CAN WE MAKE THE CONSTITUTION MORE DEMOCRATIC?

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INTRODUCTION

Recent years have seen renewed calls to revise the Constitution to make it more democratic.¹ We do not necessarily disagree with those who argue that some parts of the Constitution are flawed and should, if possible, be reformed. However, efforts to alter the Constitution in order to make it more democratic face serious obstacles that advocates of reform have largely ignored. In particular, they have failed to grapple with the reality of widespread political ignorance, which both reduces the extent to which the Constitution can ever be fully democratic and makes the reform process more difficult.

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

In part II, we provide examples of how elected officials and interest groups employ pro-democracy rhetoric to cloak reform proposals. Examples include the 22nd Amendment, term limits and other Contract with America reform proposals, voter initiative and referendum, the constantly changing positions of leading political actors on the question of executive power, and battles over the composition

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¹ The most prominent is probably SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006). See also ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003); DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY (1996);
of the federal courts, including FDR’s Court-Packing plan and the recent fight over filibusters. By highlighting the exploitation of political ignorance by elites, part II suggests that substantive visions of democracy—as structured by political ignorance—have significantly affected constitutional debates throughout our history.

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

These dangers may to some extent be mitigated if large-scale constitutional change is kept within the confines of Article V of the Constitution. As one of us has argued elsewhere, the stringent supermajority requirements of Article V make it difficult for political elites to force through constitutional change by manipulating voter ignorance.2 However, Article V has the defects of its virtues, which include the near-impossibility of quickly enacting any major controversial amendments. As a result, many advocates of large-scale constitutional reform argue for a process that circumvents the usual Article V procedure.3 Circumventing Article V may be an idea whose time has come. But it is important to recognize an important weakness of this proposal: it tends to exacerbate the dangers posed by the combination of a crisis atmosphere and widespread political ignorance.

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3 See, e.g., LAZARE, supra note ___ (suggesting that the House of Representatives might initiate constitutional reform on its own initiative); LEVINSON, supra note ___ at 168-77 (calling for a new constitutional convention to draft a document that could be approved in a national referendum); cf. Akhil R. Amar, America’s Constitution: A Biography 295-99 (2005) (arguing that such an approach would be consistent with the Constitution); Amar, Popular Sovereignty and Constitutional Amendment, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 89 (Sanford Levinson ed., 1995) (same).
I. WHAT KIND OF DEMOCRACY DO WE WANT?

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

A. Competing Theories of Democratic Participation.

Theories of democratic participation can be ranked on a continuum regarding the degree of political knowledge that they require. At one extreme are advocates of deliberative democracy, who want voters to not only understand specific policy issues but to be able to deliberate about them in a sophisticated manner. In some versions of the theory, citizens are expected to accept complex restrictions on modes of deliberation of a sort that are normally the province of professional political philosophers. For example, some leading advocates of deliberative democracy claim that the deliberative process must be limited to arguments based on “impartiality” between citizens and incorporating the “mutual recognition of competent subjects.” Others contend that “citizens” should only be allowed to “appeal to reasons that are recognizably moral in form and mutually acceptable in content” and only make empirical claims backed by reliable scientific evidence.

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

In between these two extremes lie several other approaches, which require varying degrees of voter sophistication. For example, the theory of retrospective voting is a relatively modest extension of the Schumpeterian approach, requiring voters to assess incumbents on the basis of their record in office and “punish” them at the polls if that record seems poor.\(^10\) However, retrospective voting may still impose a substantial information burden on voters if they are to be able to accurately assess the quality of incumbents’ policies. They need to know which officials are responsible for which issues, and also to be able to tell how well the issue in question is being handled.\(^11\)

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

Finally, there are a variety of other theories of participation, not all of which can be considered in detail here. Perhaps the best known is that of “Burkean trusteeship,” which requires that voters judge not the merits of competing policies, but those of competing candidates. Edmund Burke, the eighteenth century British statesman who played a key role in developing the theory, claimed that

\(^8\) JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 272 (3d ed. 1942).
\(^10\) See references in Somin, Political Ignorance, at 1298-1300.
\(^11\) Id.
voters should choose representatives of superior judgment and virtue—a “natural aristocracy”—and then give them broad discretion to make policy. Explicitly factoring voter ignorance into his theory, Burke argued that this is the best approach because most ordinary citizens lack sufficient sophistication to “think or act without direction.” However, even Burkean trusteeship places a substantial information burden on voters, because it requires them to be able to judge the qualifications and “virtue” of competing candidates.

Finally, there are more radical theories of direct democracy, which would require hands-on voter participation in everyday governance. This approach is, of course, similar to the direct democracy of ancient Athens, and raises some of the same issues of voter competence as were debated in the ancient world.

B. The Shadow of Rational Political Ignorance.

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

Decades of survey research has established that most citizens have only minimal knowledge politics and public policy. Surveys conducted around the time of the closely contested 2004 presidential election showed that some 70% of the public was unaware that the Bush administration’s prescription drug plan had been adopted – even though it was the largest and most expensive new domestic program in

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14 Id. at 398. This brief summary deliberately ignores many internal contradictions and qualifications in Burke’s own views because my interest is not in Burke per se, but in the knowledge requirements of the trusteeship theory of representation more generally. For a more nuanced analysis of Burke’s theory of trusteeship representation, see PITKIN, supra note 32, at 127–31, 168–89.

15 Somin, Political Ignorance, at 1300-1302.


18 For citations to the literature and additional data, see Somin, Political Ignorance, supra note at 1304-14.; see also MICHAEL X. DELLI CARPINI & SCOTT KEEPER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996) (documenting widespread voter ignorance and explaining the importance of political knowledge to the democratic process); SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS: OPINION SURVEYS AND THE WILL OF THE PEOPLE (2003); BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER (2007).
decades. \(^\text{19}\) Fifty-eight percent admitted that they had heard “little” or “nothing” about the controversial USA Patriot Act. \(^\text{20}\) Perhaps more telling, while only one in four Americans can name more than one of the five freedoms guaranteed by the First Amendment, more than half can name at least two members of the Simpsons cartoon family. \(^\text{21}\)

Such widespread ignorance is not the result of irrationality or stupidity. Since the 1950s, \(^\text{22}\) many scholars have recognized that voters are “rationally ignorant” about politics. Because of the low significance of any single vote, \(^\text{23}\) even voters who make the tremendous effort to become highly informed have almost no chance to swing the electoral outcome in favor of the “better” candidate or party. \(^\text{24}\) The acquisition of political information is a classic collective action problem, a situation in which a valuable product (in this case, information) is undersupplied because any one individual’s possible contribution to its production is insignificant. Those who choose not to contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others. \(^\text{25}\) Obviously, some voters acquire political knowledge for reasons unrelated to casting a “better” ballot; for example, for entertainment value. However, the evidence suggests that few acquire it to decrease the prevalence of political ignorance. \(^\text{26}\)

In addition to acquiring relatively little knowledge about politics, rationally ignorant voters also have poor incentives to make good use of the information they do possess. They may limit not only the

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\(^\text{20}\) Id.


\(^\text{22}\) For the pioneering early work on this subject, see Anthony Downs, *An Economic Theory of Democracy* 238–76 (1957).


\(^\text{24}\) Id. at 25.


\(^\text{26}\) And if that is not enough, even well-informed Americans know very little about specific policy questions (so much so that general knowledge about politics is not especially useful in sorting out one’s views on specific policy questions). See Martin Gilens, *Political Ignorance and Collective Policy Preferences*, 95 *Am. Pol. Sci. Rev.* 379 (2001).
amount of information they acquire but “how rationally they process the information they do have.”

Rational ignorance is exacerbated by “rational irrationality.”

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

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

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27 Bryan Caplan, *Rational Ignorance vs. Rational Irrationality*, 54 KYKLOS 3, 5 (2001); see also CAPLAN, supra note ___ (explicating and defending the theory of the “rational irrationality” of voters in greater detail).
28 Id.
30 Somin, supra note ___ at 260-61.
31 For example, the most widely known facts about President George H.W. Bush were his distaste for broccoli and that he had a dog named Millie. Delli Carpini & Keeter, supra note ___ at 101.
32 See id. at 261 (citing studies).
Voters who possess little political knowledge can sometimes use information shortcuts to offset their ignorance. Possible shortcuts include cues from respected opinion leaders, knowledge about political parties, and politically relevant information from everyday life.

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

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

C. Implications for Constitutional Reform.

36 For the leading advocate of the efficacy of this shortcut, see SAMUEL POPKIN, THE REASONING VOTER (1991); Samuel Popkin, Information Shortcuts and the Reasoning Voter, in INFORMATION, PARTICIPATION, AND CHOICE 17 (Bernard Grofman ed. 1993). See also DONALD WITTMAN, THE MYTH OF DEMOCRATIC FAILURE 1–6 (1995). Examples of politically relevant information from every day life may include experience serving in the military (which could provide insight into policy decisions related to war), experience of being unemployed (which may help the citizen understand some aspects of economic policy), or experience of inflation (which alerts the citizen to the possibility that inflation is rising and has therefore become a more serious public policy problem).
37 Somin, Voter Ignorance, at 419–31; Somin, Ignorance is No Bliss.
38 Ilya Somin, Resolving the Democratic Dilemma?, 16 YALE J. ON REG. 401, 410-14 (1999). See infra part II (highlighting ways that elected official and interest groups often seek to conceal true purpose of reform proposals).
39 Somin, Knowledge About Ignorance, at 262-65.
40 CAPLAN, supra note ______.
If we are to make progress in the debate over constitutional reform, those who advocate changing the Constitution to make it more democratic must specify which theory of democratic participation they have in mind. Different theories may imply very different changes to the constitutional structure.

For example, deliberative democracy – if feasible at all – probably requires a major effort to increase voters’ knowledge and understanding of public policy. Retrospective voting, by contrast, may require making it easier for voters to trace particular policies to specific office-holders. This might increase voters’ ability to identify politicians who deserve “credit” or “blame” for particular policy outcomes.

The relatively minimalistic Schumpeterian approach probably requires less radical changes than the other models. However, if we are truly committed to the idea that voters should be able to remove incumbent policy makers if they are dissatisfied with them, we may wish to do away with life-tenured judges, the Federal Reserve, and other institutions in which key policymakers are insulated from punishment at the ballot box.

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

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

If constitutional reform is to provide genuine increases in democratic participation, advocates must

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41 Somin, *Voter Ignorance*, at 438-42.
42 Somin, *Countermajoritarian Difficulty*, at 1298-1302.
explain how their proposal will either increase voter knowledge, or facilitate democracy even in spite of widespread political ignorance. 43

In a 2004 book, Bruce Ackerman and James Fishkin put forward a proposal to try to circumvent the political ignorance that otherwise blocks implementation of deliberative democracy. 44 They contend that political ignorance can be alleviated by requiring voters to spend a day in deliberation of public policy issues prior to each presidential election. 45 We are skeptical that a single day of discussion can do much to alleviate massive ignorance; still less can it alleviate rational irrationality. Nonetheless, Ackerman and Fishkin are right to focus on the problem of ignorance and to look for a possible solution. Unfortunately, most of the debate over constitutional reform has proceeded without consideration of the problem of ignorance. That neglect should be remedied.

II. THE RHETORIC AND REALITY OF PRO-DEMOCRACY REFORMS

Elected officials and interest groups often mask their pursuit of substantive policy goals when advancing structural reform proposals. Seeking to capitalize on widespread voter ignorance, reform proposals are packaged in ways to garner public support—shifting the emphasis away from contested policy outcomes and towards good government reforms. This part will provide some examples of this practice. In so doing, we do not mean to suggest that all proponents of structural reform are untrustworthy—seeking to cloak their true agenda from voters. 46 Our point, instead, is that there is a mismatch between the public debate over structural reform proposals and the true purpose of these reforms—a mismatch that is fueled by political ignorance.

43 We do not doubt that structural changes intended to make the Constitution more democratic will create incentives for voters to pay more attention to policymaking. Nevertheless, rational ignorance and rational irrationality are tied to the fact that a single vote is unlikely to make a difference in shaping public policy—and proposals intended to make the Constitution more democratic will not change that reality. For similar reasons, one of us has argued that proposals to “take the Constitution from the Court” by eliminating judicial review would not create sufficient incentives for lawmakers, interest groups, and the American people to pay greater attention to constitutional questions. See Neal Devins, Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency, 34 U. Richmond L. Rev. 359, 365-67 (2000). See also Joan Larson, Constitutionalism Without Courts?, 94 Nw. U. L. Rev. 983, 990-92 (2000) (same).
44 BRUCE ACKERMAN & JAMES L. FISHKIN, DELIBERATION DAY (2004).
45 Id. at 17-38.
46 For example, we think that Sandy Levinson and many other academic proponents of structural reform are motivated by a desire to make our government more democratic.
A disjunction between the public justification and rhetoric of constitutional reform is not in and of itself harmful. As basic economics shows us, firms seeking profit for themselves can simultaneously benefit consumers. Profit-seeking entrepreneurs have incentives to create products with lower prices and higher quality than those of their competitors, thereby improving consumer welfare. However, there is no comparable necessary connection between institutional reforms motivated by substantive policy agendas and increases in democracy – however the latter is defined. Thus, there is a real danger that constitutional reforms packaged as democracy-enhancing will have no such effect.

Before turning to examples of proposals to alter the federal structure, we think it useful to set the stage for this part by talking about state voter initiatives and referenda. A majority of states, especially in the West and South, allow voters to shape constitutional values by placing legislative and constitutional reform on the ballot. Backers of this practice extol its democratic virtues, namely, that initiative and referenda encourage voters to be more engaged in policy making and that direct democracy is a more accurate measure of voter preferences than the laws and regulations produced by elected officials.47 Proponents of initiatives and referenda likewise argue that special interest politics plays a smaller role in direct democracy campaigns than it does in the state legislative process.48

But the promise and reality of direct democracy are two very different things.49 There is good reason to think that interest groups also have a strong influence over referenda, just as they do over ordinary legislation.50 For example, interest groups often sponsor initiative and referenda campaigns—with national groups writing ballot initiatives, collecting signatures, and launching public relations campaigns

49 This is not to deny that some initiative campaigns reflect popular sentiment more accurately than the state legislative process. For example, property rights reform in the aftermath of the Supreme Court's Kelo decision has been much more meaningful when pursued by citizen initiative than when pursued by the legislative process–where lawmakers in many states have capitalized on voter ignorance to push reforms that give the appearance of change while actually accomplishing very little. See Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, George Mason Law & Econ. Res. Paper 07-14 (Mar. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298
to secure the enactment of their favored policies. Similarly, they sometimes organize to defeat a popular initiative by advancing competing initiative proposals that are intended to confuse voters (so that voters will maintain the status quo by defeating the popular initiative). More generally, voters (by a six to one majority in a 1990 California poll) question their ability to “make an intelligent choice” when casting their ballots. And if that is not enough, initiative sponsors often sell measures that voters disapprove of by packaging them with measures that voters support—so, for example, limits on the contractual rights of same-sex couples (something voters may disapprove of) are packaged with prohibitions of same-sex marriage.

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

Consider, for example, various proposals tied to the composition of the Supreme Court and to the process by which federal judges are confirmed by the Senate. When Franklin Delano Roosevelt

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51 See Garrett, supra; Hahn & Kamiencki, supra at 20; Richard J. Ellis, Democratic Delusions: The Initiative Process in America102-09 (2002). More than that, special interests sometimes take over populist initiatives—making use of their deep pockets to see to it that their own interests were served in the initiative campaign. See David S. Broder, Democracy Derailed: Initiative Campaigns and the Power of Money 154 (2000). At the same time, initiative opponents sometimes mischaracterize the role of special interests. When Colorado passed an anti-gay rights initiative, for example, initiative opponents miscast “the proponents of Amendment 2 as a loose conspiracy of national organizations—a web of right-wingers and religious fanatics with a far-reaching agenda.” Robert F. Nagel, Playing Defense, 6 WM. & MARY BILL RTS. J. 167, 171 (1997).

52 See John Garamendi, California’s Ballot Industry, N.Y. TIMES, May 7, 1990 at A-15 (discussing insurance industry’s sponsoring of “initiatives designed to neutralize consumer-sponsored initiatives on the same ballot”). Special interests, moreover, launch t.v. campaigns to defeat initiatives they dislike. See, e.g., Evan Halper, Tobacco Firms Light Up Airwaves, L. A. TIMES, Oct. 5, 2006 at B-1 (discussing tobacco interests’ efforts to characterize an initiative on cigarette taxes as a “ploy by bottom-line driven hospitals and HMOs to boost profits”).

53 See George Skelton, Voters Say Initiatives are ‘Out of Control,’ L.A. TIMES A-1, Nov. 4, 1990.


introduced his Court-packing plan, the president did not mention his frustration with Supreme Court decisions limiting New Deal initiatives. Instead, Roosevelt spoke of the problem of “aged or infirm judges” and claimed that superannuated Justices lacked the “mental or physical vigor” to examine “complicated and changed conditions.” In other words, the Supreme Court needed new, younger blood to function effectively. This claim was quickly rebuffed by Chief Justice Hughes, who wrote the Senate that “apart from any question of policy” an increase in the number of Justices “would not promote the efficiency of the Court.” For his part, Roosevelt was forced to admit the true purposes of his plan, namely, that the Court was standing in the way of the “modern movement for social and economic progress through legislation.”

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

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

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57 6 Public Papers and Addresses of Franklin D. Roosevelt at 55 (1937 volume).
58 S. Rep No. 711, 75th Cong., 1st Sess. At PIN (1937). - SWEM
59 6 Public Papers and Addresses of Franklin Delano Roosevelt (1937 volume) at PIN (approx 124).
63 For a general defense of the filibuster (both with respect to judicial nominees and legislation), see 139 Cong. Rec. S5719 (daily ed. May 7, 1993) (statement of Sen. Dole).
The fact that Democrats opposed Bush nominees on ideological grounds and Republicans opposed Clinton nominees for ideological reasons was downplayed in these filibuster fights. The reason: lawmakers thought neutral-sounding rhetoric about democratic values and potential abuses of power were a better way to advance their partisan objectives than an outright defense of their practices on ideological grounds. Indeed, 2005 focus group interviews by Democratic strategists revealed that voters would not embrace a partisan attack on Bush's judicial nominees; in contrast, voters did think it wrong for Republicans to "change the rules in the middle of the game" and do away with the filibuster in order to force up or down votes on Bush's judicial picks.64

That Republicans and Democrats alter their positions on filibusters whenever there is a change of party in the White House underscores the fact that ideology, not views about democracy, defines lawmaker attitudes on the appropriate and inappropriate uses of the filibuster. More than that, the strategic use of pro-democracy rhetoric makes clear that lawmakers do not see reform proposals as a way of engaging the American people in constitutional or policy discourse; lawmakers and interest groups, instead, are interested in advancing a substantive agenda and the rhetoric of democracy is simply a tool that allows partisans to advance their positions.65

Congressional views towards the separation of powers follow a nearly identical script: Republican and Democratic attitudes towards presidential power are hinged on who sits in the White House. When Bill Clinton was president, Republicans viewed oversight as integral to a well functioning democracy. Reflecting the view that power should not be centralized in a too powerful president,

64 See Matt Bai, The Framing Wars, N.Y. TIMES MAG., July 17, 2005 at 38. Interest groups opposed to the 1987 Robert Bork Supreme Court nomination likewise made use of focus groups to sort out how best to frame their message. In particular, after learning that the abortion issue would not play with most voters, pro-choice interest groups and Democratic Senators shifted their message away from abortion and to a broader attack on privacy. Mark Gittenstein, A Matter of Principle 112-17 (1992) In full page newspaper ads, anti-Bork interests claimed that "[y]our personal privacy . . . has never been in greater danger," including "your freedom to make your own decisions about marriage and family, childrearing, and parenting." Planned Parenthood Fed'n of Am., Advertisement, WASH. POST, Sept. 14, 1987 at A-9. The fact that lawmakers were unlikely to enact politically unpopular restrictions on marriage, parenting, and the like did not matter. What mattered was that the abortion issue would not play and, as such, a bit of misdirection was called for.

65 Much the same can be said of recent efforts of Democratic Senators to insist that Supreme Court nominees be in the "judicial mainstream" and that the Court be ideologically diverse. For example, rather than simply say that he opposed Bush Supreme Court nominees Roberts and Alito on ideological grounds, Senator Charles Schumer said that "a Supreme Court with one Scalia and one Brennan would be a vibrant and interesting Court; but four or five of either would be utterly imbalanced" "veering it far from the core values most Americans believe in." Opening Statement of Schumer in Roberts confirmation hearing, 109th Cong. (June 26, 2001), statement of Schumer in Should Ideology Matter?
Republican Jim Leach said in 1994 that it was “indefensible that a [ Democratically controlled] Congress charged with oversight lacks the backbone to investigate the executive branch, even if it may be embarrassing to their party.” 66 For their part, Democrats accused Republicans (after their 1994 takeover of Congress) of “misusing Congressional oversight power to harass and intimidate the Administration.” 67 But when Democrats took over Congress in 2006, oversight was considered a necessary part of our system of checks and balances. Complaining that “up until now the Republican Congress has given [the George W Bush administration] . . . a blank check with no oversight, no standards, no conditions,” 68 Democrats made oversight reform a top priority. Democrats accused Congressional Republicans of “having abdicated their responsibility for oversight.” Indeed, Senator Hillary Rodham Clinton blamed much of the Iraq crisis on a “Congress [that] was supine under the Republican majority, failing to conduct oversight and [demand] accountability.” 69

Lawmaker attitudes towards the federal-state balance are likewise tied to the substantive agendas of Democrats and Republicans. In particular, there is no federalism constituency in Congress–lawmakers and interest groups regularly trade off federalism in order to pursue first order policy priorities. 70 This was true when Jeffersonians and Federalists flipped their normal positions in a fight over the Louisiana Purchase. 71 And it is true today–when Republicans eschewed and Democrats embraced states' rights in the Terri Schiavo case (where the Republican Congress enacted legislation calling upon federal courts to reconsider a state court order terminating Ms. Schiavo's life support). 72 Against this backdrop, it is not surprising that pro-federalism reform proposals are much more about substantive policy objectives than either their pro-democracy rhetoric of the federal-state balance.

66 Keith Brasher, House Inquiry is Urged on Clinton’s Land Deals, N.Y. TIMES, Jan. 12, 1994, at A-16.
Consider, for example, the 1994 Contact with America. Like many pro-federalism reform proposals, the Contract was couched in pro-democracy ideals—"a promise to restore the bonds of trust between the people and their elected representatives." Among other things, the Contract embraced the idea that states and localities are closer to the people than the federal government and, consequently, decentralized federalism is a better mechanism to satisfy voter preferences than is a unitary federal policy. By turning grants for hundreds of domestic programs into a few block grants, Republicans argued that state governments would benefit from "fewer strings" attached to the money and greater flexibility in how the chose to spend the money. Republicans also promised to "[curb] the congressional propensity to create new programs and make states pay for them," and bring an end to unfunded mandates.

A closer look at what the Republican Congress did and did not pursue, however, suggests that lawmakers were far more interested in advancing first order policy preferences than in making the government more responsive to voter preferences. Block grants were pursued in an effort to scale back programs that the new Republican majority disfavored. Most significant, the new Congress pursued welfare reform—abolishing more than a hundred social programs and replacing them with block grants that would reduce federal government spending by as much as 20 percent in food, job training, child care, and foster care. And while welfare and other block grant reforms allowed states significant power to refashion existing programs, Republicans in Congress nevertheless sought to further favored policies by placing conditions on the states.

74 See Richard Berke, Dole and Gingrich Embrace Before Republican Governors, N.Y. TIMES, Nov. 23, 1994, at A-18; Associated Press, Mandate Limit OKd in Senate: Bill Would Make U.S. Help State Pay Way, CHI. TRIB., Jan 28, 1995 at 3 (quoting Senate majority leader Bob Does as describing federalism as "the idea that power should be kept close to the people.").
76 AP, supra.
77 For a discussion of how the Reagan administration employed the rhetoric of federalism while pushing its substantive policy agenda through block grant programs, see Neal Devins & James Stedman, New Federalism in Education: The Meaning of the Chicago School Desegregation Cases, 59 NOTRE DAME L. REV. 1243 (1994).
78 Jason DeParle, House G.O.P. Would Replace Scores of Programs for the Poor, N.Y. TIMES, Dec. 9, 1994 at A-1. For an extensive examination of how welfare block grants furthered the substantive agenda of many Republicans, see CITE (Urban Institute study).
79 Conservative Republicans wanted to regulate the use of federal money so as to reduce out-of-wedlock births and penalize welfare recipients who refuse to work. Robert Pear, The 104th Congress: Welfare; Republicans’ Philosophical Discord Stalls Plan for Changes, N.Y. TIMES, Jan. 12, 1995 at A-20. Another example of Republican
Unfunded mandate reforms were largely symbolic, for Republicans and Democrats were both willing to impose unfunded mandates on the states in order to pursue favored policies. Consequently, even though Congress enacted legislation disapproving of unfunded mandates, Congress did not place meaningful limits on its power to impose unfunded mandates. For identical reasons, Republicans in Congress did not pursue another plank of their Contract with America—term limits.

Term limit reforms were intended to make members of Congress more accountable to the people who elect them and to reduce the size of the federal government—under the view that career politicians lose touch with their constituents and, instead, shift their allegiances to inside-the-Beltway special interests. In reality, the term limits movement was originally inspired by conservatives, who though “the only way to unseat the long-entrenched Democrats would be through a constitutional amendment to limit their terms.” And when Republicans took over the House in 1994, a vote on term limits was put off for lack of support and Republicans, more generally, downplayed the need to limit their terms. By 1998, several Republicans backed away from their pledge to serve no more than three terms in Congress.

The rise and fall of term limit reforms exemplifies several points made throughout this part: the propensity of politicians to curry favor with voters by claiming to be pursuing good government reforms when, in fact, they are pursuing their partisan agenda; the unwillingness of politicians to truly embrace democracy-enhancing reforms that might limit either their power or their substantive agenda; and the willingness of lawmakers to flip their positions on structural questions whenever there is a change in party leadership in either the Congress or White House.

One final (and related) example: the 22nd amendment: Approved by the Congress in 1947 and ratified by the states in X, the 22nd Amendment limits a president to two terms in office. The fight over the amendment largely broke down along party lines—with Republicans uniformly supporting the measure

80 See McGinnis and Somin, supra (explaining why Congress has incentives to pursue favored programs, not pursue a pro-federalism agenda that would curtail federal power).
84 See id.; Al Kamen, Sunday in the Loop, WASH. POST, Dec. 13, 1998 at W06.
and Democrats overwhelmingly opposed to it. Republican proponents defended the amendment as a pro-
democracy measure, claiming that the two term limit would “strengthen and safeguard democracy for
what they believed to be its greatest danger: the aggrandizement, consolidation, and even usurpation of
political power by the executive branch of government.” 85 For them, the 22\textsuperscript{nd} Amendment “was not an
undemocratic restraint upon the popular will, but a democratic restraint upon any future, dangerously
ambitious demagogue.” 86 Democratic opponents of the measure claimed that “real democracy in action’
was for the people to have the privilege of choosing whom they please as President,” that to prohibit the
reelection of “an experienced and popular President in a time of extreme national emergency”would invite
dictatorships, and that, ultimately, the amendment was a thinly veiled attempt to attack the legacy of
Franklin Delano Roosevelt (who had died in 1945, shortly after being elected for a fourth term). 87

Whether or not the 22\textsuperscript{nd} Amendment furthered or undermined democratic values, there is little
doubt that Republicans pursued this constitutional reform for partisan reasons. In both 1940 and 1944, the
Republican party platform (in an effort to derail Roosevelt’s reelection bids) called for constitutional
amendments to limit the president to two terms. 88 Campaign literature in 1940, for example, railed against
the dangers of allowing a president to “serve as a would-be dictator and made thinly veiled comparisons
between Roosevelt and the Axis powers leaders.” 89 And when Republicans took over Congress in 1946
(the first Republican Congress since Hoover), they saw passage of the 22\textsuperscript{nd} Amendment as an excellent
vehicle to both increase the power of (the Republican) Congress and to discredit the policies of Roosevelt
and then-president Harry Truman. 90

When the 22\textsuperscript{nd} Amendment was sent to the states for ratification, the presidential tenure issue held
little interest for voters and the press. “There was only spotty coverage in the local press, virtually none

85 Stephen W. Stathis, \textit{The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?}, 7 CONST.
86 Id. at 70.
87 John D. Morris, \textit{Limit of Two Terms for Any President Approved by the House}, N.Y. TIMES, Feb. 7, 1947 at 1; A.
Grimes, Democracy and the Amendments to the Constitution 122 (1978); Richard L. Strout, \textit{The 22\textsuperscript{nd} Amendment: A
89 Bruce G. Peabody and Scott E. Gant, \textit{The Twice and Future President: Constitutional Intersices and the Twenty-
90 See Strout, \textit{supra}. Not surprisingly, all Republicans voted for the amendment. Southern Democrats who
disapproved of some of the policies of Roosevelt and Truman also voted for the amendment—giving it to the two-
thirds necessary to be sent to the states. See Stathis at 67.
in national periodicals, and little public participation. Even interest groups most directly affected by the change in presidential tenure paid little attention to the ratification process.\textsuperscript{91} This uninterest is to be expected. Without knowing who sits in the White House and Congress, voters and interest groups could not predict whether the 22\textsuperscript{nd} amendment would prove useful or harmful to their favored policies.\textsuperscript{92} In contrast, during the 1940 election campaign, there was widespread public interest in the third term issue. That concern was “tied to the outcome of the election rather than any fundamental principle.”\textsuperscript{93} Put another way: Voters will pay scant attention to structural reform proposals unless those proposals are directly linked to policy questions that voters care about.

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

III. POLITICAL IGNORANCE AND THE PROCESS OF CONSTITUTIONAL CHANGE.

The problem of political ignorance impacts not only the goals of constitutional change, but also the process by which those objectives can be achieved. Political ignorance has three major implications for the process of constitutional change. First it is likely to reduce the average quality of the changes enacted. In addition, it will probably exacerbate the negative consequences of the crisis atmosphere from

\textsuperscript{91} Stathis \textit{supra} at 71.
\textsuperscript{92} For similar reasons, there is no federalism constituency in Congress. See Devins, \textit{supra} (linking absence of federalism-based interest groups to fact that interest groups cannot predict whether a broad or narrow view of federalism will serve first order policy preferences).
which large-scale constitutional change is likely to arise. Finally, the problem of political ignorance is an important, though far from decisive, consideration counseling against bypassing the amendment procedures of Article V of the Constitution.

A. Reducing the Quality of Constitutional Change.

Political ignorance and irrationality could easily reduce the quality of constitutional change. The most obvious scenario for this to happen is that ignorant voters might simply allow a flawed constitutional change to “slip by” without noticing. While this possibility seem far-fetched in the case of constitutional changes that affect important issues, it is not completely implausible. After all, more than 70 percent of the public was unaware of the passage of the 2003 prescription drug bill, which created the biggest new government program in forty years. 94 It is potentially possible that the same could happen with a flawed constitutional amendment. Some of the more technical issues raised by constitutional reformers could potentially be vulnerable to this kind of near-total ignorance. For example, efforts to change the electoral rules by which members of Congress are selected, abolish life tenure for federal judges, and revise Article V itself are unlikely to engage widespread public attention because of their unexciting nature, and the difficulty of connecting them to policy outcomes. 95 For this very reason, the ratification of the 22nd Amendment was largely unnoticed. According to the Nation, the Amendment “glided through legislatures in a fog of silence—passed by men whose election in no way involved their stand on the question—without hearings, without publicity, without any of that popular participation that should have accompanied a change in the organic law of the country.” 96 Likewise, the press, the public, and interest groups were “equally lax”—with next-to-no press coverage, little public participation, and limited interest group involvement. 97

94 Somin, Ignorance is No Bliss, at 5-6.
95 Reforms in all of these areas are urged by Levinson, supra note ________. For this very reason Cass Sunstein and (to a lesser extent) Mark Tushnet have criticized Levinson for not taking into account the realities of a populist constitutional convention. Specifically, Sunstein and Tushnet both argue that a populist convention might not focus on the types of structural changes that Levinson embraces but, instead, might veer towards controversial social policy issues. See Cass Sunstein, It Could Be Worse, New Republic On-Line, Oct. 26, 2006; Mark Tushnet, The Politics of Levinson’s Constitutional Convention, 1 HARV. L& POL’Y REV. (online) (Dec. 4, 2006), http://www.hlpronline.com/2006/06/tushnet_01.html.
96 The Two-Term Limit, 172 Nation 216, 217 (1951).
97 Stathis, supra at 71.
If the public is unaware that a constitutional change is occurring, that reduces the chance that the amendment process will be under any meaningful democratic control. It thereby increases the likelihood that changes will be made that benefit narrow interest groups at the expense of the general public. Unfortunately, most proposed reforms that seek to make the Constitution more democratic are difficult for the public to connect to important policy outcomes, and thus unlikely to attract a high degree of public attention.

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

Finally, public ignorance makes voters more vulnerable to elite manipulation. If voters do not understand the details of proposed constitutional revisions or do not understand their likely effects, political elites might be able to manipulate them into supporting “reforms” that benefit organized interest groups at the expense of the general public.

Some of the major policies enacted as a result of the New Deal constitutional revolution probably took this form. For example, the National Industrial Recovery Act of 1933, the most far-reaching new legislation enacted during the New Deal, established a system of price and wage-fixing cartels that covered “almost the entire private, nonagricultural economy.” As standard economic theory would predict, the cartels had the effect of raising prices and increasing unemployment at a time when the

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98 See discussion of “rational irrationality” in Section I.C, infra.
99 See Mark Thornton, The Economics of Prohibition (1991) (summarizing evidence that alcohol prohibition led to increases in crime and police corruption, and to the substitution of more dangerous drugs for alcohol by consumers); For the politics of the Eighteenth Amendment, See Richard F. Hamm, Shaping the Eighteenth Amendment (1995).
100 Our position does not rely on the possibly controversial claim that the most ignorant voters are necessarily the most manipulable. Some research suggests that voters with middle-range knowledge (which is still very low in an absolute sense) are more responsive to elite cues (and thus potentially more manipulable) than those with the very lowest knowledge levels. See John Zaller, The Nature and Origins of Mass Opinion 127-28 (1992) (providing evidence that this is true among conservative and centrist survey respondents).
economy was already reeling from the effects of the great Depression.\footnote{Id. at 146-47.} The enactment of the NIRA may have caused the United States’ already shrunken GDP to constrict by another 6 to 11 percent.\footnote{Id. at 146.} However, the NIRA probably did benefit labor union and industry cartel members who sought to eliminate competition from lower-cost competitors – a principal reason for the support for NIRA by key corporate and labor movement elites.\footnote{Somin, \textit{Voter Knowledge and Constitutional Change}, at 651 n. 183 (citing relevant literature.)}

Despite these traumatic and partly foreseeable results,\footnote{For example, black leaders understood that the NIRA would increase unemployment for poor black workers. See \textsc{David E. Bernstein}, \textit{Only One Place of Redress: African-Americans, Labor Relations, and the Courts From Reconstruction to the New Deal}, 88-89, 92-93 (2001). \textit{See also} Book Note, \textit{The National Industrial Recovery Act}, 33 \textsc{Colum. L. Rev.} 1092 (1933) (noting absence of strong opposition to the NIRA). By 1935, however, the NIRA had become more unpopular and Congress did not renew its two year charter. See \textsc{Barry Cushman}, \textit{Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s}, 50 \textsc{Buffalo L. Rev.} 7, 33-34 (2002) (noting contradictory poll results on the popularity of the NIRA in 1935-36).} New Deal era voters failed to understand the true impact of the NIRA. The Roosevelt Administration and other NIRA supporters probably exploited political ignorance in their efforts to win public support for the legislation, and downplay its departure from preexisting constitutional norms, which denied Congress the power to engage in such far-reaching regulation.\footnote{Somin, \textit{Voter Knowledge and Constitutional Change}, at 649-53.}

Such problems could arise with constitutional changes intended to promote democracy, as well as those enacted in pursuit of other objectives. Consider, for example, voter initiative and referendum. Even though initiatives and referendum are intended to empower voters, interest groups and elites often manipulate this process—arguably preventing any increase in “democracy.”\footnote{\textit{See supra.}} The nature and degree of the risk of manipulation will vary from case to case. But any effort to make the Constitution more democratic must take due account of this risk.

\section*{B. Political Ignorance and Constitutional Change in a Crisis Atmosphere.}
Students of constitutional change have long recognized that large-scale change is mostly likely to occur as a response to a major crisis. The three most important periods of constitutional change in America history – the Founding Era, the post-Civil War period, and the New Deal – all clearly would not have happened in the absence of crisis. Modern proponents of constitutional reform recognize that their proposals are most likely to be seriously considered in the event of a crisis such as a war or economic depression.

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

This dynamic may have occurred during the New Deal period, when the Roosevelt Administration succeed in pushing through constitutional changes that gave Congress virtually unlimited regulatory authority, despite the fact that – according to surveys – the majority of voters probably opposed this outcome. Although the majority of citizens opposed giving Congress virtually unlimited regulatory authority, this result occurred anyway, probably because voters focused on the immediate economic crisis and either were unaware of or didn’t consider the longterm effects of the New Deal constitutional revolution. The very outcome that voters opposed, occurred because most may not have realized that it had happened.

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108 The literature on the subject is too large to fully cite. But see, for example, Bruce Ackerman, We The People: Transformations (1998); and ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1987).
109 See, e.g., Lazare, supra note ________ at 293-96.
111 Somin, Voter Knowledge and Constitutional Change, supra note at 624-28.
112 Id.
Moreover, a crisis atmosphere may increase the danger that rational irrationality will lead citizens to endorse dubious and dangerous constitutional changes whose proponents effectively cater to prejudice and irrational thinking. The best-known historical example is the success of the Nazis in winning public support for their ideas by focusing on the grave crises besetting the Weimar Republic.\textsuperscript{113} Nazi leader Adolf Hitler specifically emphasized the importance of exploiting voter ignorance and irrationality in order to get citizens to support the Nazi program. He stressed that “[t]he receptivity of the great masses is very limited, their intelligence is small, but their power of forgetting is enormous.”\textsuperscript{114} As a result, effective “propaganda” “must follow a simple line” and must appeal to “emotion and feeling” instead of “sober reasoning.”\textsuperscript{115} Some Germans voted for the Nazis because they were convinced of the validity of the Nazi program through this kind of simplistic propaganda, while others cast a “protest vote” against the Weimar Republic, without giving much consideration to the likely effects of the Nazi program if the party came to power.\textsuperscript{116}

The Nazi case is an extreme example of the exploitation of popular political ignorance in a crisis atmosphere. In the United States, we are unlikely to enact a comparable disaster. Nonetheless, the combination of political ignorance and crisis could lead voters to approve dangerous constitutional innovations. Some scholars fear that this will happen as a result of the ongoing War on Terror, which might tempt voters to approve excessive restrictions on civil liberties.\textsuperscript{117} During the New Deal constitutional revolution, the disastrous NIRA was deceptively sold to the public as a temporary emergency measure intended to overcome the crisis of the Great Depression.\textsuperscript{118}

These points are more suggestive than definitive. Much scholarly labor remains to be done before we have anything approaching a complete understanding of the interaction between crisis atmospheres,

\textsuperscript{113} See generally \textsc{Richard Evans}, \textit{The Coming of the Third Reich} (2004).
\textsuperscript{114} \textsc{Adolf Hitler}, \textit{Mein Kampf} 180 (trans. Ralph Mannheim, 1999).
\textsuperscript{115} Id. at 181, 183.
\textsuperscript{116} Evans, supra note \_ at 447-59. See also, \textsc{Richard V. Hamilton}, \textit{Who Voted for Hitler?} (1982).
\textsuperscript{117} See, e.g., \textsc{Bruce Ackerman}, \textit{Before the Next Attack: Emergency Powers in an Age of Terrorism} (2005).
\textsuperscript{118} Somin, supra note ____ at 651-53.
political ignorance, and constitutional evolution. Nonetheless, the dangers posed by this combination deserve careful consideration from those who seek to reform the Constitution to make it more democratic.

C. A Limited Defense of Article V.

The dangers posed by political ignorance provide a partial justification for abjuring constitutional change that bypasses the supermajority mechanisms of Article V of the Constitution, which requires the support of 2/3 of both houses of Congress and 3/4 of state legislatures. Through much of American history, Article V has been reviled for allegedly undermining democracy by making constitutional change too difficult to enact. Current constitutional reformers have argued that Article V should be eliminated, or at least not be considered the sole legitimate mode of constitutional change.

But the much-criticized supermajority requirements of Article V may help mitigate the angers of political ignorance. Although studies of voter knowledge have historically found that most of the public is severely ignorant, they have also found that an important minority of voters, ranging from 5 to perhaps as many as 15 or 20 percent, is much better informed than the average citizen. Some evidence suggests that the most-educated and best-informed citizens are also less likely to fall victim to “rational irrationality.”

By requiring a massive supermajority to enact constitutional change, Article V effectively prevents enactment of any amendment that fails to win the support of at least a high proportion of this

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

120 The argument of this section is adapted and revised from Somin, Voter Knowledge and Constitutional Change, at 667-69.

121 U.S. CONST. ART. V.


124 See works cited in note


126 See CAPLAN, supra note ______.
informed minority. In turn, this makes it difficult to enact an amendment merely through the manipulation of voter ignorance. Even if only a small minority of voters is informed enough to see through the amendment’s advocates’ campaign of deception, that minority may well be large enough to block its enactment. 127

This consideration falls well short of proving that Article V is the ideal procedure for constitutional amendment. In some cases, the need for change may be so great that we would be justified in taking the risk of circumventing it. In reality, the problem of political ignorance is less a justification for Article V’s specific procedures than a more general argument for requiring supermajority assent to constitutional change. Nonetheless, it is an important consideration that advocates of circumventing Article V should consider. 128

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127 Defenders of super-majority requirements advance a similar argument in explaining why these requirements “protect the interests of popular, rather than legislative, majorities and protect the exercise of individual rights.” John McGinnis & Michael Rappaport, *The Constitutionality of Legislative Supermajority Requirements*, 105 Yale L. J. 483, 497 (1995). With reference to a 1995 House rule requiring a three-fifths majority of those voting to pass an increase in income tax rates, the need to persuade wavering lawmakers about the bill’s merits (and the concomitant need to win the backing of three-fifths of lawmakers) would ensure that tax increases be enacted for the public interest and not special interests. Critics of such super-majority requirements, in contrast, see such demands as little more than a smoke screen to secure a favored policy agenda. *See An Open Letter to Congressman Gingrich*, 104 Yale L.J. 1539, 1542 (1995) (arguing that the three-fifths rule was based upon “substantive and selective judgments that income tax increases—and only those increases—are unwise and should not be encouraged.”). For additional discussion, *see supra* X-Y (discussing the need for a super-majority of Senators to overcome the filibuster of judicial nominations) and A-B (discussing the gap between the rhetoric of the Contract with America and the reality of the 1995 Republican Congress’s commitment to structural reforms—such as the three-fifth rule).

128 See, e.g., Levinson, supra note _______ at 167-78 (arguing for enacting change through a constitutional convention).
CONCLUSION

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

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