according to the feedback of the first jury. Since the jury's deliberations would be publicly available, the sponsors could tailor their proposal to the needs of the randomly selected jury even though a different jury would be responsible for further consideration of the proposal. The Commission would make sure that the changes are reasonable and represent modification on the basis of pervasive comments that come from the deliberators themselves. In any event, three mistrials (hung juries) on any proposition would kill the bill. Of course, if neither a supermajority nor a majority is achieved, the measure officially fails and is taken off the deliberative agenda, even supposing that a simple majority might serve as a recommendation to the parties to adopt similar measures by traditional means.

If the proposition came from the people with an initiative-style campaign, it should not come before the branch by this mechanism for three years. Still, during this three-year period, a legislature or judiciary could demand Popular input on a similar question. If a question is put before the Popular assembly by legislators, they would not be able to bring a substantially similar measure within three years either, though an initiative campaign or a judiciary could get a substantially similar measure before the

32. A detailed defense for supermajority requirements can be found in DENNIS MUELLER, *CONSTITUTIONAL DEMOCRACY* 97, 180-87 (1996). I treat the issue at greater length *infra* Part IV.H.

Popular branch during the same period. For more details about the proposed system of checks and balances, with more attention to ratification and veto powers, turn to Part III.

4. Agenda-Setting

Of course it would not make sense to have deliberative assemblies set the agenda for other deliberative juries. Hence, I still need some of the basic mechanisms in place that currently allow for initiatives to be brought before the public. Most often, advocates of a proposal need collect the signatures of a small percentage of the population at issue. Those signatures are sometimes checked for corruption and the proposal is guided by some basic constraints of wording and reasonable procedural constraints, like subject-matter jurisdiction.³³ Alternatively, legislatures or appellate judiciaries could decide to put questions on the agenda.

In Part VI, I tackle the most difficult and central problem of agenda-setting and framing. As a teaser, I think there are two approaches to this challenge: one concrete and the other more theoretical. The concrete approach suggests that candidates in general elections may, given this reconstituted regime, start running on the basis of the questions they want to put to the public to decide in the Popular branch. In this way, citizens will have some access to the referendum (as opposed to the initiative) agenda-setters. Of course, I could not *require* candidates to have their platforms include what they will put to juries to decide. But empirical evidence suggests that candidates in states that make wide use of the referendum often run on platforms that endorse facilitation of public decision-making on various items of interest to the candidates and the public.³⁴

The theoretical approach is a form of “the civil society argument”—citizens, in their civil societies, their smaller public spheres, will frame issues themselves for the use of the political public sphere.³⁵ A radical shift in campaign funds appropriation could facilitate this process by adopting Fishkin’s sketch of a voucher system, elaborated upon in Bruce Ackerman’s

33. Magleby, *supra* note 20, at 25. “Subjects excluded from the ballot in some states include naming a person to office by initiative, emergency legislation, and using the referendum to block appropriations. Some states ‘require that a measure may not encompass more than a single subject.’” *Id.* (citing CAL. CONST. art. 2, § 8(d); FLA. CONST. art. XI, § 3; OR. CONST. art. IV, § 1(2)(d)). These seem like reasonable and necessary procedural means to help measures of direct democracy function more efficiently—and may make elites more likely to trust the proposal in general.

34. *See id.* at 29.

35. Here I employ Habermasian jargon to be clarified *infra* Parts V & VI.

"Patriot Proposal," wherein every citizen could allocate some public funds to the interest group of her choice.³⁶ In Part VI, I use these reform efforts to gesture toward my own mechanism. In the meantime, if and when civil societies fail us, we will just have to trust our representatives to do a reasonable job of presenting as many alternatives and arguments as possible by forcing them to employ non-partisan help in arbitrating between partisan arguments.³⁷ I could spend time worrying about how biased and media-driven information sources might be, but the anti-utopian institution tinkerer always uses the shadow of the present situation to gauge progress.

5. Branches

This scheme very much depends on the interaction of the various branches.³⁸ Surely, one cannot depend upon deliberation for all our 'democratic' decisions. We must often leave it to other features of institutional design in other branches to enact the virtues of "political equality" and "nontyranny." Thus, I have no reason to do away with general elections, courts, and administrative bodies; I need them to continue their administrative, oversight, legislative, statute-tailoring and interpretive capacities. Every citizen could not be expected to gain expertise in lawmaking, nor should it be desirable that they spend much of their time doing so. Thus, I would imagine that the construction of the fine details of obscure code would still be left in the hands of the agencies. To protect against tyranny of the majority, the judiciary would still have a substantial role in such a government to prevent abuses of the Popular branch. Just as referendums have had illiberal outcomes in the past, we should reasonably fear that deliberative bodies will make some bad decisions. But judicial review of even this form of direct democracy is not entirely inappropriate, and it should be welcomed in our attempt to balance republicanism and

36. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 99-100; Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71-80 (1993).

37. In this spirit, see the proposal for the CCCA by Leonard, *supra* note 22, and accompanying text at Part I.A.

38. Fishkin does not give enough attention to the value of the separation of powers in his work. This lacking inspires my proposal's excessive fixation thereupon. See *infra* Part III. There, I spell out more explicitly these sorts of considerations. The insight here is that we can trust direct democracy if we have the right checks in place. Instead of doing away with direct democracy and depending solely upon representation, we can have a branch that really includes independent individuals coming together to make law.

liberalism, popular rule and avoidance of a tyrannous majority.³⁹ Though the Executive (President or Governors) and a two-thirds supermajority of the relevant legislatures should be 'allowed' to repeal or veto laws enacted by deliberative assemblies, such action is likely to be political suicide, if not perceived as authoritarian. But judges sometimes need to take the lead and be 'undemocratic' in extraordinary circumstances. Similarly, the Popular branch could check some judicial abuses as well by contesting 'general will' claims that occasionally appear in judicial decisions as a basis for deciding law; instead, judges would have to call for a deliberative jury to assess popular will. Because I wish to avoid infinite regress on the one hand, and inattention to redressing discrimination on the other, my institutional reform proposal does not take the form of a radical overthrow of our current system. Nonetheless, real (semi-radical) changes are needed if popular sovereignty is to be taken sufficiently seriously.

B. Summing Up and Roadmapping

Habermas appreciates the need for postmetaphysical thinking and thinks we have little choice but to embrace such modes of argumentation "for which no plausible alternatives exist."⁴⁰ The proposal at issue is not only realistic and anti-utopian, but also has the capacity to transform our society in such a way that would satisfy liberals and communitarians, consensus theorists and agonistic political philosophers alike. It is realistic because our political climate could absorb and afford such an institutional reorganization. It requires a reshuffling of resources, but not total redistribution of wealth, a reassessing of the implications of our form of government, but not a reconsideration of whether democracy is the best form of government. While it challenges our assumptions about what it means to endorse 'representative' government, the proposal does not call for undisciplined populist direct democracy. It is anti-utopian because it only hopes to approximate an approximation somewhat better. It does not require assent to some grand narrative other than our weak (or 'thin') democratic one, where the people should actually have some input on a level more informed and less economically-determined than the referendum of our current representative regime. It is a practical way to make us feel more at-home under our laws, which would be rendered more democratic if

39. See Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (arguing that any form of direct democracy deserves a hard judicial look). For more on the check of judicial review upon the Popular branch, see *infra* Part III.C.3.a.

40. HABERMAS, *supra* note 12, at 443.

subjected to the new branch of government I recommend. Though I suffer from acute "polis envy,"⁴¹ I do not view the envy as a foolhardy malady; many real ills and pathologies can be treated with a dose of deliberation. The problem requires clever institutional design, even though I may fail to persuade that my particular design is clever enough.

The proposal takes seriously both the ideals of individuality and individual interests, and the politics of difference and group interests, though I will not be able to spell out all of these advantages in this context. By finding a place for procedural justice and neutrality (Part V), and taking the civil society argument into account so that the state does not have a monopoly on agenda-setting (Part VI), the proposal addresses a variety of liberal and communitarian concerns, all while avoiding making difficult fundamental-rights arguments for equality. Such arguments shall be left to the theorists and the jurists (even the jurors!) as I try to argue for a practical proposal to embody a dominant theme of American democratic life that might support such a reform.⁴² No doubt, such a proposal rests on foundational ideas insofar as I will need a theory of why governmental institutions should preserve equality and facilitate heightened degrees of self-government. I do not make such an argument here because though the terms of what counts for equality are still on the table, that our equality should be protected does not seem very controversial. And though the terms of how directly the people should influence policy are still up for debate, it seems uncontroversial that the realities of money and power often undo even a trace of self-governance.

I shall devote the next Parts of the Article to elaborating upon the proposal itself (Part II); to discussing the integration of the Popular branch into the separation of powers and system of checks and balances (Part III); and to meeting some powerful objections to the institution (Part IV). Only then can I get theoretical by bringing "ideal" deliberative democracy back to

41. I take the term from FISHKIN, *DEMOCRACY AND DELIBERATION*, *supra* note 8, at 90, but he credits Bruce Ackerman with coining it. John McCormick claims that Stephen Holmes should get credit, but I have no way of assessing McCormick's claim.

42. Here is the empirical support for the democratic climate to which I am appealing: "Depending on the precise wording of the question, more than 50 percent of Americans support the idea of national referenda [to supplant Congress and the President in making certain categories of national decisions] and more than 80 percent support both the initiative and the recall" of congressmen and senators once they have been in office for a year. Anthony King, *Running Scared*, ATLANTIC MONTHLY (January 1997), available at <http://www.theatlantic.com/issues/97jan/scared/scared.htm>. These numbers are more recent than, though corroborate similar findings and enthusiasm evidenced in, THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 223-34 (1989).

earth (Part V) and address that pestering difficulty of agenda-setting, which requires theorizing further about civil society (Part VI).

II. ARGUING FOR ARGUING

Although it is beyond the scope of this Article to argue for “equal concern and respect,” I will still need to “argue for arguing,” as Jon Elster and James Johnson have put it.⁴³

Habermas writes, “Only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process.”⁴⁴ For my purposes, such a construction is too strong. Instead, I appeal to Fishkin’s intuitive suggestion that it is a “false dilemma” to suppose “that we must choose between thoughtful but anti-democratic competence of elites on the one hand, and the superficialities of mass democracy on the other.”⁴⁵ Though his proposals for reform are too mild to address balancing his trilemma of “political equality, tyranny of the majority, and deliberation,”⁴⁶ I take the urgency of his construction to heart. His problematization begs for a firm institutional role for deliberative processes, even if Madisonian representative government must also play a role, despite its failure at achieving deliberative decision-making.

The Federalist argument for representation, adopted by Fishkin, is rather simple: James Madison wanted “to refine and enlarge the public views by

43. JON ELSTER, *DELIBERATIVE DEMOCRACY* 10 (Jon Elster ed., 1998). It is worth reproducing the catalogue of justifications Elster provides, so the reader can place my particular orientation into the matrix. Deliberation

reveals private information; lessens or overcomes the impact of bounded rationality; forces or induces a particular mode of justifying demands; legitimizes the ultimate choice; is desirable for its own sake; makes for Pareto-superior decisions; makes for better decisions in terms of distributive justice; makes for larger consensus; [and] improves the moral or intellectual qualities of the participants.

Id. at 11. Obviously, I do not embrace all of these potential benefits in service of my proposal. Susan Stokes reminds us that deliberation has its own pathologies; much of my plan looks for ways to circumvent the pathologies. Susan Stokes, *Pathologies of Deliberation*, in *DELIBERATIVE DEMOCRACY*, *supra*, at 123. For example, Button and Mattson argue that there is an overwhelming instinct to defer to experts in the deliberative situation, so that empirical psychological fact should be kept in mind as one tries to implement the proposal here and train the moderators of the small group discussions as Fishkin does. Mark Button & Kevin Mattson, *Deliberative Democracy in Practice: Challenges and Prospects for Civic Deliberation*, 31 *POLITY* 609 (1999). For more on this corrective, see *infra* Part IV.F.

44. HABERMAS, *supra* note 12, at 110.

45. FISHKIN, *DEMOCRACY AND DELIBERATION*, *supra* note 8, at 3.

46. *Id.* at 12.

passing them through the medium of a [] body of citizens.”⁴⁷ Alexander Hamilton saw the representative body as an “opportunity for cool and sedate reflection.”⁴⁸ Such visions for American democracy, however, demand more than legislative bodies taking part in mostly non-deliberative bargaining situations. Access to “representative” bodies is usually limited to a group of elites whose primary interests are fund-raising and interest-group pandering. While “[c]ritics of [a more deliberative regime] tend to argue that non-deliberative processes might approximate the judgments people would reach with fuller information and reflection—and save everyone decision costs through the use of heuristics,” Fishkin’s evidence nearly proves that “heuristics or shortcuts [cannot] plausibly proxy for deliberation.”⁴⁹ I cannot possibly survey Fishkin’s evidence in this context, but I do assume that it bears the claim that people change their minds as a result of deliberation and that there is no shortcut to figuring out just how conversation will change people’s minds.⁵⁰ Moreover, pragmatically speaking, people may be more likely to view decisions made in a deliberative body as having more legitimacy than any heuristic. Given such a condition, there is no good reason to avoid conversation when it can inspire not only more democratic governance, but can also inculcate the kind of civic virtue so many political theorists want to foster counteract the pathologies of individualism.

A. Popular Sovereignty and Direct Democracy

Habermas writes, “Political opinion polls provide a certain reflection of ‘public opinion’ only if they have been preceded by a focused public debate

47. THE FEDERALIST NO. 10, at 126 (J. Madison) (Isaac Kramnick ed., 1987).

48. *Id.* NO. 71, at 410 (A. Hamilton).

49. Fishkin, *supra* note 8, at 2-3. For the evidence, see FISHKIN, VOICE OF THE PEOPLE, *supra* note 8, at 205-09, 214-20; and Fishkin & Luskin, *supra* note 8, at 14-29; Michael Neblo, *Deliberate Actions* (1999) (unpublished manuscript, on file with author). What these sources show is not only that a random sample of individuals can mirror the population’s views at large, but that minds (more than only occasionally and in statistically significant numbers) are changed in the process. Whereas Fishkin and Luskin’s work show deliberation as effecting unpredictable outcomes, Neblo’s work suggests that deliberative situations do tend to produce outcomes with more “generalizability.” Nonetheless, in either case, deliberative input provides normative advantages, so a tendency toward certain outcomes should not disturb us: the virtues of civic republicanism here can outweigh a possible detectable predictability (for Neblo, two out of three instances show this effect) in deliberative outcomes. For more analysis on Neblo’s findings, see *infra* note 274.

50. For further evidence, see Button & Mattson, *supra* note 43. Again here we must consider Neblo’s work. See *supra* note 49; *infra* note 274.

and a corresponding opinion-formation in a mobilized public sphere.”⁵¹ He thinks we can only talk about “preferences” as what one “would express after weighing the relevant information and arguments.”⁵² Addressing this criterion, Fishkin invented his Deliberative Polls: “A deliberative opinion poll models what the public *would* think, if it had a more adequate chance to think about the questions at issue.”⁵³ By taking seriously the extent to which the voting public is uninformed and answers questions in public opinion polls with very little serious consideration, Fishkin aims to create a deliberative situation to cure these pathologies of mass democracy. The primary task of the body is to arrive at a decision, keeping public concerns in mind, all the while addressing individuals’ private preferences. By undergoing this kind of activity, not only will the participants become more informed, but they will also take more seriously their role in public affairs.⁵⁴

To achieve these ends on a more general level, and not simply for the 525 people who participate in the Polls, Fishkin tries to imagine what it might mean “for the entire electorate to be so engaged in face-to-face deliberation? As a thought experiment, we might imagine the sample being replicated innumerable times with the same stimulus . . . until virtually everyone is included.”⁵⁵ This way of posing the deliberative situation highlights its potential to serve as a better proxy for a deliberative and representative public than our current legislative bodies. “Deliberative polling is valuable precisely because it presents the voice not of experts or pundits but of the people. And not as they are, but as they would be, having learned more about the issues and had the opportunity of coming to a considered judgment about them.”⁵⁶ Thus, “[t]he ultimate point of such a poll is prescriptive, not predictive. Its results have prescriptive force because they are the voice of the people under special conditions where the people have had a chance to think about the issues and hence should have a voice worth listening to.”⁵⁷ To be sure, there will be questions for which experts will need to provide input. But there are too many questions that are left in the hands of unaccountable judges and other elites; the people are competent

51. HABERMAS, *supra* note 12, at 362.

52. *Id.* at 336.

53. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 1.

54. This is not just speculation. Both Fishkin & Luskin, *supra* note 8 and Button & Mattson *supra* note 43 show results that bear out the thesis that deliberative situations make citizens more likely to be interested (and to incite interest where it did not exist before) in political affairs.

55. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 84.

56. Fishkin & Luskin, *supra* note 8, at 6.

57. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 4.

to answer many of these questions. Democracy should tend to prefer some organized and thoughtful voice of the people, even if constraints will be necessary to ensure that democracy can be trusted. This is one of the logics for the separation of powers in the first place, and the people ought to be mobilized to have a voice of their own, to have a power all their own.

Ultimately, I am more interested in the possibilities for direct democracy than Fishkin. I share the standard suspicions of an excessively plebiscitary model:⁵⁸ “It is a dubious accomplishment to give power to the people under conditions where they are not really in a position to think about how they are to exercise that power.”⁵⁹ But wide use of Fishkin’s procedure to derive actual policy, not simply to disseminate information and garner public opinion, should allay some of the obvious critiques of the referendum as a poor instantiation of more direct democracy. As much as Habermas might protest that every single citizen must take part in the discourses (though he might not—we never really know what sorts of institutions would satisfy his discourse-theoretic appetite), this condition is too unrealistic to take seriously. Surely what he must mean is that every citizen must be represented in a nonfictive sense. “Constitutional patriotism” and the Supreme Court shouldn’t be enough either. Thus, Fishkin’s proxy not only gives us a model for a reasonable approximation of injecting a level of representative deliberation into government; radicalizing his Deliberative Polls to be more institutionally intertwined with political mechanisms might be a good way to bring about some of the goals that Habermas prizes like legitimacy and an informed public sphere that can contribute to political discourses.

As explored above in Part I, three major critiques of the standard referendum and initiative processes are: (1) their propensity for poor and biased turnout (a form of the voluntary response problem); (2) their unacceptable reliance on moneyed interest groups; and (3) the problem that results from the opacity of the statute under consideration. A radicalization of Fishkin’s methods for Deliberative Polls is poised to address each of these problems. First, mandatory service with stratified random samples addresses the lack of representativeness in direct democracy voters. Furthermore, scrutiny of proposals over the course of a few days ensures getting past sound-bite politics, thereby disempowering the forces swaying voters in expensive media advertising campaigns. Last, plenary informational sessions and research materials, as well as extended exploration in the small groups

58. See generally FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 23; HABERMAS, *supra* note 12.

59. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 21.

at the Deliberative Polls (with moderators trained to settle relevant questions of fact), should ensure that people would at least comprehend the statutes under consideration. Integrating deliberative assemblies into lawmaking provides an opportunity for citizen input into decision-making processes, without many of the shortcomings of the referendum and the initiative. To be sure, my proposal leaves us with a whole host of carry-over and new problems. My hope is to convince that the trade-off is worthwhile.

B. More Details

Let me summarize some of the salient features of Fishkin's model (and my departures therefrom) that I would want to see used as a basis for the mechanical implementation of my proposal.

1. Selecting Participants

The citizen juries are stratified random samples, chosen with a view towards getting a broadly representative sample of the population at large. Of course, the most immediate questions are: "Representative of whom more specifically?" "Can I allow race-based representation? Class-based? Occupation-based?" "Does strict demographic mirroring satisfy the demands of scientific representativeness?" "Why ought I not embrace the jury model which depends to a far greater extent on lotteries than on statistical sampling, which may further entrench suspect classifications like race and gender?" "Do I really think twelve percent of my participants being black can sufficiently account for representing black interests?" These are powerful questions (that are treated at length in their own literatures) that do not yield obvious answers. As a general rule, however, Fishkin's sampling does quite well against these sorts of objections because his samples tend to reproduce initial preferences and demographic indicators in the larger pool of public opinion. He demonstrates that his samples do generally reflect the diversity of perspectives in society as a whole. I am not sure we can settle the matter as a question of normative political theory. But institutionally, this reform could effect some progress over current representative regimes in terms of representation of minority interests.⁶⁰ In any event, it may simply

60. Magleby reports:

Lynn Baker has used public choice theory to explore the question of whether minorities do better in representative institutions than in direct democracy. She refutes "the claims that racial minorities are better served by representative than direct

be true that there is no pre-formed political will that needs representation. Providing the opportunities for deliberative assemblies is a way to create informed political will. And representativeness results not because of *who* is included, but because of *how* individuals are included. Deliberation without the prospect for bargaining forces a particular sort of attention to the question at hand.

Nonetheless, the problem of self-selection for Fishkin is as problematic as he claims it is for town-hall meetings and call-in broadcasts. Asking subjects to submit to deliberative situations is intimidating and time-intensive. Though he seems to have been successful at getting "representative" samples, the kind of people who would agree to expose themselves to a weekend of arguing surely causes a voluntary response problem. My mandating participation skirts this problem. Even Fishkin, in his less cautious moments, writes that the "role of delegate should be considered analogous to that of juror. If this kind of event were eventually institutionalized, it should come to be considered an obligation of citizenship."⁶¹ A most suggestive gesture indeed.

My selection process would be just as careful as Fishkin's and I would recommend administering a pre-deliberative questionnaire, not to see if people change their minds as Fishkin does, but to help ensure that a diversity of perspectives are heard. If this condition is met, discussion in each of the smaller groups could go in different directions even if the CCCA-like agency could not plan the demographic representation in the smaller group, thereby having too much substantive input on the direction of the deliberations. Democratic practice in the public sphere must depend upon exposure to some diversity of perspective and some expressions of self-interest, even if enlightened. Though democracy might be a procedural practice that allows private voting without discussion and majoritarian rule, surely a "strong" democracy must demand more. The private vote was instituted to cure certain ills with the public vote, which was the better theoretically-grounded mechanism. But the private vote has pathologies of its own, shielding citizens from one another, commodifying votes. The Popular branch is the necessary corrective, because often hearing a (poor) person expressing his own self-interest and its backstory is a way to change a mind. Democracies

law-making processes" and urges minorities to focus on ways to improve direct democracy rather than abolish it.

Magleby, *supra* note 20, at 44 (citing Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 710 (1991)).

61. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 9.

must allow (and even provide for) the capacity of the citizenry to change their minds; that is its progressive, experimental, and pragmatist strain.

2. Competence and Moderating It

Fishkin's model also addresses "citizen competence."⁶² The critics of deliberative democracy rightly emphasize the degree to which citizens know very little and are prone to defer to experts (or just yell unproductively at one another), given the opportunity.⁶³ But this is no excuse for paternalism. Fishkin puts his best foot forward not only by taking an "educative" stance in helping citizens work through the issues with pamphlets and videos,⁶⁴ but also by encouraging participation and carefully training moderators in social psychology such that they do not let the big-mouths rule the floor. In his polls, "80% of the participants spoke," "note-taking was common," and "incivilities were rare."⁶⁵ Of course, critics of democracy throughout the ages have stressed the degree to which democracy must be a rule by demagogues. But those who run the Deliberative Polls are taught how to diminish the effects of such a tendency. The moderators are, after all, selected for their fairness and impartiality.

This suggests that we should perhaps recruit federal judges to moderate as long as they undergo training by social psychologists to learn how to control big-mouth lawyers trying to monopolize the discourse (though I imagine they have most of the relevant training already). Even if a particular judge's track record suggests partiality on a specific issue, most judges would be usable as moderators who settle only questions of fact and decorum. The moderators should be able to settle questions of fact for the

62. Fishkin & Luskin, *supra* note 8, at 7. See generally CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

63. Button & Mattson, *supra* note 43.

64. The educational pamphlets in many states have not been a great success, but I (unsurprisingly) think it relates to the fact that voters still have incentives for ignorance—this is the well-known 'rational ignorance problem.' Flicking a lever one way or the other just doesn't demand the energy necessary to get through hundreds of pages of explanation. My more deliberative regime heightens expectations and incentives. Fishkin has noted that participants often become much more engaged in politics in general when they know that they will be part of his Deliberative Polls. *A fortiori*, I expect this reaction when their 1/n vote is a substantial piece of the pie and not an infinitesimal, and their vote is expression of a will, not merely an opinion.

65. Fishkin & Luskin, *supra* note 8, at 12. Since Fishkin's polls are not compulsory, he likely gets a large number of talkers; the voluntary response problem suggests that he would be likely to attract the talkative ones.

jurors to help them in their deliberations, since many preferences are obviously based on misinformation and misleading statistics. Since the transcripts would be public, judges would not be able to get away with steering conversation subtly. Impartiality will always be imperfect, but less imperfect than in an oligarchy where money's voice rules and interest groups are the only political force acting against politicians' self-interest in preserving an over-class to reelect them. Subtle and controllable partiality is better than corruption.⁶⁶

3. Breaking up the People to Get the Voice of the People

The discussions would take place in small groups of fifteen people with thirty-five going on at once in the same location, all facilitated by (judicial) moderators. To be sure, the basic briefing about the proposal and its history could take place in a plenary session, but the deliberations proper would be done on the micro level. This ensures that different routes of conversation are explored and addresses Dahl's insight that there are "upper limits" to effective participation.⁶⁷ Dahl estimates that 600 people can be part of a general deliberative body, not so different from the number proposed here.⁶⁸ Surely, real discourse requires small sets of individuals, making Dahl's "minipopulus" and deLeon's "PPA" undesirable. It also suggests that the fad of arguing for electronic deliberation is mostly cyberblather: who ever reads their mail from subscribed lists, especially those with 600 or more subscribers?

4. Doctrine of Affected Interests

All 'stakeholder groups' affected by deliberation should be allowed access to sway the direction of the body's deliberations. Of course, this is a rather tricky condition because just who counts as a stakeholder will always be in the hands of administrators (and civil societies as explored Part VI). But even supposing an imperfect administration of justice, we can imagine that many different perspectives could be considered over the course of a few days. One way to address this particular concern would be to adopt a voucher scheme, where all citizens (not only those selected for deliberation)

66. For a more lengthy treatment of possible corruptions of the Popular branch, see *infra* Part IV.A.

67. See DAHL, *AFTER THE REVOLUTION*, *supra* note 5, at 54, 118; ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* (1973).

68. See DELEON, *supra* note 6, at 32.

get credits to allocate money towards interest groups working on their own legislative reforms, providing extra help to the major advocates and independents looking to publicize and organize their efforts.⁶⁹

5. No Gagging

I would be very hesitant to impose “gag rules” at the deliberations.⁷⁰ Jon Elster notes that “an attempt to take an issue off the agenda is likely to place it even more firmly on the agenda.”⁷¹ Moreover, what Fishkin’s work shows is that such rules are not necessary: “The mere fact that an assembly of individuals defines its task as that of deliberation rather than mere force-based bargaining exercises a powerful influence on the proposals and arguments that can be made.”⁷² While people like Ackerman and Habermas might aim for “constrained conversation,” allowing for the admission of only the ‘Rational’ or the ‘Public-Spirited’ in debate, I would remain suspicious of such efforts.⁷³

In general, the attempt to police what people say in public forums is not only unlikely to succeed anywhere off of a spaceship, but probably also has bad implications for democratic practice. Why force someone to lie in public if her opposition to same-sex marriage is biblically inspired? Why not just push the person to question whether her biblical commitments are relevant to the political question through the use of deliberation? Failure to change someone’s ideological commitments is not devastating. Failure to try by shutting out the religious from the political public sphere is not only revolting, but also stands in the way of progress.

C. *Turning Yellow in the Face of Participatory Democracy*

As helpful as these mechanics are for getting a sense of how to avoid some of the obvious objections to the procedure, Fishkin ultimately suppresses the tremendous potential of the deliberative situation he creates. He exhibits a profound deference to our current modes of representation

69. This kind of finance reform is obviously in the spirit of Ackerman, *supra* note 36, and gets a more extended treatment *infra* Part VI.

70. See Stephen Holmes, *Gag Rules*, in CONSTITUTIONALISM AND DEMOCRACY (Jon Elster & Rune Slagstad eds., 1993).

71. ELSTER, *supra* note 43, at 16. For more on how gag rules in these kinds of forums tend to be counterproductive empirically, Elster recommends looking at W.L. MILLER, ARGUING ABOUT SLAVERY (1999).

72. ELSTER, *supra* note 43, at 100.

73. I will have more to say about this later. See *infra* Part V.

because he is so suspicious of direct democracy. He only wants the Deliberative Polls to be "initial evaluations" of potential candidates and was initially interested in their ability to replace the disproportionate importance of the primary elections in the early states.⁷⁴ Concentration on major elections diverts attention from part of the problem: politics will remain spectatorial and voyeuristic if citizens see politics as sporting events between major personalities. If issues and policies are to take center stage, it would be more useful to have citizen debate about those things, not about personalities or parties. This is why particular political personalities should get marginalized in the Popular branch. To be sure, people and parties get plenty of love in the other branches, so my inattention to them here should not be seen as an oversight or as closing off the possibility for politics as usual (or "normal politics" as Ackerman might have it).

Fishkin relies heavily upon the media to make his polls politically important.⁷⁵ While the media's attention to the polls is critical, until such time as the polls have direct impact on policy, coverage will only be possible on PBS and C-SPAN. Results of a nationwide deliberative assembly on affirmative action would run simultaneously on all three major networks, much the way the State of the Union address does. Of course, citizens not only would be *allowed* to keep their identities private, but all means necessary should be taken to keep them private before and during the days of deliberation to avoid the danger of their being manipulated, bribed, or bombarded by interest-group or corporate haranguing and electioneering.⁷⁶

The Jefferson Center for New Democratic Processes in Minnesota has proposed electoral juries of twelve-eighteen people who monitor presidential campaigns to make public recommendations. They have also experimented with "policy juries" that have grappled with such issues as the ethics of organ transplants.⁷⁷ I think that these gestures are very hopeful and that we should continue to look at what these juries decide so that we can convince ourselves that lay people can be trusted to rule themselves in a larger measure than they do now.⁷⁸ But none of these *experimental* situations has its eye on the prize. I want to radicalize the use of these units and have them

74. FISHKIN, *DEMOCRACY AND DELIBERATION*, *supra* note 8, at 8, 96.

75. Fishkin & Luskin, *supra* note 8, at 5. After all, Habermas has called the media the "fourth branch."

76. For more on the difficulties of privacy and publicity, see *infra* Part IV.B.

77. FISHKIN, *DEMOCRACY AND DELIBERATION*, *supra* note 8, at 97.

78. On the issue of jury competence, the empirical research and the literature is quite heartening even if many non-democrats would like to do away with them for normative considerations. See *infra* Part IV.G.

engaged in actual institutionalized decision-making about policies, not about politics. Until they are so engaged, they will embody many of the pathologies of deliberation (like deference to experts) without providing for any of the benefits (like more legitimacy and more civic virtue). To employ a Habermasian distinction, in a functioning republic, "opinion-formation" is only one aspect of lawmaking. For law to emanate from the civic voice of the people, nonfictive "will-formation" should be central. The way of achieving nonfictive will-formation is through deliberative procedures aimed at forming a will instead of an opinion.⁷⁹

Fishkin is correct to commend Dahl for getting us thinking about how time will always constrain deliberation.⁸⁰ "Time always matters when a decision has to be made."⁸¹ So, there is no reason to lament that we will have to vote at the end of the sessions. In fact, it is testimony in service of the claim here that deliberation must always be about *doing* something ultimately,⁸² something some ideal proceduralists seem to deny in requiring a logically complete argument. And what thinking about time also brings to the foreground is why we should reject Dahl and deLeon's suggestions because asking citizens to take a year out of their lives is simply too intrusive. I appeal only to common sense here.

79. See Bernard Manin, *On Legitimacy and Political Deliberation*, in NEW FRENCH THOUGHT: POLITICAL PHILOSOPHY 186-200 (Mark Lilla ed., Elly Stein & Jane Mansbridge trans., 1994) (1987) (depending completely on deliberative will-formation as the only source of legitimacy for a republic). Obviously, I do not follow Manin in his monolithic treatment of deliberation, but it is a very important paper in the literature and it delivers a very good argument for deliberation's importance in will-formation. It is also sensitive to Habermasian extremes, taking the more reasonable view (against Habermas's seeming need for unanimous consensus in discursive practices) that "given the appropriate procedural rules for deliberation, the better argument is simply the one that generates more support and not the one that is able to convince all participants." *Id.* at 200. For more on this distinction, see *infra* Part V. But see MUELLER, *supra* note 32, at 180-87 (arguing that if consensus is implausible, the appropriate second-best is attaining a supermajority, not merely a majority).

80. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 37.

81. ELSTER, *supra* note 43, at 6.

82. Aristotle's comments on deliberation figure here relevantly. See ARISTOTLE, NICOMACHEAN ETHICS 1112a13-1113a15 (Terence Irwin trans., 1985) (arguing that "by 'open to deliberation,' presumably, we should mean what someone with some sense, not some fool or madness, might deliberate about"). Aristotle also argues that:

no one deliberates about eternal things . . . rather, we deliberate about what results through our agency . . . where the outcome is unclear and the right way to act is undefined. And we enlist partners in deliberation on large issues when we distrust our own ability to discern [the right answer]. We deliberate not about ends, but about what promotes ends.

Id. at 1112a23-1112b13.

Even Habermas is aware that “the actual course of [deliberative] debates deviates from the ideal procedure of deliberative politics.”⁸³ In fact, he goes further when he claims that the whole concept of the ideal speech situation is a “methodological fiction”: “Even under favorable conditions, no complex society could ever correspond to the model of purely communicative relations.”⁸⁴ Habermas keeps us talking about ideal conditions, however, because “presuppositions of rational discourse have a steering effect on the course of debate.”⁸⁵ If this is true, theorists still deserve some attention to help us craft a better version of deliberation. But too often they get caught up worrying about ideal conditions without giving attention to plausible ones that would help them achieve their goal of a more deliberative republic. I will turn to theory in Part V to see if I can make realistic some of the ideal conditions that occasionally do more to constrain deliberation than to steer it. But first I will commit some pages to integrating my Popular branch into the separation of powers (Part III) and then meeting some objections to my institutional deliberative assemblies (Part IV).

III. SEPARATION OF POWERS: WHY AND HOW

My deliberative assemblies must evoke images of Thomas Jefferson’s imagined ward system: “[D]ivide the counties into wards.’ Thus Jefferson once summed up an exposition of his most cherished political idea, which, alas, turned out to be as incomprehensible to posterity as it had been to his contemporaries.”⁸⁶ In essence, Jefferson saw wards, small political debating assemblies, as building blocks for the republic. The ward was a place where each person could educate himself in political matters, a place “where every man is a sharer in the direction of his ward-republic . . . and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day.”⁸⁷ Though stressing the educative function of small local forums for deliberation among citizens, Jefferson also invoked a participatory ideal, emphasizing citizen input and activity as central to a functioning large-scale republic: “the absence of such a subdivision of the

83. HABERMAS, *supra* note 12, at 340.

84. *Id.* at 326.

85. *Id.* at 340.

86. HANNAH ARENDT, ON REVOLUTION 252 (1965) (citing THOMAS JEFFERSON, WRITINGS 1381 (Library of America ed., 1984) (in a letter to John Cartwright on June 5, 1824)).

87. JEFFERSON, *supra* note 86, at 1380, *cited in* KEVIN MATTSON, CREATING A DEMOCRATIC PUBLIC: THE STRUGGLE FOR URBAN PARTICIPATORY DEMOCRACY DURING THE PROGRESSIVE ERA 3-4 (1998).

country constitute[s] a vital threat to the very existence of the republic.”⁸⁸ But the wards were not conceived as vehicles to be utilized strictly for the power inherent in localism and the mobilization that is more easily facilitated by ward organizing; they were conceived as citizenship-enhancing for the State at large.

Jefferson appealed to his wards to instantiate a truer “gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government.”⁸⁹ Since he acknowledged that some (even if not all) sovereignty resides within the people, providing the demos a forum in which they could act as sovereign was fitting to a democracy. Moreover, popular power might be

the only remed[y] against the misuse of public power Jefferson, though the secret vote was still unknown at the time, had at least a foreboding of how dangerous it might be to allow the people a share in public power without providing them at the same time with more public space than the ballot box⁹⁰

Jefferson had in mind what Montesquieu already knew, “that only ‘power arrests power,’ that is we must add, without destroying it, without putting impotence in the place of power.”⁹¹ Like these thinkers (without taking a place among them, of course), I *add* to the separation of powers instead of scaling back and reforming by removing power, making other legislative bodies impotent in the face of direct democracy. Though Jefferson was no Federalist, his ward system could be administered and integrated into the separation of powers framework.

Yet, although Jefferson felt that it was critical to “break[] up ‘the many’ into assemblies where everyone could count and be counted upon,” he “remained curiously silent” about the “specific functions” of his “elementary republics.”⁹² Surely my proposal offers a flavor of what it might look like to have “the many” broken up into assemblies with a “gradation of authority,” taking quite seriously the practice of the separation of powers. This Part is

88. ARENDT, *supra* note 86, at 249.

89. JEFFERSON, *supra* note 86, at 1380, 1399 (in letters to John Cartwright on June 5, 1824 and to Samuel Kercheval on July 12, 1816).

90. ARENDT, *supra* note 86, at 253.

91. *Id.* at 151 (citing CHARLES-LOUIS DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 155-56 (Anne Cohler et al. trans. & ed., 1989) (1748)).

92. *Id.* at 254.

devoted to fleshing out, in a more meaty fashion than I have yet done, how my fourth branch should interact with the other three.

A. Non-Revolutionary Transition? Thinking Through Arendt

But first I want to emphasize that my elaboration of Jefferson's thought-experiment can be integrated cleanly, despite Hannah Arendt's insistence in *On Revolution* that Jefferson's council system is necessarily revolutionary, citing the wards' anticipation of the *Soviets* and *Räte*.⁹³ Arendt struggles to read the ward system—and its possibilities for citizenship and revivification of public space—as an entirely new form of government that remained unrealized even by the American Revolution, at least partly because such a system is too revolutionary. For her, even if not for Jefferson, the ward system stakes a public space where citizens can discover and practice their civic public freedom. Such deliberative forums create the possibility for public happiness, a form of flourishing that seems nostalgic, if only because flourishing seems like Greek to us. Ironically this nostalgia, for Arendt, is altogether constitutive of the revolutionary spirit.

Thus, she claims that Jefferson knew that his 'imagined community' was too revolutionary. She deems it "noteworthy that we find no mention of the ward system in any of Jefferson's formal works, and it may be even more important that the few letters in which he wrote of it with such emphatic insistence all date from the last period of his life."⁹⁴ Jefferson, she claims, gives us a hint to the councils' meaning by never spelling out their purpose formally:

This vagueness of purpose, far from being due to a lack of clarity, indicates perhaps more tellingly than any other single aspect of Jefferson's proposal that the afterthought in which he clarified and gave substance to his most cherished recollections from the Revolution in fact concerned a new form of government rather than a mere reform of it or a mere supplement to the existing institutions.⁹⁵

Of course, this Part suggests that the adoption of a Popular branch is in a sense a mere reform, a mere supplement to existing institutions. But it may have revolutionary effects; it may cause a paradigm shift. Nonetheless, this Part stresses that the proposal can be integrated into the separation of powers

93. *Id.* at 252.

94. *Id.* at 253.

95. *Id.* at 258.

framework with small reforms, without a violent and destructive campaign for revolutionary change: "It would be tempting to spin out further the potentialities of the councils, but it certainly is wiser to say with Jefferson, 'Begin them only for a single purpose; they will soon show for what others they are the best instruments.'"⁹⁶ I take this same strategy by emphasizing the degree to which a reform in the separation of powers is all that is necessary. What may follow from such a shift is for a normative conversation elsewhere.

1. Arendt and the Problems of Self-Selection in the Public Sphere

Yet, there is more to say about Arendt because her reading makes clearer how the Popular branch is not Jeffersonian, if she reads Jefferson right. First, she praises Jefferson's vision for its aristocratic implications, implications that are easily avoided in my reform plan. Arendt claims (approvingly, I think) that using ward-republics as a form of government

would spell the end of general suffrage as we understand it today; for only those who as *voluntary* members of an 'elementary republic' have demonstrated that they care for more than their private happiness and are concerned about the state of the world would have the right to be heard in the conduct of the business of the republic.⁹⁷

Of course, as I continue to emphasize, participation in my 'ward-republics,' or deliberative assemblies, would not be voluntary, and thus would avoid Arendt's depiction of the form of government as aristocratic. She doesn't mind self-selection in politics because she cares to "give substance and reality to one of the most important negative liberties we have enjoyed since the end of the ancient world, namely, freedom from politics."⁹⁸ In my possible world, freedom and legitimacy take precedence for a few days in a citizen's lifetime over the negative liberty to be free from politics. To be sure, Arendt always draws our attention to "the paradox that freedom is the fruit of necessity."⁹⁹

96. *Id.* at 283 (citing letters from Jefferson to Cartwright and Kercheval, *supra* notes 86 and 89).

97. *Id.* at 284 (emphasis added).

98. *Id.* at 284.

99. *Id.* at 54.

2. The Party Problem

In Arendt's rendering of councils that spring up spontaneously during revolutionary episodes, the wards fundamentally "challenge[] the party system as such, in all its forms, and this conflict [is] emphasized whenever the councils, born of revolution, turn[] against the party or parties whose sole aim [is] always [] the revolution."¹⁰⁰ She insists that "[i]t is indeed in the very nature of the party system to replace 'the formula "government of the people by the people" by this formula: "government of the people by an *élite sprung from the people*."'"¹⁰¹ Using the Russian Revolution as her proof of "the incompatibility of the . . . councils with the party system,"¹⁰² Arendt never takes seriously the possibility of integration because she is so committed to the councils' revolutionary impulse.

Her reading has its insight, however: if parties cannot control the deliberations and agenda of the councils, they are sure to feel disempowered and will try to fight for their dissolution. But formal integration, a separation of powers, might tranquilize the concerns of each locus of power, stabilizing the incompatibility that Arendt diagnoses in the party-council tension. This Part, then, will also be sensitive to the fact that the American regime that we take for granted as one with a separation of powers between branches is just as much a "party democracy."¹⁰³ In this vein, Arendt writes: "If we were to classify contemporary regimes according to the power principle upon which they rest, the distinction between the one-party dictatorships and the multi-party systems would be revealed as much less decisive than the distinction that separates them both from the two-party systems."¹⁰⁴ Though I have no intention of combing the political science literature to substantiate Arendt's claim here, it should remain obvious that if the Popular branch becomes institutionalized, political parties can be involved in the Popular branch without corrupting it. Perhaps, modern American parties "cannot be regarded as popular organs," and might instead be "the very efficient instruments through which the power of the people is curtailed and

100. *Id.* at 269.

101. *Id.* at 281 (citing MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 425 (Barbara & Robert North trans., 1954) (1951)).

102. ARENDT, *supra* note 86, at 261.

103. The term is taken from BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 193-235 (1997). I do not stay strictly within Manin's categories: America clearly has aspects of "Parliamentarianism" and "audience democracy" as well. But his insistence that the two-party system alters the separation of powers is critical in any attempt to integrate a "non-partisan" branch into the regime.

104. ARENDT, *supra* note 86, at 272.

controlled.”¹⁰⁵ But by forcing them to pander to the thoughtful deliberations of ordinary citizens, the people can reclaim some power without destroying parties even if they are forced to become more responsive. Arendt claims that the “historical truth of the matter is that the party and council systems are almost coeval.”¹⁰⁶ I am trying to make them consistent without a revolution. After all, “a separation of powers, far from causing impotence, generates and stabilizes power.”¹⁰⁷

B. Some Historical Illumination: Progression from the Progressives?

Jefferson’s imagined ward system was not just a thought experiment. It came closest to a reality during the Progressive Era. And the Progressives’ failures with their “ward-republics” can be instructive precisely because they failed to integrate their voluntary groups in any systematic way. By avoiding the task of finding a coherent way to absorb their councils into preexisting governmental units, their assemblies fell prey to partisan influence, destroying their capacity to help form a popular will. Though they were successful on some educational grounds, they failed to form a new site for political expression because they became slaves to politics.

The Progressive Era is known for its “bold political experimentation,”¹⁰⁸ with its major legacy to the modern republic being various institutions of direct democracy, like the initiative, the referendum, and the recall. Though the initiative and referendum enjoy widespread use in many states even today, the Progressive Era also saw the flourishing of a different form of direct democracy. Citizens in the decades before World War I met in town assemblies for public deliberations about pressing issue of the day. These evening meetings were well-attended by all classes of the population as well as those of differing political affiliations, and were often organized and funded with public resources.

1. Zueblin

Charles Zueblin, a notable leader of the movement for deliberative assemblies in the Progressive Era, was self-consciously “search[ing] for institutions where citizens could reengage in politics within the setting of the modern, urban world.” He was decidedly not “harking back to an abstract

105. *Id.* at 273.

106. *Id.* at 275.

107. *Id.* at 271.

108. MATTSON, *supra* note 87, at 7.

ideal of ancient citizens” (even if Arendt and I are).¹⁰⁹ Zueblin, with his concurrent involvement in city beautification efforts, was a social engineer engaged in the very Arendtian task of reclaiming public space for politics, but without polis envy. Yet, although Zueblin was brought into the deliberative fold by spending time in Jane Addams’s social settlement, Hull House, he decided to concentrate on the educative virtues associated with deliberation. Instead of following Addams, who “tried to set up forums where immigrant and working-class citizens debated the issues of the day,”¹¹⁰ Zueblin created forums where adults from all backgrounds could achieve higher levels of education, and with that, a greater capacity to engage in politics. He started university extension programs because he “looked upon the urban college as the leader in democratic political education,” and put most of his energy from 1891 to 1908 into this enterprise.¹¹¹

Ironically, Zueblin saw university extension as an antidote to the prevalence of professionalism in the nation’s schools at the time, which were trying to “embrace[] the German model of education.”¹¹² Of course, this is ironic only because our nation’s extension schools are nothing but forums for professional training. But insofar as they aim to reach a broader clientele and are thus often less ‘academic,’ they are partially consistent with Zueblin’s vision. Nonetheless, when we consider what university extension took as its inspiration, it is only laughable to see how distant ‘adult education’ is from Zueblin’s hopes for it: He wanted to revivify a form of lecture circuit that Ralph Waldo Emerson made famous. Yet, “[b]y the 1880s the lyceum lecture system, an important nineteenth-century popular institution that once cultivated middle-class civility, had fully degenerated into commercial entertainment.”¹¹³

If Zueblin really wished to recreate Emerson’s effect on the public, it is no surprise that he failed. Though he was also looking to accomplish a feat of class-mixing, contending with lecturers’ condescension proved too difficult. Preserving the student-teacher relationship in the context of deliberation proved disastrous, only confirming what I have emphasized here, that taking the educative aspects of deliberation too seriously works against the democratic possibilities for participatory politics. But perhaps even more demeaning to Zueblin’s enterprise was the fact that his forums

109. *Id.* at 25.

110. *Id.* at 23.

111. *Id.* at 25.

112. *Id.* at 26.

113. *Id.*

became too political: speakers took vigorous stands on issues of the day; since the speakers had an uncontested podium, their authority was not challenged in an even-handed manner. To be sure, university resistance to the project may have been motivated more by fear of upsetting funders than by concern for academic integrity and unpoliticized knowledge. Nonetheless, in either case, Zueblin's hopes for participation via education remained unrealized.¹¹⁴

2. Howe and Johnson

Frederic Howe, a trained political scientist from Johns Hopkins University, also got involved in participatory politics, and with his political training avoided many of Zueblin's mistakes. Howe went 'into the trenches' with his political knowledge, getting involved with the famous anti-corporate mayor of Cleveland, Tom Johnson. By fighting for Johnson's progressive policies in city government and as a state senator, Howe tried to help reform the political system *from within its very institutions*, moving beyond Zueblin's extra-political attempts to establish a new space for politics. Thus, Howe's strategy was to embrace "democratic self-government and decentralization . . . hand in hand."¹¹⁵ Howe looked to instantiate Jefferson's dream of the ward-republic, rallying behind Tom Johnson's ward which lived by the following motto: "Vital questions will not be left to the decision of the executive and council alone. They will come directly before the people."¹¹⁶

Of course, the rhetoric of sending vital issues to the people at the ballot box is commonplace even to those that live outside of California. And though first established by the Progressives to combat corporate power over the political process, the initiative and referendum have notoriously become just the opposite: campaigns are so costly as to be affordable only to the most moneyed interests.¹¹⁷ Johnson, however, proved his prescience by making direct democracy less commodified; he would not allow it to be a process of jostling for private votes. Instead, he felt that "heckling is the most valuable form of political education," so wanted to make direct

114. *Id.* at 28-29.

115. *Id.* at 35.

116. Tom Johnson, *The Ideal City*, SATURDAY EVENING POST, November 9, 1901, at 1, cited in MATTSON, *supra* note 87, at 36.

117. See generally DAVID BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

democracy partake of heckling.¹¹⁸ To this end, he was interested in ways to foster "collective discussion."¹¹⁹ He gained fame, then, by instituting tent meetings for the electorate to air its concerns. Johnson knew that the lecture hall wasn't the right forum to ignite public discussion, so created large picnics where urbanites could meet in an agora-esque environment and talk about politics (once they got past taking note of the weather).

But Johnson had an element of condescension in his program as well: "Johnson wrote: 'The chief part of our program in Cleveland was to educate the people never to be indifferent.'"¹²⁰ Focusing on education has its disadvantages insofar as it provides a podium for educators to impress upon the uneducated with uncontested political ideas. Such a fixation also allows too-sharp a separation of the educative aspects of deliberation and will-formation: "Johnson occasionally ignored the democratic public he helped initiate Worse yet, he tried to block the referendum that eventually defeated him."¹²¹ For Johnson, progressive politics took priority over democratic processes, a sure-fire way to undermine the ideal of popular sovereignty.

Howe, however, knew that keeping the popular forums at the level of civil society, apart from direct action upon the state, would be sure to hinder their ability to be efficacious mechanisms for democracy. He placed firm belief in the discursive inspiration that referenda could effect, but was well aware that public opinion needed to be refined for legislation to be liberal, as opposed to just democratic. Such a desire for refining political public opinion led Howe to the People's Institute of New York, founded in 1897. The Institute "became famous for its 'People's Forum' [where] a lecturer spoke typically to about one thousand people, and a question-answer period followed."¹²² Initially taking the form of Zueblin's experiment with adult education, the Forum became overtly political, self-consciously taking on legislative issues.¹²³ After the meetings, those present would vote on resolutions that "were then sent to city council representative Sometimes politicians directly addressed the People's Forum. Eventually, activists at the People's Institute, including Howe, started up other local forums throughout

118. TOM JOHNSON, MY STORY 82 (1911), cited in MATTSON, *supra* note 87, at 37.

119. *Id.* at 39.

120. *Id.* at 38 (citing Tom Johnson, *My Fight Against a Three-Cent Fare*, HAMPTON'S MAGAZINE, Sept. 1911, at 373).

121. MATTSON, *supra* note 87, at 39.

122. *Id.* at 41.

123. *Id.*

New York City.”¹²⁴ Howe’s involvement in this enterprise helped focus the forum on political *action*, not merely education or discussion. In the early days of the Forums, they successfully avoided becoming politicized and remained public spaces for citizen participation and action. “[R]egular citizens were given a chance to hear one another deliberate as public actors and see themselves as equals to intellectuals.”¹²⁵

Howe led the People’s Institute for approximately three years prior to 1915, when he became the Commissioner of Immigration. But his contributions provided a legacy: with Howe’s leadership, George Coleman founded the Ford Hall Forum in Boston in 1908, a forum that had Zueblin as a regular speaker.¹²⁶ Indeed, by 1916, “about one hundred forums” existed in New England alone, with many more sprouting in the West and the South.¹²⁷

But Howe was not quite a model leader for the forums, even if he was representative. Or, better, he fell prey to the standard Progressive misuse of the deliberative assembly:

[H]is control could become anti-democratic at times. Although he believed in a democratic public, Howe’s role as a political activist occasionally caused him to envision the forum as a *tool* for political reform At times [] Howe admired the forum less for its democratic initiative and more for its use-value for reformers.”¹²⁸

Howe, like Johnson his mentor, could not integrate his deliberative creation without taking advantage of its potential for manipulation and political partisanship.

3. Rochester

Among the most famous of deliberative fora were the products of the social center movement centered in Rochester, New York. Avoiding partisan leanings by getting the endorsement of the two parties as well as the Progressive Party, the Rochester social debate clubs provided the greatest hope for class-mixing and political action. Because the social center movement realized that public resources could be cultivated, by 1912 it

124. *Id.*

125. *Id.* at 43.

126. *Id.*

127. *Id.* at 44.

128. *Id.* at 46.

made its own effort to integrate itself into the public sphere. As tax dollars paid for schools, organizers petitioned to use schools in the evenings for their gatherings, tying the centers directly to public funds, and therewith, to public policy. Topics debated included "direct primaries, 'race relations,' . . . women's suffrage, 'public health as a political issue,' labor union politics, and America's continued foreign policy in the Philippines."¹²⁹ Most importantly, however, "citizens themselves set the agenda" instead of professors or possibly biased organizers.¹³⁰ And funding was only contingent upon popular participation: "[I]f attendance at a social center during one evening fell below twenty-five people, funds were cut."¹³¹ This condition ensured that the contents of the meeting were not censored with the power of the purse.

But there were two severe problems with the social centers: one was a kink in the philosophy of the clubs and the other was a structural disadvantage. An example of a philosophical problem can be detected in one club's "constitutional preamble:"¹³²

Whereas, the world needs men and women, who can think clearly and express their thought well; and whereas, each of us has powers of clear thinking and good expression which need only practice for development; . . . we whose names are hereunto annexed, do form a society whose object shall be the cultivation of the powers of clear thinking and good expression by means of debates, essays, orations, public readings and discussions.¹³³

By making eloquence the main virtue of the clubs, the possibility for the success of the clubs as a site for politics was necessarily curtailed. If the clubs assembled to help members become better public speakers, the clubs were bound to become mere play-acting in a theatrical environment, trailers that were only teasers for the real policy discussions going on elsewhere.

The structural problem with the social centers was its voluntary nature. Even though "twenty-five percent of the registration for the clubs during 1910 came from working-class immigrants or 'non-English speaking persons,' as reported in the *Democrat and Chronicle*," the clubs could not

129. *Id.* at 57. Mattson cites original agenda entries from the City of Rochester's records of proceedings.

130. *Id.* at 52.

131. *Id.* at 53.

132. *Id.* at 55.

133. Herbert West, *Citizenship and the Evening Use of School Buildings II*, NEW BOSTON 530 (Apr. 1911) (cited in MATTSON, *supra* note 87, at 55).

help but represent only the particular interests of those that came forward.¹³⁴ To be sure, the social centers achieved high levels of attendance, but their capacity for representation in any sense (substantial, electoral, or social-scientific) was suspect. Although the clubs were successful at “breaking down the hegemony of America’s two-party system” by giving equal airtime to the Socialists and Prohibitionists, there was never a formal guarantee that any standard of representativeness was being met.¹³⁵

The social centers, unsurprisingly, also met a grim fate. Organized religion saw them as anarchic for not having chaperons and used their pull with political elites to bring down the ‘social’ movement. Political elites themselves felt threatened (just as Arendt would have predicted) and pulled funding. Journalists worried that speakers were having an unacceptable sway on those that could not think and speak for themselves.¹³⁶ And by the time World War I got underway, the social centers, already in decline, were used ideologically to mobilize popular opinion instead of being used to help measure it.¹³⁷

4. The Need for Integration

Participatory democracy in the Progressive Era had its attractions: “Before announcing his independent Progressive Party candidacy, Theodore Roosevelt [argued] that the social center should become the ‘Senate of the people.’”¹³⁸ And in the 1920s, “Clarence Perry argued that the major goal of the social centers had been ‘the dissolution of class and racial antagonism.’”¹³⁹ Noticing that in the social centers “the president of the Women’s Christian Temperance Union and a Polish washwoman found themselves debating a college professor and a day cleaner”¹⁴⁰ lends credence to the view that at least some of the goals of class-mixing were temporarily fulfilled in this context.

But, in the final analysis, the Progressive attempt to found ward-republics failed precisely because they were never systematized and integrated into the separation of powers; they were always a site of

134. *Id.* at 56.

135. *Id.* at 57.

136. Each of these attacks on the social centers is chronicled by Mattson in detail. *Id.* at 60-62.

137. *Id.* at 106.

138. *Id.* at 66.

139. *Id.* at 70 (citing CLARENCE PERRY, TEN YEARS OF THE COMMUNITY CENTER MOVEMENT 4 (1921)).

140. *Id.*

mobilization or education, and never contributed systematically to forming and measuring a representative popular will. These lessons were learned the hard way, but their errors are avoidable.

C. Doing the Integration: Mixing It Up

Let us get back to the business of institutional design. Bernard Manin traces the roots of popular assemblies very far back indeed, and notes that even “in the so-called ‘direct democracies’ of the ancient world—Athens, in particular—the popular assembly was not the seat of all power. Certain important functions were performed by other institutions.”¹⁴¹ A standard of competence was preserved for a set of magistracies even if most public officials were selected by lottery.¹⁴² Notable, and often neglected, is the fact that even the lottery system in Athens was voluntary: anyone could opt out and choose not to serve his polis.¹⁴³ This yielded a populism that had an aristocratic element built in, precisely the diagnosis Arendt notices about the potential for Jefferson’s imagined republic.

But perhaps the most important feature of a mixed regime—a regime that embodies populist and oligarchic, democratic and aristocratic tendencies—is exactly its mixed quality. Well-mixed regimes were clearly on the mind of our first institutional designers, the American Founders, who were thinkers with a “slightly comical erudition in political theory.”¹⁴⁴ “Aristotle thought that, by synthesizing democratic and oligarchic arrangements, one obtained a better constitution than regimes that were all of a piece. Various combinations of lot, election, and property qualifications allowed just this kind of synthesis.”¹⁴⁵ Aristotle had his own proposals for appropriate mixtures of regimes, ones that are repugnant to our more liberal sensibilities. But Montesquieu, closer to our liberal hearts, continued the tradition of investigating mixed regimes, leaving us satisfied that the mixed regime is not antithetical to the liberal enterprise. The mixed nature always contributes to stability in much the same way that the separation of powers does. By allowing flexibility and cross-breeding within his typology of regimes, Montesquieu was able to germinate the idea of the separation of powers. And the familiar path from Montesquieu to the Founders need not

141. MANIN, *supra* note 103, at 5.

142. *Id.* at 14.

143. *Id.* at 16 (citing MONTESQUIEU, *supra* note 91, at 10-15).

144. ARENDT, *supra* note 86, at 117.

145. MANIN, *supra* note 103, at 27 (citing ARISTOTLE, POLITICS 1294b11-14; 1300a8-b5 (Carnes Lord trans. & ed., 1984)).

be retraced. England's constitutional monarchy, to cite the most obvious example, only confirms that progressive democratization does not necessarily mean 'power to the people.' What it has meant is a rejection of the indivisibility of sovereignty, an appreciation that sovereignty can reside in more than one site of the exercise of political power. It is to oppose Bodin and Hobbes on principle.¹⁴⁶

Among the various possibilities for a mixed regime is what we have now: "The mixed constitution was defined as a mix of monarchical, aristocratic (or oligarchic), and democratic elements, the combination of which was seen as the cause of its astonishing stability. Leaving aside the monarchical dimension, election, could, by analogy, be termed a mixed institution."¹⁴⁷ As Manin notes, election embodies both a democratic element and an oligarchic one, reminding us that the terms election and elite have the same etymology.¹⁴⁸ Montesquieu had already insisted that selection by lot is democratic while selection by vote is aristocratic (in contrast to Arendt's typology).¹⁴⁹ Though Manin is rightfully frustrated that Montesquieu does not really give a good sense of why this is so, he concedes, as we must, that it does not need philosophical explanation when the empirical facts, at least in America's representative system, bear out the aristocratic nature of our modern form of electoral representation. The linguistic facts present their own evidence: "in a number of languages the same adjective denotes a person of distinction and a person who has been chosen [by vote]."¹⁵⁰

But an obvious counterpoise to the aristocratic nature of electoral representation is an implementation of my proposal for Popular direct democracy. Though Joseph Schumpeter was undoubtedly onto something when he suggested that the people have no preformed political will prior to political contest,¹⁵¹ there is no normative reason to settle for the

146. *Id.* at 45 (arguing that "[i]t was in opposition to [mixed government] that Bodin and Hobbes developed the modern theory of indivisible sovereignty").

147. *Id.* at 155.

148. *Id.* at 140.

149. MONTESQUIEU, *supra* note 91, at 13.

150. MANIN, *supra* note 103, at 140.

151. See generally JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942). In this context, Riker argues that populism "depends on the existence of popular will discovered by voting. But, if voting does not reveal a will, if the people speak in meaningless tongues, populism as a concept is rendered quite empty." RIKER, *supra* note 15, at 239. Of course, providing deliberative fora for genuine will-formation and expression would prove populism's very assumption: that people *can*, if given the right conditions, express a will.

Schumpeterian nightmare. Instead, we can think about how to put to use a lottery system, an idea that the Founders knew about but never took the time to consider seriously.¹⁵² Endorsing my proposal caters to Madison and the Federalists by keeping in place independent representatives that are trustees of the public, but it also appeases the anti-Federalists by separating the power of Congress from a new power vested in an institution designed to represent the people's likeness more directly.¹⁵³

As a prefatory remark, in this context, I only discuss the American case, making the specifics of integration more explicit. In the American system, there is already a relaxing of the three-branch system: the administrative agencies or the media are often known as fourth branches. And California-style democracy is surely less Madisonian than a strict three-branch system would necessitate. So I feel I am on a trodden path. Even apart from the American governmental case, I am committed to my institution's portability and think it could find a rightful place in other democratic regimes. I do not bother here, however, with the comparative work that would spell out the details of a Popular branch's role in a parliamentary regime (i.e., England) or in a direct democratic regime (i.e., Switzerland) because I do not have any expertise that would make such work valuable. Moreover, I hope that specialists in institutional design projects in international governance or workplace democracy might also see a clean way of integrating the basic structure of a Popular branch into those forms of organization, even supposing that the checks and balances would need to be calibrated differently in each case. But the essence remains the same: in addition to the representative structures necessary for organizing large groups of people, the people still need a forum for will-formation where they can be the authors of their laws.

Riker's mistake is to fixate on voting, which need not be the only forum for popular political expression.

152. MANIN, *supra* note 103, at 80.

153. For a summary of the Anti-Federalist arguments about the need for likeness in representation ("descriptive representation" in the phrase of HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60-91 (1967)), see MANIN, *supra* note 103, at 109. But this is surely not the place to treat the ever-expanding literature on theories of representation. In some respects my proposal takes a very definite position, and the entire proposal risks being rejected on the basis of its notion of representation alone. Nonetheless, I will have to defer the lengthy defense for another time.

1. The Legislative Errors that Call for Popular Action

There are two main types of communicational errors that call for popular input into the separation of powers within a representative democracy. Both surface as gaps between public opinion and those representing its interests (even if representatives are not agents but trustees of public opinion). In one instance, the people may be mobilized on an issue that representatives refuse to discuss in a meaningful way. An example of such a gap may be the case of health management organizations: since the corporations give so much money to both parties, inaction in legislatures often results even though there is mass popular mobilization for reform in the arena of health insurance. In another pathological instance, legislatures may be mystified on an issue, unable to find a reasonable compromise. In these cases, legislatures might want to consult the electorate directly, for fear of acting unilaterally. But often pollsters and pundits are in cahoots, making the gauging of public opinion unreliable.

Of course, the obvious structural correctives for these gaps are the initiative in the first instance and the referendum in the second. But this proposal rejects the standard model of direct democracy looking to replace it with a Popular branch, utilizing the idea of a *Popular* initiative and a *Popular* referendum. Without rehearsing all the details of how each of these measures of direct democracy function, I will briefly explain how each of these functions would be adapted by the Popular branch and how the processes would be integrated into our current mixed regime, which could be mixed up a little further.

At this stage I risk being too specific: all of the details in what follows are just suggestions for how to put my proposal into effect and may not take account of every possible case that could arise. Yet, I refuse to leave the integration of my branch into the separation of powers too vague. Accordingly, let me take two bills through my proposed fourth branch, and then address the role of the Executive and the Judiciary more directly before I make a brief comment about political parties.

Imagine a possible world where health-insured voters were fed up with health insurance companies. Imagine the citizens of this possible world frustrated by the legislature's unwillingness to take action against insurance companies because interested corporations fund campaigns. And imagine the further frustration associated with lobbyists' inability to provide incentives or disincentives to the representatives to reform the health insurance system. To whom can the people turn?

With a fourth branch, organizers in civil society could collect signatures to take action themselves.¹⁵⁴ Political consultants would be hired, and experts would be consulted. A bill, call it P1, would be drafted without state intervention. P1 would need to be confined to eight double-spaced pages with one-inch margins, using only 12-point Times New Roman font. Signature collecting firms and volunteers would be enlisted to try to reach the threshold number of signatures required to get the bill before the administrative agency. A major dissemination campaign would get underway. The relevant statewide or national commission detailed in Part I (CCCA) would then review the signatures collected, as well as review the wording of P1.¹⁵⁵

At that stage, the Commission could kill the bill for procedural infractions on behalf of those bringing the initiative before the body. Signature falsification, pork-barreling, or other decidedly unkosher corruptive tactics would be a good enough reason to kill a bill, forcing the special interest funding the initiative campaign to start over. Frivolous or dilatory bills could also be stopped by the Commission, though only a majority vote by the nine members of the Commission would be necessary to put the bill on the Popular agenda. The Commission would not have a line-item veto power, and could only vote on whether the bill, as drafted by the groups in civil society, should be given an official docket number and placed on the Popular agenda. Any initiative deemed to be a protest measure against a bill floating about in the Legislative branch would get top priority on the agenda. If the Commission rejects a proto-bill, it must explain its decision with a public document. The General Printing Office would take care of distribution, as is traditional. And the mass media could pick up the slack.

Once on the agenda, the Commission would arrange hearings, much the way Congress sends bills into committee for hearings. This would help them arrange the days of deliberation. There is more to say about how the Commission must go about its task of agenda-setting and framing, but these considerations must be set aside until Part VI.

After achieving the rubber stamp of the Commission, only citizens can kill a bill by not achieving a three-fifths majority vote at a deliberative assembly. If a measure gets killed by a deliberative assembly, the

154. See my discussion *infra* Part VI, for the details of just how civil society would function in this hypothetical regime with the administrative agency to which I gestured in Part I.

155. In this context, I elaborate upon statewide or nationwide Popular activity. City-wide activity could also be integrated, but city government's unicameral structure would require a slightly different, though analogous, set of procedures.

Commission must make sure that no substantially similar measure gets placed on the Popular agenda by initiative efforts for three years; this, too, would be a procedural infraction justifying a bill being killed before it gets to the people again.

Should the measure succeed, however, the bill—now signed by the executors of the deliberative assembly—would then be considered by the relevant legislators and executives on a priority basis. All relevant legislatures must ratify P1 before it arrives on the desk of the Executive for signing the bill into law: only a supermajority of a legislative body could override the informed will of the people established at the deliberative assembly. Essentially, once signed by the Commission, each legislative body votes whether to “override,” granting them a veto power. If any legislative body—the House/Assembly requiring a two-thirds supermajority, or the Senate requiring a three-fifths supermajority (and in either case, at least a simple majority of the other cameral entity)—vetoes, the bill should die.¹⁵⁶ After legislative “endorsement,” the Executive (the President or Governor) must sign the bill for P1 to become a law. The Executive might choose to veto and would have ten days in which to convince the Legislative branch to reconsider. Ten days after an Executive veto, the bill goes back into the legislature for another tally.

If the Executive can get a mere majority of the members of the legislatures (in *both* the House/Assembly and Senate) to approve his veto, the bill dies and the informed will of the people would be choked by the hands of their own elected representatives. More likely, however, the mandate of the people would be heeded quickly and efficiently: P1 would be signed, making its way through the “fifth branch,” the administrative agencies that are responsible for getting the laws tailored properly (subject to a judicial review of their interpretation of the Popular mandate). Of course, the usual amendment and repeal procedures would be available to legislatures down the road, but they would likely be resistant to exercise their powers against the Popular branch. After all, unlike the randomly selected delegates at the Popular assembly, legislators are politically accountable and desire reelection. Does that not sound like a well-mixed, well-separated, and well-balanced democracy in action?

Here’s another try: Imagine the day when the war on drugs is acknowledged as a failure. Imagine further a day when legislatures make an effort at compromising on the details of decriminalization, but get frustrated

156. If a bill dies by veto, perhaps the three-year waiting requirement should be waived.

at their inability to push an effort to legalize marijuana through the houses, even with the generous campaign contributions of Phillip Morris to Republicans and Democrats alike. The lawmakers from both sides want to stop using endless time on the floor debating the issue and they think that Popular input may be a good way to resolve the matter. Imagine that a two-thirds vote of a House/Assembly, or three-fifths majority of a Senate want to send the marijuana question to a referendum. In order to get a bill before the Commission in the Popular branch, the Legislative branch would need a relevant supermajority of one cameral entity¹⁵⁷ and a simple majority of the other agreeing to let the question leave the legislative bodies for Popular adjudication. Once it makes it through one house with the relevant supermajority, it becomes a top priority for the other entity. Two different forms of referendums, statutory questions (like the drug question) and constitutional questions, could make their way onto the Popular agenda.¹⁵⁸ Of course, by this hypothetical time in the future, the idea of a national referendum would not so be foreign.

Assume that HR876, or S543 as it is known in the Senate, gets its necessary two-thirds of the House/Assembly, so only a majority of the Senate is needed to acquire a docket number, P2, with the Popular Commission. By this time, of course, the bill has made its travels through various congressional committees and hearings, including the joint committee, ironing out any differences between the cameral entities. To be sure, the drafters of the statute to be adjudicated by the Popular referendum are responsible lawmakers who do this sort of thing for a living. Nonetheless, they, too, are restricted to the eight double-spaced pages. If only all of us could keep our proposals down to eight pages!

But when referendums come to the Popular branch, the findings of the various committees that related bills have already received are automatically admissible to the Commission, so that the Commission can get a firm history and background on the bill. Though the bill must still be limited to eight pages, the legislature must submit all reports pertaining to the bill, so as to help the Commission do its job. The Commission, of course, could also call its own witnesses and conduct its own investigations to pare down the

157. Note that the "lower" house requires a higher threshold for its supermajority requirement.

158. Here, I make no mention of mandatory referendums, certain provisions that *must* go to referendum according to state constitutional requirements. To be sure, I would argue to replace even these referendums with Popular adjudication in order to counteract the obvious shortcomings of the general referendum procedures. But that is another essay. Maybe there I could also argue that the Electoral College should be a Deliberative Poll with binding results.

materials for the deliberative assembly, but it could not kill the bill when the mandate comes from the legislature and it must arrange a deliberative assembly.

The deliberators can always reject P2 after thoughtful discussion. A failure to pass P2 would ensure that the issue could not come before the Popular assembly again for three years by way of the legislatures, encouraging the legislators to work toward their own bargaining and compromises with the added advantage of having a voice of the people. Nonetheless, if a Popular initiative brings the issue before the Popular branch later, the Commission should allow the item to be placed on the agenda again. (Similarly, an item put on the agenda by initiative in the first instance may be rehearsed a second time if the item comes from the legislature by way of a Popular referendum.) But the people's refusal to pass a measure in their deliberations should not preclude the legislature's passing the identical bill in a traditional manner if they so choose, for whatever bizarre reason they might want.¹⁵⁹ And so powers are not only separated, but also shared.

After the deliberators vote to pass the referendum measure, the bill would be signed by the commission and go directly to the Executive's desk. Should the Executive choose to veto, the veto would again need a majority of each house to sustain such action after the Executive receives ten days to plead its case. Otherwise, P2 becomes law and stoners all over America can light up after the Food and Drug Administration makes up its necessary regulations to specify just what the law means. The FDA, like the rest of the public, would have access to the transcripts of the deliberative assembly, giving it a chance to instantiate the voice of the people and address any concerns of the sanctimonious overruled. Again, once the people have spoken, it would certainly be quite strange for representatives to try to veto the outcome, especially in this case where the houses could not arrive at a 'right answer' themselves. Mechanisms for amendments and repeals, however, should remain available to legislatures.

159. If legislatures try preemptively to nullify an *initiative* campaign, passing a law in the traditional manner that conflicts with a supermajority achieved in the Popular branch, the Popular law should be upheld, unless it is successfully vetoed by a supermajority of a legislature or the Executive authority (and subsequently upheld by a simple majority of legislators). Complicated, right? Maybe I'm being too specific, ignoring easier solutions or harder and more basic problems that I should be addressing. Surely, more work elaborating upon this balancing act will be required before anyone can hit the 'GO!' button on the Popular branch. Nonetheless, I want to give a taste of how this might all look.

2. The Executive

The next questions that arise pertain to the role of the Executive in the activity of the Popular branch: Can the Executive send a bill directly to the Popular branch, bypassing the legislatures? Does the Executive get the line-item veto like many governors, or should this power be withheld from the Executive, as it is from the President?

These are legitimate questions, but sticking to tradition seems very much in order. On the first question, the simple answer is no. Executives could offer a bill to go to referendum, but it would need to get through the legislative houses in order to get onto the desk of the commission. On the second, the Executive's veto powers should stay consistent with the powers the Executive currently has. In statewide Popular decisions, the Governor would generally have the line-item veto; in national decisions, the President would not have such power. The Executive branch's lawmaking powers and oversight responsibilities could remain intact, subject to judicial review if it oversteps the directives of the Popular branch, and administrative agencies could make use of the Popular branch to settle matters of public opinion.¹⁶⁰ As a last matter with respect to the Executives, it should go without saying that they should retain all emergency powers now associated with those offices, notwithstanding the power of Popular laws.¹⁶¹ Though there is no deep reason for this conservative approach, I see no pressing rationale to cause further confusion.

3. The Judiciary

There are two places that the Popular branch could intersect with the Judicial branch. The people could be consulted or challenged. Judges could send matters to the Popular branch for a gauging of public opinion, in which case the branch would have only recommending force. Or, judges may be asked to review efforts of direct democracy taken by the Popular branch. I shall address each possibility in turn. Yet, since such a large body of literature is already available surrounding the general question of the judicial review of direct democracy, the reader is directed to those debates for treatment of the broader theoretical issues such an activity invariably

160. This use of deliberative assemblies in the administrative wing of the Executive branch has been suggested before. *See generally* DELEON, *supra* note 6.

161. Legislatures, too, should retain their emergency powers. But to override a Popular law should require a supermajority of sorts. Of course, if it were a real emergency there should be no problem getting the required votes in the houses.

raises.¹⁶² Here, I offer only guidelines for approaching the question from a practical standpoint, assuming a more textured direct democracy is already in place, shifting, to be sure, the nature of the debate.

Imagine a day, long off in the future, when judiciaries start to feel that it is time to overturn one of the most outrageous and embarrassing precedents on the books that remains *stare decisis*, *Bowers v. Hardwick*.¹⁶³ But one of the details standing in the way of such judicial action is the Court's statement there, invoking *Moore v. East Cleveland*, that the precedent is "deeply rooted in this Nation's [] tradition."¹⁶⁴ In order to overrule the decision—with the Court's own authority, the Nation's traditions—any appellate judge (or a simple majority of those sitting *en banc*) at the state or federal level could convene the Popular branch in an assembly to decide current popular conceptions of national traditions. The judges could keep their questions rather simple, and include all relevant facts and findings in a memo to the Popular branch's administrative Commission, which would still be responsible for organizing the assembly. Nonetheless, the majority of the framing would be facilitated by the Judicial branch, the famously "least dangerous branch."¹⁶⁵

The Popular deliberation would result in a tally, but there would be no threshold that needs to be reached because in this instance the Popular branch operates "consociationally." Judges could appeal to citizen input as a basis for decision-making and investigate transcripts and post-deliberation questionnaires to get a sense of why people decide as they do. Moreover, having demographic breakdowns of voting patterns might help justices do some social science, investigating citizen prejudice with modern statistical methods.

After the vote is in, the judges would, of course, be free to ignore informed popular opinion, especially if the tally proves the issue to be a hotly contested one, with one side achieving only a slim majority. It is also certainly possible that even an informed supermajority might agree with *Bowers* for a number of reasons: as with Justice Burger's concurrence in *Bowers*, national traditions might get conflated with "Judeo-Christian moral

162. See generally Eule *supra* note 40, for the most famous of these discussions.

163. 478 U.S. 186 (1986).

164. 431 U.S. 494, 503 (1977).

165. Compare ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962), with *THE FEDERALIST* No. 78, at 437 (A. Hamilton) ("[t]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them").

and ethical standards,”¹⁶⁶ ignoring the restrictions of the Establishment Clause. In these instances, the courts might still want to overrule the people, constituting their national traditions instead of merely listening to them. They ought to have such a freedom because the Popular branch still has at its disposal the legislative capacity to amend the laws, and even the Constitution. Nonetheless, the courts will always interpret those laws and their applicability. This brings us directly into our next discussion regarding the possible judicial review of the actions of the Popular branch.

a. Judicial Review

Alexander Hamilton’s perspective on judicial review in *The Federalist* is always a good place to start: “[w]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former.”¹⁶⁷ While it is certainly a strange move to equate directly the will of the people with the Constitution,¹⁶⁸ the basic need for judicial review cannot be underestimated. Keeping the legislators in touch with the people and their fundamental rights and values—as articulated in their Constitution—is one of the stronger rationales for judicial review in *The Federalist*.

But, as Julian Eule notes:

[t]he enactments that reach the judiciary via the legislative route are those that have successfully passed through an extensive filtering system. This is majoritarianism *plus*. It is the plus that reflects the Framers’ unique version of democracy, and it is the plus that warrants judicial caution in substituting its own judgment. Refined, or filtered majoritarianism, captures the virtues of popular sovereignty without being tainted by its vices.”¹⁶⁹

In fact, Eule goes further to say that “[j]udicial review is most essential in the presence of unfiltered majoritarianism.”¹⁷⁰ This approach leads him to recommend heightened scrutiny or a “hard judicial look”¹⁷¹ when it comes to the activities of direct democracy, where unfiltered majorities generally

166. *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

167. *Id.* at 439.

168. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* (1998) (especially ch. 12); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 70, at 195-240.

169. Eule, *supra* note 39, at 1532.

170. *Id.* at 1584.

171. *Id.* at 1558.

have the power to legislate. He argues against “the instinctive appeal of Hugo Black’s view that the level of appropriate scrutiny ought to decline as democracy becomes more direct,”¹⁷² insisting that the theory of judicial review must integrate the claims of direct democracy and have heightened jurisdiction above them:

Just as arguments for judicial restraint based on separation of powers or the sharing of interpretive power fail to carry over to review of ballot measures, those premised on comparative competence make little sense when removed from the legislative context. The superior legislative ability to collect information and to sort it out is routinely invoked by courts deferring to legislative judgment. Whether or not legislators actually do outperform judges at fact-finding, both groups perform with a lot more proficiency than the electorate. If the accuracy of decision-making is to be our criterion, the electorate stands at an obvious disadvantage. It lacks the staff, resources, time, and understanding to compete favorably with either judges or legislators on this count.¹⁷³

Eule is certainly right that mass democracy needs to continue to be checked by the courts, but given the regime I propose, competence and resources, evidenced in capacities for fact-finding and interpretation, are no longer withheld from the people. Since direct democracy would have a different infrastructure that would allow for filtered and representative majoritarianism at the level of the Popular branch, the claims that Eule uses to justify his hard judicial look no longer apply in their strong form. The Popular branch is not merely populist; it is republican in its own right. And Article IV of the Constitution requires that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”¹⁷⁴

Regardless of whether one ultimately sides with judiciaries giving a “hard” or “soft” look upon the actions of the Popular branch, surely they have a right to take *some* look and would have some jurisdiction over its activity. Though here I bracket the question of whether courts should review

172. *Id.* at 1508 (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967); *James v. Valtierra*, 402 U.S. 137, 141 (1971); and *Hunter v. Erickson*, 393 U.S. 385, 397 (1969) (Black, J., dissenting)).

173. Eule, *supra* note 39, at 1538 (citations omitted).

174. U.S. CONST. art. IV, § 4.

ballot measures prior to elections,¹⁷⁵ after a law is passed, judges should have some right to check efforts in the Popular branch in order to prevent majorities from trampling upon fundamental rights in a way inconsistent with the Constitution.

To this end, we must consider at least four types of activity in the Popular branch:

1. Statewide statutory actions taken in the Popular branch could obviously be reviewed by state courts on state constitutional grounds. Should the statute raise federal questions, federal courts could accept jurisdiction.
2. A statewide constitutional amendment passed by the Popular branch could be reviewed only by federal courts, provided the issue warrants review. As Eule notes, "[t]he electoral accountability of the state judiciary leaves little hope that state courts will have either the ability or the desire to take a leading role in filtering plebiscitary results. When federal constitutional rights are at risk, the judicial role must be played by an independent judiciary. And the independence demanded must insulate the courts from the people as well as from the legislature."¹⁷⁶ Though there might still be a backlash associated with judges overruling the informed actions of a state (raising difficulties with the practice of federalism), judges should retain the right to preserve the federal Constitution.

This far any rational institution designer in the United States would argue: "voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."¹⁷⁷ My regime, by injecting the deliberative conditions into popular activity supposedly associated with legislatures, gives Popular decisions the force of legislative decisions. Yet, it gives them no *more* legitimacy for the purposes of judicial review.

I would go further, however, to include provisions for amending the Federal Constitution, as well as providing a forum for federal statutory action by the Popular branch:

175. For that discussion, see Michael J. Farrell, Note, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 FORDHAM L. REV. 919 (1985).

176. Eule, *supra* note 39, at 1580 (citations omitted).

177. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981).

3. A federal statute passed by the Popular branch could be reviewed by the federal court system in order to assess its constitutionality. Judges could also delimit the scope of the passed bill to keep it within constitutional restraints, giving them a form of line-item veto. In this case, as with others, transcripts and questionnaires from the assemblies that created the laws would help justices perform their interpretive tasks.

4. Only the fourth possibility, an amendment to the Constitution of the United States passed by the Popular branch, should give pause to the inhabitants of a country with a California. On the one hand, if Hamilton is right that the “power of the people” should be “superior to both” the judicial and legislative powers, then any amendment passed by the populace must express its will and should take precedence over precedent.¹⁷⁸ For Hamilton, the Constitution is an expression of popular will, which then should be capable of being amended by *Popular* will. Yet, on the other hand, constitutional amendments are quite serious affairs, and it might cause concern that this proposal allows a supermajority of a group of stratified random samples of laymen¹⁷⁹ to enact monumental changes for the entire country, circumventing the elaborate procedures for constitutional amendment enumerated in Article V.

But with further tailoring, the procedures of the constitutional conventions (in a manner of speaking) could have higher, or simply different, supermajority requirements. The threshold for Popular “ratification” of their own initiatives could be heightened to a three-fourths or four-fifths supermajority, while amendments originating in Congress or state legislatures might only need simple majorities or two-thirds majorities. Perhaps the double majority requirement of Switzerland (a majority of voters of a majority of cantons need to ratify for passage of a referendum there) could be put use effectively in these cases.¹⁸⁰ Perhaps petitions for federal constitutional amendments would need the signatures of a higher proportion of the electorate, with stricter geography distribution requirements. Perhaps only the Legislative branch could put a federal

178. THE FEDERALIST No. 78, at 437 (A. Hamilton).

179. As aforementioned, in the case of Popular consideration of federal questions, many assemblies would be convened all over the country and some voting aggregation mechanism would be applied.

180. See Kris Kobach, *Switzerland, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* 98-153 (David Butler & Austin Ranney eds., 1994).

constitutional question on the Popular agenda pursuant to the supermajority requirements already delineated in Article V, and federal constitutional Popular initiatives would be rejected *ex ante* by the federal commission organizing the nationwide activities of the Popular branch. Perhaps ratification by the Popular branch should be *required* after the criteria in Article V are met. Or, perhaps, if the life of the Popular branch were on the line and this was the only detail of the system that was unacceptable, the privilege to amend the federal Constitution could simply be withheld from the Popular branch. But if it isn't—and I hope it wouldn't be—judicial *interpretation* would be welcome with the help of the public transcripts of the Popular constitutional convention, though judges obviously could not rule on the question of constitutionality.

In any case, however, a court cannot review any legislation enacted by the Popular branch without its first passing scrutiny in the other branches. This ensures that referendums and initiatives bear some stamp of approval from politicians, not merely the electorate, leaving the specialized question of judicial review in this context slightly redundant.

4. Back to the Party

After this brief and simple, if not superficial, foray into a possible constitutional integration of the Popular branch, questions concerning political parties remain and are quite relevant. Though the Constitution itself did not anticipate the formation of the modern party system, parties play a crucial role on the American scene. This, however, is not the appropriate context in which to enter the various debates weighing the advantages and disadvantages of two-party systems and multi-party regimes with proportional representation.¹⁸¹ Nor would it be appropriate to take a diversion to discuss the sociology of parties or to discuss the oligarchic tendencies of modern party democracy.¹⁸² Instead, it will suffice to show how the Popular branch and the two-party system in the United States could coexist, regardless of the normative assessment one might ultimately make

181. In this regard, see, for example, MUELLER, *supra* note 32, at 101-74; MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* (1992); and Ackerman, *supra* note 14.

182. See, e.g., ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden & Ceder Paul trans., 1999); LEON EPSTEIN, *POLITICAL PARTIES IN WESTERN DEMOCRACIES* (1967).

of party democracy.¹⁸³ In any case, it is important to remember that the “separation of powers in American states, often producing a divided Executive and Legislature and the need to work with cross-party coalitions, is surely a greater influence on the structure of [] parties than any provision for direct legislation.”¹⁸⁴

Referendums and initiatives, when they are not operationalized as I propose they should be in the Popular branch, are often said to “contribute[] greatly to the relative weakness of political parties.”¹⁸⁵ Widespread use of *initiative* campaigns surely undermines party control of agenda-setting¹⁸⁶ and works against the parties’ general “programmatic function.”¹⁸⁷ Even intra-party unity is sometimes sacrificed in cases of direct democracy, destabilizing the party system in general. The results of a recent referendum in Switzerland make this point: “51 percent of FDP supporters knowingly went against the recommendations of their party, as did 55 percent of Christian Democrats and 60 percent of Social Democrats.”¹⁸⁸ Similarly, evidence in Switzerland suggests that MPs and elites show dissension within parties as well when referendums are put to the public.¹⁸⁹

Ian Budge, an advocate of both direct democracy and parties, identifies four main claims that are often cited in the literature that attest to the weakening of parties in regimes that rely on direct democracy. Direct democracy weakens parties

1. By removing some legislative matters from the control of the government. In particular, decisions are forced on matters neither raised nor framed by the parties.
2. As a consequence of this, it reduces the coherence and consistency of the policy package that the ruling party is trying to promote.

183. This is a practical strategy. Even if parties are “in decline,” I would want them to see my reform as consistent with their interests because, at least for the foreseeable future, getting party endorsement is a way to get votes. Moreover, constitutional amendments would be virtually impossible without party support. Nonetheless, arguments could go both ways: a case could be made suggesting that the Popular branch would weaken parties and that it would strengthen them. It is not my purpose here to weigh these claims. This would be an appropriate question for the literature that this proposal spawns to address.

184. IAN BUDGE, *THE NEW CHALLENGE OF DIRECT DEMOCRACY* 122 (1996).

185. Kobach, *supra* note 180, at 132.

186. For more on agenda-setting, see *infra* Part VI.

187. See EPSTEIN, *supra* note 182, at 261-88.

188. Kobach, *supra* note 180, at 132.

189. *Id.*

3. Single-issue groups are more extreme and less compromising than political parties, so popular consultations encourage the taking of extreme positions and reduce the possibility of negotiation and agreement.

4. Leaders may take opposing sides in popular consultations and electors may ignore or even defy the party lead where it is given.¹⁹⁰

Budge rebuts each of these claims, however, noting that they are even "inconsistent among themselves," and are "simply contradicted by other commentators who see electors following a clear party lead when it is consistent with its ideology."¹⁹¹ Furthermore, elite dissension is common in large party systems in general, and referendums are no more likely to cause rifts than are extreme policies adopted by major parties to help form coalitions in regimes without direct democracy.¹⁹² Two-party systems without direct democracy still require party responsiveness to social movements and have parties integrating shifts in popular opinion to stay popular. Moreover, unity could be preserved within parties by avoiding taking stances on referendum questions that are not tied to their ideologies, hence actually strengthening the parties and their packages.¹⁹³ And "[c]ohere[n]ce and consistency are in the eye of the beholder and not particularly evident inside government programs themselves, even where not affected by direct legislation."¹⁹⁴

Nonetheless, Budge acknowledges that

Magleby identifies the greatest defect of direct legislation in U.S. states as bypassing and weakening the political parties, which constitute the best means of clarifying and balancing the political debate. Cronin . . . concurs on this weakness of direct legislation and indeed sees greater party involvement in it as a major way of remedying informational and other weaknesses.¹⁹⁵

190. BUDGE, *supra* note 184, at 120.

191. *Id.* at 121.

192. *Id.*

193. *Id.* (citing David Butler & Austin Ranney, *Conclusion, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY*, *supra* note 180, at 260).

194. *Id.* at 121.

195. *Id.* at 94 (citing CRONIN, *supra* note 42, at 70, 230; and DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 192-99* (1984)); *see also* David B. Magleby, *Direct Legislation in the American States, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY*, *supra* note 180, at 254-57.

But parties could have central functions in Popular activity, and would look to play a role if the Popular branch became constitutionally integrated: electors still lack guidance on how to vote and parties can help fill in the gap by working to fill informational vacuums.¹⁹⁶ Even if firm stances by parties are unnecessary and avoiding taking such stances in certain instances may enhance party integrity, parties could still help the Popular branch contextualize a policy question. They could help frame the debate in the mass media with all of their soft money and provide information about a potential policy's impact upon some more general policy package that their party is trying to promote.

Of course, these potential contributions only need to be mentioned in the case of a Popular initiative. In the case of the Popular referendum, where the relevant bill originated in the legislatures, parties would play their traditional role in bill negotiation and compromise. Since initiatives are far less likely than referendums to garner even a simple majority,¹⁹⁷ most cases of 'direct' legislation that pass scrutiny will still result from party input in the various houses. Hence, even direct democracy as I conceive it here will make use of parties.

In a regime with a Popular branch, parties could and probably would still monopolize candidate selection in general elections. Since financial power, votes, and credibility accrue to those who run on large party tickets, candidates will have large incentives to appeal to party resources. To be sure, the hegemony of the two-party system might need reorganization with an institutionalized outlet for single-issue activism, but it remains likely that parties would be clever enough to absorb single-issue advocates into coalitions. Parties (especially minority parties) might also help sponsor Popular initiatives because they might assume that bills would have a better chance for passage by the Popular branch than in the legislature. Moreover, parties might want a clear mandate from the people, precisely what the Popular branch, with its deliberative assemblies, is intended to produce. Moreover, since supermajorities are generally required for Popular decision-making,¹⁹⁸ even single-issue advocates would likely want to reach a broad base to get their measure passed and might compromise to appeal to parties themselves, who control large blocs of votes. Also, since single-issue parties could generally get their issue considered only once every three years, third parties forming on the basis of such a limited agenda would necessarily be

196. BUDGE, *supra* note 184, at 98.

197. *Id.* at 96.

198. Supermajorities might be easier to attain in multi-party systems, where coalition-building is common.

unstable or temporary, giving the two main parties the impression of relative stability.

Yet, even if none of these informational and framing functions is performed by parties in a regime with a Popular branch, the parties will still need to concentrate their efforts upon getting their candidates elected. Even if they refuse to provide cues and research assistance to facilitate the Popular branch's will-formation, parties could continue with politics as usual, especially since normal politics will generally be a time with few measures than can actually garner the required supermajorities in the Popular branch.

IV. REPLIES TO MY HYPOTHETICAL CRITICS

Designing institutions, wearing the thinking cap of a Founder, demands keeping on one's desk near the quill a specter of the present. Reform is about doing better than the status quo without purporting to solve all of the problems associated with current institutions. With that caveat in mind, I proceed to address various sorts of objections that could take aim at my Popular branch.

A. *"Couldn't deliberative assemblies be corrupted, just like any easily targeted small group of decision-makers?"*

In an effort to control for corrupted moderators and potential "foremen," federal judges serve as checks in each of the smaller groups. But in this enlarged public sphere, all citizens have the potential to be bought off. Since citizens might be susceptible to bribery and propagandists (though these problems plague legislatures at least as badly today), major efforts would have to be made to sequester the jury during the several days of the proceedings. Furthermore, the names of jurors would need to be kept completely confidential before the assembly. When serving on a jury, citizens would be prevented from interacting with anyone other than their fellow deliberators. Even if each juror were granted the freedom to associate with his family (a reasonable freedom indeed), much effort would need to be taken to keep the jurors' identities away from the mass media and interest groups prior to the event. To be sure, there would be corrupt people on the Commission who might, for the right amount of money, compromise the secrecy of the jurors' identities. Extraordinary questions at stake might tempt extraordinary efforts on the part of corporations and interested parties. But such problems with administration plague any attempt at reform. The best we can do is to offer harsh penalties for those who tamper with the

political machine and try to overturn results achieved through skewed processes.

High profile deliberations, such as ones for abortion and affirmative action, would be impractical to keep completely private during the actual course of deliberations; most likely, the whole deliberation would be televised (like some of Fishkin's Deliberative Polls)—at least on C-SPAN. The population should be entitled to see how their fellow citizens are doing their jobs as citizens and would want to ensure that the moderators (judges) running the deliberative sessions are also doing their job impartially. Perhaps the assemblies could be televised, only supposing the electronic blurring of everyone's faces to preserve privacy. While some 'value of publicity' obtains in any deliberative situation, the procedure's legitimacy depends on inclusiveness. If we needed to excuse people who are uninterested in publicity, we could not rely on the deliberations, as they would suffer the voluntary response problem that undermines Fishkin's polls.

B. "But shouldn't citizens have access to the goings-on of all deliberative assemblies and understand how the members of the jury arrive at their decisions? Doesn't the 'value of publicity' demand the transparency of the procedure? Wouldn't excessive secrecy and opacity shroud its legitimacy?"

Navigating between the competing claims of privacy and publicity is particularly difficult in this context.¹⁹⁹ From one perspective, since the deliberative assembly is a reform aimed to effect organization and mobilization of the public sphere, the value of publicity and transparency to the public is urgent. Yet citizens are generally entitled to their privacy in our liberal regime. Nonetheless, in this context a case can be made to support the claim that politics ultimately requires sacrificing some privacy for the sake of policy juries, in the same way that the justice system requires citizens to

199. Interestingly, this dilemma illuminates the potential contradictions between deliberation and Gutmann and Thompson's "value of publicity." See GUTMANN & THOMPSON, *supra* note 4, at 95-127. I thank Ian Shapiro for bringing this contradiction to my attention. I should mention that Thompson does make a case for when "democratic secrecy" is appropriate, though he again runs into a difficult navigation exercise claiming that a secret is justified only if "citizens and their accountable representatives are able to deliberate" to determine if a secret "promotes the democratic discussion." Dennis Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 185 (1999). While Thompson addresses an interesting problem, his answers leave much to be desired. Another attempt to treat the problem of secrecy can be found in MANIN, *supra* note 103, at 167-68.

serve on juries more generally. I do not have a perfect answer to address the question of "how much publicity is too much," but I am certain that our regime ought to allow some flexibility for compelling state interests, like legitimacy.

As a gesture in the direction of publicity, the transcripts and informational pamphlets of the deliberations would remain public documents. The documents could help judges and future generations make sense of why a body decided as it did, surely another compelling state interest. We might also administer post-deliberation questionnaires to help judges in the rather unattractive process of shuffling through transcripts and getting pointed answers to pointed questions. The questionnaires would also remain anonymous, though we might keep some demographic information available to judges to help them see if demographic variables played a role in voting patterns.

Moreover, although we would need to keep a public record of those who serve on policy juries, publishable after the assembly, how each member votes should remain private. The final tally would be prominently displayed on the cover page of the final report, but there should be no credible way for a juror to prove that he voted one way or the other.²⁰⁰ Also, every statement recorded in the public transcripts would be ascribed anonymously. By retaining anonymity, each citizen could feel comfortable sounding stupid occasionally, only embarrassing himself in front of his fourteen co-deliberators, the moderator, and the stenographer. Even if the proceedings were televised, voices would need to be blurred along with faces to mask identities. Though I prioritize a true publicity in the public sphere, liberalism demands that we always keep the demands of privacy in mind as well.

C. *"Don't these deliberative assemblies, in a sense, force people to be free? Isn't the use of coercion offensive to even liberal republicans?"*

My institutional design depends heavily upon compulsory service. Without such compulsion, the statistical samples would be worthless because they would be self-selected, a big no-no for any social science that aims to be accepted by the scientific community.²⁰¹ Moreover, depending on

200. The use of voter credibility here is inspired from the work of Ian Ayres. See, e.g., Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998).

201. The voluntary response problem is one of the first things researchers are taught to avoid. See, e.g., DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 265-67 (3d ed. 1999).

self-selection undermines representativeness and vitiates the possibility for textured civic identity as a consequence of adding the branch. But liberalism's "leave me alone" ethos demands that citizens be allowed to ignore politics: "Quite simply, we hate compulsion."²⁰² The libertarian strain of today's vision of citizenship makes the adoption of this branch further unlikely.

To point out the obvious, however, our society regularly redistributes wealth, makes jury duty mandatory, establishes federal holidays, and takes other measures aimed to ensure (read: to compel) a textured civic identity for the citizenry, encouraging a participatory ideal.²⁰³ Sometimes liberty and freedom demand an occasional endorsement, an amorphous establishment of a civic religion of sorts. Of course, these efforts usually fail. Compulsory participation in deliberative bodies is one more way of trying to achieve a civic voice²⁰⁴ without being so intrusive as to require a full-year commitment from each citizen, as Dahl and deLeon's programs require.

202. BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 204 (1999). Oddly, Ackerman stakes this claim just as he argues to compel a new wealth tax. Presumably, coercion in the form of taxation is considered no coercion at all. I still (perhaps naively) think that parity in social standing can be achieved without major economic reforms, without being a "Money Liberal." I see this proposal as a quintessentially "Civic Liberal" idea. See MICKEY KAUS, *THE END OF EQUALITY* 17-24, 58-77 (1992).

203. I should note that I prefer to see "participation" as a core value necessary for a republican regime with CAROLE PATEMAN, *PARTICIPATION AND DEMOCRACY THEORY* (1970) and BARBER, *supra* note 9. While I agree with Fishkin when he elaborates upon "political equality" and "nontyranny" as two of our core values, I (oddly enough) hesitate to endorse his third, "deliberation." FISHKIN, *DEMOCRACY AND DELIBERATION*, *supra* note 8, at 29-41. Strange as it may seem in this context, I think the need for deliberation arises precisely because mass participation has pathologies that deliberation is well equipped to cure. I would not build deliberation into democratic theory directly, because I think participation is more basic in the quest to reify Michelman's condition of authorship than deliberation. Michelman, *supra* note 10, at 147. For example, one might argue that participation helps establish consent of the governed, a crucial feature of any liberal regime. But when the costs of non-participation are so low, deliberation can establish legitimacy through nonfictive (that is, non-tacit) consent. Yet, participation is fundamental even if it cannot stand alone: deliberation among elite participants is just as likely to be worthless for democracy. See FISHKIN, *DEMOCRACY AND DELIBERATION*, *supra* note 8, at 52-53.

204. The value of achieving a "civic voice" as a curative to excessive individualism is a common theme in the "post-liberal" literature. For this version of republicanism, which often contains arguments for deliberation, see generally MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); and Cass Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988).

But I should not speak too quickly because there are two senses of coercion. First, coercion results when government acts autocratically against citizens and claims for itself a legitimacy that ultimately cannot be ascribed to the will of the people. When institutions deny due process and deprive people of liberties that they have endorsed as important, this kind of coercion obtains. However, this sense is irrelevant to my proposal if only because I would want to see it adopted through the proper channels of majoritarian democratic political life. When governments demand certain things of citizens (like jury service or taxation), as long as proper democratic procedure is followed to create the demand, a certain degree of legitimacy can be claimed on behalf of the governmental decree.

But perhaps there are certain spheres of life inalienable by government, and any infringement would qualify as coercion. This is the second sort of coercion. For example, if the majority of Americans passed a law condemning all law professors to death, we could say strict majoritarian democratic procedures still failed to produce any legitimacy. But now we are back to the problems associated with the tyranny of the majority with which I have already dealt. Could the institution of deliberative assemblies by an act of the people, for the people, really constitute coercion of the malignant and tyrannous sort? I cannot see it.

Others endorsing a strain of civic liberalism have argued for mandatory conscription and community service.²⁰⁵ Those proposals should be considered on their own merit and are independent of the proposal I argue for here. But I suspect that service on a deliberative jury a few times in a lifetime might accomplish some of the goals of those programs without being as much of an imposition on citizens' lives and without needing to cope with as much "conscientious" objecting and complications of administration. Nonetheless, the goal of class-mixing, emphasized by Kaus, is preserved in my proposal. I go further precisely because legitimacy—not merely civic virtue—is in view.

Although each citizen might only be expected to take part in a few civic juries in a lifetime, each of which lasts only four or five days, such a requirement could have drastic sociological effects on the political public sphere by thoroughly reconceiving it. With such a transformation, the mass media would need to treat the citizenry differently (as voters) because the voter is less easily commodified and more easily treated as a possible decision-maker who is going to be forced to hear and weigh both sides of a proposition. The deliberative assembly should serve to make people less

205. See generally KAUS, *supra* note 202, at 78-102.

manipulable, which may contribute to a more general civility evidenced in the way citizens treat one another (as voters and fellows), especially in the mass media. I am entitled to set my hopes high.

In general, many reform proposals (this one included) aim to achieve more equality in “social standing.”²⁰⁶ But politics can only hope to ameliorate the problems of social inequality if the *space* of politics is renewed and extended. If realized properly, the public sphere can be a site where citizens meet and greet each other; their ‘enlarged mentality’ where they take account of public reasons, can be facilitated and checked by real confrontation with peers in public life, not with an engagement of an abstract and non-discursive Original Position. If citizens can see one another’s shoes as they make political decisions, they are more likely to be able to feel what it might be like to wear them. In this political space, where consideration of others is more direct, contestatory dialogue might actually produce a legitimate political life.²⁰⁷

D. *“Why can only eligible voters take part in assemblies? Why draw the line there? Shouldn’t immigration policies be debated by a jury at least open to those directly affected by or interested in the decision?”*

Of course, a cosmopolitan could ask why the deliberative juries are limited to citizens. Immigrants may be affected by a Popular effort and my assemblies generally desire that some of the affected parties participate. So how can I exclude non-citizens?

There is no simple answer. Sometimes, arbitrary lines have to be drawn. In this case, however, it is somewhat less than arbitrary. The nation-state will often need to make decisions with global repercussions, but to allow for global representation would undermine the extent to which the deliberative assemblies are convened to express the voice of a particular people. To be sure, high-minded largesse is a perspective that should be heard as people deliberate about the future of their country. But the civic voice is supposed to utter the character of one nation and one people, not the peoples of the world.

Of course, deliberative assemblies would be useful in other contexts. Within the workplace, a federation of states, or multinational corporations, this model of deliberative publics could be employed to great global democratic effect. But this proposal concentrates on deliberative publics in

206. See generally *id.*; SHKLAR, *supra* note 1.

207. For an inspirational account of this kind of deliberative polity, see RONALD BEINER, *POLITICAL JUDGMENT* (1983).

American political life because in this instance it achieves not only more democracy, but also textured civic identity. Two for the price of one. More democracy might be a goal in other private or cosmopolitan contexts, but here the addition of the possible achievement of civic identity is a further republican reason for its urgency. If by some freak chance, "world citizenship," comes to have any meaning for the peoples of the world in the future, deliberative publics would be useful for decision-making in global policies, for many of the other reasons deliberative publics are desirable. Within the university, deliberative publics with decision-making power might be used to help settle disputes between administrations and graduate students, instead of reliance upon the bargaining mechanisms so often sought. But these kinds of applications are far beyond (and often come shy of) the scope of what I am trying to do here.

E. *"Could a participant in a deliberative assembly who proves persuasive be permitted to run for public office? Could people be allowed to use an assembly in the service of political ambition?"*

Though some with political ambition might try to use the assemblies in service of opportunism, I include three mechanisms to work against such use. First, since I avoid the problem of self-selection, no one could find a way to become a juror—each one is randomly selected. Because no one is allowed to volunteer to be one of the 525 deciding votes, someone who wants to use their status as a juror to catapult a career in politics may have to wait around a fairly long time for the opportunity.

Both of the other mechanisms pertain to credibility: the office-seeker could not with ease draw upon her experience at a deliberative assembly to encourage voters to vote for her *because of the effect she had on a particular policy outcome of an assembly*. A potential candidate could not credibly claim to have swayed the results of more than the fourteen deliberators in his deliberating chamber, since deliberators debate with only fourteen others over the course of the assembly (though they may be subject to plenary sessions for briefing and the like). Though a juror has access to all of his 524 other peers at meals and other recreational events or night activities, most of her arguing and convincing would take place in the sub-groups. Should a juror stand on a soapbox delivering speeches at plenary sessions, she is bound to be regarded as a loon, not as someone worthy of attention. I suspect that during lunches deliberators would want to talk about things other than what they are 'forced' to talk about all day. I would hope they get to hear about each other's non-civic domestic existences.

Also, even if the ambitious wanted to claim that they were able to sway the vote with their powerful arguments, they could find no *credible* way of proving that they were the ones who delivered the decisive arguments. Since the public record would record no names in the transcript, there would be no credible reason to believe anyone claiming to have uttered certain parts of it. To be sure, there are ways around these constraints of credibility: the ambitious could recruit witnesses for their campaign; they could try to tape themselves illegally (sparking a Popular-gate scandal); they could send themselves registered mail with the arguments they plan to use before the event. But by making it harder, the ambitious would be less likely to use deliberative assemblies for opportunistic purposes.

This discussion raises the previous question: would it would be so terrible if a deliberator tries to use his role as a public servant to become another sort of public servant in office? I cannot see why I should prohibit it *prima facie*. Since I am not as committed as Fishkin to deliberative assemblies as a way of turning a random sample of people into media stars, and since I am more concerned with the privacy of the deliberators, I do not think deliberative assemblies will catapult anyone to national stardom. But if deliberating and taking part in the legislative process inspire some to take a more active role in political life, I see no reason to stop them.

F. *"Isn't there empirical evidence that controverts Fishkin, showing incompetence and inefficiency in actual practices of deliberation?"*

As aforementioned,²⁰⁸ Button and Mattson undertake a survey of seven practices of deliberative democracy over the course of 1997 and reach somewhat disheartening conclusions. Yet their forcefully unhopeful conclusions about potential practices of deliberative democracy are not completely consistent.

They lament the large degree of deference demonstrated by citizens to experts,²⁰⁹ but applaud the outcome that citizens come away feeling that they want to be a part of deliberative situations more often. Since most of the cases studied by the team were largely organized for what they call deliberation's "educative" function,²¹⁰ it should not be surprising that the deliberators functioned as spectators instead of actors, and that many came

208. See the sources cited *supra* note 43.

209. Button & Mattson, *supra* note 43, at 610. But, simultaneously, we must ask if it is such a bad tradeoff to defer to experts when the alternative might be deferring to deep pockets.

210. *Id.* at 612.

away cynical because their deliberations had no practical effects. The problem of citizen deference to experts is precisely part of the reason that deLeon's PPA could never be enough to instantiate significant deliberative input. Moreover, Button and Mattson's confirmation of the frustrations associated with spectatorial politics demands a more active sense of political judgment for the citizenry.²¹¹ Their study is very useful for making the argument I do here, that deliberative bodies *should* act on policy not just discuss it, that Popular deliberation *should* enact policy decisions.

Interestingly, the single case study that the study labels "activist," where there was a gesture suggesting to the citizens that their deliberations would produce policy, was the one structured most *unlike* the civic juries I recommend here. In the case of Portland's energy regulation meeting, there were 200 deliberators who were not broken up into smaller groups, too many persons to effect fruitful dialogue. In that "activist" situation, the most "educative" kind of deliberation took place. Not surprisingly, it was considered the least successful of the lot.

Yet, Button and Mattson's findings, that many who take part in the deliberative practices want to do it again and get more informed as citizens in general, coheres with Fishkin and Luskin's findings.²¹² The study further substantiates my speculation that such bodies would contribute to the kind of civic virtue communarians and republicans alike think necessary for the proper functioning of a democracy.

G. *"Depending on the analogy with juries raises problems for the model: Are juries so reliable that we should depend upon them in the legislative process?"*

The literature on juries is, by and large, heartening.²¹³ But a notable critique by Marianne Constable might force a harder and more careful

211. For a theoretical treatment of the problems associated with passive political judgment, see generally BEINER, *supra* note 207; HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY (1982); and HANNAH ARENDT, THE HUMAN CONDITION (1958).

212. See Fishkin & Luskin, *supra* note 8.

213. Obviously, I cannot do any real justice to this subject in this context. The literature is, of course, not univocal. Nonetheless, my research does bear out the positive hypothesis and is a cause for cautious optimism. See, e.g., JOHN GUINER, THE JURY IN AMERICA (1988); VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY (1986); REID HASTIE, STEVEN PENROD & NANCY PENNINGTON, INSIDE THE JURY (1983); SAUL KASSIN & LAWRENCE WRIGHTSMAN, THE AMERICAN JURY ON TRIAL (1988); RITA SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY (1980).

look.²¹⁴ Yet that theoretical look does not contest the consensus of the empirical assessments. She agrees that juries' decisions tend to be unpredictable (so heuristics would not be efficient), reasonable (so we ought not worry about mass psychology yielding wacky decisions), and in the interests of justice (so we should not worry that groups selected by lottery will be tyrannous). Instead, Constable attacks the methodology of the studies. She claims that they take for granted a certain theory of law and justice by which they assess jury competence. By assuming that acting in the interests of justice means deciding in a way consonant with what lawyers and judges might consider just under similar circumstances, the social science work already presupposes that rightness and legality precede jury deliberations.²¹⁵ She may be right about the presuppositions of the social scientists (hardly a devastating critique in this context), but their findings should be calming in any event.

Nonetheless, this does raise a further question of the extent to which analogizing from jurors to deliberators is coherent. Jurors are generally on a fact-finding mission and simply because juries are competent on that score does not mean that they could handle nuanced questions of policy and compromise. What the evidence does show, however, is that jurors in small groups, chosen by lottery (and strategic lawyers making broad peremptory prejudiced judgments), can leave their prejudices at the door and debate about complicated and technical matters in a productive way.

Two further complications are worth exploring, though they both show instances where the deliberative situation is discontinuous with the jury analogy. First, deliberators are essentially asked to debate about their own fate and not that of some anonymous "peer." This remarkable difference undermines the analogy because asking people to leave their prejudices at the door when they decide the fate of some stranger is one thing; asking them to deliberate about their own interests with an enlarged or public mentality is quite another. Nonetheless, deliberators will often be debating about issues that do not touch their daily lives. Though affirmative action debates may intersect everyone's life in some oblique fashion, not everyone has an interest in the relevant and damning sense. And even supposing that a few deliberators do have an "interest" in the relevant and damning sense, it clearly wouldn't be right to exclude them. Also, juries usually need unanimous consensus; but I never ask for that much when it comes to policy. After all, juries have the power to send people to their deaths; popular

214. See MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994).

215. *Id.* at 58.

assemblies might revoke affirmative action. That might put things in perspective!

Perhaps one last empirical matter might allay a concern that people are always looking out for their self-interest in deliberations: after one Fishkin-controlled Deliberative Poll, taxpayers “were willing to pay *at least* \$1 more on their monthly bill for renewable energy.”²¹⁶ In three separate Deliberative Polls conducted by the Texan utilities industry, participant willingness to pay more on their bills increased after deliberations by an average of approximately 30 percentage points.²¹⁷ But I do not deny that areas of discontinuity suggest that we should not depend on the analogy too heavily.

Another realistic concern with the jury analogy comes from Cass Sunstein. His general worry is that juries tend towards extremism and polarization: “People who are opposed to the minimum wage are likely, after talking to each other, to be still more opposed; people who tend to support gun control are likely, after discussion, to support gun control with considerable enthusiasm.”²¹⁸ His empirical findings suggest that “for any dollar above zero, the general effect of [jury] deliberations [is] to increase awards above those of the median voter.”²¹⁹ In sum, groups tend to polarize to extreme positions. Surely, any deliberative mechanism will have to be careful to avoid some of the tendencies Sunstein diagnoses as proclivities for group interaction.

While Sunstein’s diagnosis has significant implications for the practice of juries awarding punitive damages, taking account of this particular pathology of group deliberations is built into my institutional design. Even Sunstein admits that “Fishkin’s groups do not polarize, at least not systematically; this result is undoubtedly a product of the distinctive setting, in which materials are presented on each issue, with corresponding claims of fact and value.”²²⁰ Since my branch works like Fishkin’s, polarization should be easy to avoid.

The jury analogy can, indeed, fail at various critical points. But precisely because it fails, I do not rely too heavily on jury procedures. Instead of twelve people picked by lawyers making racial and ideological assumptions

216. FISHKIN, VOICE OF THE PEOPLE, *supra* note 8, at 220.

217. *Id.*

218. Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 71 (2000).

219. *Id.* at 96.

220. *Id.* at 73 n.6. Sunstein offers many other reasons for Fishkin’s success. *See id.* at 116-17.

in their screening processes at the *voir dire*, the system I adapt from Fishkin insists on a more elaborate scheme of representation and randomization. Moreover, I depend on moderators to ensure fruitful informed discussion as opposed to relying on potentially tyrannical foreman. My supermajority requirements, in conjunction with the filtration mechanisms in place within the deliberation, help my proposal embody the virtues of a truly republican, that is truly representative and citizenship-enhancing, form of government.

H. "Why require a two-thirds supermajority to enact a law at the assemblies? Why isn't half enough? Isn't a simple majority all that is required on most versions of majoritarian democracy?"

My attention to detail in this context may seem too technical: at such an early design stage, it may not make sense to impose even more foreign notions upon our form of government, even if the basic idea of the supermajority is written into the Constitution. Nonetheless, I include it for a particular effect critical in any attempt to institutionalize the assembly: I want to build in an acknowledgment of the sheer power of the institution. If voters get too excited by this possibility for direct democracy, I suspect that they might resort to it to try to settle too many complex and charged questions of policy. There may be dangers associated with constant deliberative assemblies and having every political question settled by them. In a sense, I would like to preserve a dose of "normal politics" and have the population resort to these "revolutionary" assemblies in times of unrest where normal politics seem to lose contact with the voice of the people.²²¹ But in order to keep "revolutionary" politics at bay, only to be used in special circumstances, I want to make it slightly more difficult to get a law enacted through the use of the procedure. Of course, there will be many that do not want the bar for "revolutionary" politics to be lowered.

To be sure, this hesitance seems to work against the spirit of what I have been arguing until now. If I am right that a normative conception of popular

221. The normal-revolutionary dichotomy was, of course, first introduced by THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (Otto Neurath et al. eds., 1970) (1962) and later co-opted for political theory by BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991) in his discussion of the "constitutional moments" of American constitutional history. Ackerman never cites Kuhn, but he does entitle two of his chapters "Normal Politics" and "Higher Lawmaking." *See id.* at 230-94. Since deliberative democracy has come in vogue, some like to think of "moments" as episodes of mass deliberation. I hope my proposal presents a way to induce more mass deliberation, since revolutionary politics seems to have a capacity for legitimation that normal politics does not, at least according to Ackerman. *See generally id.*

sovereignty demands that we establish deliberative assemblies as I conceive them, then perhaps I should back away from my supermajority requirement and let the Popular branch settle as many questions as the people want them to settle.²²² If I am right that our separation of powers can accommodate deliberative assemblies and that Arendt is wrong to see the ward system as completely revolutionary, why bother with the normal-revolutionary distinction here confusing matters? As a first rejoinder to the second part of this challenge, here the notion of the revolutionary is re-conceptualized: I do not mean to adopt Arendt's revolutionary category of violence and complete newness.²²³ Instead, the revolutionary could take the form of mass mobilization or might be a response to a social movement (to Arendt's horror), resulting in Popular legislation.

As an approach to the previous question, I can also invoke again the notion of the mixed regime and insist that the goal of popular sovereignty is only part of the locus of legitimacy. Deliberative assemblies cannot be expected to settle all issues, so some circumscription of appropriate agenda items might be in order. What special circumstances would warrant the use of the assembly consistent with principles of popular sovereignty? I have no principled answer except to say that we should be wary of its abuse; the supermajority requirement might prevent bad-faith or specious measures from going to trial, so to speak, because the chances of winning Popularly, are not very high. It might prevent very close calls from going to "the people", allowing elected representatives to hammer out a compromise, as their job often requires. Proximally, and for the most part, I leave the Founders' republic pretty much intact.

My distaste for our current system is evinced exactly because people (read: "the people") have few places to turn for considered change or reform. The options given to the citizen by the two-party system are quite limited, and political action has become a game of money-allocation by PACs to get access to the decision-makers. Instead of encouraging real revolution, I want to provide an outlet for revolutionary political action. To be sure, there will always be an uphill battle to win a supermajority. But when the time is ripe, it would be more efficient and civic to have citizens decide political questions without having senators play politics for years before getting a bill passed.

222. See BURNHEIM, *supra* note 7 (arguing that we should do away with all representative electoral politics); Threlkeld, *supra* note 9 (arguing rather radically that all legislation should be jury-tested).

223. See ARENDT, *supra* note 86; *supra* Part III.A.

Perhaps as a last empirical note on the subject of supermajorities, I should establish that supermajorities do not keep the bar for revolutionary politics too high. Supermajority requirements may be as silly as unanimity requirements; relying on the need for consensus could undermine the whole political process in a society where majoritarianism has always been the procedural rule. But the empirical work shows that supermajorities can be achieved, even given the informational vacuum usually associated with mass democracy. Of the sixty-nine statewide measures that went to the "citizen lawmakers" in the elections of 1987 and 1988, twenty-three achieved consensus rates of sixty-five percent and above, one way or the other.²²⁴ Also, of the 157 statewide initiatives *passed* by voters from 1970 through 1986, fifty-three achieved the supermajority.²²⁵ Moreover, "Massachusetts and New Hampshire both required a two-thirds majority of citizens voting in a referendum to ratify their original constitutions. In both cases the initial drafts failed to achieve this majority, but did so subsequently following the inclusion of the Bill of Rights."²²⁶

Europe, too, provides grist for the supermajoritarians mill:

The political instability that plagued France in the years following World War II led more than 79 percent of French voters in September 1958 to approve a new constitution. Constitution-like changes to give Algeria its independence and thus end a bloody war were approved by majorities of French voters in excess of 75 and 90 percent in 1961 and 1962, respectively. Eighty three percent of those voting in a referendum in Ireland in 1972 voted in favor of joining the European Economic Community (EEC). More than 98 percent of voters in Iceland voted in 1944 to separate from Denmark and form a republic.²²⁷

These are the sorts of facts that encourage Dennis Mueller to set his supermajority requirement for efforts of direct democracy at a three-fourths majority, an even more skewed mandate than I recommend here.²²⁸ He

224. DAVID SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 211-14 (1989).

225. *Id.* at 287-94. Using sixty-five percent as a benchmark here is arbitrary: sixty-five is chosen because it is a round number slightly below the two-thirds supermajority I would recommend, but above a three-fifths majority.

226. MUELLER, *supra* note 32, at 180 (citing DAVID BUTLER & AUSTIN RANNEY, *REFERENDUMS: A STUDY IN PRACTICE AND THEORY* 68-69 (1978)). In this earlier volume, Butler and Ranney offer the justification for preferring "referendums" to "referenda." *Id.* at 2.

227. *Id.* at 180.

228. *See id.* at 182.

argues that majority parties in either multi-party or two-party regimes can too easily take advantage of simple majority requirements in systems with a referendum also built in. Big parties can provide big cues to voters, especially in cases of statute-phrasings that are bewildering in the first place.²²⁹ Even if Julian Eule is correct that “political parties seldom take a stand on ballot measures [and that] external cues are more difficult to come by [in referendums] than in candidate elections,”²³⁰ Mueller is also right that big parties in certain situations could abuse a simple majority requirement. If a big party can push through a referendum and get it passed, the party can undertake major governmental reorganization to benefit itself for the long term.²³¹ On behalf of Mueller’s case:

[o]n two occasions . . . referenda in Ireland were held to replace Ireland’s system of proportional representation with electoral rules favoring a two-party system as in Britain. The referenda were initiated by the Fiana Fail, Ireland’s largest political party, in an effort to increase its power The basic rules by which political outcomes are chosen should have a greater permanence than the outcomes themselves.²³²

This raises the possibility that different thresholds can be set for different sorts of direct democracy, a suggestion made by Mueller himself, and one that I followed above. But more complex schemes could be arranged: for example, statewide statutory initiatives might require only a simple majority, while constitutional referendums or amendments proposed by initiative might demand a three-fourths majority. Mandatory referendums demanded by state constitutions, since they have already passed through a vast filtrating system of representation, might only require a simple majority. National constitutional amendments would have the highest Popular threshold for passage, at three-fourths or four-fifths, as I have already suggested. A chart could be drawn, data could be crunched, and an equation could be calculated. But I just keep the two-thirds here as a simplified guideline before the scientific calculators come out.

I. A cute little question could be asked now: “Once a supermajority requirement is in place, isn’t any effect of deliberation essentially undetectable? Even if deliberation produces some changes in popular

229. See *id.* at 181.

230. Eule, *supra* note 39, at 1516.

231. MUELLER, *supra* note 32, at 181.

232. *Id.*

opinion, are any large enough to make a difference with the supermajority requirement?"

Michael Neblo's recurring finding that deliberation produces consensus around a middle of the road compromise suggests the opposite of Sunstein's findings about polarization.²³³ Deliberators can learn to compromise and rally around a moderate policy in supermajorities, even if the groups start the deliberation heavily polarized.

The real evidence to answer this question, however, should come from Fishkin's 'before and after' findings. In his "selected results" from his eight Deliberative Polls from 1994 to 1997 (a reason for slight suspicion, to be sure), Fishkin reports in nineteen out of forty-one issues that deliberation produced a change of percentage that would alter the side accruing a simple majority. Fifteen different issues acquired supermajorities one way or the other after deliberation, while nine of these had 'already' achieved a supermajority prior to deliberation. But of these nine, three had supermajorities affirming their opposing side after deliberation! Furthermore, in nine other cases, on the other hand, issues that had received a supermajority prior to deliberation failed to hold onto their 'lead' after deliberation. And five of these cases were ones that had a shift in even the simple majorities after deliberations.²³⁴ Even if Fishkin's data here is selective, it still bears out the claim that deliberation's effect would not leave supermajorities useless or impossible to attain.

V. THE THEORY PART OF THEORY AND PRACTICE (WITH MAXIMS FOR GOOD MEASURE)

In conquering the muddled uncertainties of politics and suborning reasonableness to rationality, they [philosophers and ideal discourse theorists] have served the ideal of enlightenment better than they have informed our political judgment Rights get philosophically vindicated but only as abstractions that undermine the democratic communities that breathe life into rights; justice is given an unimpeachable credential in epistemology without giving it a firm hold on action or the deliberative process and then recommended to citizens, but in a form that answers to the constraints not of citizenship but of philosophy; civility is celebrated, but

233. See Neblo, *supra* note 49; Sunstein, *supra* note 218, at 74-75.

234. FISHKIN, VOICE OF THE PEOPLE, *supra* note 8, at 214-20. Again here I use the sixty-five percent cutoff to determine a supermajority. And in the last statistic, three of the five were the ones that demonstrated 'super shifts' in supermajorities.

construed as incompatible with the sorts of collective human choice and communal purposes that give civility its political meaning.²³⁵

I do need some theory to ground part of my approach to practical reform. In particular, this Part aims to explore how deliberative assemblies can be viewed as achieving reasonable decisions, without depending too heavily on any metaphysical conception of rationality as a supreme legitimator.

Joshua Cohen provides some philosophical tools to ground and better describe a version of deliberative democracy, even though I shall try to be less foundationalist than he about the role of Reason in such a paradigm. Some (including Cohen) think the whole framework of deliberative democracy falls apart without an appeal to a strong notion of rationality. I hope to explore in this Part how we can do without the strong version of the ideal, because I am suspicious of Reason's tyranny and elitism; I do not think we need to be *über*reasoners to make approximately legitimate law in a democracy. Such metanarratives (even the Reason *über alles* story), such versions of the good life, are precisely the kind of talk that people like Ackerman cannot allow in the political public sphere in the first place.²³⁶ But Habermas's more textured neutrality allows for moral disagreement—and claims of superiority—in the public sphere. We should expect and hope to see the irrational voice itself in a public sphere with any vitality.

In the first instance, discourse theory is supposed to be postmetaphysical. Thus Habermas's wavering about whether people really can be the source of legitimacy, especially if their reasoning and deliberation do not effect rational or perfectly just results, undermines his use of democratic discourse as a legitimator. Here, the faith that perfect institutional procedures will produce perfectly egalitarian results need not bind us: this faith causes headaches for many deliberative democrats who do not want to admit that a perfect procedure without any substance (whatever that might mean) cannot guarantee results. Habermas's criticisms of Cohen will be enough to help us take a stand where Habermas himself wavers. I conclude that such procedures, when checked by other institutions, are decent approximations of legitimation (without the major problems of an "ideal" deliberative democracy), which is reason enough to give them a try. Habermas writes that "[d]eliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation that can fulfill its socially integrative function only because citizens expect its results

235. BENJAMIN BARBER, *THE CONQUEST OF POLITICS: LIBERAL PHILOSOPHY IN DEMOCRATIC TIMES* 193 (1990).

236. *See, e.g.*, BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

to have a *reasonable* quality.”²³⁷ This constitution of will-formation would be a refreshing component to add to our democracy; we have other branches in place to make sure that deliberative bodies will will more than merely reasonable results—they must also will just results. But in my model, such guarantors are peripheral to the deliberative bodies even if they must be considered at the design phase.

A. *Maxim-izing Deliberation*

Cohen enumerates five conditions for the deliberative situation that require some qualification for my use of the paradigm, mostly because the deliberative situation here is not an ideal type. Instead, it is instrumental to establishing a better, stronger democracy; the procedure is not grounded in transcendental notions of Rationality. With Cohen, I want to say something similar to the claim that laws achieve *a* justification through public argument,²³⁸ but since I allow in my model other non-deliberative branches of government, public argument and reasons cannot be the only things that accomplish the task.

1. D1’

Cohen’s first condition (D1) for the deliberative situation is that it must be ongoing, independent, and expected to continue indefinitely.²³⁹ This is fundamental for allowing each generation to change their minds, to alter and abolish their laws. Each policy decided by a civic jury could never be decisive forever. This is rather uncontroversial. And yet, implicit in the open-endedness of the process, is an undermining of the ideal procedure as such. If the ideal procedure privileges deliberation, and deliberation can never decide anything decisively, then we must see actual deliberation as stripped of its rigid Kantianism. If Reason could provide one answer, questions would be settled; deliberation, though apparently replicable, would be unnecessary. Prioritizing argument in politics is, as Bonnie Honig has suggested is the case for Arendt (a deliberative theorist, though not necessarily a democrat), “disruptive, agonistic, and most important, *never*

237. HABERMAS, *supra* note 12, at 304 (emphasis added). Notice that deliberation, on this reading, produces in itself the expectation, the anticipation, that its results will be *reasonable*, not rational.

238. Cohen, *supra* note 3, at 72.

239. *Id.* at 72.

over.”²⁴⁰ This does not mean, however, that we cannot keep deliberative laws enacted for minimum sentences, so to speak. A moratorium on affirmative action for three years may be just the social experiment the next deliberative jury needs to continue with the never-ending process of authorship. If Boalt has no blacks without affirmative action, maybe the ban could ‘sunset.’

2. D2’

The second condition (D2) is a little stickier. Cohen writes that the members must share “a commitment to coordinating their activities within institutions that make deliberation possible and according to norms they arrive at through their deliberation. For them, free deliberation among equals is *the* basis of legitimacy.”²⁴¹ This is a rather stringent (and circular) condition that is made much weaker in my model. As I have made clear, no reason—not even a democratic or liberal one—can justify constraining the debate. Moreover, the norms decided in deliberation cannot be the only sources of legitimacy.

Responding to the criticisms of Frank Michelman,²⁴² deliberative democrats would have to agree that commitment to the institutions that make

240. BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 9 (1993) (emphasis added).

241. Cohen, *supra* note 3, at 72 (emphasis added).

242. The basic strategy of Michelman’s 1997 attack on deliberative democracy is to draw attention to the tensions inherent in the “liberal” and “deontological” aspects of the ideal deliberative procedure. Michelman, *supra* note 10, at 152. He correctly places the site of the law’s validation in the democratic procedure for the deliberative democrats, but then asks how they can justify a civil government that must always coerce, that must always provide the enabling conditions for a deliberative regime. When deliberative democrats then appeal to a version of “rights foundationalism,” they are left in an undemocratic position where arguments for “deep democracy” seem tangential at best. *Id.* at 154-59. If everyone must agree to his political situations, there is no plausible reason to imagine that deliberation will necessarily work toward the end of “rights foundationalism.” And if we have a procedural account that endorses only procedures ‘all the way down,’ the procedures themselves must come about unjustified by a deliberative mechanism. When deliberative democrats use their “co-originality thesis” (even though they are clever enough to avoid the “self-legitimation thesis”) as a rejoinder to this problematic (as Habermas and Rawls do), we are left wondering how coherent such a view can be. See HABERMAS, *supra* note 12; JOHN RAWLS, *POLITICAL LIBERALISM* (1996). Deliberative politics cannot be self-legitimizing and they cannot be depended upon without other mechanisms already safely in place.

In this context, I cannot quite address all of Michelman’s concerns. To be sure, he is correct in most of what he says if his caricature of deliberative democrats is also correct. But precisely because I think many of these deliberative democrats would heartily endorse my

deliberation possible must prevent deliberators from always coordinating their activities according to the norms achieved through deliberation. Deliberation can go awry and produce decisions that flout liberal principles by denying a minimal level of equal concern and respect for all citizens. Therefore, I would revise the condition to something closer to D2': *The members of the deliberative assembly are aware that they are deciding policy for an entire polity, not just themselves, and that they may still be checked by constitutional principles. Of course, they are free to try to revise such principles, subject to judicial constraints. For them, free deliberation among equals is a basis of legitimacy in a republic. That said, they still recognize that there is a vast system of checks and balances to which they may be answerable and which attain their own levels of legitimacy.*

The ACLU, for example, could bring suit against the people of the United States if the Popular branch decides on a course of action that it feels unconstitutionally infringes upon rights of a minority group.²⁴³

3. D3'

Cohen's third prescriptive feature of deliberative democracy (D3) needs to be dumped. He argues that deliberators "do not think that some particular set of preferences, conviction, or ideal is mandatory."²⁴⁴ This implausible condition might only obtain in some ideal (not my ideal, it should be noted) situation. It is entirely possible, and sometimes desirable, that people should actually think the world hinges on a policy decision. Deliberators who have strong convictions should be encouraged, not told that they are not deliberating "properly." Habermas's hope that there will be no losers after political deliberation is thus outlandish. Embedded in Habermas's and

recommendations here, the implementation of deliberative democracy might be more sound than its theoretic instantiations. For example, "Mark Warren makes the case that deliberative democracy *requires* an authority component because of its functional nature: there are too many decisions for a minipolus [the formal name for Dahl's recommendation] or policy forum to consider." DELEON, *supra* note 6, at 120; Mark Warren, *Deliberative Democracy and Authority*, 90 AM. POL. SCI. REV. 46 (1996). Surely, this is another way of addressing Michelman's charge, and making the case I do here.

243. As previously noted, the Popular branch's institution into the system of checks and balances would alter theories of judicial review and its purview. More often than not, I think the courts would tend to work to help enforce the voice of the people against legislators and agenda-setters who refuse to heed the 'civic voice.' But the judiciary would also occasionally need to overturn 'undemocratic' decisions, even supposing they were achieved democratically.

244. Cohen, *supra* note 3, at 72.

Cohen's program for consensus is a goal (or teleology) of unanimity even though Habermas is, of course, aware that such unanimity may be a "methodological fiction." Only anarchists or totalitarians really think unanimity is a goal worth aiming for.²⁴⁵ The rest of us realize that there will always be struggles for recognition that go unnoticed, dissensus creeping underneath the presentment of "political mandates." Some groups will always have an agonistic and contestatory relationship with the state in a complex society. And the hope is that deliberative politics can help give access to more contesting voices so better compromises can be achieved, not so a consensus might be reached.

4. D4'

D4 is mostly well-suited to my use: "Because the members of a democratic association regard deliberative procedures as the source of legitimacy, it is important . . . that the terms of their association not merely be the results of their deliberation, but also be manifest to them as such."²⁴⁶ As usual, here again we must replace the phrase "the source" with the less demanding "*a* source." D4 also contains a subtle defense of non-deliberative mechanisms to serve as the "institutions in which the connections between deliberation and outcomes are evident."²⁴⁷ If the input of deliberators is not heeded by the representatives in the Executive and Legislative branches, appeal to the Judiciary would be appropriate to make deliberative decisions "manifest."

5. D5'

The last of the conditions is the most metaphysical, but arguably among the least controversial. D5 requires that "members recognize one another as having deliberative capacities."²⁴⁸ A strain of the "capacities argument" that is used to justify the "equal concern and respect" criterion of much modern liberalism, this condition does not require full "concern" (because people will still want to forward group interests—and we should not stop people from doing so as a matter of liberal principle). Nonetheless, it does demand equal respect, making the assumption that people are not too stupid to rule

245. See ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970) for a representative view advocating unanimous direct democracy.

246. Cohen, *supra* note 3, at 73.

247. *Id.*

248. *Id.*

themselves. Equal respect may be enough to get people to talk to each other respectfully, a necessary condition for deliberation.

B. *Sufficient Conditions?*

But what about sufficient conditions? What kinds of things will guarantee that conversation will be fruitful? In moments of frankness about the public sphere, we must acknowledge with Cohen that “in a well-ordered democracy, political debate is organized around alternative conceptions of the public good.”²⁴⁹ Yet it may be too much to ask for everyone to have the public good at heart when they come to the proverbial table. At a minimum, we can say that we would like political ideals to be “focused in the first instance on the appropriate conduct of public affairs.”²⁵⁰ This minimum actually provides a rather unconstrained deliberative situation, assuming that deliberation attempts to embody a conversation about *political* goals.

C. *Limits*

But Cohen provides another facet of his deliberative procedure that may prove useful in illuminating some of the *limits* of deliberation. He claims that “there is a need to decide on an agenda, to propose alternative solutions to the problems on the agenda, supporting those solutions with reasons, and to conclude by settling on an alternative.”²⁵¹ Ironically, in my institutionally realistic model, virtually all of these aspects need to be addressed by non-deliberative mechanisms. *Deciding on an agenda* will largely be in the hands of elites; *proposing solutions* will take expertise; *providing organized reasons* will be done better by think-tanks than by citizens; and *settling* will always require an aggregating endpoint.

Habermas is sensitive to the totalizing nature of Cohen’s project. Habermas’s main finding against Cohen is that Cohen assumes that society can be steered as a whole by deliberation. Habermas, in contrast, wants to see the deliberative procedure “as the core structure in a separate, constitutionally organized political system, but not as a model for all social institutions (and not even for all government institutions).”²⁵² This statement runs counter to what most assume to be true of Habermas (and Arendt), that deliberation should penetrate all spheres of life. But Habermas

249. *Id.* at 68.

250. *Id.* at 71.

251. *Id.* at 73.

252. HABERMAS, *supra* note 12, at 305.

avoids the circularity objection of people like Michelman (as I do here) by acknowledging "that democratic procedure must be embedded in contexts it cannot itself regulate."²⁵³

Part VI below addresses how we can amend Cohen's formulation of a deliberative democracy to allow for non-deliberative publics and operationalize them in a way that connects them with deliberative publics. I argue that we need a particular conception of civil society to realize the potential for a transformation of politics in the direction of deliberation. When we embrace this theoretical conception, we can find a way to cope with the agenda-setting problem that I have been deferring until this final Part. I have hesitated because I realize just how challenging the agenda-setting problem can be.

VI. THE CIVIL SOCIETY AS AGENDA-SETTER

Habermas objects that ideal conceptions of deliberative politics are "silent about the relation between decision-oriented deliberations . . . and the informal processes of opinion-formation in the public sphere."²⁵⁴ To address this objection and speak to the silence, I recruit Habermas's thoughts on civil society.²⁵⁵ Precisely because the Popular branch needs agenda-setters,

253. *Id.* Gutmann and Thompson make a similar justification for deliberative procedures as a check to both liberal proceduralism and liberal constitutionalism, both of which remain incomplete without an institutionalized deliberative politics. *See* GUTMANN & THOMPSON, *supra* note 4, at 26-51. Of course, they never actually tell us how to introduce deliberation into our regime as I try to here.

254. HABERMAS, *supra* note 12, at 307.

255. The invocation of the "civil society" connection is, obviously, not something new to Habermas. At least since Hegel this domain has been considered the place where the "citizen finds his social place, his standing, the approbation of his fellows, and possibly some of his self-respect." SHKLAR, *supra* note 1, at 63. I appeal to Habermas here because his discourse-theoretic model helps demonstrate how the discourse networks that organize in civil society can gain access to political institutions and how they may remain separate as a playground for completely unconstrained talk. Civil society is a good site to practice for the agonistic battlefield of politics. Yet, although Habermas understates its role and its capacity to influence politics, he provides the basis for a more expansive use. I argue for a broader definition of civil society but keep intact Habermas's vision of discursive civil societies (though I relax the requirement that they be deliberative) and his insight that civil societies function to bridge the "system" and "lifeworld." Yet, in many ways, my version of civil society here is not orthodox Habermas precisely because I emphasize the need for non-deliberative processes in civil societies and de-emphasize any metaphysical need for Reason as a legitimator. I acknowledge, of course, that orthodox Habermasians can be more extreme than Habermas himself. *See, e.g.,* SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* (1992).

and because agenda-setting usually takes place on the level of the elites, I need a mechanism where private individuals have better access to the information-gatherers and filterers who will ultimately more directly influence agenda-setting. Though my model achieves deliberation at the decision-making level, the question of what is up for discussion still needs to be “steered by communicative power.”²⁵⁶ In addressing the agenda-setting dilemma, we can avoid the criticisms launched against the likes of Gutmann and Thompson that “one could quarrel with the range of opinions that [they] find ‘morally respectable’ and therefore worthy of serious engagement.”²⁵⁷ Civil society, then, can function as a communicative steering mechanism that facilitates getting certain issues as well as perspectives before deliberative bodies.²⁵⁸ In summary of what is to follow, civil society is, on my model, “a network for communicating information and points of view . . . ; the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified public opinions.”²⁵⁹ To be sure, the agenda-setters still control too much “communicative action” even in this paradigm, but at least they can be under Popular control if the deliberative assemblies are made sensitive to the integrative demands of civil society. Moreover, because voting is no longer merely aggregative on my model, but is preceded by intensive deliberation, agenda-setting is less likely to be able to control outcomes, the concern that makes this Part so necessary in the first place.

At the level of civil societies, even the less stringent deliberative situation described in Part V above is too much to hope for, so I part from Habermas in requiring of civil societies that they be public spheres themselves, insofar as public spheres are locales for some form of deliberation. Even Habermas himself seems to acknowledge the advantage of “unrestricted communication,” as well as a “right to remain strangers” with fellow citizens.²⁶⁰ Civil society might be a layer of social relation

256. HABERMAS, *supra* note 12, at 330.

257. Peter Berkowitz, *The Debating Society*, THE NEW REPUBLIC, Nov. 25, 1996 at 36.

258. Some think that civil societies can only rarely exert their influence in crisis situations. See JEAN COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 587 (1992); HABERMAS, *supra* note 12, at 380. Even Ackerman’s “moments” might be construed as civil society’s mass deliberation as a result of crisis. See generally ACKERMAN, *supra* note 223. It is instructive to note that for Habermas, however, we are always in a relevant crisis: the crisis of legitimacy always arises. Of course, as Posner notes, Habermas’s crisis may be more of a German than an American concern. POSNER, *supra* note 29, at 98-107. But just because Americans are blasé about legitimacy does not make it any less a legitimate concern.

259. HABERMAS, *supra* note 12, at 360.

260. *Id.* at 308.

where we may be more entitled to apolitical talk or to ethnocentric particularism. Thus, I am suspicious of the claim that civil societies “can blossom only in an already rationalized lifeworld,”²⁶¹ because excessive rationalization of the lifeworld is precisely one of the forces that civil society militates against in its self-defense against the system’s imposed rationalizing forces.²⁶²

Of course, Habermas is still correct to note that civil society’s pathologies need tempering through the lifeworld’s rationalization, which is effected by publicity in the political sphere. But civil societies—or more specifically, bowling leagues—*need not* be sites for anything more than irrational bonding. We may *hope* with Habermas that those group affiliations lead to political and collective action. Yet, adopting my proposal here could plausibly cause a transformation of the mediatization of the political public sphere, trickling down to civil societies’ relationship thereto. With media attention focused on citizen debate instead of sound-bite marketing, civil societies will likely respond accordingly and get involved in the conversation because they can no longer afford simply to attempt to buy votes from elites in Congress or to pay marketing firms.

I follow Habermas in placing a lot of currency on whether civil society “develops impulses with enough vitality to bring conflicts from the periphery into the center of the political system.”²⁶³ In the best of cases, civil society can provide this link from social concern to political concern. Nonetheless, Fishkin cautions that “[t]he political sphere must be protected from being determined by spillover effects from social or economic inequalities in the society.”²⁶⁴ This conflation of spheres depicts our current situation of the corruption of our representative system, one that regularly experiences spillover from moneyed or empowered civil societies. Yet, while the sphere should not be *determined* by such inequalities, the interests of civil societies (often desires for a form of recognition) should have some input into the political public sphere. Civil society must serve not only a “signal” function, but also a “problematizing” and “thematizing”

261. *Id.* at 371.

262. This is not to controvert the trivial point that the lifeworld must be rationalized simply in virtue of being a lifeworld: the lifeworld is always socially constructed through various forms of rational communication. In this sense, the lifeworld is already rationalized, but not necessarily a rationalization afforded by activity in the political public sphere, which is the kind of rationalization that I think Habermas has in mind here.

263. *Id.* at 330.

264. FISHKIN, DEMOCRACY AND DELIBERATION, *supra* note 8, at 31.

function.²⁶⁵ Though Habermas understates civil societies' capacity to transform more than "the personnel and programming of [the] system," mostly because that is all they can currently hope to do, he is right to emphasize that its impact upon the political process is, and should be, through *indirect* influence.²⁶⁶ This isolation of sorts allows it to function as the kind of social glue that Michael Sandel and Robert Putnam urge us to embrace,²⁶⁷ while it also helps cure the pathologies of homogenous civil societies. Sections A through C clear some theoretical ground; Section D closes how we began—imagining practical institutional design.

A. *Garnering Communicative Power*

To have deliberative assemblies steered by "communicative power," we could presumably try to depend upon prior deliberative assemblies to have citizens voice concerns to signal future topics to be adjudicated by a subsequent assembly. Or, we could just employ Deliberative Polling to elect candidates, who would be depended upon to put the 'right' issues on the agenda. But these possibilities stray too far from the purpose of the Popular branch. The assemblies could not be focused if they tried to address too many concerns, and the selection of candidates requires picking packages with so many different factors and vectors that no preference ranking could really do justice to the complexity of picking a 'bundle' of platforms. Though my deliberative assemblies cannot aim to constrain conversation, clearly I must have a particular (atomized) topic for each deliberative situation; such situations could not purport to decide anything if they were chaotic.²⁶⁸

But this does not entail that the political public sphere itself cannot be steered, or that it needs to be completely and purely deliberative. Not only is such a version of deliberation unrealistic; but it is not even helpful as a regulative ideal. Appealing to deliberation as the only source of legitimacy is just the sort of thing Michelman argues is incoherent about discourse theory.²⁶⁹ As long as general election candidates are steered by a demi-

265. HABERMAS, *supra* note 12, at 359.

266. *Id.* at 372.

267. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); SANDEL, *supra* note 204.

268. This is a serious concern with Threlkeld's idea, where civil juries decide everything. See Threlkeld, *supra* note 9, at 5.

269. See generally Michelman, *supra* note 10. For a more lengthy exposition of his strategy, see *supra* note 242.

deliberative society that puts them in power, they can enjoy authority more comfortably.²⁷⁰ “[T]he political influence that the actors gain through public communication must *ultimately* rest on the resonance and indeed the approval of a lay public”²⁷¹

On an ongoing basis, however, we should expect and encourage forces exogenous to the state and the political public sphere to make claims against elected representatives and the population at large. And so much the better for the *political* sphere because in this way it is open to competing, or contestatory, public spheres that Nancy Fraser would want us to be attentive to.²⁷² Because Habermas’s model of civil society functions as a bridge between the private life of citizens and more public political concerns, it is a good nexus for, in his terms, the “lifeworld” to exert force upon the “system.” Indeed, for Habermas, civil society functions both as a self-defense mechanism for the lifeworld to make sure it does not get completely “colonized” by the system and as a check upon the activities of the state when it meddles in public political affairs. In my model, civil society is both a structure that helps protect the private sphere’s inviolability (though I will not develop a defense of this function of civil society here),²⁷³ and a structure that helps exert pressure upon the framing of the political public sphere itself. With more organized access to the “system,” the state, the deliberative assemblies will not be suspected of being merely tools that the state can use to impose its agenda from the top-down.²⁷⁴

270. My argument does not suggest that we must do away with general election procedures. I imagine that if my proposal were adopted, campaigns for general elections would center around which items the candidate intends to put on the Popular agenda, giving more substance to the idea of a political mandate. For an elaboration, see *infra* Part VI.D.4. And that might shift the kind of mediatization of the political public sphere so much that politicization might cease to be a bad word.

271. HABERMAS, *supra* note 12, at 364.

272. See generally NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION (1997); Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, in SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS (Linda Nicholson & Steven Seidman eds., 1995).

273. For this argument, omnipresent in the civil society literature, see, for example, PUTNAM *supra* note 267; and CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

274. An aside: Neblo presents three cases where deliberation produces altered opinions. In the issues of affirmative action and whether gays should be allowed to serve in the military, noticeable changes in the deliberators can be charted. But Neblo labels the third case, of deliberation about effecting a flat tax, an “outlier” because it did not produce the same statistically significant shifts in opinion. Geoffrey Garrett has suggested that the third case is the most important for testing deliberation because it was the one case where all present

B. Mild Interest-Group Pluralism

Immediately, it should be obvious that my use of civil societies bears resemblance to an endorsement of a mild version of interest-group pluralism.²⁷⁵ Civil societies, often bundled into issue-specified interest groups, can have political influence that is normatively desirable. For Habermas, influence “is converted into political *power*—into a potential for rendering binding decisions—only when it affects the beliefs and decisions of *authorized* members of the political system and determines the behavior of voters, legislators, officials, and so forth.”²⁷⁶ In my model, civil societies and interest groups could predominantly touch the authorized members of the political system by rallying potential deliberators, a primary nexus of authorized power in my proposed regime.

One can see how money and inequality of access sneak their way back into my model through civil society. The interest groups with the biggest advertising funds can conceivably rally the most support; they can then get better access to the agenda-setters and influence deliberative assemblies, albeit in a much more indirect fashion than they influence policy in our current regime. But it is important to note against such objections that giving civil societies (or interest groups) the indirect power to set the agenda should be considered more democratic than providing them with the direct power ultimately to decide issues, which is the sort of power they often enjoy now. We currently live in the latter kind of oligarchic regime, and it would be a move of dramatic progress (and regime-mixing) to try to instantiate the former. Admittedly, I want to hold onto civil societies because of their valuable social (not merely political) functions. Identity, patriotism, and

would be directly affected by the outcome. Geoffrey Garrett, personal communication (1999). But given that Neblo’s deliberators are always samples drawn from college students, it is not clear that tax code affects them substantively more than affirmative action. Moreover, Neblo’s deliberators are not as informed as they are in Fishkin’s models; Neblo spends less time briefing and more time listening. Therefore, we should expect that lack of knowledge in this instance contributed to a lack of fruitful deliberation. Last, when Neblo notes that his deliberators did not feel very strongly about the flat tax one way or other, we might use that as evidence (much as we do Steve Forbes’s political failures) that the flat tax does not have substantial enough popular support to be an item on the agenda in the first place. See Neblo, *supra* note 50. This last possible retort allows me to ignore Neblo’s “outlier” finding because such a subject would not be entitled (by any urging of civil society) to a deliberative jury in the first place, since it would be especially unlikely to achieve a supermajority.

275. Setting interest-group pluralism as an alternative to republicanism is emphasized by Richard Epstein. See Epstein, *supra* note 16. I make an effort here to navigate back and forth, to have my cake and eat it, too.

276. HABERMAS, *supra* note 12, at 363.

other kinds of emotional connections to fellow citizens are radically important for social maintenance, so I have no interest in trying to disband civil societies that foster such senses, even if they are forums for self-interest and not the public interest. All the better that such associations foster strong beliefs; such beliefs will make a more vital public sphere. As William Galston remarks,

even to achieve the kind of free self-reflection that many liberals prize, it is better to begin by believing something. Rational deliberation among ways of life is far more meaningful if (and I am tempted to say *only* if) the stakes are meaningful, that is, if the deliberator has strong convictions against which competing claims can be weighed.²⁷⁷

Social standing, too, can be elevated and leveled by the actions of civil society; such standing need not rely on formal political equality within the state. When political actors do so rely on political equality, social parity rarely follows.

Furthermore, some body must do the partisan work of making arguments for adoption of one policy over another. If a racist group wants to submit a recommendation of their own for a deliberative assembly about affirmative action, there is no democratic reason that could justify their efforts being marginalized. In fact, such material is likely to make the deliberations and the choices that deliberators make based upon discussion of the materials more legitimate, not less so. Of course, in the unlikely event that members of the deliberative assembly ban affirmative action for the reasons provided by the KKK, the courts could easily overturn the Popular branch without hesitation.

C. Private and Public Contestations

Perhaps another advantage of conceiving of civil societies in the way I have here is that such a conception addresses the concerns of liberal feminist thinkers who “fear that the liberal version of the neutrality principle makes it possible to keep from the agenda precisely those concerns hitherto designated as ‘private’ according to conventional [read: phallogentric] standards.”²⁷⁸ It further addresses the concerns of communitarians who fear that the Arendtian gestures in Habermas towards a plenary political publicity

277. WILLIAM GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 255 (1991).

278. HABERMAS, *supra* note 12, at 312.

co-opt private life in an undesirable and infeasible manner. Essentially, both camps attack the homogenizing and totalizing potential of discourse theory (probably because both orientations are susceptible to the critique as well).²⁷⁹

Habermas meets the feminists' fear halfway and distinguishes "procedural constraints on public discourses from a constraint or limitation on the *range of topics* open to public discourse."²⁸⁰ While he thinks that his tolerant version of procedural neutrality is unconstrained enough to admit topics from the private sphere, the private sphere itself, he argues, is left protected: "Legally granted liberties entitle one to *drop out of* communicative action"²⁸¹ Of course, others question Habermas's basis for such a distinction and see a "bias against privacy" implicit in his version of the political public sphere.²⁸² But Habermas is insistent: "Certainly the intimate sphere must be protected from intrusive forces and the critical eyes of strangers."²⁸³ He knows that his version of the public sphere can trickle down into private life, so he needs a place in his schema where the lifeworld can protect itself.

Civil society provides just this protection. Civil societies are necessarily, and by definition, less juridified than the political public sphere because in the political public sphere attention is focused upon the intersubjective validity of laws. Indeed, the sphere only exists for the purpose of validation and intersubjective legitimation. By providing space for civil societies in the

279. Since under strict neutrality liberalism, no textured version of the good life gets publicized, so to speak, we get a rather homogenous public sphere where issues traditionally conceived as private do not get airtime. And radical communitarianism suffers from a similar problem when it recommends staying loyal to local inherited communities that are often homogenous. Discourse theory, on the other hand, aims to find a way of coping with the ever-shifting public-private split and the fact of overlapping and conflicting loyalties.

280. *Id.* at 313.

281. *Id.* at 120.

282. See, e.g., Axel Honneth, *The Other of Justice: Habermas and the Ethical Challenge of Postmodernism*, in THE CAMBRIDGE COMPANION TO HABERMAS 289-323 (Stephen K. White ed., 1995); J. Donald Moon, *Practical Discourse and Communicative Ethics*, in THE CAMBRIDGE COMPANION TO HABERMAS, *supra*, at 143-64; Tracy Strong & Frank Sposito, *Habermas's Significant Other*, in THE CAMBRIDGE COMPANION TO HABERMAS, *supra*, at 263-88; Georgia Warnke, *Communicative Rationality and Cultural Values*, in THE CAMBRIDGE COMPANION TO HABERMAS, *supra*, at 120-42; Mark Warren, *The Self in Discursive Democracy*, in THE CAMBRIDGE COMPANION TO HABERMAS, *supra*, at 167-200. Each of these articles, from different assumptions and angles, lashes a similar critique. But it is Moon who is most consumed with this tension in Habermas. See J. Donald Moon, *Constrained Discourse and Public Life*, 19 POL. THEORY 202-29 (1991).

283. HABERMAS, *supra* note 12, at 313.

schema, however, and by letting civil societies play a more central role in politics, we can be assured that the political realm itself will be less juridified. This is desirable because with less concern for entrenched legal norms, we are more likely to be successful in attempts at experimentalism and progress.

The portrait of civil society that I have sketched here highlights its functional potential as an information gatherer and filterer. This function serves the deliberative bodies indirectly in thematizing issues as well as agenda-formation more generally. But it also has a self-protecting and self-defensive function in shielding the individual from invasive state mechanisms. Civil societies are not as repressive to individuality as state-imposed (read: top-down) agendas, even though civil societies too will often give attention to collective juridical concerns, congregating for the purposes of acting upon the law. Social movements that aim for legal mobilization are part of civil society too.

Because civil societies float in the general public sphere and are unconstrained there, "it is better suited for the 'struggle over needs' and their interpretation."²⁸⁴ Habermas is right that "[o]nly after a public 'struggle for recognition' can the contested interest positions be taken up by the responsible political authorities."²⁸⁵ Thus, civil societies can address the inviolability of the private with a view toward public recognition. If civil societies can get things on the agenda, and they are simultaneously a place for psychological clarification of identity, it is then a nexus for private concerns to be voiced publicly (when collectives feel the psychological need to petition the public sphere for recognition). Deliberative politics is then properly realized as an "interplay between democratically institutionalized will-formation" in the Popular branch and "informal opinion-formation" in civil societies.²⁸⁶ In this interplay, the game of keeping the public public and the private private has the best chance for success.

D. The Practice of Politicizing Civil Society

Now that I have cleared some theoretical ground for the integration of civil society into the political public sphere, I must find a practical way of actually setting the agenda for the deliberative assembly with this marriage in mind. Is there a practical way for the Popular branch to take account of all plausible positions when it convenes to deliberate upon a policy? Who is

284. *Id.* at 314.

285. *Id.*

286. *Id.* at 308.

going to decide which opinions count as bona fide opinions? Jim Fishkin? Would not interest groups with more money have more “communicative power”? And would all bona fide opinions get equal airtime?

Let me sketch a tentative way to address these difficult design questions.

1. Submitting Opinion Proposals

Anyone should be able to submit a potential opinion to be included in the deliberative assembly. That ‘opinion proposal’ could take many forms: It might be an exercise in biblical exegesis; a scientific number-crunching assessment of efficiency; an argument of normative political theory; or even a personal rant. Unfortunately, I can see no legitimate way to discount any of these sorts of arguments on substantive grounds.²⁸⁷ Obviously, though, we must limit the proliferation somehow because we could be sure that a pamphlet of 500 pages of opinions, containing every possible argument on a policy issue would rarely, if ever, get read in its entirety. Moreover, trying to impart too many potential arguments at a plenary session prior to breaking up into smaller groups would extend the “educative” part of the deliberations too much, when deference to the best-looking expert in plenary sessions is a likely outcome of that sort of design.

But when seminar professors assign so much reading that no one can do all of it, many participants have done some of it and can make some valuable contribution, even if oftentimes participants are talking at cross-purposes. Such a scenario might obtain on the days of deliberation: each deliberator will have read different sections of the pamphlet and will have her own

287. Again, here I differ from many discourse theorists. Because most base their ideals of deliberation upon the legitimating powers of Reason, they are forced to disallow talk that appeals to versions of the good life that claim a superiority of one group over another. *See generally* ACKERMAN, *supra* note 238; Cohen, *supra* note 3. As annoying as biblical arguments may be in political discussions, I cannot see how they can be left out of the political public sphere in a democracy. I suppose I may be naively hoping that these kinds of arguments just will not be very convincing. I am guessing that as public reasons, which are precisely what is required in the political public sphere, they do not tend to work. Habermas gives us another good reason to allow moralists to express their opinions: “if neutrality were in addition to require that ethical questions be *bracketed out* of political discourse in general, then such discourse would forfeit its power to . . . change prepolitical attitudes, need interpretations, and value orientations.” HABERMAS, *supra* note 12, at 309. We must at least try to avoid the tyranny of Reason, the effect of closing out all reasons that are not sufficiently ‘public’ in character. Reason is, after all, just one version of the good life—one only made necessary for the political public sphere by the contingent fact of value pluralism. Let us also not forget that if the Popular branch passes a law because of a biblical argument, the courts could strike it down.

contribution to make. Indeed, each deliberator could be assigned small chunks, requiring her to make presentations in the smaller groups. Fishkin's research, after all, shows that people do make an effort to get informed before they show up to deliberate with their peers so as not to look foolish.²⁸⁸ But now I am idealizing the seminar room a little too much; most seminars are failures anyway.

A further institutional design could help my need here for filtering and integration. When we consider *to whom* the opinion proposal is submitted, a model emerges that integrates civil society with the political public sphere in a more organized way.

2. The Bureaucracy

Ideally, it would be most efficient to have "Yea" and "Nay" subcommittees for each of my Popular conventions (as Australia has). In citywide, statewide, or nationwide deliberative assemblies, having two subcommittees, both being guided and watched over by the general Commission sketched above,²⁸⁹ would be a good way to ensure that filtration is facilitated by citizens themselves—in particular, non-deliberating partisan citizens. Recreating the advantages of the two-party system for each Popular proposition could help bundle the platforms into neat packages. To be sure, the leaders of these subcommittees will be appointed elites of some kind: they will most likely be influential interest-group activists that are in the public eye (and hence somewhat politically accountable), chosen by the Commission to represent the side.

But the subcommittees will need to remain sensitive to others in their camp in order to rally their support, both their financial backing as well as their personnel. In this scenario, then, smaller interest groups appeal (or perhaps even pander) to the subcommittees—which are civil societies, not state-run units—rather than to state mechanisms directly. In this manner, more perspective would get consideration and presentation.

3. The Recurring Problems of Campaign Financing and Voucher Reform

Of course, money is still a huge problem in this schema. Cash would still be very useful at the statute drafting (pre-assembly) stage, even if spending

288. See Fishkin & Luskin, *supra* note 8.

289. See my integration of Arne Leonard's CCCA, *supra* note 22, and accompanying text at Part I.A.

on advertising campaigns would require altering the medium and the message: the media blitz would have to be less sound-bite driven because campaigns would ultimately be subject to real scrutiny during the days of deliberation and may never reach the randomly selected jurors. Nonetheless, there is no easy or democratically feasible way to curb political speech to keep rich folks out of funding activities in civil society. Very soon, I will try to give a more satisfactory approach to this problem.

But once a subject for debate is in the public sphere and on the Popular agenda, there is a way to level the playing field. The general Commission that oversees the deliberative assembly should, after establishing the question to be settled, accept applications from interest groups and non-profit organizations wanting to be considered for public monies allocated for gathering, filtering, and disseminating information. These groups would need to demonstrate that their efforts would further the debate in some educational fashion, and that their interests are substantially related to the question at issue. Of course, each applicant would need to certify that any monies would not be squandered (but could be transferred to another qualified group); that it would not take any private monies or solicit independent expenditures after being awarded one of the coveted spots on the public money roster; and that it is not a front-group for privately funded groups looking to get a piece of the public purse. Any failure to meet these criteria would result in immediate disqualification.

All groups passing the preliminary scrutiny of the Commission would then compose a paragraph-long mission statement to be included in a general mailing. Prior to jury selection, the Commission would send these mini-statements to each member of the community (the pool from which the policy jury is to be randomly selected), informing them of the upcoming deliberative assembly. In the mailing, each citizen would be told that the Commission has allocated a prescribed amount of money to be distributed among the various interest groups included in the enclosed pamphlet. The citizen would be told that the interest groups included have agreed to take only public money, but are entitled to transfer their funds to another partisan non-profit group if they feel that their money would be better utilized under a larger umbrella. The citizen would be informed that the public monies that have been allocated for this stage of the deliberative assembly are aimed to help thematize the issues relevant for the deliberative assembly. The money would fund educational efforts, including buying media time, to give citizens a chance to have input into their fellows who will ultimately decide the issue at the assembly. The citizen would then be asked to allocate fifty points

among the different groups in whatever way she feels appropriate.²⁹⁰ Citizens would have a few weeks to complete their forms and return their preferences along with an affidavit and accompanying identification documents to ensure that the points were not awarded under coercion or on the promise of perquisites, and to ensure that each individual only gets to award fifty points. The funds available would then be distributed by the Commission to the groups, proportional to the points awarded by the general public.

Many good citizens will probably toss the lengthy pamphlet into the garbage. But as long as we get a reasonable response rate,²⁹¹ this measure will help ensure that some new faces will get access to the political public sphere, actors usually reserving their activities to civil society. This allocation mechanism does not solve all of our agenda-setting problems, but it does expand who can get heard. Even the privately-funded civil associations that will not qualify for public money may still want to pander to some of the smaller civil societies that get awarded substantial monies in the public mechanism. Substantial monies at stake for contest by the general electorate may also encourage “big money” to help some of the smaller civil associations indirectly, by advertising for them with independent expenditures (though solicitation of them may be illegal). This contest for cash at the outset would inundate people with important information that would get them to start thinking about the issues even before they are called to the proverbial roundtable.

One of the advantages of the design described in the previous subsection is that new committees, Yea and Nay, are effectively created to cater

290. Obviously, this suggestion bears close resemblance to Ackerman's “Patriot” proposal. There are, of course, a number of differences: I do not do away with all private money (civil societies can opt-out); I do not allow candidates or parties to vie for the cash; I do not prescribe in advance how much to allocate to the program or to a particular election—I will leave it to appropriations committees to figure a reasonable amount to allot. But I will not belabor the differences in this context. See Ackerman, *supra* note 36.

291. The clever will notice here that I seem remarkably cavalier about the voluntary response problem when I need to ignore it for my proposals. But I never claim that such a problem always can be avoided. Instead, I argue that will-formation, which takes place in the deliberative assemblies, requires true representativeness without the response problem. In opinion-formation, taking place at the level of civil society and its organization and mobilization, however, no such assurances need be made: civil society is predominantly a site of voluntarism. Fishkin's Deliberative Polls can be vindicated, then, as their standard for voluntary response need be no more stringent than that of radio talk-shows and town hall meetings, both sites of civil society and opinion-formation with no necessary (only hoped for) integrated political influence.

to each deliberative situation. To be sure, bargaining (not deliberation) would be the most likely form of communication *within* the subcommittees. But that is entirely appropriate and is just one more instance where non-deliberative mechanisms can cater to deliberation. These committees would be heterogeneous publics, as Young likes to call them.²⁹² Therefore, they would not require special representation or protection for groups because the subcommittees would absorb minority arguments to help their coalitions—and cash flows—in any event. But since the arguments of the subcommittees would ultimately be subjected to the thoughtful consideration of 525 random and representative people, they would need to make forceful arguments, not just target the right pockets with campaign contributions, as interest groups are wont to do in our current system.

4. Turning Back the Clock: Another Agenda-Setting Issue

I have said nothing about setting the agenda *before* an issue gets signaled for deliberative adjudication. Is there no way that the people can have better access to getting issues on the Popular agenda in the first place? Of course, only people with substantial funds for signature-collection would have any hope of getting a Popular initiative before the people.²⁹³

Presumably, I could try arguing for a public funds allocation program similar to the one described above at an earlier stage of the process, allowing interest groups access to public money continuously. But this emendation of the system would be exorbitantly more costly,²⁹⁴ making it more infeasible than it already is. Moreover, with constant begging coming from so many different angles and causes, the field of public discourse would be too undisciplined to serve as the sort of jolt for focused discussion that such a program aims to effect.

Perhaps there is another way to address the problem by encouraging candidates in general elections to set their agenda in line with the kinds of items they would like to see raised in future deliberative assemblies of the Popular branch. Since legislatures, with the supermajority requirement discussed above, could send items onto the Popular agenda for adjudication, candidates could be assessed in terms of what they actually want to bring

292. See generally YOUNG, *supra* note 13.

293. See generally BRODER, *supra* note 117.

294. It is difficult to predict just how much the Popular branch would cost, mostly because there is no way to anticipate just how popular its mechanisms would be and how often people would want to call upon them. Nonetheless, it is obviously far more costly to provide constant public funding to any interest group that will not squander the money.

before the public's purview. Of course, such a structural change of campaigns certainly could not be forced upon candidates. Telling candidates what they must say during a campaign feels wrong.

But empirical evidence suggests that candidates would have a propensity to operate in this manner under the conditions of a deliberative regime in any event. Candidates have noticed that running on the platform of letting the voters decide issues directly, can propel their campaigns: "Candidates for governor in California now regularly sponsor their own initiatives during their gubernatorial campaign."²⁹⁵ Furthermore, in 1992, the Colorado and Michigan governors used similar tactics.²⁹⁶ With the structural transformation of the public sphere, we could expect this kind of behavior more often. This helps voters set the deliberative agenda more directly, albeit through a representative body.

Also, in states that make wide use of current referendum practices, "issue activists have learned that placing an initiative on the ballot, regardless of the outcome of the election, generates widespread media attention for their issue."²⁹⁷ So, one of the unintended consequences of this part of the proposal is that it counteracts the supermajority requirement that aims to dissuade potential losers from wasting energy and (public) money. Since issue salience is important in its own right, many issue activists may not care that their measures will fail to pass deliberative muster. Once they acquire media attention and heightened sensitivity to their issue, groups may, in the final analysis, resort to less deliberative (and less democratic) mechanisms to forward their agenda. And if groups just make a game out of deliberative assemblies, they will cease to serve their purpose of will-formation.

But is that really so? Will no important objective be served if they are used 'merely' as a means of gaining salience? The shift of the nexus of power from the voter to the deliberator should have substantial effects on how the individual is treated by the mass media. The aggregative aspects of my proposed reform could still potentially commodify voters: interest

295. Magleby, *supra* note 20, at 29 (citing Pete Wilson, Jerry Brown, George Deukmejian, Diane Feinstein, and John Van de Kamp). I should note that Magleby does not find this phenomenon commendable. On the contrary, he thinks this sort of strategy "not only diverts legislators from the work of the legislature, but encourages legislators to duck tough issues and 'let the voters decide.'" *Id.* Obviously, I respectfully dissent. But perhaps Magleby would be more inclined to agree with my reliance on his work if he knew how I wanted to change the initiative system.

296. *Id.* (citing Roy Romer and John Engler).

297. *Id.* at 28.

groups could still calculate how much media money they need to spend to get their message implanted in potential jurors. Nonetheless, the 'means of production' of the aggregation undergoes a transformation. The private vote, as John Stuart Mill astutely noted, is necessarily a commodity with an opportunity for exercising private interests.²⁹⁸ But public deliberation could change perceptions of interests and responsibilities, and thus cure the ills Mill diagnoses with the private vote. The media, if it aims to shape public *will*, would need to undertake its own transformation to fit better with the decision procedure. Since the aggregation of uninformed votes would no longer win policy elections, it is no longer in the media-manipulator's interest to use techniques that avoid intelligent and more detailed information. To be sure, these speculations about what might happen to the mass media are ultimately empirical questions that we can only answer by structurally transforming the public sphere.

Even if no initiative activists hope to win a supermajority at a deliberative assembly, and just desire the salience in the media associated with an assembly, a compelling state interest is still served. The level of discourse in the public arena would be heightened, and the sorts of arguments that must be put forth in the context of the assemblies must go beyond advertising campaigns. Moreover, access to the public sphere is expanded more widely into voluntarist civil societies by providing them public funds for issue-education. In this way, opinion-formation in civil society would have indirect but substantial input into policy decisions taken in the political public sphere.

VII. CONCLUSION, OR JUST THE BEGINNING

Since Gerald Rosenberg has shown that courts are a generally ineffective mechanism for bringing about social change, political theorists have been forced to look beyond judicial activism for other hopeful routes of progress and reform.²⁹⁹ Even before the empirical realities of the failures of judicial activism were broadcast, the standard objections to activism, viewing it as undemocratic and counter-majoritarian, still obtained.

The model for reform that I offer here may be naïve. But the interaction of civil society and deliberative publics provides another possibility for *democratic* change. We should keep the courts and the elected

298. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 323-39 (Geraint Williams ed., 1993) (1861).

299. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

representatives in place to keep the majority in check, as any good Madisonian would. But the addition of the Popular branch into our institutional mechanisms might get us closer to Avishai Margalit's *civilized* society.³⁰⁰ Instead of tortuously making efforts to get our institutions not to humiliate anyone (the precondition for the *decent* society), we can simultaneously, through confronting each other in a face-to-face democracy, actually hope for better. And our failure at achieving even *decency* to this point might indicate that we should be aiming even higher if we only want to satisfy the lesser condition. When we do, if we do, and adopt a form of the proposal endorsed here, we might have something to help the neo-republicans (like Sandel) cure "democracy's discontent."³⁰¹ We could point to a distinctly American procedure that could be the basis for a substantive civic voice.

300. See generally AVISHAI MARGALIT, *THE DECENT SOCIETY* (Naomi Goldblum trans., 1996) (1995).

301. See generally SANDEL, *supra* note 204.