

Deliberation by the People Themselves: Entry Points for the Public Voice

James Fishkin

ABSTRACT

Deliberative democracy by the people themselves is a distinctive form of democratic practice. It can be distinguished from deliberative democracy practiced by elites or representatives as well as from other forms of democracy that do not emphasize deliberation. In this article I explore ways this kind of democracy can be realized and then inserted into our current democratic institutions. The idea is to explore possible entry points in our political system for deliberative democratic designs involving ordinary citizens. In doing so I draw on recent experiments with Deliberative Polls and other mini-publics. I focus on four entry points: a) the evaluation and/or selection of candidates in the nomination phase; b) the evaluation and/or formulation of ballot propositions; c) public input into policy and legislation; and d) public input into processes of constitutional change.

IN THE LAST TWO DECADES there has been a dramatic “deliberative turn” in democratic theory.¹ Even advocates of “participatory democracy” have admitted that deliberation has largely supplanted participation as the most commonly invoked

touchstone of democratic aspiration inspiring both theory and practical reforms.² But “deliberative democracy” is a banner with followers of very different sorts.³ Some focus on the general idea of deliberation with little specification of who is to

James Fishkin is a professor of international communication and political science at Stanford University in Stanford, CA. This article was prepared for a conference on “The Law of Deliberative Democracy” at New York University (NYU) Law School on April 5–6, 2013. My thanks to all the conference participants as well as to Bruce Ackerman and Joey Fishkin for helpful discussions, especially on the last sections.

¹This phrase was borrowed from: John Dryzek, *Deliberative Democracy and Beyond* (Oxford: Oxford University Press, 2000), James Bohman says that by raising “problems of justification, institutionalization and empirical obstacles, deliberative democracy...has ‘come of age’ as a complete theory of democracy rather than simply an ideal of legitimacy.” All of these issues are being confronted and contested in what is now a large body of literature. See James Bohman, “The Coming of Age of Deliberative Democracy,” *Journal of Political Philosophy* vol. 6, no. 4, (1998): 400–425. For a systematic critic of the

turn to deliberative democracy, see Lynn Sanders, “Against Deliberation,” *Political Theory* vol. 25, no. 3, (June 1997): 347–76. For a more recent statement that the Deliberative Polling model avoids her critique, see Lynn M. Sanders, “Making Deliberation Cooler,” *The Good Society*, vol. 19, no. 1, (2010): 41–47.

²Carole Pateman, “Participatory Democracy Revisited” *Perspectives on Politics*, vol. 10, no. 1, (March 2012): 7–19.

³For some collections that gather the most influential of these discussions regarding deliberative democracy from various perspectives, see James Bohman and William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 2007); Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 2008); and James S. Fishkin and Peter Laslett, eds., *Debating Deliberative Democracy* (Malden: Blackwell Publishing, 2003).

do the deliberating. Is it public officials? Is it representatives?⁴ Is it the media?⁵ Is it the people themselves?⁶ And if so, which people? Everyone? Most people? Some self-selected group? Or does it matter? There are also different accounts of criteria that ought to be satisfied for the quality of deliberation as well as different views about whether deliberators need to be making actual decisions⁷ or whether they can deliberate by just expressing their considered judgments. I will sketch a particular approach to these issues here.

What does a focus on “deliberative democracy” add to the evaluation and possible reform of democratic practices? It foregrounds issues that were always a part of democratic theory, but which bring into view the problem of public will formation. Democracies ought to make decisions that have some connection to “the will of the people.” But what is the condition of our public will when the public often has low levels of information,⁸ limited attention spans and is the target of so many millions spent by the persuasion industry—on campaigns, elections, and issue advocacy?⁹

How different would public opinion—and voting—be if people weighed competing arguments on the basis of good information? If they considered different candidates, different parties, different ballot propositions, or different policies, all under good conditions for really thinking about the trade-offs posed by those competing choices? The root of deliberation is *weighing*.¹⁰ And the root idea of deliberative democracy is that the people should weigh the arguments, the competing reasons, offered by their fellow citizens under good conditions for expressing and listening to them and considering them on the merits. A democracy designed without successful attention to this kind of public will formation could easily be reduced to a democracy of manipulated sound bites and misled opinions. Even if the elections for candidates, parties, or ballot measures are competitive and the people have a choice, it may be no more thoughtful or authentic a choice than one between brands of soap or cigarettes. Our republic began with the aspirations of Madison, but our practices have moved closer to those of Madison Avenue.

⁴The term “deliberative democracy” is often cited as being coined by Joseph Bessette’s study of the Congress, in both theory and practice. See Joseph M. Bessette, “Deliberative Democracy: The Majority Principle in Republican Government,” in Robert A. Goldwin and William Schambra, eds., *How Democratic is the Constitution?* (Washington D.C.: American Enterprise Institute, 1980); and Joseph Bessette, *The Mild Voice of Reason* (Chicago: University of Chicago Press, 1994). In Bessette’s view, a deliberative democracy is “one which would foster rule by the informed and reasoned judgments of the citizenry,” yet the current system is one in which “the citizenry would reason, or deliberate, *through* (emphasis in original) their representatives.” (p. 1–2). In this context, Bessette is not applying the term to deliberations by the people themselves, but rather to the deliberations of their representatives; who were thought to be more competent.

⁵For an account focused on the role of the media that is sometimes stimulating, sometimes limiting public deliberation, see Benjamin I. Page, *Who Deliberates?* (Chicago: University of Chicago Press, 1996).

⁶For an early proposal to identify deliberative democracy with deliberations by the people themselves convened through random sampling, see James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991).

⁷Amy Gutmann and Dennis Thompson have championed the view that deliberation needs to be “binding,” interpreted broadly. In their view, a “characteristic of deliberative democracy is that its process aims at producing a decision that is *binding* (emphasis in original) for some period of time. The participants...intend their discussion to influence a decision

the government will make, or a process that will affect how future decisions will be made.” Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 5. By this generous definition, most Deliberative Polls, and indeed other deliberative forums mentioned in this article’s references, have been “binding.”

⁸For the implications of low information levels among the mass public, see Michael Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why it Matters* (New Haven: Yale University Press, 1996); and Scott Althaus, *Collective Preferences in Democratic Politics: Opinion Surveys and the Will of the People* (Cambridge: Cambridge University Press, 2003).

⁹For an account of the corrupting role of money throughout our political process, see Lawrence Lessig, *Republic, Lost* (New York: Hachette, 2011). For the impact of economic inequality on the political process, see Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (Princeton: Princeton University Press, 2008). For an argument based on earlier data suggesting that less money is spent in U.S. politics than one might expect, see James M. Snyder Jr., Stephen Ansolabehere, and John M. de Figueiredo, “Why is There So Little Money in U.S. Politics?” *Journal of Economic Perspectives*, vol. 17, no. 1 (2003): 105–130.

¹⁰Origins of the word: “weigh”: “late 14c., from L. *deliberationem*, from *deliberare* ‘weigh, consider well,’ from *de-* ‘entirely’ + *-liberare*, altered (perhaps by influence of *liberare* ‘liberate’) from *librare* ‘to balance, weigh,’ from *libra* ‘scale.’” Dictionary.com. “Deliberations.” Accessed August 26, 2013. <<http://dictionary.reference.com/browse/deliberations>>.

Deliberative democracy, as I will discuss it here, is an attempt to combine deliberation with another fundamental democratic value, political equality. We must answer two questions: what and who? What sort of preferences are given expression by the democratic process? Who expresses them? Deliberation helps specify an answer to the first question. But how does that aspiration combine with answers to the second? Whose deliberative preferences?

In what we are calling deliberative democracy, the views of citizens are given equal consideration. They are counted equally. It is possible to have a concern for deliberation but not political equality. John Stuart Mill famously advocated “plural voting.” In wishing to give extra weight to the more educated and thoughtful views he violated political equality.¹¹ With his concern for individuality at the individual level and the consideration of competing arguments at the collective level (see his famous discussion of the “Congress of Opinions” for an excellent account of how the deliberations of representatives could be connected to the public¹²) he was clearly what we would now call an advocate of deliberation. But with plural voting the more educated opinions could count more.

On the account here, deliberative democracy requires an equal counting of everyone’s views. But this notion of “everyone” carries ambiguities. Everyone who turns out? Literally everyone eligible to vote? And of course there are the many familiar questions about non-citizens or various groups denied full membership. My focus is not on those issues here.¹³ If we stipulate a population eligible to participate how do we include everyone in that population? One way is to somehow get everyone to actually participate. A second way is to recruit via random sampling so that everyone is included via an equal chance of being invited. The aspiration is to offer a combination of political equality and deliberation that represents the conclusions the public would arrive at if it deliberated under similarly good conditions. In that way it offers a practical method for inserting public will formation under good conditions. This essay will explore some of the ways this kind of process can be inserted into our conventional political processes. Deliberative democracy, like all forms of democracy, requires an institutional design. The two that I will focus on here are the one just mentioned, the randomly selected deliberative microcosm, or mini-public, in designs such as the “Deliberative Poll” and the strat-

egy of large scale deliberation on the model of Deliberative Polling but scaled up to a large portion of the population.¹⁴ Bruce Ackerman and I have proposed “Deliberation Day” as a design for such a large scale mass deliberation.¹⁵ So the question is how or whether either or both of these designs can be inserted into our current constitutional order.

As a preface to this argument about the four entry points I will claim that there are four fundamental conceptions of democracy. The entry points connect deliberative democracy to processes that embody each of the others. So I will talk about entry points for deliberative democracy in competitive democracy (elections of candidates), in participatory democracy (in this case primarily initiatives and referenda) and in elite deliberations both about policy and about constitutional change.

FOUR CONCEPTIONS OF DEMOCRACY

There are many notions of democracy, but in my view they boil down to a few competing democratic principles and how they combine to form normative conceptions of democracy. It is useful to think of some core component principles—political equality, (mass) participation, deliberation, and avoiding tyranny of the majority (which I will call non-tyranny). Three of these principles are internal to

¹¹According to John Stuart Mill, “everyone ought to have a voice—but that everyone ought to have an equal voice is a totally different proposition.” See Chapter 8 of: *Considerations on Representative Government* (Amherst: Prometheus Books, 1991).

¹²On Mill’s account of an ideal parliament, it is a microcosm of the nation’s opinions “where every person in the country may count upon finding somebody who speaks his mind as well or better than he could speak it himself—not to friends and partisans exclusively, but in the face of opponents, to be tested by adverse controversy; where those whose opinion is over-ruled feel satisfied that it is heard, and set aside not by a mere act of will, but for what are thought superior reasons, and commend themselves as such to the representatives of the majority of the nation...” *Id.* at 116.

¹³For the struggles over the extension of the franchise in the United States, see Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

¹⁴For an overview of Deliberative Polling and its applications, see James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford: Oxford University Press, 2009). The account of the four democratic theories below draws on the presentation in that book.

¹⁵Bruce Ackerman and James S. Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004).

TABLE 1. CONCEPTIONS OF DEMOCRACY

| <i>Principles</i> | <i>Competitive Democracy</i> | <i>Elite Deliberation</i> | <i>Participatory Democracy</i> | <i>Deliberative Democracy</i> |
|--------------------|------------------------------|---------------------------|--------------------------------|-------------------------------|
| Political equality | + | ? | + | + |
| Participation | ? | ? | + | ? |
| Deliberation | ? | + | ? | + |
| Non-tyranny | + | + | ? | ? |

+ means a position is committed to the principle indicated; ? means the position is agnostic about that principle.

the design of democratic institutions and one (non-tyranny) is about the effects of democratic decision, effects that have long worried critics of democracy. If we consider these four principles essential components of a democratic theory, then the variations in commitment to them provide a kind of rudimentary grammar that allows us to specify the range of alternative normative theories or conceptions of democracy. In other words, we can get a handle on different conceptions of democracy according to whether or not they accept or reject these component principles.

By political equality I mean, roughly, the equal consideration of one's views as these would be counted in an index of voting power. Does the design of a decision process give each person a theoretically equal chance of being the decisive voter? Or, to take an obvious example, do voters in Rhode Island have far more voting power than voters in New York in selecting members of the Senate? By participation I mean actions by voters or ordinary citizens intended to influence politics or policy or to influence the dialogue about them. By deliberation, I mean the weighing of reasons under good conditions in shared discussion about what should be done. The good conditions specify access to reasonably good information and to balanced discussion with others who are willing to participate conscientiously. This summary is a simplification but should do for now. By non-tyranny, I mean the avoidance of a policy that would impose severe deprivations when an alternative policy could have been chosen that would not have imposed severe deprivations on anyone.¹⁶ Obviously there are many interesting complexities about the definition of severe deprivations, but the basic idea is that a democratic decision should not impose very severe losses on some when an alternative policy would not have imposed such losses on anyone. The idea is to rule out only some of the most egregious policy choices and leave the rest for democratic decision.

Each of these four conceptions of democracy embraces a commitment to two of the principles just mentioned. The position is usually agnostic about the other two (see Table 1). While there are obviously sixteen possible positions defined by acceptance or rejection of the four principles, I have argued elsewhere that the useful positions reduce to these four.¹⁷ Variations that aspire to more than the four are either unworkable or merely utopian or empty (such as the rejection of all four principles). Those that aspire to less include elements of one of these but are less ambitious than necessary.

The four positions have all been influential. In some cases, I modify a familiar position to make it more defensible, in order to get the strongest version of each position.

By Competitive Democracy I mean the notion of democracy championed by Joseph Schumpeter and more recently by Richard Posner and others.¹⁸ On this view democracy is not about collective will formation but just a "competitive struggle for the people's vote" to use Schumpeter's famous phrase. Legal guarantees, particularly constitutional ones, are designed to protect against tyranny of the majority. Within that constraint, all we need are competitive elections. On Schumpeter's view, it is a mythology left over from ill-defined "classical theories" of democracy to expect the will of the people to be meaningful. Electoral competition, without any constraints on whether candidates or parties can mislead or bamboozle the voters to win, is

¹⁶For more on non-tyranny as a principle of democratic theory, see James S. Fishkin, *Tyranny and Legitimacy: A Critique of Political Theories* (Baltimore: Johns Hopkins University Press, 1979).

¹⁷See Fishkin, *supra* note 14, "Appendix: Why We Only Need Four Democratic Theories."

¹⁸Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper and Row, 1942); and Richard Posner, *Law, Pragmatism and Democracy* (Cambridge: Harvard University Press, 2003). See also Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003).

what matters on this view. While Schumpeter did not even specify political equality in competitive elections,¹⁹ I have included it here, on the grounds that it makes the position more defensible than would a position that embraced competitive elections in rotten boroughs (the constituencies that over-represented small populations in nineteenth century Britain). The question marks in Table 1 signal agnosticism about the other two principles. Some variants of this position avoid prizing participation, viewing it as a threat to stability or to elite decision making. Better not to arouse the masses, on this argument, as their passions might be dangerous and motivate factions adverse to the rights of others, threatening the position's commitment to protect against tyranny of the majority. Because of collective action problems and incentives for "rational ignorance" (to use Anthony Downs' famous phrase) little can be expected of ordinary citizens. This position makes that minimalism a virtue.²⁰

By Elite Deliberation I mean the notion of indirect filtration championed by Madison in his design for the U.S. Constitution. The constitutional convention, the ratifying conventions, the U.S. Senate were supposed to be small elite bodies that would consider the competing arguments. They would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens" as Madison said in *Federalist 10* in discussing the role of representatives. Madison held that the public views of such a deliberative body "might better serve justice and the public good than would the views of the people themselves if convened for the purpose." A similar position of elite deliberation was given further development in J.S. Mill's "Congress of Opinions" which was supposed to embody a microcosm of the nation's views "where those whose opinion is overruled feel satisfied that it is heard, and set aside not by a mere act of will, but for what are thought superior reasons" (prefiguring Jurgen Habermas's famous notion about being convinced only by the "forceless force of the better argument").²¹ This position like the last one, avoids embracing mass participation as a value. The passions or interests that might motivate factions are best left unaroused. The Founders after all, had lived through Shays' rebellion and had an image of unfiltered mass opinion as dangerous. If only the Athenians had had a Senate, they might not have killed Socrates.²²

By Participatory Democracy, I mean an emphasis on mass participation combined with equal

counting. While many proponents of Participatory Democracy would also like deliberation, the essential components of the position require participation, perhaps prized partly for its educative function (as Carole Pateman argued²³) and equality in considering the views offered or expressed in that participation (even if that expression is by secret ballot). Advocates of Participatory Democracy might also advocate voter handbooks, as did the Progressives, or perhaps with new technology for voter information such as voter advice applications,²⁴ but the foremost priority is that people should participate, whether or not they become informed or discuss the issues.²⁵ Part of the problem with this position is that it is sometimes advocated based on a picture of small scale decision making such as the New England town meeting, in which discussion is facilitated, but then the position is implemented in the social context of mass democracy—the California process of ballot initiatives, for example, where plebiscitary processes involving millions of voters are employed for constitutional change.

¹⁹Robert Dahl criticizes the Schumpeter model for not specifying anything about how inclusive the demos should be. According to Schumpeter's view, one could not criticize the U.S. for much of its history for the exclusion of blacks; even the Soviet Union could have been democratic if it had democratically consulted the demos who were party members. Robert A. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989), 121.

²⁰See for example Posner, *supra* note 18, 172–73.

²¹John Stuart Mill, *supra* note 11, 116. See also: Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996), Chapter 7.

²²If the Athenians had only had a Senate: "Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next." James Madison, "Federalist No. 63," *Independent Journal* (March 1788). For the many uses of this event for anti-democratic argument, see Jennifer Tolman Roberts, *Athens on Trial* (Princeton: Princeton University Press, 1994).

²³Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1976).

²⁴For an assessment of these applications (whose use is burgeoning, especially in certain European countries), see Stefaan Walgrave, Michiel Nuytemans and Koen Pepermans, "Voting Aid Applications and the Effect of Statement Selection," *West European Politics*, vol. 32, no. 6 (November 2009): 1161–1180.

²⁵For an overview, see David Magleby, *Direct Legislation: Voting on Ballot Propositions* (Baltimore: Johns Hopkins University Press, 1984). For the relative ineffectiveness of voter handbooks and other efforts to get voters more informed, see 137–139.

A fourth position, which I call Deliberative Democracy, attempts to combine deliberation by the people themselves with an equal consideration of the views that result. One method for implementing this twofold aspiration is the deliberative microcosm chosen by lot, a model whose essential idea goes back to Ancient Athens for institutions such as the Council of 500, the *nomothetai* (legislative commissions), the *graphe paranomon*, and the citizens' jury. Modern instances of something like this idea include the citizens' assemblies in British Columbia and Ontario and the Deliberative Poll. Some cases of the Deliberative Poll have been involved in constitutional processes or have provided input to them before national referenda in countries such as Australia and Denmark.²⁶

Deliberative democracy by the people themselves is often invoked but rarely tried. It is an open but difficult to resolve empirical question whether, on those rare occasions or periods when there might be a "constitutional moment" the people are really actively engaged on a mass scale in considering competing arguments. Bruce Ackerman's account of the American founding, Reconstruction, and the New Deal, offers cases before the full development of modern public opinion polling. The accounts are primarily about political elites with stipulations about the broader debate in the mass public. While it is certainly plausible to assume that these issues produced a national debate, we know from later public opinion research that even when there is a big national issue, most of the public is not well informed and when they do engage, there is a great deal of partisan selectivity—people talk to those they agree with and consult websites and sources likely to confirm their views. Deliberation of a high quality, where there is really a balance of argumentation that gets effectively considered, is rare in ordinary life. But from the evidence of mini-publics, ordinary citizens are capable of participating in such dialogues, once they are engaged with the appropriate institutional design.

CONSULTING THE PEOPLE

This potential poses the question of appropriate entry points for deliberation by the people themselves. How are the people to be consulted? What do they do? To what purpose?

One position might be "anything goes." In a society valuing free expression, there are many ways in which citizens provide input to policymakers, representatives, and other elected officials as well as to each other, via social media and the mass media. Why do we need any special institutional designs?

Or, to put it another way, if we want to know what the people think, why not just ask them? But ask who? If we ask everyone, or just have open meetings or invite public comments, we get those especially interested or motivated, those who feel strongly enough to put themselves forward. And such approaches are open to capture by organized groups who would like to impersonate public opinion as a whole, or at least speak for it. Consider the Obama administration's experience with the "Citizens' Briefing Book" during the transition and with its current "We the People" website. During two wars and the great recession the most urgent problems facing the country were thought to be legalizing marijuana and legalizing online gambling.²⁷ And with the "We the People" site, there is a threshold that triggers an official Administration response to the issue proposed. Some of the recent issues that have met the ever-rising public threshold for self-selected mobilization include deporting the CNN commentator Piers Morgan for his support of gun control and developing a "death star." The former was likely mobilized by pro gun groups while the latter seems to have been a mischievous prank designed to embarrass the Pentagon and the Administration ("it is not the policy of this administration to destroy planets" was the official response). If the goal is a public input that is both representative and informed, self-selection cannot reliably be expected to produce either.

Further, as we attempted to clarify in our list of core values, participation and deliberation need to be distinguished. Methods for encouraging mass participation need not do much for deliberation

²⁶For discussions of Deliberative Polling before both the Australian and Danish Referendums, see Fishkin *supra* note 14. For more on the Australian case, see: "Deliberative Polling." The Center for Deliberative Democracy. Accessed August 26, 2013. <<http://cdd.stanford.edu>>. For more on the Danish case, see Kasper Moller Hansen, "Deliberative Democracy and Opinion Formation." Accessed August 26, 2013, <<http://www.kaspermhansen.eu/Work/Hansen2004.pdf>>.

²⁷Anand Giridharadas, "Athens on the Net," *New York Times*, September 12, 2009. Accessed August 26, 2013, <http://www.nytimes.com/2009/09/13/weekinreview/13giridharadas.html?_r=0>.

(turnout efforts do not encourage consideration of trade-offs or competing arguments) and deliberation can be fostered in select groups, such as the mini-publics, without achieving any large scale application.

The Deliberation Day scenario is unusual for proposing to combine both values, mass participation, and deliberation. A significant honorarium for participation would motivate large scale action. If most or virtually everyone were to participate then the distortions from self-selection disappear. But there is still the problem that in ordinary life people tend to communicate with those they agree with and consult information sources they find congenial. The question for institutional design is whether a context can be created that will effectively motivate people to consider other viewpoints and arguments. The Deliberative Poll design is intended to do that. But how might that work for Deliberation Day? Once participants arrive, the design is very much like the Deliberative Poll—small-group discussions, balanced briefing materials, questions agreed on in the small groups directed to panels of competing experts or policymakers. The proposal also includes random assignment to local sites, in order to provide for at least the sort of diversity that is practical within a given geographical region (say the metropolitan area of a city).

To the extent that Deliberation Day is successfully modeled on the Deliberative Poll, we can expect it to facilitate the public's considered judgments. But those judgments also have one great advantage over those facilitated by the Deliberative Poll. They would be widely shared on a mass scale. If Deliberation Day took place in the climax of an election, it could have a major effect on the election. Hence this route connecting deliberative democracy by the people themselves to the competitive democracy of elections is straightforward. But as noted, Deliberation Day is a very large scale proposal and at the moment it is hypothetical. The use of mini-publics such as the Deliberative Poll is an on-going practice and easily applicable to many contexts. So in most of what follows I will focus on mini-publics rather than the entire public.

The basic idea of a mini-public, whether the Deliberative Poll or some other design, is that it should be both representative and deliberative. However designs vary in important ways. I would propose some key considerations in evaluating viable designs:

- a) Random sampling
- b) Sample size
- c) Attitudinal as well as demographic representativeness
- d) A design that avoids distortions of small-group psychology
- e) A design that embodies good conditions for considering the issue

Random sampling

No random sample with humans is perfect. But the social science issues are well understood and there are best practices to get a reasonably good sample. With a mini-public there is potentially a second stage of self-selection. Assuming the first stage to be some kind of initial questionnaire or data gathering, the second stage is the actual participation in the mini-public. It is important to keep the response rate as high as possible, particularly in the first stage, so that one can evaluate the degree of representativeness of the sample recruited to the second stage, the actual deliberations.

The representativeness of the mini-public can be evaluated statistically, but the presumption of these evaluations is that the method of recruitment was random sampling. Hence every effort must be made to limit non-response bias, or an apparently "random" sample can really become essentially self-selected. In the Deliberative Poll, there are usually extensive call-backs to those initially in the sample to ensure that they take the initial questionnaire and to encourage participation. Efforts to overcome special challenges for those selected in the sample, such as child care or the need to care for a sick relative, are also standard practice. In the first Deliberative Poll in the U.S., a woman who had a small farm in Alabama could not fly to Austin, Texas, for the weekend because there was no one to milk her cow. The project sent someone to do so and she came for the weekend. In addition, all the expenses and usually a significant honorarium are paid to enable everyone to participate regardless of income. All these efforts are focused on getting those initially identified in the random sample to turn up and to provide data making it possible to evaluate how successful the recruitment effort was in creating a microcosm of the population.

Sample size

The sample of deliberators needs to be large enough that it is meaningful to evaluate their

opinions statistically. If the size is too small, an apparent strong majority in favor of a proposal could actually be a strong majority against, merely due to sampling error. As we will see, some deliberative democracy efforts in election contexts suffer from this vulnerability.

Attitudinal and demographic representativeness

The idea of the mini-public is that it is a microcosm of the people, a miniature version of the public in both its demographics and attitudes. If the microcosm starts out as representative and then changes on the basis of arguments considered under good conditions, then its considered judgments at the end can plausibly be claimed to be those the public would reach if it were engaged to consider the issue under similar good conditions. If the balance of initial opinion is very different then that difference by itself could explain any difference in eventual conclusions. The representative claim of the mini-public is two fold: it should be representative before deliberation of public opinion in the broader society as it actually is (as would any conventional poll) and representative after deliberation of public opinion in the broader society as it would be, if that population could engage in deliberation under similarly good conditions. Of course a great deal depends on the account of good conditions. And some mini-publics differ in their specific designs and the conditions for deliberation participants engage in. But there must be a basis for establishing the claim to representativeness before deliberation in order to establish the claim after. And without that claim to representativeness, why should we pay attention to the conclusions of the participants? Both demographics and initial attitudes are important. The demographics may affect their interests or the realizations of the participants about their interests as they discuss the issue. The attitudes include their values, viewpoints on the issues, causal assumptions, and ideologies as well as their specific policy attitudes. Some of these may change as people become more informed and consider competing arguments. But the claim of representativeness requires that the microcosm and the public begin in roughly the same place.

Avoiding distortions

Applications of deliberative democracy have spawned a critical literature focused on small-

group processes. Based on jury studies, one line of criticism is that deliberation will allow the more advantaged to impose their views on everyone else. While a selection process for deliberative democracy might involve random sampling, once the participants get into the room, the more advantaged will be able to dominate the deliberations and effectively impose their views on the others.²⁸

A second line of criticism is also based on jury like studies and posits a different, but not incompatible small-group distortion. According to what Cass Sunstein calls “the law of group polarization,” for an issue that has a midpoint, if the pre-deliberation mean of the group is to the left of the midpoint, the group will move further to the left with deliberation. If the pre-deliberation mean of the group is to the right of the midpoint, then the group will move further to the right with deliberation. He posits two mechanisms, an “imbalance in the argument pool” and a “social comparison effect.” For example, if most people start on the right side of the issue they will tend to offer more arguments on that side producing most persuasive effect in that direction—a process he labels “going to extremes.”²⁹ As people see how others are moving they will also see more pressure to converge, hence the role of the social comparison effect.

Both of these distortions undermine the normative claims of deliberation. The domination by the more advantaged is disturbing since it undermines the claims of the process to political equality. Instead of the resulting conclusions representing the considered judgments of everyone, the process has been effectively hijacked by the privileged who use it to impose their own views on everyone else. The polarization critique is also disturbing. If there is a regular pattern of group psychology, a “law of group polarization” that can predict the outcomes regardless of the substance of the deliberations, then it is hard to make the claim that the participants are really arriving at considered judgments on the merits.

²⁸See Lynn Sanders, “Against Deliberation,” *Political Theory*, vol. 25, no. 3, (1997): 347–76; and Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002).

²⁹Cass R. Sunstein, “The Law of Group Polarization,” *Journal of Political Philosophy*, vol. 10, no. 2, (2002): 175–95. See also Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (Oxford: Oxford University Press, 2009). For a list of key findings in support of his thesis, see specifically the “Appendix: Findings of Group Polarization.”

As it turns out, there are institutional designs for mini-publics that avoid these two distortions and it seems advisable for deliberative democracy proposals to take these two problems into account.

A design that embodies good conditions for considering the issue

The core idea of the mini-public is that a representative sample considers the issues under good conditions and this offers a form of representation—a representation of what the larger public would think if it were to engage in the issues under similarly good conditions. So much depends on the conditions and on whether they fulfill that aspiration. The Deliberative Poll, for example, has briefing materials that have been vetted for balance and accuracy by an advisory committee representing different points of view; it has moderated small-group discussions; it has each group's most important agreed questions answered by panels of competing experts and policymakers in plenary sessions where all participants get to hear the same answers; it has the final considered judgments of the sample recorded in confidential questionnaires. The confidential questionnaires, without any push for consensus, limit the “social comparison effect.” The balanced briefing materials and the competing experts in the plenaries provide balance to the argument pool. The moderated discussions encourage everyone to participate and limit domination by the more advantaged. Information questions in the questionnaires before and after provide evidence that the participants become significantly more informed. And extensive before and after questionnaires allow evaluation of the extent to which the microcosm is representative in attitudes as well as demographics (since they permits comparison of participants with non-participants who take the initial survey but who do not attend). This design is, of course, not the only possible design, but it is one that permits a mini-public to fulfill the criteria listed above.

CONNECTING DELIBERATIVE TO COMPETITIVE DEMOCRACY

We have a largely Schumpeterian system of campaigns and elections in which the incentives and opportunities for citizen deliberation are minimized. Our campaigns harness mobilization (the “ground

game”) and the persuasion industry's production of attack ads, impression management, and sound bites tested in focus groups. We have the entire apparatus that was developed to sell products applied to selling candidates. We have undergone an immense journey from the original vision of Publius of representatives “refining and enlarging the public views” to an adversarial vision of “say anything to win.” In sum we have gone from Madison to Madison Avenue.

In this context, where might there be an entry point for citizen input that might be thought to satisfy our criteria for deliberative democracy? A prime area is candidate evaluation and selection, particularly in the nomination period.

The Deliberative Poll was originally proposed as a reform of the presidential selection system.³⁰ Instead of Iowa and New Hampshire—unrepresentative states with processes focused increasingly on wholesale rather than retail politics, launching the momentum for all that follows—the idea was that a representative and deliberative process representing voters from around the country could question the candidates in depth and on the basis of real deliberation on the issues. A partial version of this idea was realized in the 1996 National Issues Convention on PBS in which a national random sample of voters questioned presidential candidates with more than six hours of national broadcast. However, the National Issues Convention evaluated the issues and not the candidates themselves and so the horserace coverage in most media did not engage the process.³¹

A more direct application of the idea occurred in Greece in 2006 when one of the two major political parties used the Deliberative Poll to officially select a candidate for mayor (for the town of Marousi, the large Athens suburb which hosted the Olympics). In the Greek case, the Deliberative Poll was not just a recommendation but the official party selection of the candidate. While further experiments along these lines were planned by PASOK party leader and later Prime Minister George Papandreou,³² the

³⁰James S. Fishkin, “The Case for a National Caucus,” *The Atlantic* (August 1988); and Fishkin, *supra* note 6.

³¹See Maxwell McCombs and Amy Reynolds, eds., *The Poll with a Human Face: The National Issues Convention Experiment in Political Communication* (Mahwah: Lawrence Erlbaum Associates, 1999).

³²George M. Papandreou, “Picking Candidates by the Numbers,” *International Herald Tribune*, June 2006. Accessed August 26, 2013, <<http://cdd.stanford.edu/press/2006/iht-picking.pdf>>.

Greek crisis cut these efforts short. Given that the whole idea of the deliberative microcosm chosen by lot goes back to ancient Athens, this modern project charts an immense journey from Athens to Athens, from the ancient Council of 500 (which set the agenda for voting in the Assembly) to modern candidate selection (setting the agenda for competitive elections).

In the U.S., even without the power of official nomination the demonstration effect of a national Deliberative Poll evaluating candidates in a serious way on the issues could do a great deal to reform the so-called “invisible primary” now largely dominated by fundraising and media jockeying. If Iowa and New Hampshire can influence all that follows, a national deliberation before Iowa and New Hampshire can influence the beginning by occurring before the beginning. This is the sort of informal reform that would not take legislation but only resources and political will.

A more ambitious effort to employ deliberative democracy in competitive elections would arise by inserting the deliberations on a mass scale into the general election. For many years well-intentioned reform efforts have fostered voter handbooks, self-selected information meetings, candidate debates, and, most recently, voter advice software to help voters connect their policy preferences and their candidate choices.³³ Bruce Ackerman and I have proposed a scheme for a more ambitious intervention. We call it Deliberation Day. All voters are invited and compensated to participate in a one day discussion on a national holiday (we propose to borrow and move Presidents’ Day) with small-group discussions and questions to party representatives organized roughly on the model of a scaled up version of the Deliberative Poll.

The idea of deliberative democracy realizing both political equality and deliberation can be embodied in a random sample, in which each citizen has an equal chance of being selected and, alternatively, in a design with everyone (or most everyone) actually participating. The former is a representation of what the people would think under stipulated good conditions for their thinking about it. The latter would make the deliberative opinions of the masses especially consequential because actual public opinion would have become more deliberative. Candidates and partisans would know that after Deliberation Day the public would have really engaged the competing sides of the issues and

would have become far more informed. Of course the forces and methods of the persuasion industry would be employed to distract. But the design has some careful provisions to ensure a high degree of thoughtful engagement with the issues. If this happened soon before a national election, it would successfully instill a high measure of deliberation into competitive democracy.

CONNECTING DELIBERATIVE TO PARTICIPATORY DEMOCRACY

In nearly half of the American states, the public has the opportunity to vote on initiatives put forward by the people themselves. But the process of agenda setting for those initiatives is not a deliberative one. In fact, it is largely a matter of paid signature collectors who accost voters at supermarkets and other public places and gather signatures for dimly understood proposals. In California, which has just completed more than a century of experience with the initiative, the signature collecting is itself a barrier to many public interest propositions getting on the ballot. Measures with constitutional implications require signatures equal to 8% of the votes cast in the last gubernatorial election, amounting to millions of dollars just to get something on the ballot.³⁴ Usually well-funded special interests are willing to fund propositions that will serve their purposes. But public interest proposals have a harder time getting on the agenda.

Imagine a random sample deliberating and proposing an initiative. In the case of the citizens’ assemblies in British Columbia and Ontario, those samples actually deliberated an entire year in order to generate a proposal from scratch on electoral reform. In the case of the British Columbia Citizens’ Assembly the proposed electoral reform actually received 57% of the vote but fell short of the required 60% threshold, even though there were virtually no resources for a campaign on behalf of the measure. In theory

³³See for example Stefaan Walgrave, Peter van Aelst, and Michiel Nutemans, “Do the Vote Test: The Electoral Effects of a Popular Vote Advice Application at the 2004 Belgian Elections,” *Acta Politica*, vol. 43, (2008): 50–70.

³⁴Proposition 31, which had constitutional implications cost 2.8 million dollars in 2012. See <http://ballotpedia.org/wiki/index.php/California_ballot_initiative_petition_signature_costs>.

the formulation of an initiative by a good microcosm provides an entry point for citizen deliberation to take back the agenda of direct democracy.³⁵ Even if citizens, in the course of ordinary life, have little reason to think in depth about initiative proposals, if they have one voice in a few hundred in a microcosm (the actual citizens' assembly was somewhat smaller—160), they have every reason to pay attention because they can plausibly view their individual views as consequential. One might imagine a further elaboration of this approach to establish an institution in which a random sample was convened periodically with the power to recommend or actually place a proposal on the ballot.

The *What's Next California* Deliberative Poll was a trial run at such an effort. A statewide random sample of 412 deliberated for a long weekend in Torrance in 2011 to evaluate 30 possible proposals that could go on the ballot. Possible reforms covered four areas: the initiative process itself, state/local relations (particularly vexed in California given the long term effects of Proposition 13), the structure of the legislature and tax/spend issues. A sample that was demonstrably representative in attitudes and demographics deliberated on all thirty proposals, in many cases with dramatic changes of opinion.³⁶ Six of the proposals that started high and went even higher formed the core of what became Proposition 31.³⁷ However, the coalition of civic and public interest groups that put together Proposition 31 also added other provisions that drew opposition from the Democratic Party and from labor and environmental groups. In particular they added a provision for "Community Strategic Action Plans" that critics thought could be used to evade environmental and labor standards. Our data show that support for the proposals from the Deliberative Poll remained high and, presumably, if the Proposition had been limited to those provisions, it would have had a reasonable prospect of passage. In any case, this experience has suggested a path for what I call the Deliberative Initiative—the idea that an institution might be created to regularly convene and vet proposals to go on the ballot.³⁸ Every two years, the highest rated one(s) could be put to a public vote without the necessity of signature gathering. The path to such a reform is through the initiative process itself.

Such an agenda setting function is reminiscent of the earliest use of the deliberating

microcosm. Just as the Council of 500 set the agenda for everyone's vote in the Assembly³⁹ the Deliberative Poll attempted to set the agenda for everyone's vote in California. If fully realized an institution such as the Deliberative Initiative would return the agenda-setting function to the public.

There are more modest connections than agenda-setting that could be devised between a mini-public and direct democracy. The Citizens' Initiative Review in Oregon employs a "citizens' jury" model to provide evaluations of the proposals that have already been selected to go on the ballot. These recommendations go into the voter's pamphlet distributed to all voters. It is worth pausing to look in detail at the Citizens' Initiative Review as a test case for designing and applying a deliberative microcosm to the problem of advising voters in elections.

The Citizens' Initiative Review has a noble aspiration: providing representative and thoughtful voter advice to other voters with a clear recommendation about whether a proposition deserves support. However, there are some design elements that are problematic in light of the criteria offered earlier. First, random sampling: while the Citizens' Initiative Review claims random sampling as a basis for selection, in actuality it employs a design that quickly approximates self-selection. The initial

³⁵For a detailed assessment of the British Columbia (BC) Citizens' Assembly, see Mark E. Warren and Hilary Pearse, eds., *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge: Cambridge University Press, 2008).

³⁶See "What's Next California: A Statewide Deliberative Poll for California's Future." Report Prepared by the Center for Deliberative Democracy at Stanford University (October 2011). Accessed August 26, 2013, <<http://cdd.stanford.edu/polls/california/2011/final/nextca-final-report.pdf>>.

³⁷See James S. Fishkin, comment on Deliberative Democracy, "What the People Want—When They Think About It," *SF Gate Blog*, May 22, 2012, <<http://blog.sfgate.com/jfishkin/2012/05/22/what-the-people-want-when-they-think-about-it>>.

³⁸See James S. Fishkin, comment on Deliberative Democracy, "The Deliberative Initiative: Returning Direct Democracy to the People," *SF Gate Blog*, February 1, 2012, <<http://blog.sfgate.com/jfishkin/2012/02/01/the-deliberative-initiative-returning-direct-democracy-to-the-people>>.

³⁹See Chapter 10 of Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes* (Oxford: Blackwell Publishing, 1991).

mailing of 10,000 questionnaires yielded only 350 candidate participants.⁴⁰

The initial 10,000 were presumably a random sample. However, the 350 who self-selected from that large pool were not. How do the 350 compare to the rest of the 10,000 in their attitudes on the issue? We have no way of knowing anything about how the views of the 9,650 compared to the 350. A tiny percentage decided to return the questionnaire. What motivated them? Were they activists or people who felt strongly about the issue or about politics in general? We have no way of evaluating the amount of selection bias. With a response rate of 3.5% this process is much like a public call in a community of 10,000 for a town hall meeting with 350 people showing up. Obviously, such a process is dominated by those who are motivated to put themselves forward. The fact that demographic quotas were employed from this small pool of 350 to reduce the number to 24 does not change the fact that the 350 from which they were drawn had to self-select and we do not have any way of evaluating their attitudinal representativeness.⁴¹

A similar point can be made about the Citizens' Initiative Review on our second criterion for mini-publics—sample size. Why does it matter that a sample is 24 rather than 300 or 400 (or even 160 as in the citizens' assembly)? A first issue is sampling error. With a sample of 24, even if it were a perfect random sample, the so-called "margin of error" or the confidence intervals would render many results meaningless within standard assumptions. For example, the Citizens' Initiative Review evaluated Proposition 74 and published results saying that 13 members supported the Proposition and 11 opposed. So this result means 54% supported and 46% opposed. But the margin of error in this case would be plus or minus about 20 points! So the 54% could be as high as 74% or as low as 34%. And the 46% could be as high as 66% and as low as 26%. Hence any conclusion that there is a modest majority in favor of this measure, after deliberation is simply wiped out by sampling error. One simply needs a larger sample to protect against these situations, which will be common with controversial subjects. Even a large majority in favor could not be distinguished from a large majority against, within standard assumptions. This problem could easily be solved by *having numerous small groups* instead of just one. So if the random sample consisted in say 25 or 30 small groups of 15 to 18, the quality of the small-group discussions would be improved (we

have found that 25 is too many to have a real discussion) and the N would be large enough to meaningfully evaluate the results quantitatively.

Thirdly, for attitudinal and demographic representativeness, the first point to note about the Citizens' Initiative Review is that the small sample size means that representativeness cannot be meaningfully evaluated quantitatively. But a related and key point is that the design does not include any attitudinal data. We only know demographics. Out of the initial 10,000, how do the 350 compare in their views? And how do the 24 who are drawn from the 350 to fill demographic quotas compare in their viewpoints on the issue to the 350, and more importantly to the initial 10,000 who were a random sample? The design gives us no information about such questions. But it is worth noting that there must be some reason the 350 volunteered. Their views can certainly be expected to be atypical, but we do not know precisely how. Of course their starting viewpoints may well have a big effect on where they end up.

Fourthly, small-group distortions can be expected based on Sunstein's work with juries and jury-like

⁴⁰The selection method as described in the official report is as follows:

One of the key goals of the Citizens' Initiative Review is to be demographically reflective of the state's voting population. Potential panelists were first identified through a random sampling of 10,000 voters from the statewide voter registration list. Healthy Democracy Oregon mailed questionnaires to these 10,000 voters. Approximately 350 (3.5%) completed questionnaires were returned. Two panels of Twenty four voters were then selected from this pool for the two Reviews held in August 2010. The final panelists were carefully selected to be a fair reflection of Oregon's voting population based on the demographics of age, gender, ethnicity, location of residence, educational attainment, party affiliation and likelihood of voting.

"Citizens' Initiative Review of Ballot Measure 74—Final Report." Healthy Democracy Oregon. (August 16–20, 2010). Accessed August 26, 2013, <http://cirarchive.org/media/attachments/documents/M74_Final_Report.pdf>.

⁴¹A similar argument could be made about the method of recruitment in the BC Citizens Assembly. See my review, forthcoming in *Perspectives on Politics*, of Mark E. Warren and Hilary Pearce, eds., *Designing Deliberative Democracy: The British Columbia Citizens Assembly* (Cambridge: Cambridge University Press, 2008), and Patrick Fournier, Henk van der Kolk, R. Kenneth Carty, Andre Blais, and Jonathan Rose *When Citizens Decide: Lessons from Citizens Assemblies on Electoral Reform* (Oxford: Oxford University Press, 2011).

processes. The shared pressure for a verdict (or at worst, agreement on a majority verdict and a minority statement) can be expected to enhance the social comparison effect. And the process does not appear to have firm elements that would guarantee no imbalances in the argument pool. The Citizens' Initiative Review is modeled on the citizens' jury and thus largely fits the jury-like model of Sunstein's studies. While this is an empirical question, there are no initial attitudinal data collected, so the vulnerability to his pattern is by analogy to the jury, not based on data we have available.

Fifthly, proponents of the Citizens' Initiative Review would argue that it does embody good conditions for considering the issue. But because no data are collected on the initial viewpoints of the participants, we cannot tell if we are getting a sample of open minded citizens or zealous partisans.

Overall, the Citizens' Initiative Review is open to serious critique about its vulnerability to sampling error, non-response error, representativeness, and the small-group distortions of domination and polarization. While it is impressive that the effort has been institutionalized in the context of actual elections, these design features need to be carefully assessed in any discussion of future applications.

CONNECTING DELIBERATIVE DEMOCRACY TO ELITE DELIBERATION FOR POLICY

There are many forms of public consultation and public comment sponsored by entities that engage in elite deliberation. These processes are often captured by interest groups that mobilize to create an impression of widespread public support. So-called "town hall" meetings may actually end up peopled by lobbyists or interests intensely mobilized to show up, often with the intention of creating an impression of public support. In this welter of activity, there are sometimes opportunities for an entry point for deliberative democratic designs to provide informed and representative public input on decisions by public officials. In 1996 the state of Texas required regulated utilities to consult the public about "Integrated Resource Planning" for how they would provide electricity in their service territories. The companies considered conventional polls but knew the public would not be informed about the trade-offs. They considered self-selected

town meetings, but knew they would be peopled by lobbyists and organized interests. They considered focus groups but knew they were too small to be representative. So they conducted Deliberative Polls.

Averaged over eight Deliberative Polls, the percentage of the public willing to pay a bit more on monthly utility bills for the support of renewable energy rose from 52 to 84%. There was a similar increase in support for conservation or "demand side management." Based on these results, the Public Utility Commission approved a series of integrated resource plans that involved substantial investments in both wind power and conservation (as well as investments in natural gas which was also strongly supported in the Deliberative Polls). The cumulative effect of these decisions by the Public Utility Commission and then related decisions by the legislature on a renewable energy portfolio (supported by the same data) led to Texas moving from last among the 50 states in the amount of wind power in 1996 to first by 2007 when it surpassed California. So the Texas utility cases provide an example where deliberative democracy became an explicit input to policymaking by relevant public officials (the Public Utility Commission and the legislature).⁴²

Rather than self-selected open meetings or public comment processes, the use of a deliberative microcosm chosen by random sampling can provide data that represent what the public would think, if it had a comparable opportunity to think about the issues, get its questions answered and weigh the trade-offs. In ordinary life most people are not effectively engaged to do this. Indeed there is a sense in which it would be irrational for them to do so as they each have only one vote in millions and hence only a tiny part in any decision. But for those selected there is more of a reasonable basis for extensive participation as they have one voice in hundreds in the random sample (and in small group discussions, one voice in a dozen or so). In cases around the world we do see them effectively taking up this opportunity once they see that they have good reasons for becoming seriously engaged.

⁴²See Fishkin, *supra* note 14, 123–24. See for more detail: "Deliberative Polling: Energy Choices." The Center for Deliberative Democracy. Accessed August 26, 2013, <<http://cdd.stanford.edu/polls/energy>>.

CONNECTING DELIBERATIVE DEMOCRACY TO CONSTITUTIONAL CHANGE

Consider another form of elite deliberation, that which takes place on constitutional issues. This may happen through constitutional interpretation by the courts or through legislation of “landmark statutes” that become crucial parts of a new constitutional moment.⁴³ These processes invoke and in some way draw on public opinion.

There is widespread, but not universal, agreement that we need to reconceptualize constitutional change in the U.S. in some way beyond the formal limitations set out by Article V. Whether the idea is Ackerman’s “constitutional moments,” Kramer’s Madisonian variant of “popular constitutionalism,”⁴⁴ Siegel’s “constitutional culture,”⁴⁵ or Balkin and Levinson’s “partisan entrenchment,”⁴⁶ there is a widely shared view both that Article V does not explain how our constitution actually changes nor how it should change.⁴⁷ As Levinson argues, the difficulty of passing amendments within Article V traps us in an eighteenth century design that is difficult to adapt to the modern era, or that, like the Electoral College, leads us to recurrent democratic anomalies.⁴⁸

There are two questions: how does the constitution actually change and are there reforms that might improve the process of constitutional change from the standpoint of democratic theory? The premise of the argument I will sketch here is that deliberative democracy should play a role in the process of constitutional change and that we should think about possible reforms that would heighten the sense in which the public’s considered judgments are incorporated into the processes of constitutional change. Without representative and thoughtful public will formation, the changes do not reflect the will of the people. Building on Ackerman’s work, I regard constitutional changes as calling for a “higher lawmaking” and it is deliberative democracy that can best provide the normative claim that the people have really thought about the question and weighed the reasons for and against a proposal. What makes the higher lawmaking higher? Ideally it is deliberative democracy. But how to incorporate deliberative democracy into actual processes is far from clear in our system.

As Siegel shows convincingly in the case of the NRA and the Second Amendment, a concerted

and well-financed effort at public persuasion and mobilization can affect relevant elites and constitutional interpretation over an extended period.⁴⁹ She offers this account as a positive not a normative theory. However, it means that the mobilization of interest groups funding persuasion campaigns has made constitutional interpretation another battleground for competitive democracy. But as such it has no real claim to higher lawmaking. Indeed, the efforts to persuade and change the constitution offer no limits on strategies that deceive, manipulate, or mislead the public. Mobilized groups can change the “constitutional culture” and persuade us that it is our culture that we take ownership of. But what are the ground rules for such persuasion if this is to be part of a higher lawmaking process? We have only to recall the “war on terror” and the misleading claims that got the United States and others into the Iraq war to realize that in some constitutional areas deception and persuasion campaigns may produce changes in constitutional rights—changes that are still being contested. These changes can result from the interpretations of the courts or the passage of legislation that

⁴³In Bruce Ackerman’s view, these landmark statutes take on constitutional status. See Bruce Ackerman, *We the People: Volume 3 The Civil Rights Revolution* (forthcoming), (Cambridge: Harvard University Press, 2014); see also William Eskridge and John Ferejohn, *A Republic of Statutes* (New Haven: Yale University Press, 2010).

⁴⁴Larry D. Kramer, *By the People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004). The Madisonian presuppositions are clearest in “The Interest of the Man: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy,” *Valparaiso University Law Review*, vol. 41, no. 2, (2006): 697–753.

⁴⁵Reva B. Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA,” *California Law Review*, vol. 94, (2006): 1323–1417.

⁴⁶Jack M. Balkin and Sanford Levinson, “The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State,” *Fordham Law Review*, vol. 75, no. 2, (2006): 101–145.

⁴⁷See Akhil Amar for the view that it is only the “conventional” interpretation of Article V that is limited to the formal amendment process. He offers an alternative “popular sovereignty” interpretation that points to majoritarian deliberation by the people as a mode of amendment. See Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V,” *Columbia Law Review* vol. 94, (1994): 457.

⁴⁸Sanford Levinson, *Our Undemocratic Constitution* (Oxford: Oxford University Press 2006).

⁴⁹Reva B. Siegel, “Dead or Alive: Originalism as Popular Constitutionalism in Heller,” *Harvard Law Review*, vol. 122, (2008): 191–245.

eventually takes on the quasi-constitutional status of “landmark statutes.”

Whether it is the courts or the legislature, the informal invocation of public opinion could be improved by processes that offer a systematic procedure for public consultation. Instead of impressions from intense voices who mobilize, why not use scientific processes that are both representative and informed? I should emphasize that the idea is *not* to hand over constitutional interpretation or legislation to polling. First of all conventional polls represent top of the head opinion, often just an impression of sound bites and headlines. So while non-deliberative opinion from random samples is an improvement over the opinions expressed by mobilized groups, from the standpoint of being representative, it is not a voice that by itself deserves any special hearing. Deliberative opinion that is representative and informed can be represented by the considered views of a mini-public, in a method such as Deliberative Polling or a citizens’ assembly. But absent anything approaching Deliberation Day the rest of the public will not be similarly engaged. The route from a deliberative mini public to constitutional change should be more advisory and indirect if it is provide a credible input.

We can think of a deliberative mini-public or microcosm serving different functions. First, it provides a *route to responsible advocacy*. It shows where the public would go if it considered the issue in depth on the basis of good information. Its considered judgments can be invoked in debates and can be used to make the case for a major change. Second, it can be invoked by courts or the legislature, once it is credibly a part of the public dialogue. Imagine, for example, a presidential or congressional commission that grapples with a key issue, clarifies some key trade-offs and policy options, and then, instead of just holding public hearings or conducting conventional polls, convenes a national Deliberative Poll, or a series of regional Deliberative Polls.⁵⁰ Those results if striking enough can be invoked by the courts. Note that courts invoked the Carter/Baker Commission on voter identification (ID) even though it may well have been more a matter of bipartisan bargaining.⁵¹ Instead of just some policy elites why not engage the people, but in a representative and thoughtful way?

Such a commission-sponsored deliberation by the people themselves can provide public input into the dialogue between the branches during the

informal process of constitutional change that Ackerman describes as creating landmark legislation or new interpretations by the courts. At each step, there could be a role for organized and representative public input, to clarify the public’s considered judgments. Ackerman describes a “signaling” function when one of the country’s key institutions, the House or the Senate or the court or the presidency, tries to inaugurate serious change and chart a way forward. A commission clarifying some competing options and then assessing representative and informed opinion through a systematic deliberation by the people would allow the public to take ownership of the new initiative. A second stage, the “proposal” stage could equally benefit from such input. At this stage the idea is that potential landmark statutes get clarified for national debate and perhaps passage. A third stage, a “triggering election” can create the widespread perception of a mandate. But a mandate for what? At that point, if changes are to last the scope of the mandate could be tested by informed public opinion. A fourth stage, which Ackerman calls “mobilized elaboration” enlarges the scope into an enduring constitutional legacy through landmark statutes and judicial super precedents. All of this activity can be enriched by the voice of the people gathered in a representative and thoughtful way on the difficult issues that pose trade-offs.⁵²

I mention Ackerman’s theory because it is developed in depth and shows several promising entry points for deliberative democracy. An even more ambitious entry point would be to test the triggering election with an institution like Deliberation Day. Such an effort to engage the public in widespread deliberation could give the higher lawmaking effort greatly extended life and energy. Or it could lay down the markers that the new arguments should not cross. In any case, it would bring the people into the processes of popular constitutionalism in a way that moved beyond anecdote and impression.

⁵⁰For a recent proposal in this spirit, including a series of “shadow conventions” modeled on the Deliberative Poll to explore possible constitutional revision, see testimony of Lawrence Lessig, Senate Judiciary Committee Hearing on “Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs.” Subcommittee on the Constitution, Civil Rights and Human Rights. (July 24, 2012), 15–18.

⁵¹See Heather K. Gerken, *The Democracy Index* (Princeton: Princeton University Press, 2009), 43.

⁵²See Ackerman, *supra* note 43.

In my view, the popular constitutionalism movement needs both a normative theory and an institutional specification of how the people are brought into the process. Without such a theory and specification, manipulation can serve as well as deliberation and mere interest group mobilization can substitute itself for the public voice. Popular constitutionalism would risk becoming populist constitutionalism.

SPECULATING ON NEW INSTITUTIONS

In addition to informal triggering mechanisms or the possibility that a deliberative mini-public might be convened by a commission, we can think of new formal institutions in which the convening of randomly selected microcosms, or even the convening of a Deliberation Day type process would be part of a method for constitutional change. Such arrangements would require an Article V constitutional amendment and hence should not be considered immediate possibilities. Nevertheless, it is clarifying for political and legal theory to consider improved constitutional designs that might incorporate significant elements of deliberative democracy.

Ethan Leib has such a proposal for a “popular branch” both at the state level and the national level. Leib envisions “civic juries” like Deliberative Polls:

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 “charges.” Such juries would debate political policies at assemblies convened for such purposes and would be modeled on Fishkin’s Deliberative Polls, administered with the degree of care that Fishkin takes to make his Deliberative Polls representative, unbiased and informed...In this paradigm, the popular branch would have the authority to enact law, while the legislative and executive branches would help with setting the agendas and tailoring the findings of the deliberative body into coherent written statutes.⁵³

This popular branch would also engage in constitutional changes, but with a supermajority require-

ment, perhaps set even higher than the current ones.⁵⁴ As we know from the current Article V process, supermajorities make it very hard to get changes passed. By themselves they are not a guarantee of deliberation, only a way of privileging the status quo over alternatives to it.⁵⁵

Leib’s proposal would give the final say to a random sample of deliberators. In this respect it is like the ancient institution of the Athenian legislative commissions or *nomothetai*, that had the final say on legislation in fourth century Athens.⁵⁶ While this proposal has many attractions from the standpoint of deliberative democracy, it has the limitation, as with all mini-publics, that those not in the random sample do not participate. They are represented in a sense by the microcosm. However, for something as consequential as constitutional change, it might be argued that we want broad participation to signal mass consent.

The interest in getting some sort of mass consent through participation fuels the many uses of referendums for constitutional change, either at the state level in the U.S., or in various international contexts. However, the referendum is not a deliberative democratic mechanism. Mass participation is rarely deliberative. There is the rational ignorance problem: if I have one vote in millions why should I pay attention to the details of arguments for and against? Hence the potential for conflict between the ideals of deliberation and mass participation.⁵⁷ If participation in a referendum were to be interpreted as a kind of mass consent, it is not likely to be deliberative or thoughtful consent.

The Ackerman-Fishkin proposal for Deliberation Day in national elections can apply to referendums

⁵³Ethan Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch* (University Park: Penn State University Press, 2004), 12–13.

⁵⁴*Id.*, 72–73 for consideration of a possible 3/4 or 4/5th supermajority requirement for constitutional change.

⁵⁵There is, however, a tradition of thought connecting supermajority requirements to deliberation. John C. Calhoun’s theory of “concurrent majorities” (a system permitting minority vetoes) is a prominent example. For a discussion and critique, see James S. Fishkin, *supra* note 6, 39–40. For a more general framework accounting for the implications of supermajority requirements, see Douglas W. Rae, “The Limits of Consensual Decision,” *American Political Science Review*, vol. 69, no. 4, (December 1975): 1270–94.

⁵⁶Hansen, *supra* note 39, 164–69.

⁵⁷More precisely, I argue that there is a three-way conflict, or trilemma, between mass participation, deliberation, and political equality. See James S. Fishkin, *supra* note 14, 32–64.

to provide a more thoughtful process.⁵⁸ This approach would incentivize participation throughout the nation in small-group discussion processes modeled on the Deliberative Poll. It would apply the sort of deliberation we find in Deliberative Polls to the entire population. In that sense it responds to the problem of how to involve the rest of the public, beyond the microcosm, in thoughtfully considering the constitutional change.⁵⁹

Christopher Zurn's proposal takes this approach:

I propose, speculatively, to combine Leib's civic juries with Ackerman and Fishkin's deliberation day into a new type of process for constitutional amendment. The basic idea is that we can use randomly selected juries for certifying amendment proposals for the ballot and require national deliberation days for the ratification or rejection of those amendment proposals.⁶⁰

As with the citizens' assemblies in Canada and in my Deliberative Initiative proposal, piloted in California, Zurn would use a deliberating microcosm to generate a proposal and then a referendum to approve. But by borrowing the apparatus Ackerman and I propose in *Deliberation Day*, Zurn's approach offers the potential of making the referendum deliberative in significant ways. Millions would be incentivized to engage in an entire day of small-group discussions and plenary sessions roughly on the model of the Deliberative Poll.

I believe Zurn's proposal merits serious discussion. One line of criticism is the sort that applies to all convenings of a convention-like process that could change the constitution. The concern is the "runaway convention." How are we to put strict limits on the topics considered? The United States' own original constitutional convention was a kind of runaway convention in that it was originally supposed to only consider amendments to the Articles of Confederation.

To stimulate dialogue about institutional variations that would incorporate deliberation in formal constitutional change, let's consider another version. What problems might such a newly designed amendment process attempt to solve? First, we have a constitution which is currently one of the most difficult in the world to amend in a formal way. As Sanford Levinson has argued we are in an eighteenth century "iron cage."⁶¹ So the first problem is making it possible for the deliberative sense of the community to actually

engage in higher lawmaking that could successfully and formally change the constitution. A second problem is that if a constitutional process is engaged, it needs to be limited to the issue selected. The prospect of a "runaway convention" poses the risk of killing any reform effort. So our first issue is the capacity to change too little, the second issue is the potential to change too much. A third issue is whether a process could achieve the ideal of embodying all three of our key democratic principles: deliberation, political equality, and mass participation. As we have approached the issue here, the combination of deliberation and political equality constitute deliberative democracy. But if a process could also embody mass participation, it could plausibly be interpreted as achieving mass collective consent because the whole population would be involved or have the effective opportunity to be involved. The people would have been convened thoughtfully together and come to actually approve a constitutional change.

There are other practical issues that such a proposal needs to confront. Where do the proposals come from? Even a deliberative assembly convened to generate proposals needs to have a source for them, or a charge from current institutions. The citizens' assemblies in British Columbia and Ontario were convened by an act of Parliament and thus limited to the proposed topic.

Consider this variation. Suppose there were a new amendment procedure whereby:

- a) the legislative process, without special supermajority requirements, could lead the Congress and the president to approve a draft constitutional amendment;

⁵⁸See Bruce Ackerman and James S. Fishkin, *supra* note 15, 112–115.

⁵⁹See Colon-Rios for another variation, in which a deliberating sample can submit a question to a binding referendum, but without the deliberation day proposal to spread the deliberation beyond the microcosm. See Joel I. Colon-Rios, "The Counter-majoritarian Difficulty and the Road not Taken," *Victoria University of Wellington Legal Research Papers*, vol. 3, no. 20, (2013): 29–30. For a variation in which the Deliberative Poll-like institution constitutes a "citizen's court," see Eric Ghosh, "Deliberative Democracy and the Counter-majoritarian Difficulty: Considering Constitutional Juries," *Oxford Journal of Legal Studies*, vol. 30, no. 2 (2010): 327–359. The proposal is on pp. 345–359.

⁶⁰Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press, 2007), 336.

⁶¹See Sanford Levinson, *Our Undemocratic Constitution* (Oxford: Oxford University Press, 2008), 165.

- b) that amendment would be considered by a citizens' assembly designed along the lines of a Deliberative Poll, and if the proposal were approved by a majority in the citizens' assembly then it would
- c) be taken to a national vote convened at the time of the next presidential election, accompanied by a Deliberation Day process focused on the pros and cons of the proposed constitutional amendment.

This proposal would be based on the assumption that the Congress is capable of generating some public interest proposals as topics for constitutional amendment provided that the current 2/3rds requirement in the Congress were shelved. If there were a process that offered some realistic prospect of success there could be more proposals and a few might get through a simple majority process in both houses, once the supermajority requirements (both in the Congress and in the states) were waived. Hence there is reason to think this proposal satisfies the first requirement. It would lead to some proposals actually being approved through a deliberative process.

Second, the citizens' assembly, convened on the model of the Deliberative Poll, would be charged with an up or down decision on the proposal. It would be like the *nomothetai* except that it would not make the final decision. Rather, it would trigger the next stage. Its recommendations would be widely reported and a positive view of the measure would provide heuristics or cues to voters who participate in the third stage. Because its mandate is an up or down decision, it offers no prospect of a runaway convention.

Third, the decision of the citizens' assembly would be the trigger for convening a national Deliberation Day focused on the proposed constitutional amendment. As we noted at the outset, one way to satisfy political equality is to take a random sample. Another way is not to sample but to engage everyone. By paying a significant incentive for a day's work of citizenship we would hope to voluntarily engage the mass citizenry in a context where every-

one is given the opportunity. The aspiration would be to engage the electorate on a mass basis in discussing the pros and cons of the proposal in alternating small groups and plenary sessions on the model of the Deliberative Poll. If this succeeded it would achieve political equality (through an equal counting of votes and equal participation),⁶² deliberation (through the many, many small-group discussions throughout the country) and mass participation. It would be the voice of the people duly considered.

In all these contexts—constitutional change, policy change, legislative change, the reform of direct democracy—the question is whether it is theoretically defensible and practically realizable to insert the deliberative voice of the public. Doing so would make real a process of collective will formation in which the public expresses its will based on reasons, after considering competing arguments. Do we want a democracy in which political and policy elites mostly manipulate public opinion to electoral advantage and then invoke it afterwards as a mandate?⁶³ Or do we want a democracy in which the public will meaningfully results from deliberation, at least for some decisions of consequence? The rediscovery of Athenian notions of the deliberative microcosm chosen by lot or random sampling has provided a practical route to democratic reform in the modern era. If we employ it we can supplement existing practices of Schumpeterian competitive democracy, plebiscitary direct democracy and elite deliberation with a public voice really worth listening to.

Address correspondence to:

James Fishkin
Department of Communication
Stanford University
450 Serra Mall, Bldg. 120
Stanford, CA 94305

E-mail: jfishkin@stanford.edu

⁶²For the purpose of simplicity, I am considering this as a national popular vote. In theory, the vote could be state by state with passage by only a percentage of the states, but in consideration of the goal of achieving political equality on a national basis, this version is simpler and closer to the ideal.

⁶³For a penetrating account of the plasticity with which "mandates" can be invoked from elections, see Robert A. Dahl, "The Pseudo-democratization of the American Presidency," The Tanner Lectures on Human Values. (April 11–12, 1988). Accessed August 26, 2013, <http://tannerlectures.utah.edu/_documents/a-to-z/d/dahl89.pdf>.