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ACKERMAN'S PROPOSAL FOR POPULAR CONSTITUTIONAL LAWMAKING: CAN IT REALIZE HIS ASPIRATIONS FOR DUALIST DEMOCRACY?

PHILIP J. WEISER

INTRODUCTION

In his recent book, *We The People*,¹ Bruce Ackerman proposes to reform the article V constitutional amendment process by adding a national referendum procedure that would increase the public's participation in constitutional decisionmaking.² After a Presidential election which reversed the trend of declining voter turnout,³ this proposal appears especially promising as an opportunity for meaningful direct public decisionmaking. Because Ackerman promises to develop his proposal further in his next volume,⁴ it may be too early to criticize him for not illuminating how this proposal could succeed under the present political conditions in the United States. Nonetheless, this Note accepts Ackerman's invitation to undertake a "critical examination"⁵ of the merits of his proposal.

This Note argues that any referendum procedure for constitutional amendment must rest upon an appropriate deliberative foundation. That is, a referendum procedure without a reformation of constitutional politics to facilitate a deliberative and fully participatory debate lacks the filter necessary to prevent Americans from voting away essential protections of liberty, basic civil rights, and thoughtfully entrenched institutional arrangements. Ackerman's proposal, derived from a theory of the Constitution rather than an examination of referendums in practice, does not address the concern that referendums have often failed to spark an active and deliberative debate. Faced with such an objection, Ackerman might respond that the public will muster sufficient support to enact constitutional referendum proposals only in those times of crisis which he terms "constitutional moments."⁶ Undoubtedly crises offer special op-

¹ Bruce A. Ackerman, *We The People: Foundations* (1991).

² See *id.* at 54-55. Ackerman previously suggested this reform in Bruce A. Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164, 1182 (1988).

³ See Robert Pear, *55% Voting Rate Reverses 30-Year Decline*, N.Y. Times, Nov. 5, 1992, at B4.

⁴ See B. Ackerman, *supra* note 1, at 329 n.10.

⁵ *Id.* at 55.

⁶ See notes 8-11 and accompanying text *infra* for an explanation of the concept of a consti-

portunities for public mobilization; however, as these are rare occasions, it is critical to consider the fate of referendums during times not characterized by crisis.

While Ackerman places a high value on referendums, he addresses neither their shortcomings nor the shortcomings of the political process in which they operate. Ackerman's endorsement of a national referendum procedure for constitutional amendment appears to assume that people will deliberatively consider the public interest in a referendum campaign. However, as this Note demonstrates, both a theoretical analysis of political participation and an empirical examination of referendums at the state level undercut this assumption. Hence, implementation of Ackerman's proposal might lead to the enactment of amendments which deviate from the deliberatively entrenched principles of previous constitutional moments (antiregime amendments⁷). While a referendum procedure for constitutional amendment could increase the American public's involvement in constitutional politics, America must first prepare for direct constitutional politics through political reform and an enriched education for citizenship in order to avoid enacting antiregime amendments which would devalue the principles deliberatively entrenched in the Constitution.

Part I of this Note examines Ackerman's constitutional theory and his recommendation for a national referendum procedure for constitutional amendment. Part II addresses Ackerman's assumptions about how people would participate in such a referendum and focuses on two alternative models—one deliberative, one nondeliberative—of the process of public consideration of a proposed constitutional amendment through a referendum procedure. Part III then presents a theoretical analysis of political action and examines the experience with referendums at the state level, concluding that immediate implementation of Ackerman's proposal would lead to the situation described in the nondeliberative model of the political process. Finally, Part IV offers a reconception of citizenship to foster the quality of deliberation necessary to support Ackerman's proposal, and it proposes structural reforms and a system of political education to nurture that reconception of citizenship. The magnitude of and obstacles to instituting these reforms demonstrate the considerable challenges to be encountered in preparing for popular constitutional lawmaking and caution against immediate implementation of Ackerman's proposal.

tutional moment.

⁷ See note 48 *infra* for an explanation of antiregime amendments.

I

UNDERSTANDING ACKERMAN AND HIS REFERENDUM
PROPOSAL*A. Dualist Democracy: A Look at Ackerman's Constitutional Theory
and History*

In *We The People*, Bruce Ackerman develops his theoretical and historical understanding of the Constitution to explain why a long-dead supermajority can still bind the present generation. In essence, he posits a "dualist democracy" consisting of two levels of lawmaking: (1) a "higher lawmaking" that occurs during an intense period of political deliberation and excitement when the American people exercise a direct role in the constitutional scheme to effect enduring constitutional change, and (2) a "lower lawmaking" or "normal politics" when the people delegate their authority to political institutions—that is, to Congress, the President, and the judiciary—to govern on their behalf.⁸ Ackerman explains that the Constitution is formed through higher lawmaking, whose periods of excited activity he terms "constitutional moments."⁹ During these constitutional moments the public speaks as "We The People" to govern itself and change the Constitution according to the "considered judgments" of the community.¹⁰ Ackerman argues that the Framers consciously set up this dualist system in which citizens participate in politics on two tracks.¹¹

What is especially innovative about Ackerman's theory is his suggestion that constitutional moments structurally amend the Constitution in a manner other than that prescribed by article V.¹² Ackerman suggests that the Founding and Ratification Period, the Reconstruction Era, and the New Deal represent the three constitutional moments¹³ in America's history when The People offered their deliberatively considered judgments regarding "the rights of citizens and the permanent inter-

⁸ B. Ackerman, *supra* note 1, at 6.

⁹ See, e.g., *id.* at 97 (noting that Reconstruction and Founding periods were "constitutionally creative moments").

¹⁰ *Id.* at 6-7.

¹¹ See *id.* at 172.

¹² Article V of the Constitution outlines two procedures for constitutional amendments. The procedure most often employed is a two-thirds vote of both houses of Congress on a proposal which must then be ratified by three-fourths of the state legislatures or by conventions in three-fourths of the states. The second procedure, as yet to be employed, allows two-thirds of the state legislatures to petition Congress for the right to call a constitutional convention. This convention can then propose amendments which will be enacted upon approval by three-fourths of the state legislatures or by conventions in three-fourths of the states. See U.S. Const. art. V.

¹³ See B. Ackerman, *supra* note 1, at 41-50.

ests of the community”¹⁴ to change fundamentally the nature of the Constitution. Ackerman demonstrates that in each of these three constitutional moments, a group of politicians devised a process to take their case for constitutional change to the people in a novel manner that defied the normal legal procedures for constitutional change. According to Ackerman, the legitimacy of this “extra-legal” amendment procedure derives not from the dictates of article V, but from an intense process of deliberation and popular participation.¹⁵

For example, in the case of the Founding, the Federalists took the lead by outlining both a new constitutional framework emphasizing economic rights and limits on the power of the national government and a democratic procedure for implementing that framework which violated the amendment procedures of the existing Articles of Confederation.¹⁶ Similarly, a group of Republican Congressmen spearheaded the constitutional changes of the Reconstruction to emphasize a firm constitutional commitment to equality and personal liberty. These Congressmen, supported by the results of the elections of 1866, defied President Johnson and illegally coerced the Southern states to adopt the fourteenth and fifteenth amendments.¹⁷ Finally, President Roosevelt, with the assistance of a group of Democratic Congressmen and the encouragement of the 1936 Presidential and Congressional elections, spearheaded the constitutional changes of the New Deal to strengthen the power of the national government and create the modern administrative state.¹⁸ Roosevelt forged this change by threatening to pack the Supreme Court with new appointments, thereby pressuring Justice Roberts to “switch in time” and provide a crucial fifth vote to uphold the New Deal legislation.¹⁹ Deep public support for the New Deal gave Roosevelt a further mandate to use his appointments to the Court to install a new constitutional regime through “transformative appointments,”²⁰ without amending the Constitution through the procedures of article V.²¹

¹⁴ *Id.* at 240, 272-74.

¹⁵ See *id.* at 41-44.

¹⁶ See *id.* at 67-70.

¹⁷ See *id.* at 81-83.

¹⁸ See *id.* at 105-08.

¹⁹ See *id.* at 50-52.

²⁰ See *id.* at 50-52, 283-85.

²¹ William Fisher has pointed out that Roosevelt's use of transformative judicial appointments as a mechanism for constitutional change was hardly an innovation, noting that John Adams's appointment of John Marshall as Chief Justice (over 125 years earlier) was one such appointment. See William W. Fisher III, *The Defects of Dualism*, 59 U. Chi. L. Rev. 955, 966 (1992). Nor was Roosevelt the last President to attempt to make such an appointment; Ackerman argues that Reagan's failed effort to place Robert Bork on the Supreme Court was a part of this tradition. See B. Ackerman, *supra* note 1, at 51-52; Ackerman, *supra* note 2, at 1177-79.

Moreover, Ackerman suggests that each of these constitutional moments forms a separate regime of constitutional law which must be synthesized through judicial interpretation in order to derive the true meaning of the Constitution.²² Although this concept of constitutional synthesis has sparked some new thinking about the Constitution²³ and Ackerman's innovative view of constitutional theory and history offers a creative response to the "counter-majoritarian difficulty" of judicial review,²⁴ *We The People* has also spawned criticisms on a number of fronts.²⁵ While this Note will not consider the strengths and weaknesses of Ackerman's constitutional theory, it is important to understand how Ackerman's theory of dualist democracy and his view that the will of the people provides the Constitution with its legal authority support his proposal for a referendum procedure for constitutional amendment.²⁶

B. Ackerman's Referendum Proposal

While Ackerman views the use of transformative appointments—such as those successfully employed by Roosevelt—as a valid mechanism with which to change the Constitution, he prefers the use of a national

²² See B. Ackerman, *supra* note 1, at 58-67. Ackerman proposes to investigate this process more fully in Volume 3 of *We The People: Interpretations*. See *id.* at 99.

²³ See, e.g., Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918, 920 (1992) (praising Ackerman's insight in viewing Constitution as synthesis of different constitutional regimes).

²⁴ Ackerman's theory of dualist democracy responds to the "counter-majoritarian difficulty" inherent in judicial review of laws enacted by democratically elected officials, a central question in constitutional scholarship since Alexander M. Bickel's *The Least Dangerous Branch* (1962), by arguing that the Supreme Court's exercise of judicial review serves to preserve the decisions of previous constitutional moments. Ackerman argues that this view offers a much more satisfying explanation of judicial review than a monist theory of democracy based on supporting the political process, see generally John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980), or on preserving fundamental rights, see generally Ronald Dworkin, *Taking Rights Seriously* (1977), because the dualist theory best reflects and fits the unique American constitutional scheme. See B. Ackerman, *supra* note 1, at 33 (noting that dualism invites "deepening reflection upon the distinctive strengths and weaknesses of the American Constitution").

²⁵ See, e.g., Fisher, *supra* note 21, at 965 ("[T]o make this case Ackerman is obliged to read a few passages in *The Federalist* very aggressively and to ignore several well-known features of James Madison's theory of government."); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan. L. Rev. 759, 785, 789-90 (1992) ("[Ackerman's analysis of *Brown v. Board of Education*] descends from implausibility to fantasy [for he] would have us believe that *Brown's* incipient ban on race discrimination was implicit in the New Deal's constitutional commitment to activist government. Yet, to credit this argument we must turn a blind eye to history. . . . Ackerman would have us believe that the Supreme Court could have decided *Brown* anytime after the 1937 switch-in-time."); Sherry, *supra* note 23, at 918 (describing *We The People* as "mired in a fictional past and envision[ing] a utopian future").

²⁶ See B. Ackerman, *supra* note 1, at 54 (noting that referendum procedure could provide necessary "evidence of deep and broad support *required* for a sharp constitutional break with the past") (emphasis added).

referendum because it promises to be a more direct and focused avenue for constitutional change.²⁷ Ackerman criticizes transformative appointments for three basic reasons.²⁸ First, the debate on appointments is poorly focused as citizens may judge Supreme Court nominees on personality as much as or more than on principle.²⁹ Second, the President's role in transformative appointments (as opposed to other forms of constitutional change) is too weighty because Congress is an unequal partner.³⁰ Third, this "emerging system of transformative appointments" raises the threat of "unacceptable elitism" because it can change the Constitution without involving the populace.³¹

Ackerman's proposed alteration of the amendment process is designed to enable the President and Congress to take potential constitutional changes directly to the people:

During his or her second term in office, a President may propose constitutional amendments to the Congress of the United States; if two-thirds of both Houses approve a proposal, it shall be listed on the ballot at the next two succeeding Presidential elections in each of the several states; if three-fifths of the voters participating in each of these elections should approve a proposed amendment, it shall be ratified in the name of the People of the United States.³²

Because he views popular sovereignty as the sole legitimating principle of the Constitution, Ackerman even prefers this referendum procedure to the formal procedures of article V.³³ However, few commentators besides Ackerman endorse a referendum procedure to amend the Constitution.³⁴ One commentator who does, Akhil Amar, goes beyond Ackerman to suggest that such a procedure could be adopted without a constitutional amendment.³⁵ Like Ackerman, Amar rests his case on the

²⁷ See *id.* at 54 (suggesting that "legal focus, institutional weight, [and] popular responsiveness" can be better captured by referendum procedure than transformative appointments).

²⁸ Ackerman initially levelled these criticisms and suggested his referendum proposal in a discussion of the rejection of Robert Bork's nomination to the Supreme Court by the United States Senate. See Ackerman, *supra* note 2, at 1182.

²⁹ See B. Ackerman, *supra* note 1, at 52-53.

³⁰ See *id.* at 53.

³¹ *Id.* at 53-54.

³² *Id.* at 54-55.

³³ See *id.* at 54 (underscoring article V's weaknesses in that "[w]e may no longer believe that the states [should] have a veto over national political change").

³⁴ There have been several commentators who have criticized the introduction of such a procedure into America's constitutional politics. See, e.g., John R. Vile, *Contemporary Questions Surrounding The Constitutional Amendment Process* 87 (1993) (questioning value of Ackerman's proposal in light of its oddities and potential dangers); Thomas K. Landry, *Ackermania: Who Are We the People?*, 47 U. Miami L. Rev. 267, 286-89 (1992) (seriously considering proposal but rejecting it because it would destroy federal nature of America's constitutional scheme by eliminating state involvement in constitutional politics).

³⁵ Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*,

underlying principle that popular sovereignty alone legitimizes the Constitution.³⁶

Needless to say, there are other interpretations of the American constitutional scheme.³⁷ However, this Note accepts the popular sovereignty theory of constitutional legitimacy in order to question whether implementation of a referendum procedure for constitutional amendment is a worthwhile reform within that framework. Even within this view, Ackerman includes high threshold requirements for enacting an amendment,³⁸ thereby acknowledging some need to build in a screen to filter out nondeliberative amendments and to ensure that the public enacts only those amendments which are rooted in higher lawmaking.³⁹ Before examining whether these threshold conditions would be sufficient to achieve that goal, the next Section first outlines an interpretation of the dynamics of dualist democracy.⁴⁰

C. *The Referendum Procedure in the Context of Dualist Democracy*

The core of Ackerman's argument for the referendum proposal is that it will directly involve the public in constitutional lawmaking and will result in higher lawmaking.⁴¹ Hence, Ackerman endorses a referendum procedure for its theoretical appeal on popular sovereignty grounds; however, he does not consider how present political conditions might

55 U. Chi. L. Rev. 1043 (1988). Amar argues that since many state constitutions echoed the Declaration of Independence's view that the people retain the natural right to alter their form of government, expressions of popular sovereignty—such as the state conventions authorized in article VII to ratify the Constitution—are legal forms of amending a constitution. See *id.* at 1050. While a national referendum procedure is acceptable to Amar, he recommends deliberation in popular and proportionately elected representative bodies. See *id.* at 1094.

³⁶ See *id.* at 1050.

³⁷ For one alternative interpretation, see Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893, 905 (1990) (arguing that Constitution contains "right mix" between entrenching basic civil rights and institutional arrangements and allowing for popular expression). Sager criticizes the popular sovereignty interpretation of the Constitution because the Constitution recognizes "that there are important matters of right and wrong that transcend preference, collective choice, and welfare." *Id.*

³⁸ See B. Ackerman, *supra* note 1, at 54-55 (imposing requirements of second-term Presidential initiating proposal, passage by two-thirds of both houses of Congress, and support from three-fifths of electorate in two successive presidential elections).

³⁹ While Ackerman does not explicitly state that the threshold requirements are meant to ensure deliberation, their basic elements—especially the requirement of a supermajority in two successive Presidential elections—seem uniquely suited to achieve that end.

⁴⁰ It is important to note that Ackerman does not explicitly outline the interpretation of dualist democracy offered in Section C. While it is possible that the interpretation offered here differs somewhat from Ackerman's view, Section C outlines this author's best and most defensible understanding of dualist democracy.

⁴¹ See B. Ackerman, *supra* note 1, at 266 ("So long as higher lawmaking remains mysterious [to the public] . . . we remain far away from our goal [of making constitutional change accessible].").

affect the potential for higher lawmaking or why a referendum procedure would—or would not—lead to higher lawmaking in practice.

While times of national crisis—such as the Founding, the Reconstruction, and the New Deal eras—may offer unique possibilities for higher lawmaking, the minimal threshold conditions proposed by Ackerman cannot ensure that a national referendum procedure would be limited to such times of crisis. Ackerman does not address this issue, but in light of the rarity of previous constitutional moments and their exceptional characteristics,⁴² he would probably acknowledge that not every successful referendum would constitute a constitutional moment. By their nature, constitutional moments must be rare events; they are significant because they *fundamentally* change the previous constitutional order.

While Ackerman could not expect that every successful referendum would mark a new constitutional moment, he would expect that successful referendums not enacted during constitutional moments would be consistent with the principles of the previous constitutional regimes. Hence, nonconstitutional moment-inspired referendums should cohere with the synthesis of the principles of the original Constitution (largely economic rights), the commitment to equality and personal liberty of the Reconstruction, and the principle of a strong national government founded by the New Deal.⁴³ Ackerman hints at this view through his suggestion that certain periods of mobilization and deliberation consistent with the present constitutional regime may be “lesser constitutional moments,” pointing to the Jeffersonian and Jacksonian states’ rights movement⁴⁴ and the civil rights movement⁴⁵ as two notable examples. In the event that a successful referendum departs from the constitutional regime but is not part of a constitutional moment, Ackerman might contend that the people would later rebuff this effort as a “failed constitutional moment.”⁴⁶ A failed constitutional moment would, at most, make a limited departure from the considered judgment and stability which characterizes a constitutional regime.

For example, the repeal of the eighteenth amendment fourteen years after its initial enactment might suggest that Prohibition represented a

⁴² See *id.* at 6 (noting that “decisions by the people [that is, constitutional moments] occur rarely”).

⁴³ This requirement flows from Ackerman’s views on synthesizing the principles of the three constitutional regimes. See note 22 and accompanying text *supra*.

⁴⁴ See B. Ackerman, *supra* note 1, at 77, 196.

⁴⁵ See *id.* at 108-09, 196.

⁴⁶ *Id.* at 56. Ackerman uses this term to characterize President Reagan’s reelection in 1984 and Reagan’s subsequent attempt to nominate Robert Bork to the Supreme Court. See *id.* Ackerman also uses this term to describe the consequences of William Jennings Bryan’s defeat by William McKinley in 1896. See *id.* at 84.

failed constitutional moment.⁴⁷ This failure might have occurred because Prohibition attempted to impose a certain type of morality on the public that was not the "considered judgment of the community." Alternatively, one might view Prohibition as illustrative of the view that some constitutional amendments may be enacted through normal politics requiring less deliberation, provided that the amendment is consistent with the existing constitutional regime.

While failed constitutional moments are always possible, as long as the public halts its nondeliberative course before permanently departing from an entrenched constitutional regime, the failed effort will not undermine the foundation of dualist democracy. However, if such amendments are enacted without sufficient deliberation, and (unlike Prohibition) are not later rebuffed, they threaten to undermine the basis of dualist democracy by undercutting the view that citizens *deliberatively* adopt a regime of constitutional law which reflects their considered judgments.

For a referendum procedure to result in higher lawmaking and avoid enacting *reflexive*, rather than *deeply reflective*, amendments,⁴⁸ it must nurture a level of deliberation to screen out normal political enactments at odds with the established constitutional regimes. Ackerman explains that the process of higher lawmaking is made up of several steps which together serve as this screen: a signaling of the movement's deep, broad, and decisive support, an elaboration of the movement's basic proposal in accessible language, a substantial period for mobilized deliberation, and the enactment of the proposal.⁴⁹ Despite Ackerman's procedural threshold requirements,⁵⁰ however, a popular referendum could still conceivably pass without the deliberation necessary to screen out an antiregime amendment; a referendum procedure does not *necessarily* involve intense deliberation and "transformative thinking" by the electorate, but only a certain level of popular support.⁵¹

The present low levels of duty to the polity, understanding of constitutional principles, empathy for others, political efficacy,⁵² and inherent

⁴⁷ The twenty-first amendment, enacted in 1933, provides that "[t]he eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. Const. amend. XXI, § 1. Although Ackerman does not specifically discuss this example, it illustrates the issues implicated in identifying a failed constitutional moment.

⁴⁸ This Note terms an "antiregime amendment" an amendment which is enacted in contravention of an entrenched constitutional regime (such as the commitment to equality found in the constitutional moment of Reconstruction) without sufficient deliberation to have changed the previous constitutional regime altered by the amendment. For an example of an antiregime amendment, see notes 57-59 and accompanying text *infra*.

⁴⁹ See B. Ackerman, *supra* note 1, at 290-94.

⁵⁰ See note 38 and accompanying text *supra*.

⁵¹ The necessary components of this "transformative thinking" are described in Part II. See notes 62-64 and accompanying text *infra*.

⁵² This Note employs this term to describe the feeling that participation in political action

value placed on political participation, and the substantial flaws of America's political system all threaten to handicap any potential deliberation and transformative thinking by the electorate.⁵³ Notwithstanding these obstacles to true deliberation, Ackerman might offer two possible defenses for implementing the referendum procedure: that the *referendum procedure itself* would ensure deliberation, or that the fact that a referendum considers a *constitutional issue* would spark deliberation.⁵⁴ As will be shown in Part III.B, however, the states' experience with referendum procedures casts doubt on the suggestion that America can rely on the power of the referendum procedure alone to spark deliberation. Nonetheless, Ackerman's suggestion about the power of constitutional debate, which is at the heart of his dualist aspirations for constitutional politics, requires further examination.

The critical question in examining the power of constitutional debate is whether legislatures operating under the article V procedure or voters employing a referendum procedure would better deliberate in amending the Constitution. While Ackerman prefers the direct mechanism of a referendum for higher lawmaking, a commitment to popular sovereignty does not *necessarily* compel the use of a direct-democratic mechanism to instigate constitutional change.⁵⁵ Ackerman might contend that popular involvement in constitutional politics will induce a level of awareness of and reflection on the present constitutional regime sufficient to prevent the passage and persistence of antiregime amendments. However, the dynamics of America's pluralist politics, discussed in Part III, undernourish the American conception of citizenship and political culture, thereby lessening the potential for deliberative public constitutional debate.⁵⁶

is ineffective and does not make a difference.

⁵³ These obstacles to deliberation are discussed in Part III *infra*, and proposed reforms to remedy them are considered in Part IV *infra*.

⁵⁴ Ackerman might also contend that America should employ such a device, despite its flaws, because it is an improvement over the use of transformative appointments. However, even if this were true (an issue beyond the scope of this Note), the implementation of a referendum procedure would not preclude a President from "amending" the Constitution through transformative appointments.

⁵⁵ Michael Klarman notes that "[n]othing in the nature of dualist democracy requires, or indeed even favors, abandoning Article V's conveniently precise rule for identifying successful accomplishment of constitutional change." Klarman, *supra* note 25, at 767. Moreover, Ackerman's understanding of previous constitutional moments indicates that higher lawmaking can occur through agents of the popular will such as Roosevelt's leadership during the New Deal.

⁵⁶ See Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 Colum. L. Rev. 581, 598-99 (1991) (noting that Ackerman's suggested level of civic consciousness may prove elusive, as "the dominance of liberal pluralism [has] undermined the dualist system over time. [Hence,] the subordination of constitutional citizenship to pluralist politics appears indisputable").

If America's pluralist politics undernourishes the American conception of citizenship enough to preclude direct public involvement in deliberative constitutional politics, then one might expect antiregime referendums to succeed and persist without embodying the considered judgments of the community. For example, under the present regime of a strong national government⁵⁷ committed to equality,⁵⁸ Referendum X, a national referendum limiting constitutional protection and remedies for discrimination in housing, should fail at the ballot box. If Referendum X does not garner support from a deliberative and reflective decision to change the entrenched constitutional regime, it should fail because its passage would undermine the essence of dualist democracy by allowing a deliberatively entrenched regime to be eroded through normal politics. If Referendum X (which is similar to one passed in California⁵⁹), did succeed and persist in opposition to the present constitutional regime (that is, it was an antiregime amendment), it might suggest that voters did not deliberatively and thoughtfully consider the proposed amendment.

One explanation for the public's failure to deliberate effectively on Referendum X might be that the political environment failed to prepare the public for thoughtful discussion and political participation and thereby limited the quality of the public deliberation. Alternatively, the passage and retention of Referendum X might disprove the assumption that the American people deeply agree with the principle of equality embodied in the constitutional regime arising from the Reconstruction and/or the New Deal's empowerment of the national government to protect equality (and other constitutional principles).

This Note highlights the threat of antiregime amendments, such as Referendum X, to suggest that the failure of a referendum procedure to produce higher lawmaking does not necessarily undermine the viability of Ackerman's dualist aspirations for popular constitutional lawmaking but rather illustrates the need for deliberative preconditions before implementing his referendum proposal. This Note examines how Ackerman's proposal would work by outlining two possible models of public participation in constitutional politics and then analyzing them in theory and in practice.

⁵⁷ This regime stems from the constitutional moment of the New Deal. See text accompanying note 18 *supra*.

⁵⁸ This regime stems from the constitutional moment of Reconstruction. See text accompanying note 17 *supra*.

⁵⁹ See discussion of *Reitman v. Mulkey*, 387 U.S. 369 (1967), at notes 128-36 and accompanying text *infra*.

II

TWO MODELS OF THE POLITICAL PROCESS

A. Deliberating About Deliberation

If Americans value the present institutional arrangements and civil rights embodied in the Constitution, proponents of a national referendum procedure to amend it bear a special theoretical burden: to explain how and why people will not alter the basic elements of the present constitutional scheme without thoughtful deliberation. This explanation must specify how public consideration of proposed constitutional amendments would involve deliberative votes based on reasoning about the common good, rather than nondeliberative votes based on private interests at the expense of the common good. As a generally available referendum procedure could be employed either during the heightened activity of a constitutional moment or during times of normal politics, such a procedure must be able to screen out antiregime amendments in times of normal politics. Before analyzing public behavior during normal politics⁶⁰ to understand how the public might view proposed referendums during those times, this Section discusses the different levels of deliberation during times of both heightened activity and normal politics.

Despite the rarity of constitutional moments, Ackerman does not address the possibility that referendums could amend the Constitution in nonconstitutional moments. He seems to depend on the referendum mechanism itself and its threshold requirements to enable the people to offer their considered judgments. Ackerman confidently evaluates how the referendum procedure would work:

Properly structured, it can serve as a catalyst for the broad-ranging popular debate essential for the democratic legitimation of proposed constitutional initiatives. While the President and Congress, acting together, should be able to propose an amendment, they should not be able to ratify an amendment without first going to the People and gaining the specially focused and considered consent permitted by the use of the referendum device.⁶¹

Ackerman's confidence appears to stem from a view that the mere use of the referendum procedure for constitutional amendment will spark a deliberative form of politics. He explains that in exercising their considered judgment on a proposed constitutional amendment, people would

⁶⁰ See Part III *infra*.

⁶¹ B. Ackerman, *supra* note 1, at 54-55. Ackerman's suggestion that the President and Congress must go directly to the People in order to ratify an amendment does not seek to eliminate the indirect route of article V, it simply underscores Ackerman's preference that national constitutional politics be conducted directly rather than through the indirect route of transformative appointments or article V amendment.

transform from *private* citizens, unconnected to public concerns, to *private citizens*, who care deeply and deliberate in constitutional decision-making enough that they will not endorse a proposal that undermines the present constitutional regime without intending to do so.⁶² Ackerman explains that this deliberative reflection upon the nature of the constitutional regime is a process in which

[m]uch of the softness of normal public opinion will dissolve. The apathy, ignorance, selfishness that occlude the judgments of tens of millions of Americans will have been dissipated by hundreds of millions of arguments, counterarguments, insults, imprecations. Apathy will give way to concern, ignorance to information, selfishness to serious reflection on the country's future . . .⁶³

Ackerman's description of this transformative thinking involves two essential elements, a process of "serious reflection" and a focus on the "country's future." The first requires thoughtful and informed deliberation. The second demands that people deliberate in a public-regarding manner. Taken alone, neither of these components will produce a constitutional moment. Together, these two components produce what this Note terms "Model I politics"; the absence of either of these two components characterizes what this Note terms "Model II politics."⁶⁴

Since the public does not turn deliberation on and off like a switch, there is a spectrum of possible levels of deliberation (high Model I to low Model II). In particular, dualist democracy might require a lower level of Model I deliberation to enact an amendment consistent with previous constitutional moments, and a higher level of Model I deliberation to establish a new constitutional moment. A successful use of Ackerman's proposed referendum procedure would require at least the lowest level of deliberation necessary to attain Model I status (combining serious reflection and a focus on the country's future) in order to screen out the potential enactment of an antiregime amendment.

If a proposed constitutional amendment could overcome Ackerman's threshold requirements—second-term President, Congressional supermajority, and a supermajority vote in successive national elections—but fail to achieve even the necessary lower level of Model I deliberation, Ackerman's proposal could potentially allow for passage of antiregime amendments. This possibility, unless extremely remote, cautions against introducing a referendum procedure into constitutional politics without first substantially reforming the present political condi-

⁶² See *id.* at 243.

⁶³ *Id.* at 287.

⁶⁴ These terms approximate the attitude of the electorate during times of higher lawmaking (Model I) and normal politics (Model II). For a description of the dualist democratic nature of these two levels of lawmaking, see text accompanying notes 8-15 *supra*.

tions in America. Part III examines the issue of whether referendums could pass without Model I deliberation by considering whether a referendum procedure can serve as a focal point for deliberation in America's pluralist political system. First, however, the next Section presents a more detailed description of Model I and Model II deliberation.

B. Two Models of Deliberation

In Model I deliberation, as envisioned by Ackerman, "apathy will give way to concern, ignorance to information, selfishness to serious reflection on the country's future."⁶⁵ In this transformation, the country would temporarily transcend the evils of faction which may be constrained, but never completely overcome, within America's pluralist political system.⁶⁶ Transcending factional politics would mean that the evils of partisan and interest group politics would not infect deliberation over the "permanent rights of citizens and the aggregate interests of the community."⁶⁷ For Ackerman's proposal to be desirable, it must either provoke Model I deliberation or, at a minimum, prove at least as effective as article V's representative amendment procedure in preventing the evils of partisan or interest group politics from infecting the Constitution.

A Model I process of deliberation demands that the consideration of constitutional issues through a referendum procedure will be such that "when individuals act politically, when they act as citizens, they are to act on behalf of and with regard to one another, as well as themselves, as persons worthy of a full and equal measure of respect."⁶⁸ A Model I vision of a politics of respect and equal participation can best be achieved through a participatory, empathetic, and public-spirited conception of citizenship.⁶⁹ Moreover, Model I deliberation can only occur in a polit-

⁶⁵ B. Ackerman, *supra* note 1, at 287.

⁶⁶ Madison defined a "faction" as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *The Federalist* No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

⁶⁷ B. Ackerman, *supra* note 1, at 240, 272-74.

⁶⁸ Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *Ind. L.J.* 145, 183 (1977-1978). While Michelman contrasts two modes of consideration, his discussion focuses on the legislative process and on how the Supreme Court conceives of it. See *id.*

⁶⁹ In this sense, Model I consideration seeks to avoid the exercise of "naked preferences" which, on one account, are frowned upon by the Constitution. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689, 1691 (1984) (explaining that Constitution views politics as search for common good rather than mere reconciling of preferences, thus it forbids "naked preferences" under several of its clauses). The necessity of developing a sense of empathy for others through education in order to screen out a proposed amendment driven by a naked preference is considered in Part IV. See notes 225-39 and accompanying text *infra*.

ical marketplace thriving with accurate portrayals of ideas, thoughtful discussion of the issues, and a knowledgeable and thoughtful electorate.⁷⁰

In contrast, a Model II conception of politics is not a thoughtful, public-spirited discussion, but rather a strategic game for selfish gain. In this game, participants pursue personal and corporate profit through the political process. As legislators or voters, they do not deliberate: they act on self interest rather than the public interest. Frank Michelman has offered the following description of a Model II vision of politics (as applied to legislators):

Legislative intercourse is not public-spirited but self-interested. Legislators do not deliberate towards goals, they dicker towards terms. There is no right answer, there are only struck bargains. There is no public or general social interest, there are only concatenations of particular interests or private preferences. There is no reason, only strategy; no persuasion, only temptation and threat. There are no good legislators, only shrewd ones; no statesmen, only messengers; no entrusted representatives, only tethered agents.⁷¹

This vision of politics views preferences as fixed and exogenous to the political process, a stark contrast from Model I where preferences are formed through deliberation and political participation.

A marketplace of ideas mobilized by private interests would characterize Model II consideration of a proposed constitutional amendment. In this scenario, the electorate would not actively engage in public discourse and political participation but would selfishly operate to maximize their individual interests. These political dynamics would both discourage and hinder citizens from enjoying as well as succeeding in political action. Hence, people would lack a sense of connectedness and duty to the polity, an understanding of constitutional principles, empathy for others, a sense of political efficacy, and an appreciation for the intrinsic benefits of political participation.⁷²

⁷⁰ Lynn Baker has explained that this aspect of Model I politics entails four distinct procedural aspects of deliberation:

First, deliberation requires that one be well-informed about proposed legislation. This includes being knowledgeable about competing—and minority—ideas, needs, and perspectives. Second, it requires that this information be thoughtfully and rationally considered rather than reacted to emotionally. Thoughtful and rational consideration will typically be more time consuming than purely emotional reaction. Third, deliberation requires that one be able to discuss and exchange views on proposed legislation with other decisionmakers, if one chooses. Fourth, deliberation requires openmindedness. One's preferences must be revisable in light of discussion, debate and new information.

Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 *Chi.-Kent L. Rev.* 707, 745 (1991).

⁷¹ Michelman, *supra* note 68, at 148.

⁷² The nature of these problems and proposed reforms to remedy them are discussed further in Part IV *infra*.

The appeal of dualist democracy is that even if normal politics generally conforms to Model II, people can rely on the constitutional provisions produced through higher lawmaking to preserve their Model I decisions. Before implementing a national referendum procedure to connect the public directly to constitutional politics, however, it is important to consider whether this innovation could potentially import Model II lower lawmaking into the Model I Constitution. The next Part offers an analysis of referendums in ordinary times (nonconstitutional moments) to test whether they bring Model I politics to the fore or whether they allow Model II politics to hold sway.

III

REFERENDUMS IN THEORY AND PRACTICE: PLURALIST POLITICS AGAINST THE DEMOCRATIC IDEAL

The central question in evaluating Ackerman's referendum proposal is whether Model II politics would characterize referendums during normal times, times free from the crises which precipitated past constitutional moments, so as to lead to the enactment of antiregime amendments. In an attempt to answer this question, this Part discusses how low voter turnout, high levels of ignorance or misinformation, a disproportionate access to campaign funds by special interests, and a lack of sensitivity to minority rights all suggest that American pluralist politics currently undercut the possibilities for Model I deliberation through a referendum procedure like that proposed by Ackerman.

A. A Theoretical Analysis of Political Participation in the Pluralist State: Obstacles to Deliberative Politics

Political theory continues to struggle to explain why people participate in political action. Mancur Olson's landmark economic analysis of politics, *The Logic of Collective Action*,⁷³ offers one extreme explanation, concluding that collective political participation is irrational.⁷⁴ Olson argues that only selective incentives given to individuals (specific and tangible benefits, such as money), apart from any group benefit (such as the collective benefits from the victory of the better candidate), can induce a rational self-interested individual to participate in collective action.⁷⁵

Ackerman notes that Olson's theory of collective action explains the motivations of "the perfect privatist."⁷⁶ Motivated solely by self interest, perfect privatists do not participate in collective political action (voting

⁷³ Mancur Olson, *The Logic of Collective Action* (1965).

⁷⁴ See *id.* at 1-2.

⁷⁵ See *id.*

⁷⁶ B. Ackerman, *supra* note 1, at 236-40, 352 n.7.

or other political activity) because they can free-ride on the actions of others (the free-rider problem).⁷⁷ Ackerman, however, rejects Olson's view of political participation and suggests that the private citizen is someone with "enough virtue to get . . . to the polls."⁷⁸ This suggestion coheres with the broadened calculus of participation proposed by Jack Nagel which posits that a rational person will vote under certain circumstances.⁷⁹ Specifically, a rational individual will participate in political action if the value of participating outweighs the costs.⁸⁰ While Ackerman does not refer to this calculus, he relies on a notion of obligation to explain why citizens vote.⁸¹ This notion of obligation can be understood as part of the duty component of Nagel's theory (which increases one's valuation of political participation). However, Ackerman explains that in normal politics a sense of duty to participate is the primary motivation because the private citizen finds little intrinsic value in participating, sees little efficacy in voting, and is "*under no illusions about the [low] quality of reflection that lies behind her ballot.*"⁸²

The calculus of participation not only helps to explain the private citizen's limited interest in voting but also explains why certain interest groups succeed in America's political system. Nagel and Olson explain how interest groups with a concentrated interest (that is, groups with a limited number of parties receiving substantial direct benefits) have a greater motivation to participate and will be more successful than those groups with diffuse interests (groups with many parties receiving diluted

⁷⁷ See *id.* at 234.

⁷⁸ *Id.* at 236-40.

⁷⁹ Nagel indicated that these circumstances would exist when:

$$(C_p) < P(B_i + B_g) + S + I + D$$

where C_p = the cost of political participation,

P = the probability of making a difference (political efficacy),

B_i = the benefit to the individual,

B_g = the benefit to the group (as valued by the individual),

S = selective incentives to the individual for participating,

I = the intrinsic value in participating, and

D = the strength of the duty to participate.

Jack H. Nagel, *Participation* 26 (1987).

⁸⁰ See *id.*

⁸¹ See B. Ackerman, *supra* note 1, at 239 (noting "limited, strategic, but universal obligation that voting imposes on private citizens").

⁸² *Id.* at 241. The American public may deserve more credit than Ackerman gives them. Samuel Popkin suggests that while people do not educate themselves on every issue, they engage in a

low-information rationality, or "gut" rationality [that] . . . is by no means devoid of substantive content, and is instead a process that economically incorporates learning and information from past experiences, daily life, the media, and political campaigns. As Tony LaRussa, the manager of the Oakland Athletics, put it: "When you trust your gut you are trusting a lot of stuff that is there from the past."

Samuel L. Popkin, *The Reasoning Voter* 212 (1991).

direct benefits).⁸³ For example, a group of automobile manufacturers, each of whom will lose money if forced to manufacture cars with a higher average fuel economy standard, will likely prevail over a coalition of Citizens for Clean Air (CCA) who are numerous and have little to gain as individuals. Groups like the CCA consistently lose to concentrated interests by contributing less to political campaigns, waging less effective public relations campaigns, hiring less effective lobbyists, and ineffectively organizing their constituencies.⁸⁴ Not surprisingly, "[f]eelings of frustration and helplessness abound among initiative activists on campaigns where opposition money [from concentrated interests] engulfs them."⁸⁵

Some pluralist theorists, drawing on Madison,⁸⁶ disagree with Olson and counter that bargaining among interest groups will lead to a social optimum.⁸⁷ While this pluralist vision of politics is appealing, it fails to answer Olson's insight that diffuse interests will confront substantial obstacles in order to overcome concentrated interests. Furthermore, concentrated interests may engage in "rent-seeking" behavior to reap government benefits particular to their needs rather than struggle amongst themselves as some neo-Madisonians would posit.⁸⁸

⁸³ Hence, special interests comprised of corporations which can save large sums of money by avoiding regulation will prevail against citizens groups where individual citizens will not receive large monetary rewards from their work. This phenomenon suggests that special interests will stifle both reform and innovation so that the nation suffers a slow decline. See, e.g., Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* 36-37 (1982) (arguing that proliferation of special interest groups compromises public interest and acts as barnacle on society to hold back economic growth).

⁸⁴ See, e.g., Daniel A. Farber & Philip P. Frickey, *Law and Public Choice* 19 (1991) (reporting findings of Schlozman and Tierney that "interest group politics is skewed dramatically toward narrow economic interests" and that "[t]oday many groups have substantial resources and engage in sophisticated political strategies, including active involvement in electoral politics").

⁸⁵ John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. Miami L. Rev. 377, 405 (1985).

⁸⁶ Madison predicted that factions could be controlled in a large republic as "[t]he influence of factious leaders may kindle a flame in their particular States but will be unable to spread a general conflagration through the other States." *The Federalist* No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

⁸⁷ See generally Charles E. Lindblom, *The Intelligence of Democracy: Decision Making Through Mutual Adjustment* (1965) (arguing that assortment of interest groups in American society leads to socially optimal equilibrium).

⁸⁸ "Rent-seeking refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention [or lack of potential intervention] in the market." Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 224 n.6 (1986). For example, wool manufacturers were able to maintain a large subsidy, paying some sheep ranchers over \$100,000 per year, even though the initial justification for the program that wool was a strategic material ceased to be true in 1960. Congress finally voted to end support for this program just this past year, after Vice President Gore termed the program

While thoughtful deliberation may not arise merely from consideration of a constitutional issue, Ackerman implies that use of the referendum device in and of itself would spark deliberation. However, the American and Swiss experience with referendums belies this view. As reported by Jack Nagel, "[d]uring the 1970s, turnout in Swiss national referendums averaged 42 percent, whereas 52 percent voted in the 1975 Swiss federal election. A comparable 14-17 percent 'dropoff' . . . occurs in American states."⁸⁹ While this observation is not dispositive, the next Section's discussion of the experience with referendums in the United States underscores this cause for concern.

*B. The States' Experience with Referendums:
A Case of Unrealized Democratic Ideals*

A much heralded attribute of America's federal system is that the states can serve as laboratories of democracy.⁹⁰ Although many states have experimented with the referendum procedure in their laboratories, Ackerman does not consider whether these results support his proposal. In fact, the results of these experiments show that referendums at the state level have not engendered public-regarding and thoughtful deliberation, but rather manipulation of the electorate by well-organized and well-funded groups.

The states' experience with referendums does not necessarily doom Ackerman's proposal, however, since it differs from the states' current use of referendums in three fundamental ways. First, some states use ballot propositions to enact statutes as well as or instead of constitutional amendments.⁹¹ Second, voters may afford less consideration to state issues than to national issues. Third, Ackerman's proposal is more cautious than many of the referendum procedures used at the state level because the state procedures include lower threshold requirements.⁹²

an "unnecessary subsidy for the wealthy." See Stephen Barr, Two Farm Subsidies Plucked Out of Budget, Wash. Post, Oct. 17, 1993, at A8.

⁸⁹ J. Nagel, *supra* note 79, at 92.

⁹⁰ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

⁹¹ See, e.g., Colo. Const. art. XIX, § 2 (providing for direct public vote on proposed constitutional amendment after legislative approval); *id.* art. V, § 1 (providing for direct public vote on proposed constitutional amendments or proposed statutes after collection of requisite number of signatures).

⁹² See, e.g., Colo. Const. art. XIX, § 2 (providing for amendment through two-thirds vote of each house of legislature and majority vote of electorate at next election); *id.* art. V, § 1, cl. 2 (providing for proposed constitutional amendment to be placed on ballot if five percent of those voting in last election file requisite number of valid signatures with secretary of state three months before election). Amendment 2, recently enacted in Colorado to limit civil rights

However, two basic considerations minimize the importance of these distinctions and thus caution against use of the referendum at the national level. First, there are more opportunities for grassroots politics at the state level than at the national level. Second, the practical obstacles of low voter turnout, the strong influence of money on elections, the ability of concentrated interests (special interests) to dominate the marketplace of ideas, and insensitivity to minority rights all exist with respect to national constitutional issues as well as state issues. Under present political conditions, then, the behavior of the electorate in voting on proposed constitutional amendments through Ackerman's referendum procedure would be likely to reflect the low level of deliberation of Model II.

The American record of low voter turnout⁹³ as well as the lack of interest and dropoff in voting on referendums⁹⁴ is especially disturbing since turnout is heavily biased toward more affluent voters. After an in-depth consideration of voter behavior, Francis Fox Piven and Richard Cloward summarized the phenomenon that the "American electorate overrepresents those who have more, and underrepresents those who have less."⁹⁵ In addition to the distorting effects of low and economically uneven voter turnout, the high cost of referendum campaigns ensures that concentrated interests, which are able to raise large sums of money, both because they often have the resources as well as the incentives to contribute to referendum campaigns, will have a disproportionate influence on those who do vote. In a survey of the research on the subject, Professor Nagel found that

[i]n 1980, for example, the ten largest contributors to initiative campaigns in American states were three electric utilities fighting antinuclear power proposals, three tobacco companies resisting anti-smoking questions, and four oil firms. . . . [In his research of California initiative campaigns, David Magleby found that] opponents "can virtually guarantee the defeat of an initiative if they significantly outspend the proponents." Evidence from other states leads to a similar, but less absolute, conclusion. Outside California, opponents with a big financial edge succeeded in 79 percent of campaigns between 1976 and 1981, as compared with the 100 percent rate Magleby found in California.⁹⁶

protection afforded to gays, lesbians, and bisexuals, through the public procedure described above, is discussed at text accompanying notes 104-12 *infra*.

⁹³ The 55% voter turnout in the 1992 Presidential election, which ended a 30-year slide in voter turnout, still ranks the United States as having among the lowest voter turnout of all industrialized nations. See Pear, *supra* note 3, at B4.

⁹⁴ See notes 115-22 and accompanying text *infra*.

⁹⁵ Francis F. Piven & Richard A. Cloward, *Why Americans Don't Vote* 4 (1988).

⁹⁶ J. Nagel, *supra* note 79, at 93 (quoting David B. Magleby, *Direct Legislation: Voting on*

Despite Ackerman's confidence in the referendum to serve as a focal point for deliberation, Thomas Cronin highlights a serious weakness of referendums: "Whereas a town meeting gives all sides an equal chance to speak [and to listen,] . . . permitting unlimited spending [in referendum campaigns] promote[s] a system in which the better-financed side can, and does often, outspend the other by a dramatic margin."⁹⁷ Such disparate spending is problematic for deliberative democracy and Ackerman's aspirations for constitutional politics because the amount of campaign spending becomes the single most powerful predictor of who wins and loses in a referendum campaign.⁹⁸ For this reason, Daniel Lowenstein has decried the ability of large campaign spenders to manipulate the electorate and monopolize the "marketplace of ideas."⁹⁹ His study of referendum campaigns concluded that "the power of some groups to raise enormous sums of money to oppose ballot propositions, without regard to any breadth or depth of popular feeling, seriously interferes with the ability of other groups to use the institutions of direct democracy for their intended purpose."¹⁰⁰ Lowenstein further reported:

It has been shown that one-sided spending often causes the defeat of ballot propositions that would otherwise have been approved, and that one-sided spending results in campaigns marked by gross exaggeration, distortion and outright deception Thus, the results in certain of the ballot measure elections that we have examined have largely failed to reflect the will of the majority of the voters.¹⁰¹

Moreover, a study of three ballot propositions in Colorado, initially drawing widespread popular support but later defeated by staunch corporate opposition, arrived at a similar conclusion.¹⁰²

The popular initiatives in Colorado and Oregon in 1992 that were intended to curb the civil rights protections afforded to gays and lesbians offer a vivid example of the perils of popular constitutional lawmaking under present political conditions. These examples underscore how the framing of an issue can mean the difference between passage and defeat.

Ballot Propositions in the United States 147-48 (1984)).

⁹⁷ Thomas E. Cronin, *Direct Democracy* 226 (1989).

⁹⁸ See Betty H. Zisk, *Money, Media and Grassroots* 90 (1987) (reporting findings of comprehensive study which concluded that money is greatest predictor of who wins and loses in referendum campaigns).

⁹⁹ Daniel Lowenstein, *Campaign Spending and Ballot Proposition: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. Rev.* 505, 608 (1982).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 570.

¹⁰² See generally Randy M. Mastro et al., *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 *Fed. Comm. L.J.* 315 (1980) (examining nuclear safety proposal, bill promoting beverage container recycling, and bill reforming regulation of public utilities in 1976 campaign). In these campaigns, the corporate interest outspent the citizens' groups 4-1, 50-1, and 45-1, respectively. *Id.* at 360.

In Oregon, voters rejected by a fifty-six percent to forty-four percent margin an effort to amend the state constitution with a provision denouncing homosexuality as "abnormal" and "perverse," removing civil rights protection for discrimination against gays and lesbians, and requiring all levels of government in Oregon to take steps to discourage homosexuality.¹⁰³ In contrast, however, a similar effort in Colorado to deny gays, lesbians, and bisexuals protection against discrimination and minority or protected status passed by a vote of fifty-four percent to forty-six percent.¹⁰⁴ Hence, Lon Mabon, who led the antigay measure in Oregon, vowed to return there with a "Colorado-style" measure which could be framed more neutrally.¹⁰⁵

In successfully fighting for or against a referendum such as the one in Colorado, groups often seek to excite people's passions and emotions. The Coalition for Family Values (CFV), which organized the Colorado referendum,¹⁰⁶ was united by a powerful force—those majoritarian passions which Madison predicted would sway the public. Madison suggested that in direct appeals to the public (as opposed to representative government), "[t]he *passions*, therefore, not the *reason*, of the public would sit in judgment. But it is the reason, alone, of the public that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."¹⁰⁷ While appeals to passion do not spark the reasoned deliberation endorsed by Madison as well as by Ackerman,¹⁰⁸ they are often rooted in an ideological, rather than a self-interested, approach to politics. For example, in the Colorado referendum, the provisions restricting homosexuality would not directly benefit anyone; rather, they serve to forward a particular group's collective passion and view of the public good which may not be in the public interest. A collective passion, such as a passion for equality supportive of a constitutional norm, is not necessarily undesirable; however, many such passions are driven by prejudice and hatred.¹⁰⁹

In addition to their ability to frame the issues in public debate, well-financed and well-organized groups also are able to target their message

¹⁰³ See Jeffrey Schmalz, *Gay Areas Jubilant Over Clinton*, N.Y. Times, Nov. 5, 1992, at B8.

¹⁰⁴ See *id.*

¹⁰⁵ See Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. Times, Nov. 8, 1992, at A38.

¹⁰⁶ See *id.*

¹⁰⁷ The Federalist No. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961).

¹⁰⁸ In fact, Ackerman endorses this exact quotation from The Federalist. See B. Ackerman, *supra* note 1, at 347 n.70.

¹⁰⁹ Hans Linde has observed that many "collective passions appeal to a communal judgment of inclusion and exclusion based on nationality, race, or religious convictions—to *ad hominem* preconceptions like those condemned as 'invidious' in equal protection doctrine." Hans Linde, *When Initiative Lawmaking Is Not "Republican Government,"* 72 Or. L. Rev. 19, 35 (1993).

selectively through the media which allows them to define the proposition differently to different groups. Computer technology allows these groups to segment the electorate and to target each segment with very different, even contradictory, messages in order to unite them behind the same proposition. Moreover, such interest groups can use a variety of tools to mobilize targeted groups and further skew the voter turnout in an election. For example, by using focus groups, which gather together a representative group of individuals to test their reactions to political issues, well-funded campaigns can better identify the constituencies that might support their position and determine how they can best be mobilized. The use of focus groups is so prevalent that one analyst doubted that voters would see any spontaneous dialogue or activity during the entire 1992 presidential campaign.¹¹⁰

These tools were skillfully manipulated in the recent referendum campaign in Colorado, where the CFV framed the question of granting civil rights remedies to protect homosexuals from discrimination as a matter of homosexuals demanding special privileges¹¹¹ and thereby encouraging a large rural turnout to overcome the opposition that the ballot proposition faced in the major cities.¹¹² CFV's success in framing the issue and in winning the election supports David Magleby's prediction that, in the absence of political parties and other voting cues, "the side that defines the proposition usually wins the election."¹¹³ In a system where the public may be susceptible to certain emotional appeals and groups with access to large sums of money can dominate the marketplace of ideas, well-organized and well-funded groups can often define the issues in an unbalanced way and inhibit informed deliberation.¹¹⁴

¹¹⁰ See Elizabeth Kolbert, *Test Marketing A President*, N.Y. Times, Aug. 30, 1992, (Magazine), at 18, 60.

¹¹¹ For example, Kevin Tebedo, co-founder of the CFV, testified that the CFV inaccurately and unfairly depicted homosexuals in its advertising to gain support for the amendment by portraying homosexuals as a dangerous group demanding "special rights." See First News (KCNC, Denver television broadcast, Oct. 18, 1993), available in LEXIS, Nexis Library, Script File.

¹¹² See Dirk Johnson, *A Ban on Gay-Rights Law Is Put on Hold in Colorado*, N.Y. Times, Jan. 16, 1993, at A6.

¹¹³ David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 168 (1984).

¹¹⁴ The findings of cognitive psychology support Magleby's observation about the importance of framing the issue and further suggest why a marketplace of ideas dominated by concentrated interests will inhibit informed deliberation. Samuel Popkin explains:

[P]eople cannot easily integrate all their information, their choices are context-sensitive: "Preferences are not simply read off from some master list; they are actually constructed in the elicitation process. Furthermore, choice is contingent or context sensitive An adequate account of choice, therefore, requires a psychological analysis of the elicitation process and its effect on the observed response."

S. Popkin, *supra* note 82, at 17 (quoting Amos Tvesky et al., *Contingent Weighting in Judge*

Under present political conditions, the informed deliberation of Model I is limited to a small sample of the electorate. For example, over thirty-five percent of those voting on a typical proposition are not even aware of, let alone educated about, the issue.¹¹⁵ Needless to say, voters rarely deliberate on most referendum proposals. For example, in the case of a June 1972 environmental initiative presented to California voters in Proposition 9, sixty-seven percent of the electorate had not even heard of the issue five weeks before the election.¹¹⁶

Due to the ability of well-organized and well-funded groups to control and target information communicated to the public, voters often decide based upon distorted information. Thomas Cronin has reported that "voters are sometimes confused, often make up their mind at the last minute—perhaps as much on the basis of a television campaign blitz as on any detailed knowledge of the issues."¹¹⁷ Indeed, either because of such confusion, lack of comprehension, or unfamiliarity with the issue, fifteen to eighteen percent of those voting in statewide elections do not vote at all on issue-oriented propositions.¹¹⁸

As with low voter turnout, this dropoff is biased against those from lower socioeconomic backgrounds and with lower levels of education.¹¹⁹ Magleby explains that ballot propositions are often difficult to understand, with the deleterious consequences that

[i]n the absence of party cues or economizing devices, poorer and less educated voters confronted by most statewide propositions are less likely to participate and do not have their preferences recorded. For these citizens, at least, voting on propositions does not lead to a more accurate representation of the popular will than the traditional candidate elections.¹²⁰

The reason that party cues and economizing devices are so important for less educated voters is that, in a political environment which does not provide accessible and reliable sources of information, they serve as a means of lowering information costs for many voters.

Contrary to Ackerman's suggestion, the referendum procedure thus often fails to engage the public. Based on their international study, David Butler and Austin Ranney warn that the referendum procedure does not spark deliberation because it does not require dialogue and pub-

ment and Choice, 95 *Psych. Rev.* 371 (1988)).

¹¹⁵ See D. Magleby, *supra* note 113, at 129.

¹¹⁶ See *id.* at 128.

¹¹⁷ T. Cronin, *supra* note 97, at 187.

¹¹⁸ See D. Magleby, *supra* note 113, at 100.

¹¹⁹ See *id.* at 145 ("Compared with voters generally [and the population as a whole], people who typically vote on propositions are disproportionately well educated, affluent, and white.").

¹²⁰ *Id.* at 121.

lic participation.¹²¹ They conclude: "All in all, then, voting [on ballot propositions] is a most passive, undemanding, uninspiring and unimproving kind of civic participation, vastly inferior to taking an active part in the discussion of issues in town meetings, local caucuses, and other types of face-to-face assemblies."¹²²

The experience with referendums at the state level underscores that caution is required in considering a national referendum procedure for constitutional amendment. Specifically, Americans must consider whether the threshold requirements proposed by Ackerman—second-term President, congressional supermajority, and a national supermajority vote in successive elections—will ensure that those measures enacted through a referendum constitute the considered judgments of the community. If the threshold requirements do not ensure that the desirable amount of deliberation will occur, the nation, if committed to Ackerman's referendum proposal, must reform its political process. Such reform must stress education for constitutional citizenship in order to facilitate the deliberation necessary to screen out referendums which would pass under unreflective Model II political conditions.

C. Reflecting on Referendums in Practice

The preceding discussion of the politics of referendums counsels reformers to pay attention to whether the political process will always involve high levels of deliberation. Moreover, some commentators have argued that the specter of Model II referendums undermining America's constitutional commitment to equality and minority rights further militates against the implementation of referendum procedures.¹²³ For example, amendments which would place persons with AIDS in quarantine¹²⁴ or establish English as the official language¹²⁵ both have the potential to evoke certain public passions without the reasoned deliberation and transformative thinking anticipated by Ackerman's model. One notable example is a California proposition, passed by over seventy percent

¹²¹ See *Referendums: A Comparative Study of Practice and Theory* 33 (David Butler & Austin Ranney eds., 1978).

¹²² *Id.*

¹²³ See, e.g., Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 *Wash. L. Rev.* 1, 18-20 (1978).

¹²⁴ See Douglas H. Hsiao, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 *Duke L.J.* 1267, 1283 n.100 (1992) (citing *Cal. Prop.* 64 (1986)).

¹²⁵ See, e.g., *Ariz. Const. amend. 5* (establishing English as official language of Arizona). Anti-immigrant sentiment often prevails in referendums considering such laws, with "[t]he margins of victory [being] usually overwhelming." Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 *Harv. C.R.-C.L. L. Rev.* 293, 293 (1989). The Arizona amendment was later overturned on first amendment grounds, however. See *Yniguez v. Mofford*, 730 *F. Supp.* 309, 310 (D. Ariz. 1990).

of the electorate, which called on Congress to free the state of its obligation under the Voting Rights Act to provide ballots in languages other than English.¹²⁶

The impact of a national referendum procedure for constitutional amendment could be more damaging and severe than the use of referendums by states to amend their constitutions, because state and federal courts can presently strike down referendum-based antiregime amendments to state constitutions under the federal Constitution.¹²⁷ For example, in *Reitman v. Mulkey*,¹²⁸ the Supreme Court struck down a California referendum which banned state interference with a residential property owner's right to refuse to sell, lease, or rent to anyone (which overruled several legislative enactments) on the grounds that such a limitation protected discriminatory action in violation of the fourteenth amendment.¹²⁹ The *Reitman* Court stressed that its scrutiny (and overturning of the results) of the referendum was not based on the nature of the outcome (overturning a fair housing ordinance), but rather on the fact that the amendment served both to facilitate and effectively *encourage* discrimination.¹³⁰

Presumably, the *Reitman* referendum or another similar direct enactment, if adopted as a federal constitutional amendment through Ackerman's proposal, would not be reviewable by the Supreme Court since amendments can override previous judicial interpretations of the Constitution as well as the Constitution itself.¹³¹ Hence, there would be no remedy for those who lost constitutionally protected rights through the passage of an amendment such as that passed in *Reitman* because amendments to the Constitution are constitutional by definition.¹³² The

¹²⁶ See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 346-47 (1986).

¹²⁷ For a discussion of this phenomenon, see Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1549 (1990).

¹²⁸ 387 U.S. 369 (1967).

¹²⁹ See *id.* at 376.

¹³⁰ See *id.*

¹³¹ See, e.g., *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 18 (1916) (construing sixteenth amendment as overruling *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), and declaring use of income tax constitutional); see also Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 776 nn.127-28 (1991) (enumerating four occasions on which constitutional amendments reversed Supreme Court decisions).

¹³² This view is not the only understanding of America's constitutional scheme. See generally Jeff Rosen, Note, *Was The Flag Burning Amendment Unconstitutional?*, 100 Yale L.J. 1073 (1991) (arguing that flag-burning amendment infringing on first amendment would have been invalid under basic principles of America's constitutional scheme). However, Ackerman clearly accepts all enacted amendments as valid. See B. Ackerman, *supra* note 1, at 15 (arguing that "[n]o serious opponent suggested that the First Amendment could not be validly revised"); see also *id.* at 14-15 (arguing that properly enacted amendment establishing Christianity as state religion would be valid and enforceable).

threat of ballot propositions to minority rights is considerable and has led some legal commentators to underscore the need for a close judicial screening to filter out nondeliberative ballot propositions.¹³³

The public's vote on the California amendment for a right to discriminate and to overrule a legislative enactment to the contrary is a case in point against holding referendums in a nonpublic-spirited Model II political environment.¹³⁴ Surveys show that the voters in California did not cast their votes based on ignorance or distorted information, but understood the proposition's impact and voted based on some degree of racial prejudice.¹³⁵ If adopting such amendments into the Constitution is the price of adopting Ackerman's referendum procedure for constitutional amendment, that cost may not be worth paying.¹³⁶

As suggested by *Reitman*, the present representative system of government and constitutional amendment is more considerate of minority rights than Model II direct enactment. The legislature will be more empathetic and concerned about minority rights for several reasons. First, practices such as logrolling and representatives' sensitivity to the intensities of support on selected issues will factor into a representative's consideration of a proposed amendment.¹³⁷ For example, in the case of the *Reitman* amendment, minority legislators might have influenced other legislators to vote against it because they felt so strongly on the issue and would be willing to sacrifice other benefits to prevent its passage. Second, direct, unlike representative, consideration of issues, fails to take advantage of the collegiality of representative bodies, so that while "we cannot force white voters to listen to blacks in their neighborhoods, . . . black legislators can interact with and influence their white col-

¹³³ See, e.g., Eule, *supra* note 127, at 1566-67 (arguing for greater judicial role in overseeing enactment of popular referendums than representative enactments).

¹³⁴ See *Mulkey v. Reitman*, 413 P.2d 825, 836 (1966) (noting that public overwhelmingly supported right to discriminate afforded by amendment by vote of 4,526,460 to 2,395,747).

¹³⁵ See generally Ray Wolfinger & Fred Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 Am. Pol. Sci. Rev. 753 (1968) (analyzing voting behavior and attitudes toward civil rights).

¹³⁶ The price this Note is most concerned about is the risk that referendums enacted without sufficient deliberation in a Model II environment will erode a Model I-formulated Constitution. Of course, one could argue that such corrosive amendments could be passed after deliberation where a majority simply wished to impose its will—naked preference or not—on a minority. While the definition of Model I politics as used in this Note precludes this view because of its stress on *empathetic* deliberation, see notes 68-69 and accompanying text *supra*, a different definition of deliberation could demand accepting this result, even if it means enforcing an amendment that reflected tyranny of the majority.

¹³⁷ The advantage of the representative-based federal constitutional system did not go unnoticed by the *Reitman* Court. Justice Douglas quoted James Madison to underscore that representatives must exercise sensitivity to minorities, as the government must not act as the "mere instrument of the major[ity]." *Reitman v. Mulkey*, 387 U.S. 369, 387 (1967) (Douglas, J., concurring) (quoting 5 Writings of James Madison 272 (Gaillard Hunt ed., 1904)).

leagues.”¹³⁸ Third, as Derrick Bell has highlighted, institutional political protections also serve to safeguard minority rights:

Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns. Of course, politicians, too, may offer quick cure-alls to gain electoral support and may spend millions on election campaigns that are as likely to obfuscate as to elucidate the issues. But we vote politicians into office, not into law. Once in office, they may become well-informed, responsible representatives; at the least, their excesses may be curtailed by the checks and balances of the political process.¹³⁹

Professor Bell's point reflects some of the same logic used by the Framers to advocate for representative rather than direct democracy. However, Madison offered a more generous interpretation of American constitutional democracy and the advantages of “enlightened” leaders who can

refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.¹⁴⁰

Madison's theoretical argument against popular lawmaking and the practical experience of the states with referendums both illustrate that there are many obstacles to an empathetic and deliberative referendum procedure for constitutional amendment. As part of a constitutional moment or not, debates over proposed amendments must be part of a “dialogue between leaders and masses within a democratic structure”¹⁴¹ in order to afford the deliberation necessary to screen out proposals which are not the “considered judgments” of the community. Ackerman might counter that amendments such as that in *Reitman* would not pass the threshold requirement that the legislature first support an issue before it is sent to the public. While this requirement might have some prophylactic effect and could presumably filter out some nondeliberative amendments which would likely pass in a Model II environment, the threshold requirement would be ineffective because congressional representatives would be inclined to take the easier route of voting in favor of such amendments so that the people could decide the issue for themselves.¹⁴²

¹³⁸ Akhil R. Amar, Note, Choosing Representatives By Lottery Voting, 93 Yale L.J. 1283, 1304 (1984).

¹³⁹ Bell, *supra* note 123, at 19-20.

¹⁴⁰ The Federalist No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

¹⁴¹ B. Ackerman, *supra* note 1, at 19.

¹⁴² Cf. Hedrick Smith, The Power Game 657 (1988) (“[T]he incentives of the power game [congressional politics] reward . . . finger pointing [and] damage control.”). Smith's observation is the natural result of the tendency of representatives to avoid taking difficult votes if they

If nondeliberative proposals are not effectively screened out through Ackerman's threshold requirements (either by Congress or by the double national supermajority requirement), then antiregime amendments could pass and persist despite the fact that they contravene the considered judgment of the community. As this Part has demonstrated, low voter turnout, high levels of ignorance or misinformation, disproportionate access to campaign funds by special interests, and a lack of sensitivity to minority rights all suggest that American pluralist politics would not only fail to screen out antiregime amendments but also would actually increase their chances of passage.

This unfortunate reality highlights the need for political reform and an enriched appreciation of constitutional citizenship before implementing a referendum procedure for constitutional amendment. Ackerman is unclear as to whether he believes that such preconditions (political reform and education for constitutional citizenship) exist, but he acknowledges the need for some reform.¹⁴³ However, Ackerman does not outline the shape of these reforms, explain whether they need to be instituted before his referendum proposal is implemented, or discuss whether they could succeed in screening out potential antiregime amendments. The next Part attempts to outline the nature of several reforms which this Note suggests must be implemented in order to ensure that the use of a referendum procedure for constitutional amendment is sufficiently deliberative to prevent the enactment of antiregime amendments. It also concludes that the extent and difficulty of these reforms, which might not necessarily support popular constitutional lawmaking, further caution against immediate implementation of Ackerman's proposal.

IV

CHANGES NECESSARY TO STRENGTHEN CIVIC IDENTITY AND FOSTER A MORE DELIBERATIVE CONSTITUTIONAL POLITICS

This Note argues that America's political system inhibits Model I deliberation and fosters a weak conception of citizenship by contributing to a variety of attitudinal obstacles: a minimal sense of duty to the polity, a lack of knowledge and understanding of constitutional principles, a

do not have to so as to enhance their chances of reelection. See, e.g., David R. Mayhew, *Congress: The Electoral Connection* 13 (1974) (noting that primary goal of Congresspersons is to get reelected).

¹⁴³ Ackerman reminds readers that "[a]bove all, don't make the mistake of supposing that our present constitutional version of dualist democracy is in perfect running order. To the contrary, the constitutional machine will run down unless we make an ongoing effort to . . . use the opportunities given to us in the future to enact needed reforms." B. Ackerman, *supra* note 1, at 55.

weak sense of empathy (especially for minority rights), low feelings of political efficacy, and an impoverished appreciation of the intrinsic value of political participation. While Ackerman is unclear as to whether Americans' weak conception of citizenship is a cause for concern in implementing his proposal, he seems to expect that the referendum procedure itself, the fact that the issue to be considered is a constitutional concern, or that referendum propositions will only be considered in times of crisis, will ensure that the public sufficiently deliberates before passing a constitutional amendment. Because Ackerman does not discuss the necessity of implementing a set of preconditions—for example, political reforms and education for citizenship—this Note assumes that Ackerman relies on one of the above explanations to support an immediate implementation of his proposal.

While Ackerman explains how moments of crisis may generate extraordinary levels of deliberation,¹⁴⁴ this Note is primarily concerned with whether the proposed referendum procedure would enact antiregime amendments in times not characterized by crisis,¹⁴⁵ which might otherwise be screened out through the present representative-based system of Article V.¹⁴⁶ To avoid this fate, this Part first suggests a set of structural reforms to address flaws in the political process, and then outlines a system of political education to address the attitudinal dimensions of Americans' weak conception of citizenship.

Moreover, this Part's brief overview of a path of reform intended to transform Americans' conception of citizenship underscores the enormity of these changes and illustrates the difficulty in preparing the public for constitutional lawmaking by referendum. This Note posits that despite the difficulty of these paths to reform, these changes are critical to implementing a referendum procedure which otherwise threatens to undermine higher lawmaking by allowing normal politics to thwart the promise of deliberative dualist democracy. Ackerman's silence on the

¹⁴⁴ Other commentators have also recognized the transformative nature of times of crisis. See, e.g., Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 *UCLA L. Rev.* 936, 964 (1983) ("[V]oters can act collectively by means of the initiative process only episodically and at moments of high political passion."). Moreover, such "periodic occasions of political crisis may both serve to crystallize the national identity at the moment of crisis and also help to reveal that identity to later interpreters." Gregory A. Mark & Christopher L. Eisgruber, *Introduction: Law and Political Culture*, 55 *U. Chi. L. Rev.* 413, 424 (1988).

¹⁴⁵ This inquiry appreciates Mark Tushnet's view that constitutional politics must rise from normal politics and cannot ever completely transcend them (although times of crisis break free of some of the restrictions of normal politics). See Mark Tushnet, *The Flag Burning Episode: An Essay on the Constitution*, 61 *U. Colo. L. Rev.* 39, 52 (1990) ("I suggest, constitutional politics flow from ordinary politics because of the basic structure of our constitutional system.").

¹⁴⁶ The value of the representative screen is discussed in notes 137-42 and accompanying text *supra*.

necessity of reform appears to indicate that he believes that the traps of normal politics¹⁴⁷ coexist with possibilities for direct public involvement in constitutional politics. However, as one commentator has explained, these traps threaten the possibilities for dualist democracy in "acting like a corrosive on metal, eating away at the ties of connectedness that bind us together as a nation."¹⁴⁸ Hence, one who supports Ackerman's dualist aspirations but nonetheless concurs in this Note's fear of antiregime amendments should demand these reforms as a precondition to implementing Ackerman's referendum proposal.

A. *Reconceiving Citizenship As Participatory and Deliberative*

In developing his view of constitutional citizenship, Ackerman has begun to outline an intermediate position between Madison's distrust of popular involvement in constitutional politics¹⁴⁹ and Jefferson's commitment to generational constitutional change in which the people actively deliberate to change the Constitution.¹⁵⁰ Unlike Ackerman, however, Jefferson specified the necessity of an attentive, politically active, and educated public in a participatory democracy to support popular constitutional politics.¹⁵¹ That is, Jefferson underscored the need for a *participatory constitutional culture* because he believed that a constitution giving "power to the citizens, without giving them the opportunity of *being* republicans and *acting* as citizens," presented a mortal danger to the republic.¹⁵²

Given present political conditions and the political culture in Amer-

¹⁴⁷ These traps include an unsupportive political environment (including the disproportionate power of special interests in campaigns), a minimal connection to the polity, a lack of information on and understanding of constitutional principles, insensitivity to minority rights (lack of empathy), low levels of political efficacy and motivation to participate in political action. See Part III *supra*.

¹⁴⁸ Ward, *supra* note 56, at 598.

¹⁴⁹ See *The Federalist* No. 49 (James Madison) (Clinton Rossiter ed., 1961). Madison cautioned against appeals to the popular will because they would irrationally stir public passions: "[E]very appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability." *Id.* at 314.

¹⁵⁰ See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), reprinted in 15 *The Papers of Thomas Jefferson* 1789, at 392, 396 (J. Boyd ed., 1958). Jefferson's advocacy for a more active popular role in constitutional politics led him to decry those "men [who] look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched." Letter from Thomas Jefferson to Samuel Kerscheval (July 12, 1816), reprinted in 10 *The Writings of Thomas Jefferson* 37, 42 (Paul L. Ford ed., 1899).

¹⁵¹ Jefferson's belief in the power of education is exemplified by his belief that if we "[e]nlighen the people generally[,] . . . tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day." 14 *The Writings of Thomas Jefferson* 491 (Albert E. Bergh ed., 1907).

¹⁵² Hannah Arendt, *On Revolution* 256 (1963).

ica, a direct constitutional lawmaking procedure would present this danger. As Benjamin Barber has observed, Americans lack this important sense of public involvement as "civic identities tie them not to one another but to the government, first as sovereign contracting parties, second as subjects or beneficiaries, [and the citizen's] relations with his fellow citizens are entirely private and have nothing of the civic about them."¹⁵³

In order to successfully implement a national referendum procedure for constitutional politics, America must first reform its political conditions and political culture in order to develop a conception of citizenship that includes an ability to deliberate on proposed constitutional amendments. Without first paving the necessary path of reform and reconceiving citizenship, the process of voting on proposed constitutional amendments will be an isolated act, rather than the culmination of a period of public discussion and participation.¹⁵⁴ Such a vote would therefore fail to "serve as a filter for those who have thought about the underlying issues."¹⁵⁵ While Ackerman might suggest that these discursive activities spontaneously arise from the energy of a constitutional debate, this Note maintains that such activity is so lacking in American politics that it would not flourish without the implementation of the reforms outlined in this Part.

Clayton Gillette has characterized these reforms as geared to ensure that "the positive, educative or coordinating aspects" of voting exist while neutralizing those aspects "appeal[ing] to self-interest."¹⁵⁶ Gillette proposed to meet this challenge by implementing direct voting procedures only in a closely connected community where neighbors value their reputation and realize that the benefits of cooperative behavior outweigh self-interested action.¹⁵⁷

In order to reinforce the "ties of connectedness that bind us together," America must better outline the responsibilities of citizenship and support them through increased opportunities for meaningful political participation and a system of political education. Most citizens generally accept some minimal civic obligations such as jury duty, enlistment in the armed services, payment of taxes, adherence to laws, and enrollment of children in school until a certain age. However,

¹⁵³ Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* 220 (1984).

¹⁵⁴ See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 Mich. L. Rev. 930, 958 (1988). For Gillette's enriched theory of voting as a culmination of public action, see *id.* at 953-67.

¹⁵⁵ *Id.* at 958.

¹⁵⁶ *Id.* at 959.

¹⁵⁷ See *id.* at 961-67.

despite a consensus on these core civic responsibilities, many Americans disagree about other responsibilities like voting.¹⁵⁸ The Constitution contributes to this disagreement: it defines who is a citizen and the basic rights of citizenship, but it is silent on the obligations of citizenship.¹⁵⁹

The Constitution's weak and minimal conception of citizenship is rooted in the Madisonian distrust of popular appeals and commitment to representative government.¹⁶⁰ This weak conception of citizenship is most clearly illustrated through the Constitution's chosen path for its own ratification: through representative conventions designed to ensure deliberation.¹⁶¹ Ackerman seems to explain the choice of conventions over a national referendum procedure by the fact that referendum procedures were still in their infancy,¹⁶² but this view ignores the Constitution's general commitment to representative lawmaking.¹⁶³ While this commitment has eroded somewhat over time,¹⁶⁴ further reforms are necessary to strengthen Americans' sense of civic identity.

An enriched conception of civic identity would revitalize several fragile components in American citizenship—a sense of duty to participate in constitutional politics, an understanding of constitutional principles, empathy for other members of the polity, feelings of political efficacy, and appreciation for the intrinsic value of group and community participation in public decisionmaking—as preparation for direct public participation in constitutional politics. Because Americans' present conception of citizenship lacks these qualities, however, citizens do not view themselves as a smaller part of a whole.¹⁶⁵

Alexis de Tocqueville, in describing the New England town meeting

¹⁵⁸ See Robert D. Hess & Judith V. Torney, *The Development of Political Attitudes in Children* 39 tbl. 7 (1967) (finding that only 44.6% of eighth graders viewed good citizen as someone who voted and encouraged others to vote).

¹⁵⁹ The fourteenth amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. Const. amend. XIV, § 1. Prior to this amendment, the Constitution did not define who was a citizen of the United States.

¹⁶⁰ Hence, the Constitution's "structural components are formed around a belief that representative government can better accommodate the lofty goals of consensus building and effectuation of the public good—a concept that embraces sensitivity to minority interests as well as majority preferences—than the popular masses." Julian N. Eule, *Representative Government: The People's Choice*, 67 Chi.-Kent L. Rev. 777, 784 (1991).

¹⁶¹ See U.S. Const. art. VII.

¹⁶² See B. Ackerman, *supra* note 1, at 356 n.12.

¹⁶³ See notes 140, 160-61 and accompanying text *supra*.

¹⁶⁴ See, e.g., U.S. Const. amend. XVII (providing for direct election of Senators).

¹⁶⁵ This point is convincingly made in Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 196-218 (1985); see also Lawrence Rosen, *Individualism, Community, and the Law: A Review Essay*, 55 U. Chi. L. Rev. 571, 578 (1988) ("The central theme of Bellah's book is that American culture does not provide its citizens with ways in which to speak about the conflict so many sense between the constant quest for individual betterment and involvement in a common design or project.").

form of government, captured the spirit of citizenship which must be nurtured to make direct democracy work:

The [citizen] of New England is attached to his township because it is independent and free: this co-operation in its affairs insures his attachment to its interest; the well-being it affords him secures his affection; and its welfare is the aim of his ambition and of future exertions. He takes a part in every occurrence in the place; he practises [sic] the art of government in the small sphere within his reach; . . . he imbibes their spirit; he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.¹⁶⁶

Even if the Constitution clearly outlined such expectations of citizenship, the parchment of a governing document could not ensure that citizens were public-regarding, deliberative, and participatory; these qualities can only come from personal experience in political participation and an educational system that empowers its citizens. To address these problems, Sections B and C outline some of the basic elements of the reforms necessary to foster a more participatory and deliberative constitutional culture and a more enriched sense of civic identity, both of which are necessary to support direct constitutional lawmaking and to remedy the deficiencies identified in Part III.

B. Structural Changes Necessary to Filter Out Nondeliberative Referendums

Misinformation and public apathy, which lead to uneducated votes and low voter turnout, thwart Model I deliberation. Present political structures fail to rectify and at times even encourage these conditions, which have their origin partially in three structural defects in the American political system: (1) the system of campaign financing, (2) registration requirements and other obstacles to voting, and (3) a lack of public forums. This Section examines potential reforms in these areas and considers whether they would sufficiently address the source of these problems.

1. Campaign Finance Reform

A major structural barrier to Model I deliberation is the existence of a campaign finance system which enables well-financed interests to triumph in ballot measure referendums.¹⁶⁷ Any reform of this system must level the playing field of campaign financing in referendum campaigns so

¹⁶⁶ Alexis de Tocqueville, *Democracy in America* 61 (Richard D. Heffner ed., Penguin Books 1956) (1840).

¹⁶⁷ See notes 96-102 and accompanying text *supra*.

that both sides on an issue can adequately present their case to the populace. This subsection advocates three campaign finance reform measures, addresses their administrative and constitutional difficulties, and briefly considers whether they could rectify the misinformation and distortion characterizing a monopolized marketplace of ideas.

First, the government should ensure support for underfinanced campaigns. This entails recognizing committees for and against propositions and demanding that each report its fundraising activity to an administering agency. Once a committee for or against a proposition raises over one million dollars (or some other designated sum), the agency would immediately issue to the other side one dollar for each additional dollar raised by the wealthier group.¹⁶⁸ This system would preclude wealthy groups from drastically outspending the other side because their spending would be countered by support for their opponents to communicate better with the electorate. While this scheme requires the implementation of complex and difficult administrative enforcement mechanisms, it would, however, comply with the Supreme Court's decisions in *Buckley v. Valeo*,¹⁶⁹ *First National Bank v. Belotti*,¹⁷⁰ and *Citizens Against Rent Control v. City of Berkeley*,¹⁷¹ which constrain campaign finance regulation by protecting campaign expenditures under the first amendment.

A second category of reform proposals would limit the amount of money that could be raised and spent in referendum campaigns. This type of proposal is simpler than the first, as it would require less government regulation and would be easier to administer. Under this scheme, committees campaigning for or against a referendum would be required to report their spending to an administrative agency to ensure that they comply with spending limits for national constitutional referendums. Such spending limits would be set either by an administrative agency or Congress. This system would not only ensure that campaign committees followed the limitations but also that groups advocating for or against a proposal could not use closely associated groups illegally to support their

¹⁶⁸ See Lowenstein, *supra* note 99, at 579. Lowenstein outlined this proposal to ensure that the gap between supporters and opponents of a proposition not exceed one million dollars. Lowenstein suggested that the money given to the second side could be given in the form of vouchers to prevent fraud and that, if the recipient side actually received over one million dollars, the government would be entitled to any future revenues which reduced the spending gap between those for and against the proposition. See *id.* at 579 n.277.

¹⁶⁹ 424 U.S. 1, 58-59 (1976) (declaring expenditure limitations of federal election law unconstitutional because they restrict candidates', citizens', and associations' first amendment right to engage in political expression).

¹⁷⁰ 435 U.S. 765, 776-77 (1978) (holding that first amendment prohibits limitations on corporate contributions to campaigns on ballot measures because views communicated by corporations are "indispensable to decisionmaking in a democracy").

¹⁷¹ 454 U.S. 290, 300 (1981) (holding local ballot measure contribution limit of \$250 unconstitutional).

efforts.¹⁷²

The major difficulty with this proposal is that it employs the limitation on spending that was struck down by the Supreme Court in *Buckley* as violative of the first amendment.¹⁷³ While *Buckley* countenanced limits on candidate campaign contributions (not expenditures) to prevent quid-pro-quo corruption,¹⁷⁴ it underscored that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."¹⁷⁵ Thus, this proposal first requires either a direct reversal in the Court's campaign finance jurisprudence or a constitutional amendment, both of which are highly unlikely.

A third way to address inequities in campaign financing is to minimize the high information costs in referendum campaigns by offering educational information to voters. California employs such a system by distributing handbooks which outline the issues on the ballot.¹⁷⁶ However, these handbooks, which are often very long and detailed, are reportedly used by only thirteen to thirty-three percent of the voters in California.¹⁷⁷ Even if the national constitutional proposals were fewer and less complex than those offered in California,¹⁷⁸ a national handbook still might get lost in the midst of the other voter information, such as candidate literature and "junk mail," which often goes unread by the majority of the electorate.

Regardless of whether the public would actually read a handbook

¹⁷² This difficulty also arises in campaigns for political office, as oversight agencies must monitor not only limits on campaign spending but also the spending of other groups supporting that candidate. For example, in the recent New York City mayoral campaign, David Dinkins's campaign was forced to pay for a \$226,000 advertising effort nominally paid for by the New York State Democratic Committee. See James C. McKinley, Jr., *Steering Around the New York City Campaign Finance Law*, N.Y. Times, Dec. 26, 1993, at 33. While this problem may be policed by the various groups campaigning on the issue, this problem might also be addressed through limiting the total amount that an individual can contribute to *any* group advocating for or against a particular referendum. This would eliminate the threat of closely associated groups by depriving them of their natural source of funds.

¹⁷³ See *Buckley*, 424 U.S. at 58-59.

¹⁷⁴ See *id.* at 55.

¹⁷⁵ *Id.* at 48-49.

¹⁷⁶ See D. Magleby, *supra* note 113, at 136.

¹⁷⁷ See *id.* Moreover, those with higher levels of education are significantly more likely to read the handbook as it is written at the level of a third-year college student. See *id.* at 138.

¹⁷⁸ There is no compelling reason, however, to believe that this would be the case. There might be an equal number of proposals because Congress would probably choose to let the electorate consider them rather than carefully prescreening them, see note 142 *supra*, and constitutional amendments would undoubtedly raise difficult issues for presentation in such handbooks. For example, even if a proposed amendment would simply outlaw flag burning, citizens would need to consider such complexities as to which American flags the ban would apply (official flags, painted banners of flags, etc.) and what effect the ban would have on the burning of flags of other countries.

describing proposed constitutional amendments, the production of such a handbook would present considerable administrative and constitutional difficulties. First, the handbook would be expensive and time consuming to publish. Second, the question of what to include in the handbook would raise thorny first amendment issues. If the handbook welcomed statements from advocacy groups, then it might be regulated under the first amendment public forum doctrine mandating that public arenas must accept all participants pursuant to acceptable time, place, and manner limitations.¹⁷⁹ However, if the handbook was drafted by the government, groups might contest the fairness with which their concerns were presented. Hence, one solution might be simply to accept statements from those committees registered for campaign finance purposes.

While each of the three above proposals may offer some cure for the problems posed by a distorted marketplace of ideas, successful campaign finance reform must overcome very difficult structural and behavioral obstacles. Although Ackerman endorses campaign finance reform,¹⁸⁰ he notes the inherent obstacle posed by the ability of concentrated interests to circumvent campaign finance limitations through other means.¹⁸¹ The ability of well-financed groups to employ other means of persuasion—such as a business's distribution of distorted information about a referendum campaign to its employees—is a basic structural obstacle to achieving true equality in the marketplace of ideas.

In attempting to establish a genuinely free marketplace of ideas, one also must address the concern that if concentrated interests' use of money *manipulates*, rather than *informs* the electorate, equalizing campaign funds will simply advantage the better manipulator. If the use of money informs the electorate, then the quantity of information, regardless of the presenter, should not affect the outcome because voters will be able to consider the issue intelligently and see through any attempted manipulation. While some voters may be able to sort through all of the information presented to them, the existing system of campaign financing certainly makes their work much more difficult by providing an insufficient opportunity for diffuse groups to refute misinformation and offer their best arguments to the public. As for those voters who are not able to see through manipulation, education may provide the answer if cam-

¹⁷⁹ See Laurence H. Tribe, *American Constitutional Law* §§ 12-24 (2d ed. 1988).

¹⁸⁰ See B. Ackerman, *supra* note 1, at 354 n.18 (noting that while he views many "reform" proposals as counterproductive, he "hope[s] to make some serious proposals sometime soon"). Because Ackerman is vague in discussing his support for campaign finance reform, it is difficult to discern whether he would be supportive of the proposals discussed in this subsection or whether he views such proposals as preconditions to implementing his referendum proposal.

¹⁸¹ See *id.* at 246 (noting that businesses will still be able to influence their workers disproportionately regardless of any campaign finance reform).

paign finance reform cannot.

Campaign finance reform is not a cure-all, but workable reforms would make a difference. However, each of the reforms discussed in this subsection presents serious administrative and constitutional obstacles which make them difficult to implement. Moreover, even if they could be implemented, such reforms still would need to overcome the concern that wealthier groups and companies, by virtue of their greater resources, will have structural advantages that cannot be addressed through campaign finance reform. Finally, campaign finance reform can help present voters with more balanced information, but it cannot address their ability to consider that information.

2. *Decreasing Barriers to Registration and Voting*

Even with an improved campaign finance system and increased access to reliable information, the nation still must deal with the fact that approximately forty percent of the electorate is "outside the political system altogether."¹⁸² Hence, the turnout in the 1988 presidential election was twenty-five percent lower than the modal turnout in Canada and the United Kingdom, and forty percent lower than in Sweden, Italy, and Austria.¹⁸³ One cause of low voter turnout in the United States is the state and local registration requirements which raise the costs and difficulty of voting.¹⁸⁴ Even if the United States removed these requirements, however, the experience in Wisconsin, which allows election-day registration, suggests that voter turnout would rise only to an average of sixty-seven percent, still leaving the country seventeenth in voter turnout among industrialized nations.¹⁸⁵

Further, it is difficult to project accurately national voter turnout without the present registration requirements because the political and psychological consequences of excluding large segments of the electorate from the ballot box in the past must be considered. Because the political machinery has focused on the pool of registered voters and ignored the concerns of nonvoters,¹⁸⁶ it might take considerable effort to reconnect these alienated nonvoters to the political system and for that system to address their concerns.

¹⁸² Walter D. Burnham, *The Current Crisis in American Politics* 46 (1982). Burnham estimates that 44% of the electorate are "core" voters, about 16% are "peripheral" voters, and 40% are "outside the political system altogether." *Id.*

¹⁸³ See James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* 55 (1991).

¹⁸⁴ See Raymond E. Wolfinger & Steven J. Rosenstone, *Who Votes?* 88 (1980) (estimating that turnout in presidential elections would increase by over 9% if unnecessarily complex registration laws were eliminated).

¹⁸⁵ See J. Fishkin, *supra* note 183, at 56.

¹⁸⁶ See F. Piven & R. Cloward, *supra* note 95, at 19-21.

With respect to Ackerman's proposed referendum procedure, requiring the votes of a minimum percentage of the entire voting-age population in order to enact a referendum would serve as a demand-side incentive for greater voter turnout by encouraging advocacy groups to focus on voter turnout.¹⁸⁷ Even with these structural reforms and incentives, however, many people will still fail to vote because of their weak sense of citizenship. While the structural changes can support an enriched conception of citizenship, the attitudinal obstacles discussed in Section C below pose a far greater and more important challenge to successfully implementing Ackerman's referendum proposal.

3. *Expanding Available Political Forums*

In addition to making existing political processes more accessible, the debate over a proposed constitutional amendment must be invigorated through the creation of new possibilities for deliberation and political participation. These opportunities are essential to deliberation because the central guiding principle of a healthy democracy is ensuring the continued availability of and access to public forums.¹⁸⁸ While the courts protect access to existing public forums,¹⁸⁹ it is crucial that government actively provide opportunities for citizens to discuss and deliberate on relevant issues because these face-to-face opportunities would reinforce a connection and duty to the polity, sharpen citizens understanding of the issues, support empathy for others, strengthen feelings of political efficacy, and enrich civic appreciation of the intrinsic value of participation.¹⁹⁰ Benjamin Barber stresses that such opportunities must accompany the introduction of a referendum procedure because: "Referendum and initiative processes divorced from innovative programs for

¹⁸⁷ Ackerman does not propose this nor any other such requirement, but he does address the concern that low voter turnout is a serious threat to dualist democracy. See B. Ackerman, *supra* note 1, at 239-40.

¹⁸⁸ See Joseph Tussman, *Government and the Mind* 126 (1977). Tussman sums up the necessity of government regulation of and support for public forums:

The freedom of speech is like the freedom of the city. To be given the freedom of the city is not to be permitted to do whatever one wishes, but is to be granted the status of being under the city's law. To be granted the freedom of speech—and it is a kind of bestowal—is to be given a place in a rule-governed forum, the institution within which and under whose protection the citizen may share in the reflective and deliberative process by which the community seeks to govern itself.

Id.

¹⁸⁹ See, e.g., *United States v. Kokinda*, 497 U.S. 720, 726 (1990) ("Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity . . . is examined under strict scrutiny."); see also L. Tribe, *supra* note 179, at §§ 12-24.

¹⁹⁰ See John Gastil, *Democracy in Small Groups* 156 (1993) (suggesting that such opportunities "could contribute to the development of more sophisticated public judgments on national issues, increased public involvement in all aspects of politics, a heightened sense of citizen self-confidence, and a more profound commitment to democratic norms").

public talk and deliberation fall easy victim to plebiscitary abuses and the manipulation by money and elites of popular prejudice."¹⁹¹

The government should encourage public deliberation through political forums by financially and administratively supporting democratic activity modeled on town and community meetings,¹⁹² as well as other forms of participation. One model for public participation would emulate the successful deliberation and civic education that exists in the jury system¹⁹³ by creating a program of "policy juries." The concept of a policy jury, like that of a jury in a criminal trial, offers a forum with a specially focused agenda to consider certain issues based on prepared information and an adequate amount of time to deliberate. This model is presently being organized and employed to promote consideration of national issues.¹⁹⁴

In a different vein, James Fishkin has proposed a new public forum to improve the present presidential selection process through a national deliberative public opinion poll.¹⁹⁵ Unlike the typical poll that asks questions over the telephone, Fishkin's proposal would enable ordinary citizens to discuss issues with the presidential candidates and then deliberate as a group before casting sample ballots.¹⁹⁶ Fishkin describes the advantages of such a system, which could also be employed at the state and local level to address issues involved in a national referendum campaign on a proposed constitutional amendment:

In a deliberative opinion poll, the first evaluation of candidates would have the thoughtfulness and depth of face-to-face politics, as well as the representative character of a national event that includes us all. It offers a way out of the false dilemma within which previous reforms [to

¹⁹¹ T. Cronin, *supra* note 97, at 223 (quoting Benjamin Barber).

¹⁹² See, e.g., Jane Mansbridge, *Beyond Adversary Democracy* 39-135 (1980) (describing town meeting form of government in small Vermont town).

¹⁹³ The Supreme Court's commitment to juries stems in part from the Court's appreciation of the jury system as a program in civic education. The Court underscored this insight by quoting de Tocqueville:

"By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society. . . . I look upon [jury service] as one of the most efficacious means for the education of the people which society can employ."

Powers v. Ohio, 499 U.S. 400, 407 (1991) (quoting Alexis de Tocqueville, *Democracy in America* 334-37 (Schocken 1st ed. 1961) (1840)); see also Akhil R. Amar, *The Bill of Rights As a Constitution*, 100 *Yale L.J.* 1131, 1186-89 (1991) (discussing both effectiveness and Framers' awareness of the importance of juries in strengthening civic identity and supporting self-government).

¹⁹⁴ The Jefferson Center convened a 24-member citizens' jury in January 1993 to deliberate on national issues. See Ned Crosby & Bob Meek, *Making the Voices of Ordinary Citizens Count*, *USA Today*, Jan. 7, 1993, at 15A.

¹⁹⁵ See J. Fishkin, *supra* note 183, at 1-13.

¹⁹⁶ See *id.*

enhance the quality of participation in the presidential selection process] have been trapped. It is not elitist; a deliberative opinion poll is representative of ordinary citizens. But it permits the reflectiveness of small-scale interactions to replace the comparative superficialities of mass-retail and wholesale politics.¹⁹⁷

Fishkin's critical insight is that such small-scale interaction would offer people an opportunity to connect with their political system. As this process enables people to reach their deliberative opinions and to appreciate better the intrinsic value of political participation, it should also be employed to discuss the issues involved in a proposed constitutional amendment. To the extent that the New England style town meeting may not always be a viable option, Fishkin's proposal enables people to experience personally and learn from the practice of deliberative politics.¹⁹⁸

However, the reality is that deliberative politics is less "efficient" than representative politics because it requires an enormous investment of public and individual resources to be successful. Not only will the government need to subsidize these efforts at a substantial cost, but individuals will also need to devote their time to such endeavors. Moreover, the government will have to administer these programs responsibly through enrolling participants as well as preparing speakers and information. This will not only be a difficult organizational task, but any governmental support for public forums also might involve some of the same first amendment concerns that arise in connection with the preparation of a national voter handbook.¹⁹⁹

While effectively providing such opportunities for public participation and deliberation on proposed constitutional amendments will not be easy, these opportunities are necessary to support Model I deliberation. The adoption of Ackerman's referendum proposal without the implementation of such reforms would ignore Jefferson's concern regarding the delegation of the responsibility *to act* as citizens without providing the opportunity and sense of responsibility *to be* citizens.²⁰⁰ However, even if political reform overcomes the significant obstacles impeding its chances for success in offering citizens meaningful opportunities to act as citizens, it is also critical that people are prepared for their civic responsibilities and opportunities through a system of political education. The next Section thus attempts to address the serious attitudinal obstacles to

¹⁹⁷ Id. at 9.

¹⁹⁸ Fishkin's deliberative opinion poll is scheduled to be tested in the United Kingdom in the spring of 1994. See John Darnton, American in London to Test 'Deliberative' Polling, N.Y. Times, Sept. 21, 1993, at A5.

¹⁹⁹ See text accompanying note 179 *supra*.

²⁰⁰ See text accompanying note 152 *supra*.

Model I deliberation.

C. *Education for Democracy: The Foundation of a Healthy Republic*

As the last Section demonstrated, the campaign finance system, barriers to registration, and the limited availability of public forums pose significant structural obstacles to successfully implementing Ackerman's proposal. However, the most pernicious threat of Model II politics is not rooted in political structure, but in civic behavior, thus requiring reforms which can change public attitudes toward political participation. While education for citizenship is the most promising means of effecting the necessary attitudinal change—that is, inculcating a sense of duty to the polity, increasing civic understanding of constitutional principles, promoting empathy in political participation, increasing feelings of political efficacy, and fostering an appreciation for the intrinsic value in political participation—it must be preceded by significant changes in the nature of public education.

Ackerman's failure to discuss the importance of education for citizenship in *We The People* leaves open the question of whether he believes that an enriched system of education for citizenship would be a precondition to implementing his referendum proposal. While Ackerman might concur in the need for such a program, he most likely would claim that education for citizenship, like the need for increased political forums, would naturally be provided through the course of public constitutional debate.²⁰¹ It is conceivable that implementation of a referendum procedure might force a commitment to education over a long period of time, but implementing the referendum procedure for constitutional amendment with the expectation that the necessary preconditions would follow would endanger the delicate balances presently contained in the Constitution.

A system of education for constitutional citizenship²⁰² would be

²⁰¹ Although Ackerman does not speak directly to this point, Akhil Amar, a proponent of a more direct constitutional amendment procedure, offers this exact argument. Amar justifies popular constitutional lawmaking without the precondition of an enriched program of political education on the theory that implementing a popular sovereignty-based system of constitutional amendment would force Americans to educate each other. See Amar, *supra* note 35, at 1102. While this argument might apply with regard to deliberative conventions (as favored by Amar), it would not succeed in the context of a referendum campaign where it would be too late and too difficult to reach and effectively educate all voters.

²⁰² Many of these principles look to the Supreme Court's jurisprudence with respect to the nature of public education. The Court has recognized the importance of public education as providing the "foundation of good citizenship" and as one of government's "most important function[s]." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Moreover, the Court has also underscored that the importance of educating people for citizenship has "been confirmed by the observations of social scientists." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (citations omitted).

based on principles falling into two basic categories: (1) identity—that is, the educational system must stress who Americans are as a people and how Americans have developed over the course of their history;²⁰³ and (2) empowerment—that is, the educational system must prepare people to participate and deliberate in the political process. Together, these principles seek to address the different components of attitudinal change specified above (duty, knowledge, empathy, efficacy, and intrinsic value of participation).

Current programs of political education fail to effect these attitudinal changes because they are largely redundant for most students and consist of only a basic instruction in civics and history provided through traditional teaching methods.²⁰⁴ Margaret Conway suggests that this traditional curriculum fails through both its tendency to focus only on basic skills of political literacy and its typically nonparticipatory method of instruction.²⁰⁵ While focusing on political literacy, the present programs of education for citizenship fail not only to teach citizens effectively about basic lessons of American government²⁰⁶ but also to build a connection to the polity so as to inspire and motivate citizens to seek out information on important issues and thereby overcome the high information costs of complicated referendum proposals.²⁰⁷ While this Section offers neither a concrete nor definitive program of political education to prepare citizens for involvement in constitutional politics, it outlines the nature and importance of a program of political education based on the principles of identity and empowerment.

1. Identity Formation: The American People's History and Constitution

Developing a strong sense of civic identity is critical to increasing feelings of civic obligation because it translates into an increased connection to the polity.²⁰⁸ Moreover, building a sense of civic identity natu-

²⁰³ The importance of understanding and appealing to an American identity in constitutional interpretation is discussed in Christopher L. Eisgruber, *Is the Supreme Court an Educational Institution?*, 67 N.Y.U. L. Rev. 961, 968 (1992) (arguing that particularly effective form of persuasion based on collective identity relies on appeals such as "it's the American thing to do").

²⁰⁴ See M. Margaret Conway, *Fostering Group-Based Political Participation*, in *Political Socialization, Citizenship Education, and Democracy* 297, 301 (Orit Ichilov ed., 1990).

²⁰⁵ See *id.*

²⁰⁶ See S. Popkin, *supra* note 82, at 34 (noting that while percentage of electorate graduating high school has climbed from 25 to 75 over the past 50 years, there has not been significant increase in understanding of basic constitutional principles).

²⁰⁷ The dilemma posed by high information costs is discussed at text accompanying note 120 *supra*.

²⁰⁸ This connection to the polity also serves to legitimize the nation's system of government. In this spirit, Alexander Meiklejohn argues that the Constitution

rally entails exposure to and understanding of the principles of the Constitution. This understanding is essential to direct constitutional law-making because raising civic awareness about the commitment to and values of constitutional norms (that is, those adopted by previous constitutional moments) will foster a commitment to the current constitutional regimes and will help screen out antiregime proposals. Finally, developing a sense of civic identity would foster feelings of empathy through consideration of powerful examples of oppression in American culture and history in order to counteract any possible temptation to act self-interestedly and/or with disregard to injustices to others.²⁰⁹

In its landmark decision on political education, *West Virginia v. Barnette*,²¹⁰ the Supreme Court discussed whether the basic curriculum in American history and civics, a "slow and easily neglected route to aroused loyalties[,] constitutionally may be short-cut by substituting a compulsory salute and slogan."²¹¹ The Court condemned the use of the forced salute and countered with a principled program of political education, explaining that education should consist of a program of "instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriotism and love of country."²¹²

The Court believed that this instruction would be less hurtful because it would not adversely affect the Jehovah's Witnesses who would not participate in flag salutes and would be at least as effective as a flag salute in fostering a commitment to citizenship. As the Court stated: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."²¹³

derives whatever validity, whatever meaning, it has, not from its acceptance by our forefathers one hundred and sixty years ago, but from its acceptance by us, now. Clearly, however, we cannot, in any valid sense, "accept" the Constitution unless we know what it says. And, for that reason, every loyal citizen of the nation must join with his fellows in the attempt to interpret [the Constitution] in principle and in action . . .

Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 3 (1960). Anne Norton also has highlighted the importance of this connection to the polity by explaining how "polities [are] made and unmade in the mind, in the effects of allegiance and alienation on a regime's legitimacy." Anne Norton, *Reflections on Political Identity* 3 (1988).

²⁰⁹ Garrett Hardin has stressed the importance of teaching the lessons of history because while "[e]ducation can counteract the natural tendency to do the wrong thing [act on a narrow conception of self-interest], . . . the inexorable succession of generations requires that the basis for this knowledge be constantly refreshed." Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1245 (1968).

²¹⁰ 319 U.S. 624 (1943).

²¹¹ *Id.* at 631.

²¹² *Id.* (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).

²¹³ *Id.* at 641.

The Court further noted that the fact that America is "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."²¹⁴

Despite the appeal of the Court's reasoning, it is important to understand that *Barnette* was a difficult case which struggled with significant tensions in America's constitutional democracy. This fact is underscored not only by Justice Frankfurter's spirited dissent²¹⁵ but also by the fact that *Barnette* overruled *Minersville School District v. Gobitis*,²¹⁶ which was decided only three years earlier. The tension inherent in considering the constitutionality of a forced flag salute is that those supporting the salute believed that they were adhering to a sound principle of justice—treating all people the same—whereas those supporting the Jehovah's Witnesses believed that they also stood for a sound principle of justice—caring for those who are oppressed. The genius of the Court's opinion in *Barnette* is its illustration of how forcing an empty ritual onto a minority not only shows a lack of the respect due an oppressed group but also fails effectively to inculcate those very values the ritual seeks to teach.²¹⁷

Following *Barnette*'s lesson, educators must attend to the demands of a diverse society in designing a system of political education. This system should strengthen a sense of civic identity not through indoctrination, but through the "slow and easily neglected route"²¹⁸ of instruction in American history, civics, and the principles of the Constitution. This road must offer more than basic instruction in these areas; it must also explore the civic responsibilities underlying America's constitutional norms and principles.

This Note suggests that Americans should make use of the Constitution through a process of political education that makes each student feel as if she or he had actually participated in the Constitutional Convention of 1787.²¹⁹ This process could imbue students with an increased sense of

²¹⁴ Id. at 637.

²¹⁵ See id. at 653 (Frankfurter, J., dissenting) (arguing that even Framers' commitment to religious diversity and freedom did not justify "claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views").

²¹⁶ 310 U.S. 586 (1940).

²¹⁷ *Barnette*'s reminder that the students forced to salute the flag "are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means," *Barnette*, 319 U.S. at 631, underscores how the manner in which the ritual was observed actually depreciated the lessons of the Constitution and American citizenship.

²¹⁸ Id.

²¹⁹ This suggestion requires that women and people of color discount the historical reality that they would have been excluded from the Founding. However, one should not underestimate the extent to which this discounting actually can occur.

connection to each other as parts of a larger whole as well as foster a sense of obligation to the polity. This historical connection is often lacking in students; a recent study showed that a majority of high school seniors cannot identify the subject of the Supreme Court's decision in *Brown v. Board of Education*.²²⁰ While many possible variations exist, one component of this program might be a simulation project in which students design a constitution as the culmination of a program of constitutional study.²²¹ This exercise would ask students to play the role of delegates at a constitutional convention charged with the task of drafting some basic constitutional provisions. This simulation would enable students to confront the issues of rights and responsibilities codified in the constitutional scheme more directly by affording them an opportunity to consider and debate the underlying issues and concerns.²²²

This historical connection not only would serve to develop a sense of national identity and civic duty but also would include an appreciation for the constitutional principles which were central to past constitutional moments. Sanford Levinson analogizes the connection to a historical and constitutional past to a commitment to an organized religion because both require a central faith in a system and an effort to define the rightness of actions under a code.²²³ Like faith in a particular religion, the connection to American constitutionalism and history involves a level of attachment which would ensure that citizens carefully reflect on the value of the existing Constitution before changing it. Citizens connected to American history and constitutionalism would only be willing to let go of deeply held beliefs, such as the freedom of expression provided by the first amendment, if they seriously considered the constitutional principle and were willing to break from the deeply accepted view. Political education thus would serve to inculcate a respect for and understanding of past constitutional regimes and constitutional values so that citizens would hesitate before changing the Constitution without serious deliberation.²²⁴ As a result, the likelihood of enacting antiregime amendments through Model II politics would be minimized.

²²⁰ American Fed'n of Teachers, *Education for Democracy* 9 (1987).

²²¹ The Note author credits Professor Christopher Eisgruber for employing this project as a learning tool in his constitutional law course at New York University School of Law.

²²² Sanford Levinson suggests a similar project to assist in the development of citizens in America's constitutional democracy. Levinson's program (though conceived as a thought experiment rather than as a pedagogical tool) calls for teachers to offer students a copy of the Constitution and ask them whether they would sign it if they were at a present-day constitutional convention. See Sanford Levinson, *Constitutional Faith* 180 (1988).

²²³ *Id.* at 152-54.

²²⁴ This view, stressing the role of education in the constitutional scheme, enjoyed strong support from some of the Framers. See, e.g., Amar, *supra* note 193, at 1207-08 (noting that Madison had pointed to importance of "public opinion" in enforcing Bill of Rights and that both Madison and Jefferson viewed public education as remedy for and deterrent to unconsti-

While honoring American constitutional democracy, political education also must acknowledge, confront, and critically address America's past failures to accept difference and live up to its ideals.²²⁵ An awareness of and inquiry into the areas in which America has failed to live up to its ideals would force citizens to confront past oppression and develop empathy for its victims.²²⁶ This empathy would promote accepting, rather than persecuting, different views.

The need to accept differences of opinion and background also requires a degree of respect in political discourse. Hence, in *Bethel School District No. 403 v. Fraser*,²²⁷ the Supreme Court underscored the importance of encouraging "tolerance of divergent political and religious views, even when the views expressed may be unpopular."²²⁸ Moreover, the Court has protected minority viewpoints by stressing that the Constitution "does not permit the official suppression of *ideas*."²²⁹ Similarly, in *Tinker v. Des Moines School District*,²³⁰ the Court soundly rejected the view that "a State might so conduct its schools as to 'foster a homogeneous people.'"²³¹ However, the toleration of differences of opinion does have some limits. As the Court explained, in justifying a limit on the

tutional conduct).

Moreover, the concern about the educative value of the Constitution has been an enduring theme in the American constitutional tradition. In the early debate over judicial review, Judge John Bannister Gibson questioned the need for judicial review and criticized Chief Justice Marshall's failure to discuss the possible role of the Constitution as an educative institution. Judge Gibson suggested that judges should view the Constitution solely as educative and not as a device for judicial review. See *Eakin v. Raub*, 12 Serg. & Rawle 330, 354-55 (Pa. 1825) (Gibson, J., dissenting) (arguing that judiciary's power should be limited and that written constitution is of "inestimable value . . . in rendering its principles familiar to the mass of the people; for, after all, there is no effectual guard against legislative usurpation [of constitutional principles] but public opinion, the force of which, in this country, is inconceivably great").

²²⁵ The opposite approach, "sanitizing" American history by refusing to address America's failures, is criticized in Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. Rev. 497, 504-11 (1987).

²²⁶ Richard Rorty explained how a shared national identity would support a spirit of empathy:

[A shared national identity] is an absolutely essential component of citizenship, of any attempt to take our country and its problems seriously. There is no incompatibility between respect for cultural differences and American patriotism.

Like every other country, ours has a lot to be proud of and a lot to be ashamed of. But a nation cannot reform itself unless it takes pride in itself—unless it has an identity, rejoices in it, reflects upon it and tries to live up to it.

. . . That is the desire to which the Rev. Dr. Martin Luther King Jr. appealed, and he is somebody every American can be proud of.

Richard Rorty, *The Unpatriotic Academy*, N.Y. Times, Feb. 13, 1994, § 4, at 15.

²²⁷ 478 U.S. 675 (1986).

²²⁸ Id. at 681.

²²⁹ *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982).

²³⁰ 393 U.S. 503 (1969).

²³¹ Id. at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

language that a student speaker could use in a required school assembly, such toleration "must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."²³²

A program of education for citizenship must value the American ideal of a diverse society committed to "equality and justice for all." In this spirit, George Fletcher has suggested updating the Pledge of Allegiance to make it more meaningful and appreciative of diversity and minority views by replacing "one nation, under God indivisible with liberty and justice for all" with "one nation, united in our diversity, committed to liberty and justice for all."²³³ This change would adapt "E Pluribus Unum" to a diverse society and present "liberty and justice for all" as an aspiration, rather than as a failed reality. Not only has American society not achieved this aspiration, but empirical studies show that the present educational system still fails to inculcate empathy for oppressed groups and respect for minority rights:

[A large number of adolescents] tend to believe that those with values and conceptions that are very different from their own should not have freedom of speech, the right to dissent openly from established socio-political patterns. They appear to believe that because a set of values is orthodox it must be right for all peoples and all social conditions.²³⁴

A political education like that envisioned in *Barnette* might help students develop the empathy and tolerance often absent from political deliberation.²³⁵ *Barnette* insists that the educational system must not only teach, but also practice, the lessons of American history and the Constitution by fostering constitutional values: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their

²³² *Bethel*, 478 U.S. at 681.

²³³ See George P. Fletcher, Update the Pledge, N.Y. Times, Dec. 6, 1992, at E19.

²³⁴ John J. Patrick, Political Socialization and Political Education in Schools, in Handbook of Political Socialization 190, 201 (Stanley A. Renshorst ed., 1977).

²³⁵ Exploring how political education develops a spirit of empathy is beyond the scope of this Note. However, this Note's concern for empathy echoes Jean-Jacques Rousseau's view that a program of political education can heal the political ills of civil society by nurturing a natural spirit of empathy. See Allan Bloom, Introduction to Jean-Jacques Rousseau, *Emile* 10-12 (Allan Bloom ed. & trans., 1979) (describing role of political education as preventing natural *amour de soi* (absolute love of self, conducive to empathy and concern for others) from deteriorating into *amour propre* (relative self-love, conducive to competition, selfishness, and prejudice)). Moreover, Rousseau explains how a system of political education can develop a spirit of empathy because "human nature [i]s an alterable social product . . . [where p]rivate interest [i]s not innate, but [i]s cultivated in each individual. . . . Self-interest [i]s therefore socially imposed, and the pursuit of self-interest [i]s an expression of slavery, not of liberty." Guyora Binder, What's Left?, 69 Tex. L. Rev. 1985, 1990 (1991).

faith therein.”²³⁶ Hence, the educational system should respect the first amendment not only by teaching it but also by encouraging free and open debate, rather than discouraging difference through exercises such as forced flag salutes.²³⁷

An awareness both of the injustices throughout American history and of the ability of the Constitution to guard against the tyranny of the majority should nurture an awareness of and sensitivity to the costs to others resulting from any potential change in the Constitution.²³⁸ This sensitivity is consistent with *Barnette*’s realization that a rule requiring everyone to engage in a flag salute is not a “short cut” to patriotism; rather, a forced flag salute is a dead end road of “inequality [that] adversely affects *both* parties”²³⁹—that is, the excluded Jehovah’s Witnesses as well as the remaining students.

Without a system of political education to prepare people for citizenship, the temptation to act selfishly will make the process of empathetic deliberation considerably more difficult. However, the awareness of and empathy for others fostered by education will counteract this temptation by helping the individual thoughtfully to screen out proposals which might not seem to hurt the individual but which would harm society as a whole. In the end, individuals enter the voting booth alone; however, their obligation to the polity, understanding of America’s constitutional principles, and empathy for others enable and motivate them to participate deliberatively in politics.

2. *Empowering Citizens for Political Participation*

In addition to developing a sense of civic identity to support civic obligation, an understanding of constitutional principles, and a sense of

²³⁶ *Barnette*, 319 U.S. at 642.

²³⁷ Moreover, this view conforms with Ackerman’s vision of a system of liberal education offered in an earlier book which stressed that a system of political education should “bring the child to citizenship in a way that, as nearly as possible, respects the questions of legitimacy he raises as he develops his own distinctive pattern of resistances to, and affirmations of, his earliest culture.” Bruce A. Ackerman, *Social Justice in the Liberal State* 167 (1980).

²³⁸ Drawing on Carol Gilligan’s psychological insights, one might view the issue of sensitivity to others and the tension in *Barnette* as a conflict between an ethic focused on caring about those who are oppressed—minority groups, such as the Jehovah’s Witnesses—and an ethic which defines justice as everyone following the same rules:

To understand how the tension between responsibilities and rights sustains the dialectic of human development is to see the integrity of two disparate modes of experience that are in the end connected. While an ethic of justice proceeds from the premise of equality—that everyone should be treated the same—an ethic of care rests on the premise of nonviolence—that no one should be hurt. In the representation of maturity, both perspectives converge in the realization that just as inequality adversely affects *both* parties in an unequal relationship, so too violence is destructive for everyone involved.

Carol Gilligan, In *A Different Voice* 174 (1982) (emphasis added).

²³⁹ *Id.* (emphasis added).

empathy for others, a system of political education must also empower citizens for political action. A sense of empowerment would build feelings of political efficacy and help citizens develop an appreciation for the intrinsic benefits of participation in constitutional politics. Thus, education must encourage civic participation beyond voting, paying taxes, and sitting on juries. To this end, Ralph Nader has recently developed a program, "Civics for Democracy," which "calls for providing students with practical experience in participating in their own community's affairs. [This curriculum] is an attempt to give some vibrant history of what citizen action has accomplished and to give [students] examples of what students are doing and have done."²⁴⁰ Such instruction, which would encourage people better to appreciate the process of contributing to civic affairs, also promotes basic first amendment values by improving a citizen's effectiveness in reasoned political debate.

In this respect, the Supreme Court in *Board of Education v. Pico*²⁴¹ reminded Americans to take education seriously, for "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press and political freedom."²⁴² The Court quoted Madison to emphasize its commitment to informed and efficacious public deliberation:

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."²⁴³

An educational program must also include experiential learning²⁴⁴ in order to teach students the intrinsic as well as the instrumental benefits of political participation. The value of a more participatory and experiential system of education is twofold: students will be more motivated and productive, and they will learn the values of democracy and participation first hand.²⁴⁵ Since an appreciation for the intrinsic and instru-

²⁴⁰ Nader Is Promoting a "Radical" Civics Course, N.Y. Times, Dec. 6, 1992, at A34.

²⁴¹ 457 U.S. 853 (1982).

²⁴² Id. at 866.

²⁴³ Id. at 867 (quoting 9 Writings of James Madison 103 (Gaillard Hunt ed., 1910)).

²⁴⁴ This Note uses "experiential learning" to refer to learning through active participation and experience in political action (whether real or simulated) rather than the traditional and more passive mode of instruction.

²⁴⁵ Education must foster participation through both theory and practice. As John Patrick has reported:

An important weakness of most innovative political education programs has been insufficient attention to the instructional context. This neglect has probably resulted in severe inconsistencies between formal learning achieved through academic experiences and informal learning associated with the hidden curriculum. These inconsistencies can lead to the blunting or subversion of formal learning and to negative unintended outcomes.

mental benefits of political participation is critical to the success of a deliberative democracy, these qualities must be fostered through both curricular and extracurricular programs wherever possible.²⁴⁶

One extracurricular component of a democratic education geared to develop students' sense of efficacy and to increase appreciation of the intrinsic value of political participation could be a community service program for students. Ideally, this program would be a mandatory element of the curriculum whereby students would be offered several possible placements to fulfill a graduation requirement. A community service program would "better equip [students] to participate actively in society throughout their lives."²⁴⁷ Moreover, such a program would "plac[e] the value of personal responsibility for oneself and one's society in a central place in our country's common values."²⁴⁸

Whether a community service program or a mock constitutional convention can begin to address the current deficiencies in constitutional citizenship is difficult to predict. However, such programs seek to make a program of political education meaningful and effective in addressing the serious attitudinal deficiencies which limit Model I deliberation. These deficiencies (a lack of obligation to the polity, knowledge of constitutional principles, empathy for others, a sense of political efficacy, and appreciation for the intrinsic value of participation) necessarily undermine the potential for constitutional politics. While this Note has not attempted to offer a definitive program to address these deficiencies, it has suggested some elements of a principled program of education for citizenship, presently lacking in America's educational system, which can remedy them and prepare the public for Model I deliberation.

A critical weakness in Ackerman's support for his referendum proposal is that he fails to explain whether an enriched program of political education is a precondition to implementing his referendum proposal. If Ackerman would support such a program, this Section has identified two

Patrick, *supra* note 234, at 216-17; see also Amy Gutmann, *Democratic Education* 88-94 (1987). This prescription also coheres with this Note's earlier suggestion of a simulation exercise of designing a constitutional scheme. See text accompanying note 221 *supra*.

²⁴⁶ In order to realize this vision of education, teachers must be very sensitive to their students. John Patrick warns that

excessively dominating, authoritarian role performance is likely to lesson the possibility that students will develop cooperative, creative and self-directive behavior. In contrast, teachers who are respectful of student rights and feelings, who establish relationships of mutual trust that encourage speculation and innovation, and who are attentive to the emotional needs of students are more likely to contribute substantially to the development of desirable intellectual and social learning such as skills in divergent thinking and human relations.

Patrick, *supra* note 234, at 217-18.

²⁴⁷ Kim Grosse, *National Service For Youth*, N.Y. Times, Feb. 23, 1993, at A21.

²⁴⁸ *Id.*

principles, identity and empowerment, which should be incorporated into such a program; if Ackerman is willing to implement his referendum proposal without addressing the need for education for citizenship, he fails to heed Jefferson's concern regarding the delegation of the responsibility *to act* as citizens without providing the necessary education for them *to be* citizens.²⁴⁹

CONCLUSION

In *We The People*, Ackerman appears to offer an unqualified endorsement of a national referendum procedure for constitutional amendment. This Note has argued that implementation of such a procedure would be a grave error without first committing to political reform and an enriched program of political education. Only these efforts can overcome unsupportive political structures and the need for serious attitudinal changes necessary to move the public towards consistent Model I deliberation in constitutional politics and to screen out potential anti-regime amendments. Instead of such reforms, Ackerman appears to rely on a set of threshold requirements; however such requirements cannot ensure deliberation. They can only demand a certain level of public support.

Because present political conditions limit the public's ability to translate its considered judgments into higher lawmaking through a national referendum procedure for constitutional amendment, all Americans should be wary of implementation of such a procedure. Only after improving current political conditions could Americans possibly screen out many proposed amendments that would fail if examined through informed deliberation but that might currently succeed under Ackerman's proposal. Under improved political conditions favorable to Model I deliberation, constitutional choices would not depend upon how issues are presented by special interest groups but would reflect the people's thoughtful judgments, as for example, those reached through Fishkin's deliberative public opinion polls.²⁵⁰ Only after strengthening a sense of national civic identity through political reform and education, could America successfully adopt Ackerman's referendum procedure. To do so any earlier would risk weakening those values that are central to constitutional democracy and America's Model I Constitution.

²⁴⁹ See notes 151-52 and accompanying text *supra*.

²⁵⁰ See notes 195-97 and accompanying text *supra*. Professor Christopher Eisgruber suggests why and how this process might work under the proper conditions: "The reverence that Americans throw about the Constitution, and the assumption that constitutional norms will be supreme and enduring, all provide incentives for constitutional participants to represent their convictions about justice seriously, thoughtfully, and sincerely." Christopher L. Eisgruber, *Justice and the Text*, 43 *Duke L.J.* 1, 37 (1993).

This strengthened sense of civic identity would require the implementation of a set of reforms and a system of political education that would be difficult to implement and may or may not succeed. Some might consider this fact and surrender any hope for direct constitutional lawmaking. However, surrendering to the present flaws in America's constitutional scheme misses the essence of Ackerman's vision of dualist democracy and his aspirations for constitutional citizenship. This essence, which helps explain how the Constitution has endured and succeeded, should inspire Americans to take the difficult but ultimately rewarding road to reform necessary to implement a procedure for direct constitutional lawmaking.