

How Difficult Should it be to Amend Constitutional Laws?

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1 Introduction¹

In contemporary constitutional democracies, there are two things in particular that characterise constitutional laws compared with ordinary laws. In the first place, from a legal point of view, constitutional laws are *lex superior* in relation to ordinary laws. Thus, in cases of conflict, the constitution takes precedence over ordinary legislation. Secondly, from a political point of view, it is more difficult to change the constitution than to enact ordinary legislation. While simple majorities in the parliament can pass ordinary laws, constitutional amendments must be made on the basis of special and more demanding decision-making procedures. In current jurisdictions, one can find a number of different amendment procedures, and these are often combined. Among the most important mechanisms of constitutional amendment are 1) supermajority rules (e.g. a two-thirds or a three-fourths majority in the legislature), 2) delays (e.g. amendments must be passed by two successive parliaments or they must be proposed during one parliament and adopted during another), 3) referendums, 4) state ratification (in federal systems), and 5) absolute entrenchment of parts of the constitution.

The purpose of this paper is to consider some aspects of the question of how difficult it should be to amend or change constitutional laws through formal amendment procedures.² This is a complex problem with no easy answer. The problem is complex both because there are many ways to design constitutional amendment procedures,³ and there are many different and sometimes competing considerations that are relevant for assessing such procedures. In view of these reflections, the aim of the present paper is restricted to throwing light on some central aspects of the outlined problem. The point of departure of my discussion is an amendment procedure that has recently been suggested by the prominent legal and political philosopher Bruce Ackerman. His proposal springs from a critique of the existing formal amendment procedure of the U.S. constitution – Article V. Article V offers two routes to constitutional amendments. The first implies that an amendment proposal must be supported by two-thirds of both Houses of Congress and then ratified by three-fourths of the state legislatures. The second route is initiated if Congress is requested by two-thirds of the state legislatures to call a constitutional convention for proposing amendments. Thereafter, the suggested amendments must be enacted by three-fourths of the state legislatures or conventions, depending on the mode of ratification proposed by the Congress.⁴ It is generally recognised that this procedure makes it

1 I would especially like to thank Aanund Hylland for valuable comments. I am also very grateful to Bruce Ackerman, Cornelius Cappelen, Brian Garvey, Anthony McGann, Johnny Hartz Søraker og Jon Wetlesen for useful comments and discussions.

2 Constitutional amendment can either mean to supplement, modify or repeal constitutional laws.

3 This becomes evident when one looks at constitutions around the world. *See*, e.g. Maddex, Robert, *Constitutions of the World* (2nd ed.), CQ Press, Washington, D.C. 2001.

4 The relevant part of Article V is formulated like this: ‘The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on

extremely difficult to amend the U.S. constitution. Compared with Article V, Ackerman's reform proposal represents a significant improvement. As a replacement for Article V, he defends a three-step amendment procedure – where a re-elected president is authorised to propose amendments that must thereafter be approved first by a two-thirds majority of the legislature, and then by a simple majority of the citizens at the next two presidential elections.⁵

Article V and Ackerman's reform proposal provide an interesting starting point for a more general discussion of central aspects of the question of how difficult it should be to amend constitutional laws. Moreover, several arguments can be presented in support of Ackerman's three-step procedure. Nevertheless, I believe that his suggestion is open to some important objections. Therefore, I will propose and consider an alternative amendment procedure that can be termed a four-step procedure. According to this procedure, the right to propose amendments is granted both to legislators and voters via citizen initiatives. Thereafter, the proposed amendments should be placed before the legislature, where they must be approved by a simple majority in two successive parliaments, and there must be an interval of no less than one year between the two votes. If passed by the legislative assembly, the amendment(s) should be approved by a simple majority of the electorate in a referendum. However, a submajority of the legislators (i.e. a one-third minority) should be empowered to require an additional referendum on the proposed amendment(s), and this final referendum should be held two years after the first popular vote.

As mentioned above, a number of factors or considerations are relevant in order to assess or evaluate alternative constitutional amendment procedures. In the present paper, I will primarily focus on the following factors or criteria of evaluation, which I will group under three headings: (1) Central ideas and ideals in deliberative democratic theory and the fact of persistent disagreement in modern pluralist societies (this will include considerations of how well alternative amendment procedures deal with disagreement among citizens); (2) rule of law values, stability and flexibility; and (3) the value of checks and balances that can guard against abuse of power (or more precisely, whether the amendment procedures under consideration provide adequate checks and balances between courts, political actors and citizens).

The article proceeds as follows. Part 2 lays out the criteria of evaluation that will provide the starting point of my assessment of the constitutional amendment procedures that I wish to analyse. Part 3 will present and consider Ackerman's three-step procedure. In part 4, I will finally present and defend the proposed four-step procedure.

the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress'.

5 See Ackerman, Bruce, *We the People 2. Transformations*, Belknap Press, Cambridge Mass. 1998, p. 410 and 415; and Ackerman, Bruce, *Constitutional Economics – Constitutional Politics*, Constitutional Political Economy 1999, p. 421-422.

2 Normative Premises – Criteria of Evaluation

Constitutional change does not result only from decisions following formal amendment procedures laid down in the constitutional text. Constitutions are often revised or changed by other informal means such as by judicial interpretation. Despite this fact, the present paper will focus on formal amendment procedures. In what follows, I will set out the criteria of evaluation that will provide the basis of my discussion of competing amendment procedures.

2.1 *Deliberative Democracy and the Fact of Persistent Disagreement*

From the point of view of the deliberative model of democracy, collectively binding decisions should ideally be made on the basis of a thorough process of public deliberation – where all the affected parties or their representatives have the opportunity to participate and present critical arguments for and against the proposals that have been put forward. The primary aim is to establish a democratic decision-making procedure that provides an open and free forum for a reasoned dialogue and argumentation that can lead to more rational and impartial decision outcomes.⁶

In the theory of deliberative democracy, importance is attached to the process of public deliberation that takes place among the decision-makers before the issue in question is decided through voting. The point and value of a thorough process of deliberation is to improve the basis of information and enhance the level of reflection among the participants. The hope is that reasoned dialogue, good reasons and inputs of new information will have a bearing on people's preferences and the way they vote. A central assumption in deliberative democracy is, therefore, that public deliberation has a transformative effect, in the sense that the initial or pre-deliberative preferences and views of the participants can undergo a change that can lead to more rational and impartial decisions. Thus, deliberation can be regarded as a form of discussion intended to change the preferences on the basis of which people decide how to act.⁷

Since it is impossible in modern states to arrange face-to-face discussions across the entire community, it is important to make a distinction between two aspects of deliberation – the external-collective and the internal-reflective

6 Important contributions to the recent revival of deliberative democratic theory are presented by Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in J. Elster and A. Hylland (eds.), *Foundations of Social Choice Theory*, Cambridge University Press, Cambridge, 1986; Bernard Manin, *On Legitimacy and Political Deliberation*, *Political Theory* 1987; Joshua Cohen, *Deliberation and Democratic Legitimacy*, in A. Hamlin and B. Pettit (eds.), *The Good Polity*, Blackwell, Oxford 1989; John Dryzek, *Discursive Democracy. Politics, Policy, and Political Science*, Cambridge University Press, Cambridge 1990; John Rawls, *Political Liberalism*, Columbia University Press, New York 1993; Jürgen Habermas, *Between Facts and Norms*, MIT Press, Cambridge Mass. 1996; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement*, Harvard University Press, Cambridge Mass. 1996; and Robert E. Goodin, *Reflective Democracy*, Oxford University Press, Oxford 2003.

7 See Przeworski, Adam, *Deliberation and Ideological Domination*, in J. Elster (ed.), *Deliberative Democracy*, Cambridge University Press, Cambridge 1998, p. 140.

aspect.⁸ The *external-reflective* aspect refers to the process of discussion with others or interpersonal conversations and discussions – e.g. a debate in parliament. The *internal-reflective* aspect refers to the intrapersonal process of deliberation – e.g. when we read a newspaper or watch a political discussion on TV and deliberate about the pros and cons of alternative policies.

From the point of view of deliberative democracy, the normative legitimacy⁹ of collectively binding decisions is not only the product of majority rule or a mere aggregation of preferences. Rather, democratic decisions can only be regarded as just or ethically justifiable if they result from a process of thorough and reasoned public deliberation where all affected parties or their representatives have had the opportunity to participate. Furthermore, some advocates of deliberative democracy claim that the process of deliberation must satisfy certain procedural norms that are supposed to promote rational and impartial discourses.¹⁰

Given the outlined ideas and ideals in deliberative democratic theory, the following questions arise: how should constitutional amendment procedures be designed, and what decision rules or voting rules (e.g. majority rule voting or supermajority rules) should be chosen? These are questions that have not received much attention in the literature on deliberative democracy. Nevertheless, they are important because it would be naïve and unrealistic to assume that disagreement about justice, the common good, and constitutional rights will disappear as a result of public deliberation in modern pluralist societies. While discussion may eliminate some disagreements, it is also likely to generate and increase the diversity of opinions on many matters.¹¹ In modern pluralist societies the ‘circumstances of politics’ are characterised by the need to make collectively binding decisions that coordinate the activities of citizens in the face of disagreement about what decisions should be taken.¹² Thus, a fundamental problem confronting political and legal philosophers and theorists is to find morally justifiable procedures for making binding collective decisions

8 This distinction is drawn by Goodin. See Goodin, *Reflective Democracy*, ch. 9.

9 The term ‘normative legitimacy’ refers in this context to what Habermas has called worthiness of recognition (*Anerkennungswürdigkeit*).

10 See, for example, Habermas, *Between Facts and Norms*. Such norms are also discussed more closely in Alexy, Robert, *A Theory of Practical Discourse*, in S. Benhabib and F. Dallmayr (eds.), *The Communicative Ethics Controversy*, MIT Press, Cambridge, Mass. 1990; and Ekeli, Kristian Skagen, *Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People*, *Journal of Agricultural and Environmental Ethics* 2005, p. 445-447.

11 See, e.g. Christiano, Thomas, *The Significance of Public Deliberation*, in J. Bohman and W. Rehg (eds.), *Deliberative Democracy*, MIT Press, Cambridge Mass. 1997, p. 249-250; and Knight, Jack and Johnson, James, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, *Political Theory* 1994, p. 286.

12 The idea of the ‘circumstances of politics’ is discussed in Waldron, Jeremy, *Law and Disagreement*, Oxford University Press, Oxford 1999, p. 101-106. According to Waldron, the circumstances of politics come as a pair. ‘Disagreement would not matter if there did not need to be a concerted course of action; and the need for a common course of action would not give rise to politics as we know it if there was not at least the potential for disagreement about what the concerted course of action should be’ (*ibid.*, p. 102-103).

in light of the fact of persistent disagreement among citizens in modern pluralist societies. One central aspect of this problem is how well alternative constitutional amendment procedures deal with disagreement about justice, the common good, and constitutional laws.

2.2 *Rule of Law Values, Stability and Flexibility*

The rule of law is often contrasted with despotism or arbitrary use of state power. In a state regulated by the rule of law, everyone – both those who govern and those who are governed – are subject to the law, and all are regarded as equals before the law. This implies that government officials must operate within a limiting framework of law. Furthermore, it entails that citizens are subject only to the law, and not to the arbitrary will or judgement of those who wield government power. It is important to underline that it is widely acknowledged that the rule of law means that the exercise of state power should be regulated by laws that meet certain conditions. For example, laws should be general, publicly promulgated, not retroactive, clear and understandable, and relatively stable over time.¹³ Legislation and executive action should be governed by laws with these characteristics, and independent courts should be empowered to impose the rule of law. At this point, it should be noted that the rule of law is an ideal that can be approximated to a greater or lesser degree. Complete realisation of the ideal is impossible, in part because some vagueness in law is inescapable. Moreover, some controlled (or restricted) judicial and administrative discretion (whatever its source) can be desirable.¹⁴

One important value of a legal system which does in general observe the rule of law is that it enables individual autonomy or freedom.¹⁵ Under the rule of law, it is possible for people to plan their lives and to predict the consequences of their actions in light of a pre-existing framework of law without fear of arbitrary intervention from those who wield government power. In this way, rule of law will also reduce uncertainty that restricts people's ability to plan for their future.¹⁶

Rule of law values are in several ways relevant for assessing constitutional amendment procedures. First, very rigid and burdensome amendment procedures

13 See, e.g., Fuller, Lon, *The Morality of Law*, Yale University Press, New Haven 1969, ch. 2; and Raz, Joseph, *The Rule of Law and its Virtue*, in *The Authority of Law*, Oxford University Press, Oxford 1979, p. 210-229.

14 See Raz, *The Rule of Law and its Virtue*, p. 222.

15 See also Hayek, Friedrich A., *The Road to Serfdom*, Routledge, London 1944, p. 75-76.

16 Richard Kay gives an interesting account of what is at stake in this connection: 'One of the most serious injuries the state can inflict on its subjects is to commit them to lives of perpetual uncertainty. Our picture of the totalitarian state is associated with the surprise knock on the door that can come on any day at any hour, by the threat of punishment for the violation of standards of conduct that were different or unknown before enforcement, with official behavior that is uncontrolled by any preexisting patterns or restraints. This kind of existence is like a journey, full of dangerous obstacles and risks, undertaken in total darkness' (Kay, Richard, *American Constitutionalism*, in L. Alexander (ed.), *Constitutionalism. Philosophical Foundations*, Cambridge University Press, Cambridge 1998, p. 22-23).

can lead courts and/or political actors to resort to informal means to pursue constitutional change. In some cases, this can be problematic in view of the outlined rule of law values, because the formal rules for changing constitutional provisions are set aside. One example would be a court which changes the constitution by means of inventing new constitutional rights.

Second, the rule of law ideal that laws should be relatively stable over time is particularly important when it comes to constitutional provisions, which lay down the basic rules and principles of a constitutional democracy. It is widely recognized that a constitution should provide a relatively stable framework for the public life of a state and its political and legal institutions, and that frequent and radical changes to this framework are not desirable. This is primarily because the constitution sets out the fundamental rules of the game from both a political and a legal point of view. In democratic states, most constitutions regulate (a) the basic structure and main organs of government (e.g. the functions of government, the division and distribution of power between the legislative, executive and judicial branches of government, checks and balances, modes of election and representation), and (b) the area of human rights (e.g. political and civil rights). These domains regulated by constitutional law are of vital importance to the machinery of government, and they have a significant impact on the life-conditions and life-prospects of citizens subject to state authority. Stephen Holmes explains the advantage of continuity in the basic principles that guide the political and legal institutions of a constitutional democracy, as follows: 'If we can take for granted certain procedures and institutions fixed in the past, we can achieve our present goals more effectively than we could if we were constantly being sidetracked by the recurrent need to establish a basic framework for political life. An inherited constitution can institutionalize as well as stabilize democracy'.¹⁷

A constitution can serve as a stable framework for the political and legal institutions of a state precisely because constitutional laws are more difficult to change than ordinary laws. Since constitutions can only be amended by special and more demanding procedures that favour the status quo (i.e. existing constitutional laws), such provisions will place constraints on or limit the exercise of legislative, executive and judicial power. First of all, this means that present legislators and other state organs are bound by the decisions of earlier electorates. Secondly, such restraints imply that certain decisions that are regulated by constitutional laws are withdrawn from the immediate control of present majorities and governmental agencies.

The preceding considerations are not meant to suggest that stability is always an advantage. There will, of course, be times when there is a need for constitutional reform. Furthermore, the value of a stable constitution will depend on the content of constitutional laws, and there is often fundamental disagreement about the desirability of existing constitutional provisions and the need for constitutional reform. Against this background, one can say that constitutional stability comes with a price. The price to be paid for stability is lack of flexibility, and vice versa. These reflections demonstrate why it is

¹⁷ Holmes, Stephen, *Passions and Constraints. On the Theory of Liberal Democracy*, The University of Chicago Press, Chicago 1995, p. 153.

important to consider more closely the question of how difficult it should be to amend constitutional laws.

2.3 *The Value of Systems of Checks and Balances*

In order to guard against abuse of state power and despotism (or arbitrary use of state power), various systems of checks and balances can play an important role. For the present purposes, ‘checks’ will refer to institutional devices which grant one branch of government the right, ability and responsibility to oversee and control the activities of other branches. ‘Balances’ will refer to institutional mechanisms that enable or empower one branch of government to limit the powers of other state institutions in order to prevent one branch from accumulating too much power. Well-known examples of systems of checks and balances found in the U.S. are bicameralism, executive veto and judicial review of the constitutionality of legislation. It is worth noting that these and other checks and balances presuppose some separation of powers. If A (e.g. a court empowered to review the constitutionality of legislation) is to act as a check on B (e.g. the legislature), A must have some degree of independence from B.¹⁸

One central aim of checks and balances is to provide a guard against the danger that the rulers use the power that is conferred on them against the ruled. In *Federalist* no. 51, James Madison has aptly described the need for checks and balances in view of such threats:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed: and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁹

In the present paper it will be argued that one important criterion for assessing various constitutional amendment procedures is whether these procedures provide adequate checks and balances between courts, the political branches of government (i.e. the legislature and the executive) and citizens. Let me explain why such considerations are important. In order to illustrate this, I will use as an example the need for checks and balances between the legislature and courts empowered to review the constitutionality of legislation. This will also provide an important background for the subsequent discussion of alternative amendment procedures.

After the Second World War, the institution of judicial review of legislation has been introduced in most constitutional democracies. This institution grants courts the power to review the constitutionality of laws enacted by the legislature and to set aside ordinary laws that are assumed to be in conflict with

18 Cf. Elster, Jon, *Majority Rule and Individual Rights*, in S. Hurley and S. Shute (eds.), *On Human Rights*, Basic Books, New York 1993, p. 187.

19 Madison, James, Hamilton, Alexander and Jay, John, *The Federalist Papers*, Penguin Books, London 1788/1987, p. 319-320.

the constitution. One can make a distinction between two main types of systems of judicial review of the constitutionality of legislation. In a *centralised system*, judicial review is the exclusive competence of a special constitutional court. In a *decentralised system*, every court in the hierarchy of courts has the competence to exercise judicial review, but the Supreme Court is the final court of appeal on constitutional matters.²⁰ The best known example of the latter system is USA. Both these systems provide institutional devices through which courts can serve as guardians of the constitution and prevent the tyranny of the majority (e.g. when a majority of legislators are tempted to manipulate political rights in order to stay in power, or if a majority wants to set aside the rights of an ethnic or religious minority).

In states where judicial review of legislation has been adopted, constitutional amendment procedures have important implications with regard to the distribution of power between courts and legislators when it comes to constitutional issues. In general, one can say that the more difficult it is for the legislators to amend constitutional laws, the more power is transferred to judges who are empowered to enforce (i.e. interpret and apply) the constitution and to review the constitutionality of laws. More precisely, if it is very difficult or almost impossible for the legislators to amend constitutional laws, it will be very difficult or nearly impossible for the legislature to change judicial decisions (or judicial interpretations that have become precedents) for the future through constitutional amendment. In this connection, Article V of the U.S. constitution can serve as an example (cp. part 1). In contrast to Article V, one can find an interesting example of a system where it is relatively easy for the legislators to amend constitutional provisions in the Swedish constitution. In Sweden, a successful amendment of the constitution requires a simple majority in two successive parliaments.²¹

Moreover, the choice of amendment procedures is relevant with respect to the classical problem of who should guard the guardians (in this case courts) and how. Under systems in which it is very difficult to amend the constitution (e.g. Article V), it would be much more difficult for legislators to check *and* balance the power of the judiciary on constitutional issues, as compared with a system where it is relatively easy for the legislators to change judicial decisions for the future by means of constitutional amendment (e.g. the Swedish amendment procedure).

20 Cf. Cappelletti, Mauro, *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford 1989. In the literature on legal philosophy and theory, the centralised system is often called the 'European model' of judicial review, whereas the decentralised system is termed the 'American model'. See, e.g. Kelsen, Hans, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, The Journal of Politics 1942; Favoreu, Louis, *Constitutional Review in Europe*, in L. Henkin and A.J. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, Columbia University Press, New York 1990; and Ekeli, Kristian Skagen, *Hvem skal vokte vokterne? Modeller for håndheving av konstitusjonelle lover*, Tidsskrift for Rettsvitenskap 2004.

21 See The Constitution of Sweden, The Instrument of Government (Regeringsformen), ch. 8, art. 15. It is worth mentioning that this article also empowers a minority or submajority of at least one-third of the legislators to require a referendum.

The foregoing reflections are worth taking seriously in view of the law-making discretion and power that is inherent in the institution of judicial review. Many constitutional provisions – especially constitutional individual or human rights – are very general and abstract. The generality and abstraction of such provisions comes with a price: ‘the more general and abstract the formulation of a constitutional provision, the less clear it is what the provision actually means, or requires’.²² A related point is that many constitutional rights are vague and indeterminate, and this vagueness and indeterminacy can give judges a high degree of law-making discretion and power.²³

Here, one should also bear in mind two other reasons to design checks and balances that apply to courts empowered to enforce constitutional laws and to review the constitutionality of legislation. First of all, judges – like legislators and other government officials – are not angels, and the power of constitutional judicial review can be abused – as a number of historical examples demonstrate. Thus, when designing checks and balances, one must for instance take into account the danger of judicial activism and the threat of the tyranny of a minority of judges. Secondly, judges become judges in their own case when they have to enforce constitutional legal standards (both written constitutional provisions and precedents) on themselves. This problem will, for instance, arise in cases brought before the court where judges must consider (or interpret and apply) constitutional standards that lay down limitations on their power or the scope of their competence.²⁴

3 Ackerman’s Reform Proposal

In light of an extensive and interesting historical analysis of the effects of Article V of the U.S. constitution, Bruce Ackerman has recently proposed a new amendment procedure. In what follows, I will first present Ackerman’s proposal and then assess his suggestion.

22 Marmor, Andrei, *Interpretation and Legal Theory* (2nd edition), Hart Publishing, Oxford and Portland 2005, p. 143.

23 In legal philosophy and theory, it is a widely held assumption that the law is indeterminate when there is no single right answer to a question of law, or to a question of the application of the law to the facts of the case. See, e.g. Endicott, Timothy, *Vagueness in Law*, Oxford University Press, Oxford, p. 9; and Kress, Ken, *Legal Indeterminacy*, in D. Patterson (ed.), *Philosophy of Law and Legal Theory*, Blackwell, Oxford, p. 253.

24 See also Ekeli, *Hvem skal vokte vokterne?*, p. 570-571. Martin Shapiro has made a similar point: ‘If the people have chosen review as a device for limiting the power of others to govern, they will usually be interested in limiting the power of the judges as well. Either initially or subsequently part of this limitation may be provided by the language of the constitutional text. Such limitation is obviously subject to the problem that the judges become judges in their own case when they are called upon to enforce the text on themselves’ (Shapiro, Martin, *The Success of Judicial Review and Democracy*, in A. Stone Sweet and M. Shapiro, *On Law, Politics and Judicialization*, Oxford University Press, Oxford 2002, p. 164).

3.1 *Ackerman's Three-Step Amendment Procedure*

As a replacement for Article V of the U.S. constitution, Ackerman suggests the following three-step amendment procedure.

- 1 The President should be authorized to propose constitutional amendments, upon being elected for a second term of office.
- 2 The proposed amendment(s) should be submitted to the legislature (i.e. the Congress) for two-thirds approval.
- 3 If passed by the legislative assembly, the proposed amendment(s) should be submitted to the voters at the next two presidential elections. More precisely, a successful amendment must be approved by a simple majority of those voting in two successive presidential elections.²⁵

3.2 *The Case for Ackerman's Proposal*

The three-step procedure gives the executive or the President an important role in the amendment process. In this connection, Ackerman makes two clarifications that are worth mentioning. The first is that not all presidents should be granted the power to propose amendments. This right should be reserved for presidents who are re-elected. According to Ackerman, the reason for this is that many presidents come into office without anything resembling a mandate.²⁶ The second is that the president should not be allowed 'to design referenda without restraint'. Thus, he suggests that the president's initiative must be approved by a qualified majority in the congress. This is because '[a]n unchecked President could use his proposals for personal or partisan advantage, rather than for expressing considered judgments that might ultimately win the sustained support of the community'.²⁷

Compared with the status quo, i.e. Article V, Ackerman's amendment procedure represents a significant improvement, and several arguments can be presented in support of his reform proposal. First, it might be argued that his procedure has the advantage of involving the people directly in the amendment process.²⁸ Second, the suggested procedure makes it much easier for democratically elected and accountable politicians to amend the constitution by formal means. This will also affect the distribution of power and improve the system of checks and balances between the judicial and political branches of government on constitutional issues. For example, compared with Article V, Ackerman's proposal would make it much easier for the legislature to change judicial decisions for the future by amending constitutional laws. In this way,

25 See Ackerman, *We the People 2*, p. 410 and 415; and Ackerman, *Constitutional Economics – Constitutional Politics*, p. 421-422.

26 See Ackerman, *We the People 2*, p. 411.

27 Ackerman, *We the People 2*, p. 411.

28 I will elaborate this point and how it can be defended from the point of view of deliberative democratic theory in part 4.

Ackerman's proposal sets out a better system of checks and balances between courts on the one hand, and the executive and the legislature on the other.

Third, the three-step procedure involves multiple actors, and this introduces two other important checks and balances in the decision-making process. Since the procedure requires the approval of both the legislature and the executive, it guards against constitutional changes that would strengthen one of these branches over the other. Moreover, by giving the citizens a direct veto power in the amendment process, the procedure guards against constitutional changes that would benefit those in government at the expense of the people, even though the proposed amendments are favoured by both the legislative and executive branches of government.²⁹ Fourth, Ackerman's three-step procedure will make amendment proposals subject to what he terms 'the test of time':

Under my plan, it is not enough for the voters to approve an initiative once, but twice – and the referenda are four years apart. I propose this serial feature to guard against the danger [of] ... a one-shot referendum – in which the incumbents exploit a momentary enthusiasm for their partisan advantage. The serial feature places the President and Congress in a position more like the "veil of ignorance." It is very hard for most politicians to calculate their narrow partisan advantage over a four- or eight-year period. They are unlikely to unite in large majorities unless they believe that a serious civic movement will be around to support a constitutional proposal for a long time to come. This is, at least, my hypothesis.³⁰

This delay between the two referendums will also ensure that the people will have time to consider and discuss the amendments in question more closely before they make their decision through majority rule. Such a delay device can be defended in view of central ideals in deliberative democracy.

In addition to the outlined arguments for Ackerman's proposal, some might argue that there are cogent reasons for the supermajority requirement (i.e. step 2) that he suggests, because it can serve both to protect minorities and to promote stability. This line of argument will be discussed more closely in the next part.

3.3 A Critique of Ackerman's Three-Step Procedure

Although something can be said for Ackerman's three-step procedure compared with the existing formal amendment procedure in the U.S. constitution, I will argue that it is open to several important objections. In what follows, I will present two sets of objections against Ackerman's proposal.

(i) Proposal rights

The first objection is related to step one in Ackerman's procedure – his view on proposal rights. In light of the outlined ideals of deliberative democracy (see section 2.1), one can argue that it is questionable that the power to place an amendment proposal on the voting agenda is restricted to the President. A

²⁹ See also Mueller, Dennis C., *On Amending Constitutions*, Constitutional Political Economy 1999, p. 392.

³⁰ Ackerman, *Constitutional Economics – Constitutional Politics*, p. 422-423.

central assumption in deliberative democracy is that the right to put forward proposals about laws and policies should be inclusive – ideally all affected parties or their representatives should be granted such proposal rights. This does not necessarily imply that every citizen should have the power to place a bill on the formal voting agenda in the legislature. However, as I will argue below (see part 4), Ackerman's procedure is in this respect too restrictive. One reason for this is that his procedure can even prevent widely supported amendment proposals from being placed on the voting agenda either in the legislature or in a referendum. Another important problem with Ackerman's procedure is that it will block the opportunities to formally put forward amendment proposals during periods when presidents are not re-elected. In this connection, it should be stressed that it is conceivable that no presidents are re-elected for a very long period of time. This has happened before in the USA (e.g. the period between 1837 and 1861) and it can happen again.³¹

(ii) Supermajority rules

The second objection concerns step two in Ackerman's procedure – the supermajority requirement in the legislature. Before I set out this critique, let me first give a brief account of Ackerman's supermajority requirement and how such decision rules tend to be defended. The second step of Ackerman's procedure implies that an amendment must be approved by a two-thirds majority in the legislature, and this will give a one-third minority of the legislators a veto power.³² In other words, if a one-third minority of legislators opposes the amendment, it can block the change or constitutional reform, even though a simple majority of legislators support the bill. Since supermajority rules require qualified or special majorities and allow for minority vetoes, they will have a conservative bias in the sense that they will favour the status quo (i.e. existing constitutional laws). In the literature, one often finds two types of argument for supermajority rules. The first type focuses on stability (and various reasons for privileging the status quo), whereas the second pertains to protection of minorities. In this connection, the following question arises: are supermajority rules (e.g. Ackerman's proposal) the best and most desirable devices for promoting stability and protection of minorities?

With regard to *arguments from stability*, I agree that there are convincing arguments in support of amendment procedures that create stability with respect to constitutional laws. An important value of a constitution is to provide a relatively stable framework for the public life of a state and its political and legal institutions (cp. section 2.2). As mentioned above, the question is, however, whether supermajority rules provide the most desirable way of promoting stability in a constitutional democracy. Supermajority rules are not the only means of favouring the status quo. There are a number of alternative ways of designing time-consuming amendment procedures (e.g. through various forms of delay devices) that will promote stability – without giving a minority of legislators veto powers that limit the relative power of those who support social

31 Aanund Hylland has made me aware of this example.

32 Strictly speaking this must be understood as one-third plus one vote.

change and that allow a minority to prevent constitutional reforms that the majority endorses (see my proposal in part 4).

The *argument from protection of minorities* states that supermajority rules should be introduced in order to protect minorities, because such decision rules grant minorities a veto power that gives them the opportunity to block constitutional amendments that they regard as unacceptable, unjust or tyrannical. Under certain circumstances, a good case can be made for this position. One example would be a state that is deeply divided between two permanent ethnic or religious groups and where the minority faces the threat of being oppressed and discriminated against by the majority, and where the majority disregards the vital interests of the minority. In such, and relevantly similar, circumstances, majority rule can easily lead to the tyranny of the majority, and supermajority rules can provide useful means to protect minorities.

It is, however, worth noting that it has been questioned whether supermajority rules offer more protection of minorities than majority rule in pluralist societies 'in which there are many groups and the relations between them are fluid',³³ and where minorities are central in coalition building or majority-cycling situations. Anthony McGann has recently argued that in such pluralist societies, majority rule can protect minorities because the instability (cycling) inherent in majority rule allows minorities to form coalitions that can overturn outcomes they regard as unacceptable. He presents two interesting arguments for this position. First, in a majority-rule parliament there is a need to build and maintain majority coalitions, and this is likely to encourage inclusion and power-sharing. Since majority rule is prone to cycling coalitions, it is often unwise under majority rule to attempt to rule with a minimal winning coalition where everyone else is excluded and the vital interests of the excluded parties are disregarded. McGann explains this as follows:

Any party that is excluded and feels like the interests of its constituents are threatened can undermine the governing coalition by offering its support to one of the governing parties at a very low 'cost'. By offering some of the governing parties outcomes they find very desirable in exchange for only the outcome it views as absolutely vital, an excluded party can break up the governing coalition. Of course, this outcome is not stable, as the new excluded parties have an incentive to pursue the same strategy. The only way to achieve stability is to organize outcomes so that excluded parties are indifferent to staying in opposition and trying to break into the governing coalition. The fact that cycling majority rule makes it easy for an excluded party to make trouble by trying to undermine the governing coalition encourages power-sharing.³⁴

Second, in a majority-rule parliament in which multiple issues are considered, a minority can trade votes on issues it considers of minor importance in order to

33 Barry, Brian, *Is Democracy Special?*, in T. Christiano (ed.), *Philosophy and Democracy*, Oxford University Press, Oxford 2003, p. 336. See also Miller, Nicholas R., *Pluralism and Social Choice*, *American Political Science Review* 1983, p. 735-738.

34 McGann, Anthony, *The Tyranny of the Supermajority. How Majority Rule Protects Minorities*, *Journal of Theoretical Politics* 2004, p. 71.

gain support on issues it regards as vital.³⁵ It is interesting to note that James Buchanan and Gordon Tullock have presented an example that seems to support McGann's argument from vote-trading: '[I]t is conceivable that a proposal to prohibit Southern Democrats from having access to free radio time might be passed by simple majority vote in a national referendum should the issue be raised in this way. Such measure, by contrast, would not have the slightest chance of being adopted by the decision-making process actually prevailing in the United States. The measure would never pass the Congress because the supporters of the minority threatened with damage would, if the issue arose, be willing to promise support on other measures in return for votes against such discriminatory legislation'.³⁶

At this point, it is important to emphasise that one can also argue that supermajority requirements can be questionable precisely because they allow for minority vetoes. There are several reasons for this. First of all, supermajority rules allow for minority vetoes that can block the process of decision making about constitutional amendments – despite the fact that a majority of both citizens and legislators would like to pass the bill after thorough discussion and deliberation. I believe that this can be problematic from the point of view of deliberative democracy – at least in cases where the minority retain the chance to win the next time, so that the minority has 'the opportunity in the future of winning over the majority with better arguments and thus revising the previous decision'.³⁷ Should a minority of legislators have the opportunity to veto a decision made by a majority of citizens and their elected representatives after an open, free and thorough process of public deliberation has taken place? In such situations, there are, in my opinion, *prima facie* good reasons for making the decision through majority rule, since a majority vote accords equal weight or equal potential decisiveness to individual votes. To let a minority block the decision of a majority in the case under consideration would express a lack of respect for persons' post-deliberative views and judgements.

Given the fact of persistent disagreements in modern pluralist societies, one important advantage of majority rule is that it expresses respect for the individuals whose votes it aggregates in two ways.³⁸ First, it respects the views that individuals have arrived at after deliberation and their differences of opinion about justice, rights and the common good. Second, majority rule accords equal weight to each person's vote and views. In other words, at the stage of decision

35 See McGann, *The Tyranny of the Supermajority. How Majority Rule Protects Minorities*, p. 71.

36 Buchanan, James M. and Tullock, Gordon, *The Calculus of Consent. Logical Foundations of Constitutional Democracy*, The University of Michigan Press, Ann Arbor, MI 1962, p. 133. McGann also argues that majority rule cycling can protect minorities because it can ensure that there are no permanent losers. 'A group out of power can always expect to be able to defeat the incumbents in the future and, thus, have an incentive to keep playing the game, which enhances the stability of the system' (McGann, *The Tyranny of the Supermajority. How Majority Rule Protects Minorities*, p. 71). The last point is also discussed in Miller, Nicholas R., *Pluralism and Social Choice*, p. 740-744.

37 Habermas, *Between Facts and Norms*, p. 179.

38 See, Waldron, *Law and Disagreement*, p. 109-114.

making, every individual is given equal power to affect the decision outcome. Supermajority rules lack this latter egalitarian quality. This is because they empower a minority to block change so that more weight and power are accorded to the views of a minority who opposes change than to those who favour reform.³⁹ In this way, supermajority requirements (such as the one Ackerman proposes) give minorities veto power to preserve what the majority regard as existing injustices. Against the background of persistent disagreement and fallibility of moral judgment, it is questionable to accord more weight to the post-deliberative views and judgements of a minority. This will be discussed more closely in the next part.

This brings me to a final objection to Ackerman's proposal. His procedure lays down a supermajority rule that gives a minority of legislators the opportunity to prevent proposed amendments from being placed before the citizens. In other words, a minority of legislators can block popular votes on important constitutional issues, and thereby decide whether the citizens should be involved in the amendment process. I think that such a supermajority requirement grants minorities of legislators too much power with regard to the process of constitutional decision making.

4 An Alternative to Ackerman's Proposal – the Four-Step Procedure

In view of the preceding critique of Ackerman's proposal, I believe that we should look for alternative amendment procedures. The purpose of this part of

39 Neal Riemer claims that under supermajority rules, 'the egalitarian premise is denied, for the views of the individual members of the minority would be *more heavily weighted* than those of the individuals composing the majority' (Riemer, Neal, *The Case for Bare Majority Rule*, Ethics 1951, p. 17). More recently, Andrei Marmor has made a similar point: 'A supermajority requirement always disrupts the equal distribution of political power because ... it always reduces the relative power of those who favor a social change' (Marmor, Andrei, *Authority, Equality and Democracy*, Ratio Juris 2005, p. 335). It is worth mentioning that Marmor goes on to say that supermajority rules are not necessarily at odds with the equal distribution of political power. Under certain special circumstances, supermajority decision procedures can lead to a more egalitarian distribution of political power than a simple majority voting rule. He puts forward the following example of the circumstances he has in mind: 'Consider, for example, the case of a relatively large persistent minority: suppose that country A is comprised of two main social groups, let us call them the greens and the reds. The greens form about 55% of the population, and the reds 45%. Now suppose that these two social groups are in a deep and longstanding conflict with each other, whereby the greens and the reds tend to vote on most issues according to their group interests which are typically at odds with the interests of the other group. Under these circumstances the reds are extremely unlikely to have their interests protected by a simple majority. In a very simplified way we can say that instead of having their political objectives materialized in about 45% of the cases, the reds are actually going to lose in 100% of the cases. Under these circumstances, it seems that a supermajority decision procedure may actually facilitate a much more egalitarian distribution of political power, thereby giving the reds a fair chance of having their votes affect the political outcomes' (ibid. p. 335). Here, it should be pointed out that it is not these special circumstances Ackerman has in mind when he proposes his three-step procedure.

the paper is to propose and consider a new alternative amendment procedure, and this will be termed the 'four-step procedure'.

4.1 A Four-Step Amendment Procedure

The four-step amendment procedure that I will propose can be described like this.

- 1 The right or power to propose constitutional amendments should be granted both to members of the legislature and to the voters via citizen initiatives.⁴⁰
- 2 The proposed amendment(s) should be submitted to the legislature, and the amendment(s) must be approved by a simple majority in two successive parliaments. Furthermore, there should be a time interval of at least one year between the two votes in the legislature. Thus, a simple majority of legislators can pass an amendment after a delay and an intervening election.
- 3 When passed by the legislature, the proposed amendment(s) should be approved by a simple majority of the voters in a referendum. This referendum should take place one year after the amendment has been approved by the legislature.
- 4 A one-third minority of the legislators should be empowered to require an additional referendum on the proposed amendment(s), and this final referendum should be held two years after the first popular vote.

4.2 The Case for the Four-Step Procedure

Although something can be said for several aspects of Ackerman's amendment procedure, the four-step procedure has some important advantages compared with his proposal. In what follows, I will set out the most important arguments for my proposal.

(i) The distribution of proposal rights and citizen participation

The first set of arguments for the four-step procedure concerns the distribution of proposal rights and direct citizen participation in the amendment process. The four-step procedure is much more inclusive than Ackerman's three-step procedure when it comes to the distribution of proposal rights. While the latter procedure only allows a re-elected president to initiate amendments, the four-step procedure grants both legislators and voters via citizen initiatives (i.e. a predefined minority or submajority of voters) the power to propose constitutional amendments. One reason why the choice between these competing sets of proposal rights is significant is that 'nothing can emerge as the output of a

40 With regard to citizen initiatives, it should be pointed out that I will leave open the questions of how many petitioners should be required, and what time limit should be placed upon the signature-gathering process for any single proposal.

democratic process unless someone has first put it onto the agenda'.⁴¹ In this connection, the distribution of power to place issues on the formal political voting agenda plays an important role.

Compared with Ackerman's procedure, there are several arguments for the proposal rights I have suggested. The outlined proposal rights can be defended in view of considerations of procedural fairness and central ideals in deliberative democratic theory. The reason for this is that they give the affected parties a better opportunity to shape the formal political agenda and influence the process of deliberation and decision making about constitutional issues. In the first place, the four-step procedure ensures that constitutional reform proposals or bills that citizens and their elected representatives regard as very important can be placed on the formal voting agenda in parliament. Moreover, the suggested proposal rights will give minorities of citizens and their representatives the chance to increase both the political visibility and the political awareness of the constitutional issues they choose to set on the formal political agenda. In addition, a predefined minority of citizens will be given a political tool to force legislators to pay more attention to the issues in question.

It should also be underlined that the way the four-step procedure involves citizens in the amendment process differs from Ackerman's proposal. First, as indicated above, my proposal involves citizens not only at the stage of decision making (or voting in a referendum), but also in the process of placing constitutional amendments on the formal voting agenda via citizen initiatives. Second, unlike Ackerman's three-step procedure, my proposal involves the electorate by means of an intervening election (see step 2). Since constitutional amendments must be passed by a simple majority in two successive parliaments, citizens will have the chance to determine the composition of the legislative assembly before the bill can be enacted in the legislature the second time.

(ii) Public deliberation, disagreement and majority rule: The argument from the legitimating force of post-deliberative consent

Although the two amendment procedures under consideration differ in several respects, they share at least three features that can have desirable effects with respect to stability and public deliberation. First, under both procedures, a successful constitutional amendment will be a result of a fairly time-consuming process of decision making that involves the consent of various actors. This will guard against frequent and whimsical constitutional changes and promote stability. Second, since both procedures will slow down the process of decision making, they can in several ways induce a thorough process of discussion and deliberation about constitutional issues. This is partly because both amendment procedures will give citizens time to consider carefully the bills in question, gather information and come up with and discuss alternative courses of action. Third, both procedures involve the people through referendums, and this direct democratic device can serve as a useful institutional mechanism for engaging citizens more directly in public deliberations about constitutional amendments. Furthermore, referendums can have positive effects with regard to public

41 Goodin, *Reflective Democracy*, p. 163.

exchange of information. One important reason for this is that referendums create incentives for people to gather information, and for the political actors and the media to provide it.⁴² This can improve the information base and enhance the level of reflection among the voters.

All this being said, a significant difference between the two competing amendment procedures emerges (or turns up) at the stage of decision making or voting in the legislature. As discussed in part 3, the second step of Ackerman's procedure implies that an amendment must be passed by a supermajority (i.e. a two-thirds majority) in the legislature, and this gives a one-third minority of the legislators a veto power, which allows them to prevent a proposed amendment from being placed before the citizens in a popular vote. By contrast, on my proposal, a simple majority of the legislators can pass an amendment after a delay and an intervening election, and then submit the proposal to the people who can finally decide the issue through a referendum. Since this procedure gives the people the opportunity to determine the composition of the legislature, and the elected legislators are given time to think carefully through the amendment proposals, there are *prima facie* good reasons to respect their post-deliberative views and judgements by means of weighing the votes of the legislators equally (see also my discussion in part 3, section 3.3). Compared with the second step of Ackerman's procedure, one important advantage of the second step of the proposed four-step procedure is that it only slows down the process of deliberation and decision making. It does not give a minority of legislators a veto power that limits the relative power of those who support constitutional changes and that gives a minority the opportunity to block constitutional reforms that the majority endorses after a thorough process of deliberation. In this connection, I believe that the second step of the four-step procedure can be defended on the basis of what I will term *the argument from the legitimating force of post-deliberative consent under the circumstances of politics*. This argument partly draws on the preceding reflections on majority rule vs. supermajority rules (see also section 3.3), and it runs as follows:⁴³

- i. The legitimacy of collectively binding decisions requires the consent of the affected parties or their elected representatives (i.e. the representatives that the citizens have authorized to act on their behalf).^{44 45}

42 See Frey, Bruno and Stutzer, Alois, *Direct Democracy: Designing a Living Constitution*, Working Paper, no. 167, 2003, p. 28.

43 Some aspects of the argument are also inspired by John Locke's defence of majority rule. See, Locke, John, *Two Treatises of Government*, edited by Peter Laslett, Cambridge University Press, Cambridge 1988, especially the second treatise, ch. VIII, §§ 95-99. An interesting interpretation of Locke's defence of majority rule is found in Waldron, Jeremy, *The Dignity of Legislation*, Cambridge University Press, Cambridge 1999, ch. 6.

44 This is not meant to rule out that, for instance, elected legislators can delegate some power to govern to non-elected government officials.

45 Similar assumptions play an important role in Habermas' discourse ethics and his political and legal philosophy. This is, for instance, evident in his formulation of 'the discourse principle (D)': 'Just those action norms are valid to which all possibly affected persons

- ii. Unanimous consent is impossible (even among reasonable persons) in the circumstances of politics where (a) there is a need to decide on laws (i.e. both ordinary and constitutional laws) that coordinate the activities of citizens, and (b) there is disagreement on what the best and just legislation is – both before and after deliberation.
- iii. Although people vary in their abilities, experience, knowledge and wisdom, every moral agent (or competent person) should be regarded as an equal, and every citizen's consent (or opposition) should count equally.⁴⁶
- iv. Majority rule counts every individual's consent or opposition (to a bill) equally, and in this way majority rule voting expresses respect for their post-deliberative views and their differences of opinion (see also section 3.3).
- v. When we make decisions that affect not only ourselves but also other people and their life-conditions, each of us should consider the issue and what is at stake carefully and seriously, regardless of the fact that people's capacity for rational deliberation varies a great deal. If a person or a group of persons through voting consent to or oppose a collectively binding decision without carefully considering the issue in question, this will undermine the legitimacy of their consent or opposition as well as the legitimacy of the decision outcome. In light of these considerations, the legitimating force of persons' post-deliberative consent is greater than their pre-deliberative consent. One should therefore introduce devices (or institutional arrangements) that can encourage deliberation before a decision must be reached through voting.
- vi. Hence, majority rule, combined with institutional arrangements that encourage careful deliberation, is a legitimate or appropriate decision procedure for making collectively binding decisions under the circumstances of politics.

Before proceeding, let me make two clarifications with regard to the outlined argument. First of all, *actual* processes of deliberation in the real world can only approximate to a greater or lesser degree *ideal* processes of reasoned dialogue and deliberation among free and equal citizens, and this fact will affect the legitimacy of binding collective decisions. The best we can do is to try to design

could agree as participants in rational discourses' (Habermas, *Between Facts and Norms*, p. 107).

46 On Waldron's interpretation, 'Locke is adamant that, whatever the other variations among us, we are each other's equals so far as authority is concerned' (Waldron, *The Dignity of Legislation*, p. 144).

decision procedures that are fair and likely to promote reasoned public deliberation. Moreover, although there is no general agreement among proponents of deliberative democracy on the question of the status of majority rule, it is widely recognised that the legitimating force of majority rule decisions is altered after a process of open, free and thorough deliberation. This means that there is an important difference between the aggregation of preferences before and after deliberation.⁴⁷

Secondly, the proposed decision procedure (which combines majority rule voting with devices that can promote deliberation) cannot eliminate unjust or tyrannical decision outcomes. A majority can, of course, make stupid, unjust and/or morally questionable decisions even after a process of open, free and thorough deliberation. Here it is, however, important to bear the following facts in mind. First, it is presumably not possible to design a decision procedure for making collectively binding choices that could prevent unjust or tyrannical outcomes. Needless to say, despite the fact that something can be said for supermajority requirements when it comes to protection of minorities (see section 3.3), such decision rules cannot rule out unjust or tyrannical outcomes. For example, supermajority rules can allow minorities of legislators to preserve present injustices and block social changes that would have desirable effects. Like majorities, minorities can also make both stupid and morally questionable decisions. Second, in modern pluralist societies, there is persistent disagreement among citizens about the questions of what should count as injustice and what should count as tyranny. In this situation, one should also take into account the fallibility of moral judgement. The third fact I have in mind is aptly described by Jeremy Waldron: 'In the circumstances of politics, a person must expect (unless he is very lucky) to find himself from time to time bound by social arrangements he regards as unjust. That is almost bound to happen, seeing that it is the function of law to lay down rules in circumstances where people disagree about justice. ... [This] is a normal predicament for most people at least some of the time and for many people most of the time, in the circumstances of politics'.⁴⁸

(iii) Checks and balances, submajority rules and protection of minorities

The four-step procedure does not represent a defence of unconstrained majority rule. Rather, it provides several checks and balances that can be regarded as counter-majoritarian devices, the aim of which is to prevent issues regulated by constitutional laws and the process of constitutional amendment from being subject to the immediate and unlimited control of majorities of legislators and voters. As already explained, the proposed amendment procedure does not give majorities the opportunity to make hasty decisions on important constitutional issues, but lays down several devices that slow down the process of deliberation and decision making.

47 See, e.g., Manin, *On Legitimacy and Political Deliberation*; and Smith, Graham, *Toward Deliberative Institutions*, in M. Saward (ed.), *Democratic Innovation*, Routledge, London 2000, p. 38.

48 Waldron, *Law and Disagreement*, p. 247.

Besides, the four-step procedure involves several or multiple actors (i.e. citizens, legislators, as well as submajorities of voters and legislators) in the process of constitutional amendment – both at the stage of setting the formal voting agenda and at the stage of decision making or voting. The involvement of multiple actors in the amendment process provides several checks and balances between legislators, courts and citizens. In the first place, a successful constitutional amendment requires the consent of various actors. For example, like Ackerman’s proposal, the four-step procedure grants the citizens a direct power of blocking constitutional amendments that would benefit those in government at the expense of the governed. In this way, the referendum provides an important power-checking function.

A second and related point is that the proposed procedure grants minorities of legislators a suspensive veto, by means of which a submajority or a one-third minority can require an additional referendum that should take place two years after the first popular vote. I propose this submajority rule as a device to protect minorities.⁴⁹ But here it is important to stress that this submajority rule does not empower a minority to block a majority decision, but only slow down the process of deliberation and decision making. The suggested device also has a deliberative function in the sense that it gives a minority a second chance to persuade or convince the majority before the final majority rule vote.

Finally, in view of the high degree of law-making discretion and power that is granted to courts empowered to enforce (i.e. interpret and apply) constitutional laws, and the danger that courts can abuse their review powers (cp. section 2.3), the four-step procedure empowers simple majorities of legislators and citizens to change judicial decisions for the future by means of amending constitutional laws. In my opinion, this provides a better and more democratic system of checks and balances between courts, legislators and citizens than Ackerman’s procedure. His proposal would allow a minority in the legislature to prevent a majority of legislators and citizens from changing judicial decisions for the future through amending the constitution. Compared with the four-step procedure, Ackerman’s proposal would also restrict the opportunity of legislators to guard or check the guardians of the constitution (i.e. courts having review power). From a democratic point of view, I believe that it is questionable to grant minorities of legislators such powers to preserve judicial decisions that a majority of legislators opposes. In this connection, it is important to bear in mind that the representative legitimacy of democratically elected legislators is different from that of appointed judges who are not directly elected by the people. In contrast to judges, the voters can directly elect and replace the legislators during periodic elections. In other words, the people can authorize

49 A *submajority rule* is ‘a voting rule that authorizes (i) a predefined numerical minority within a designated voting group (ii) to change the status quo (not merely to prevent change) (iii) regardless of the distribution of other votes’ (Vermeule, Adrian, *Submajority Rules: Forcing Accountability upon Majorities*, *Journal of Political Philosophy* 2005, p. 76). The ‘status quo’ referred to in this definition is typically procedural rather than substantive. Vermeule points out that submajority rules are rarely or never used directly for final substantive decisions, such as the passage or defeat of legislation. Rather, they are used for procedural matters.

their elected representatives to act on their behalf, and they can hold them politically accountable by punishing them during elections. Thus, periodic elections constitute an important institutional mechanism for popular control of legislators that is absent when it comes to judges.⁵⁰ In light of these considerations, it should not be too difficult for a majority of elected and accountable legislators to act as a check on courts.

5 Conclusion

In this paper I have considered some important aspects of the question of how difficult it should be to amend constitutional laws by means of formal amendment procedures. In order to analyse this complex problem, I have assessed two competing amendment procedures – Ackerman’s three-step procedure and the proposed four-step procedure. The preceding discussion has shown that something can be said for both these amendment procedures. In view of the criteria of evaluation that have provided the starting point of my assessment, Ackerman’s three-step procedure represents a significant improvement as compared with Article V of the U.S. constitution. Nevertheless, I have argued that Ackerman’s proposal is open to some important objections, and that a better case can be made for the suggested four-step procedure.

50 John Stuart Mill also emphasises the significance of the power-checking function of popular control: ‘The idea of rational democracy is, not that the people themselves govern, but that they have security for good government. This security they cannot have by any other means than by retaining in their own hands the ultimate control. If they renounce this, they give themselves up to tyranny. A governing class not accountable to the people are sure, in the main, to sacrifice the people to the pursuit of separate interests and inclinations of their own. ... In no government will the interests of the people be the object, except where the people are able to dismiss their rulers as soon as the devotion of those rulers to the interests of the people becomes questionable’ (Mill, John Stuart, *Dissertations and Discussions*, University Press of the Pacific, Honolulu 2002, p. 386).