

# Direct Democracy and Civic Maturation

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## Introduction

Americans have grown deeply dissatisfied with government,<sup>1</sup> convinced that our elected officials care more about feathering their own nests and guaranteeing their reelection than serving the commonweal.<sup>2</sup> Ordinary citizens believe that their representatives pay heed to the whims of wealthy and powerful special interests rather than to the public interest.<sup>3</sup>

Unsurprisingly, the sense of failure of representative government has increased talk of expanding direct democracy, whereby the People themselves make laws.<sup>4</sup> Predictably, debate about direct

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1. See, e.g., David Broder, *Whose Government Is This?: Poll Finds Public Feels It Belongs to Parties, Lobbyists, Media*, WASH. POST, July 13, 1999, at A7 (discussing national poll showing deep distrust of government); Scott Shepard, *U.S. Vote Data Show Trend Toward Apathy*, ATLANTA J. & CONST., Aug. 17, 1998, at A6 (citing new Census Bureau report showing that voter turnout in 1996 presidential election was lowest in 70 years and voter registration, despite laws making it easier to register, was lowest in 30 years).

2. See Broder, *supra* note 1 (“Only one in four [of those polled] thought the government pursues the public interest and the people’s agenda, rather than special interests or its own agenda.”).

3. Some representatives agree. Senator John McCain (R-Ariz.) opines that American politics has become “an influence-peddling scheme in which both parties compete to stay in office by selling the country to the highest bidder.” David S. Broder, *A Battle of Bank Accounts*, WASH. POST, July 7, 1999, at A19.

4. Elizabeth Garrett, *Perspectives on Direct Democracy: Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 17 (1997) (“The appeal of popular lawmaking is no surprise given the growing public disillusionment with elected representatives.”). Procedures for direct democracy already exist in the District of Columbia and [the] following twenty-four states: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. One respected pundit predicts that nationwide

democracy has spilled into the legal academic community.<sup>5</sup> The debate has two principal prongs: the extent to which direct democracy meshes with American doctrine and tradition (i.e., the constitutional text and the views of the founding fathers), and the desirability of direct democracy on various public policy grounds.

Along with my co-author Akhil Amar, I entered that debate on the side of direct democracy.<sup>6</sup> However, Professor Amar and I observed that not all forms of direct democracy are alike, and we called for procedures that would minimize the risks posed by direct democracy while maximizing its potential. We made broad and tentative observations about the kinds of procedures we have in mind, leaving for another day consideration of a blueprint for direct democracy.<sup>7</sup>

This article seeks to take that next step, to address not simply *whether* citizens should make laws, but *how*. Getting to this point requires retracing some previous steps and building a stronger case for direct democracy than has heretofore been made (including by Professor Amar and myself).

Part I of this essay argues that, contrary to the prevailing view in the legal community, the founding fathers believed in direct democracy, and the Constitution embodies it. Part II reviews the public policy arguments, and the experience with direct democracy in the states. Part III makes an essentially new argument in favor of direct democracy: At this point in our history, it is needed to achieve the civic maturation of the American citizenry and polity. Building on Parts II and III, Part IV contemplates a new model of direct democracy. Specifically, I analyze the efforts of a group called Philadelphia II to introduce direct democracy to every jurisdiction in America in a way that would promote fairness and deliberation. Finally, Part V analyzes the means by which Philadelphia II seeks to enact its proposal.

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initiative will soon become a visible national issue. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 1* (2000).

5. Whereas there was a limited literature until recently, the 1990s witnessed literally dozens of articles on direct democracy. See Garrett, *supra* note 4, at 36 (noting “[i]ncreased scholarly interest in direct democracy”).

6. AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 3-47 (1998). Part I of the present essay borrows liberally from our book which, in turn, borrowed liberally from Professor Amar’s earlier scholarship, see, e.g., Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

7. AMAR & HIRSCH, *supra* note 6, at 26-27, 46-47.

## I. The Framers and Direct Democracy

Opponents of direct democracy cite the Framers of our Constitution as allies.<sup>8</sup> They argue that the Framers consciously rejected directed democracy in favor of representative democracy. First, on the federal level, the Constitution sets up a representative democracy as opposed to a direct democracy. It spells out how the People elect legislators who, along with an elected President, make the laws. The Constitution does not set forth direct lawmaking by the People.

Second, while the Constitution focuses on the organization of the federal government, Article IV, Section 4 says the United States “shall guarantee to every State in this Union a Republican Form of Government.” Opponents of direct democracy argue that a republican form of government means representative government, and conclude that the Framers envisioned representative democracy, as opposed to direct democracy, at the state as well as federal level.<sup>9</sup>

Finally, the Framers made it extremely difficult to change these (and all other) features of the Constitution, crafting laborious procedures for amending the document.<sup>10</sup> Because amendments require super-majorities, and require ample involvement and support from elected officials, the Constitution itself is distanced from direct democracy.

I believe that the above misreads the evidence in several respects, and that it is problematic to enlist the Framers as opponents of direct democracy.

### A. Federal Government—The Problem of Size

While the Framers did establish representative rather than direct democracy as the means of federal lawmaking, it is easy to draw the wrong inference from that datum. Certainly, they were under no illusion that elected officials perfectly represent their constituents. In the United States House of Representatives, the more accountable of the two branches of Congress (since its members face election every two years), each member has numerous constituents. This fact alone renders it impossible for a “representative” to truly represent any voter, and the House operates in a one-industry town of power

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8. See, e.g., Hans A. Linde, *Who is Responsible for Republican Democracy?* 65 U. COLO. L. REV. 709, 722 (1994).

9. *Id.*

10. See U.S. CONST. art. V. See also *infra* text accompanying note 48.

brokers, which is hardly conducive to representing the ordinary citizen.

Frequent elections do require members of Congress to pay some attention to their constituents. However, the constant pressure to keep wealthy campaign contributors happy further weakens the bond between representatives and the average citizen.<sup>11</sup> The threat of removing unresponsive representatives would not suffice in any event. Elections rarely present a simple choice: Each candidate is a complex combination of positions, record, character, party affiliation, and potential seniority in the legislature.<sup>12</sup>

The Framers keenly understood the distance between the most popular branch of government and the People. In Federalist 71, Alexander Hamilton noted disapprovingly that representatives “seem sometimes to fancy that they are the people themselves.”<sup>13</sup> For that reason, James Madison argued, “The people ought to indulge all their jealousy and exhaust all their precautions” to restrain “the enterprising ambition” of our representatives.<sup>14</sup>

Given this, why did the Framers establish a representative democracy at the federal level? The principal reason was practical: the country was too large for direct democracy. As John Adams put the point, “In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws. The first necessary step, then, is to delegate power. . . .”<sup>15</sup>

Permitting all voters to vote on issues would have meant sacrificing the ideal of *deliberative* democracy. The Framers regarded deliberation as the *sine qua non* of lawmaking. In the very first sentence of The Federalist Papers, Alexander Hamilton reminded people that they were called upon not merely to vote but to

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11. While the influence of money was far less pronounced at the founding, no one doubted that some constituents had more clout than others. The problems of representation were and are worse in the Senate than the House: the ratio of constituent to Senator is higher, the term of office longer, and the cost of campaigns greater.

12. In a development not fully foreseen by the Framers, Congress' seniority system gives voters in every district a disincentive to remove their incumbent: A new representative generally translates into less pork for the district. The result, at times, is what economists call a “collective action” problem: Everyone wants to throw the bums out, but most vote to keep their own bum in.

13. THE FEDERALIST NO. 71, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

14. THE FEDERALIST NO. 48 (James Madison), *supra* note 13, at 309.

15. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVES, REFERENDUM, AND RECALL 14 (1989) (quoting John Adams).

“*deliberate* on a new Constitution.”<sup>16</sup> The theme of deliberation permeates the Framers’ own deliberations on the Constitution. For example, in Federalist 68, Hamilton explained that the proposed system of electing presidents is designed to produce “circumstances favorable to deliberation.”<sup>17</sup>

James Fishkin cogently argues that the Framers’ attitude about direct democracy is captured by the conflict in Rhode Island over how to ratify the Constitution.<sup>18</sup> Some Rhode Islanders insisted on a referendum open to all eligible voters, but:

[t]he Federalists’ position was that a serious consideration of the issues, where argument could be met by counterargument, required citizens to *meet together* in preparation for a vote. Because it would be impossible for the entire citizenry to meet together, consideration by a representative body was the only way the proposed new Constitution could receive a thoughtful hearing.<sup>19</sup>

As James Madison succinctly observed in Federalist 14, “[I]n a [direct] democracy, the people meet and exercise the government in person. . . . A democracy consequently, must be confined to a small spot.”<sup>20</sup>

Madison himself considered direct democracy inherently risky.<sup>21</sup> For him, America’s size was a blessing—an extended society required representative democracy, thus avoiding the risks of popular government. But in his abiding preference for representative government, Madison was the exception. The more typical founding view, with roots in the political philosophy of Rousseau,<sup>22</sup> held the Athenian model of pure democracy as the ideal form of government. However, that model was considered workable only in a small society, with a representative government necessary in a larger one.<sup>23</sup>

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16. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 13, at 33 (emphasis added).

17. THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 13, at 412.

18. JAMES F. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 26-50 (1995).

19. *Id.* at 28 (emphasis in original).

20. THE FEDERALIST NO. 14 (James Madison), *supra* note 13, at 100.

21. See THE FEDERALIST NO. 10 (James Madison), *supra* note 13, at 81 (“[A] pure democracy . . . can admit of no cure for the mischiefs of faction.”).

22. See, e.g., Jean Jacques Rousseau, *The Social Contract*, in *THE SOCIAL CONTRACT AND DISCOURSE* (Cole. ed., 1950).

23. See FISHKIN, *supra* note 18, at 17-30; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 297-299 (1990).

Modern society faces the challenge of adapting the Framers' insights to a changing world.<sup>24</sup> One profound change since the founding is the shrinking of our country (and the world) by technological advance—a development dramatically symbolized and intensified by the internet. In 1787, discussions by the polity at large were impossible. Two centuries later, people communicate instantaneously with others around the globe.

Surely, the possibility of deliberation in a sizable country has improved dramatically. The overwhelming advances in communication and transportation call for reevaluation of whether a more direct democracy could feature adequate deliberation.

In sum, the Framers' choice of representative democracy at the federal level should not be wrenched from context. That choice derived from a commitment to a deliberative ideal that could not be achieved at the founding because of conditions that have subsequently changed.

### **B. State Government—The “Republican” Misconception**

The Constitution promises every state a “republican form of government,” which could be seen as evincing the Framers' preference for representative over direct democracy. But the notion that the Framers regarded a republican form of government as inconsistent with direct democracy rests on a slender foundation—primarily one passage in Federalist 10:

[a] republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking . . . .  
[A] great point [] of difference between a democracy and a republic [is] the delegation of the government, in the latter, to a small number of citizens elected by the rest.<sup>25</sup>

Clearly, Madison here referred to a representative democracy as a republic, and expressed a preference for this form of government. Yet there is ample reason not to attach too much significance to this brief passage.

First, Madison was not discussing the meaning of Article IV, Section IV's guarantee of a “republican form of government” to the states. When he and Hamilton did discuss this clause (in Federalist 21

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24. See *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (noting judicial role in “discern[ing] how the framers' values, defined in the context of the world they knew, apply to the world we know.”) (quoting *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring)).

25. THE FEDERALIST NO. 10, *supra* note 21, at 81-82.

and 43), they made no reference to the language in Federalist 10, nor in any way indicated that the clause prohibits direct democracy.<sup>26</sup> Second, Madison signaled that he was using “republic” in a nonobvious, perhaps idiosyncratic way: “[a] republic, by which I mean . . .” Just a few paragraphs earlier he referred to majority rule as “the republican principle.”<sup>27</sup>

In Federalist 14, Madison repeated his claim that republics, in contrast to democracies, rely on a system of representation.<sup>28</sup> But elsewhere, he pursued a different theme. In Federalist 39 and 43, he contrasted republicanism not with democracy, but with aristocracy and monarchy.<sup>29</sup> Perhaps more to the point, in Federalist 39 Madison linked republican government with “the capacity of mankind for self-government” where government derives “all its powers” from “the great body of the people.”<sup>30</sup> In Federalist 55, he reiterated that republican government presupposes “sufficient virtue among men for self-government.”<sup>31</sup> Hamilton, for his part, explicitly equated republican government with government “of the people.”<sup>32</sup>

Indeed, Hamilton’s Federalist 78 characterized the People’s right to change the Constitution as the “fundamental principle of republican government.”<sup>33</sup> His Federalist 21 declared that Article IV’s “republican form of government” clause “could be no impediment to reforms of State constitutions by a majority of the people.”<sup>34</sup>

Hamilton was far from alone in linking republican government to popular sovereignty and majority rule. Samuel Johnson’s 1786 dictionary defined “republican” as “placing the government in the people.”<sup>35</sup> In a Supreme Court opinion in 1793, Justice James Wilson, one of just six men to sign both the Constitution and the Declaration of Independence, defined “republican government” as one in which

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26. THE FEDERALIST NO. 21 (Alexander Hamilton), *supra* note 13, at 139-40; THE FEDERALIST NO. 43 (James Madison), *supra* note 13, at 274-78.

27. THE FEDERALIST NO. 10, *supra* note 21, at 81.

28. THE FEDERALIST NO. 14, *supra* note 20, at 100.

29. THE FEDERALIST NO. 39 (James Madison), *supra* note 13, at 240-41; THE FEDERALIST NO. 43, *supra* note 26, at 274.

30. THE FEDERALIST NO. 39, *supra* note 29, at 240-41.

31. THE FEDERALIST NO. 55 (James Madison), *supra* note 13, at 346.

32. *Id.*

33. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 13, at 469.

34. THE FEDERALIST NO. 21, *supra* note 26, at 140.

35. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 24 (1988).

“the [S]upreme [P]ower resides in the body of the people.”<sup>36</sup> Two years later, Justice James Iredell noted that in “a [R]epublic” the “sovereignty resides in the great body of the people.”<sup>37</sup> So too, Thomas Jefferson described majority rule as “the vital principle of republics.”<sup>38</sup> Caleb Strong, a delegate at the Constitutional Convention, noted that “in republics, the opinion of the majority must prevail.”<sup>39</sup>

Conceivably, all these references to self-government entailed nothing more than citizens casting ballots to elect representatives. However, the scraps in Federalist 10 and 14 merely establish Madison’s misgivings about direct democracy and his occasional use of “republic” to denote representative democracy. They do not prove that these misgivings and linguistic tendencies were shared by other Framers, or were reflected in the “republican form of government” clause.

The available evidence suggests neither. In the South Carolina ratifying convention, Charles Pinckney, who had been a delegate to the federal convention, described a republican government as one where “the people at large, either collectively or by representation,” form the legislature.<sup>40</sup> At Pennsylvania’s ratifying convention, James Wilson equated a “republic” with a “democracy” (contrasting both to a monarchy or aristocracy). In both, “the people at large retain the supreme power, and act either collectively or by representation.”<sup>41</sup> Wilson referred to representation itself as the “democratic principle.”<sup>42</sup>

In their many debates, the Framers regularly distinguished republican government from monarchy and aristocracy, rarely from democracy. Madison himself, who in Federalist 10 offered a “republican remedy for the diseases most incident to republican government,”<sup>43</sup> at the Philadelphia Convention described this identical scheme as a defense against “the inconveniences of

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36. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793).

37. *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 93 (1795).

38. THOMAS JEFFERSON, *First Inaugural Address*, in *GREAT ISSUES IN AMERICAN HISTORY: A DOCUMENTARY RECORD* 189 (Hofstadter ed., 1958).

39. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 143 (1969).

40. 4 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 328 (1881).

41. 2 *id.* at 433.

42. 2 *id.* at 482.

43. THE FEDERALIST NO. 10, *supra* note 21.



democracy consistent with the democratic form of Gov[ernmen]t.”<sup>44</sup> The political party he co-founded began as the Republican Party but later became known as the Democratic Party.

The etymology of these two words supports their similarity. “Republican” derives from the Latin *res (thing) publica (public)*, a rough equivalent of the Greek “demoskratia”—*krasis (rule) demos (by the people)*. Roger Sherman captured this etymological truth in a letter to John Adams, noting that “what especially denominates [a government] a republic is its dependence on the public or people at large.”<sup>45</sup>

Based on all of the available evidence, Article IV’s guarantee of a “republican form of government” cannot be said to reflect opposition to direct democracy.<sup>46</sup> It is fitting, then, that many states have adopted direct democracy and our highest courts have given it their imprimatur.<sup>47</sup>

### C. Constitutional Amendment—Direct Democracy Indeed

What about the process of amending the Constitution? Can it be denied that here the Framers’ manifested their distrust of direct democracy? Did they not make it impossible for the citizens themselves to change the Constitution, requiring instead the heavy cooperation and support of representatives? In fact, the Framers’ words and deeds yield the opposite conclusion.

Article V of the Constitution sets forth two procedures for amending the Constitution:

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44. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 135 (Farrand ed., 1937).

45. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 24 (1972).

46. Even if “republican form of government” did indeed refer to a representative government, the availability of citizen lawmaking need not compromise such a scheme. All the states have representative governments, structured similarly to the federal government. Citizen initiatives supplement this scheme of representation rather than replace it. See Matthew Spitzer, *Perspective on Direct Democracy: Evaluating Direct Democracy: A Response*, 4 U. CHI. L. SCH. ROUNDTABLE 37, 41 (1997) (“[W]hen we speak of a system of ‘direct democracy,’ we are actually talking about a mixed system of representation and direct democracy.”).

47. See, e.g., *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 673 (1976) (upholding constitutionality of city charter provision requiring approval by referendum of certain laws passed by city council, and noting approvingly that direct democracy “give[s] citizens a voice on questions of public policy”) (quoting *James v. Valtiera*, 402 U.S. 137, 141 (1971)); *Assoc. Home Builders v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976) (upholding amendment to state constitution providing for initiative, and calling the amendment “one of the outstanding achievements of the progressive movement”).

[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on 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 the 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.<sup>48</sup>

Clearly, Article V fails to provide the People with control of the government. First, the Article V procedures do not empower a majority: Two-thirds of both houses of Congress, or two-thirds of the state legislatures, must initiate an amendment, and three-fourths of the states must ratify it. Second, the Article V amendment process lies in the hands of government officials, not the People. Congress, on its own or spurred by state legislatures, must act before an amendment even gets off the ground, and may dictate that ratification take place by state legislatures rather than by the People at large.

Since Article V requires supermajority vote of government officials, it does not promote direct democracy. But a close reading of Article V reveals something interesting: It does not say that the procedures it outlines are the *only* means of amending the Constitution. A compelling case can be made that Article V merely sets forth one means for amendment, and that there is also a separate means: direct amendment by the People.

This conclusion receives support from the most relevant precedent: the establishment of our Constitution. The Framers faced a situation similar to that facing us today—they were stuck with a document that seemed to defy ready amendment. Many states had written constitutions in place in 1787. These constitutions established demanding rules for amendment—just like our Article V. On the surface, various state constitutions were violated when the federal Constitution was adopted and ratified. The Constitution was established in accordance with a process set forth in Article VII (providing for ratification by special conventions of the People), a process which seemingly contravened various state constitutions.

Taking note of all this, opponents of the proposed federal Constitution declared that ratification under Article VII would be illegal. However, they did not press the point, because supporters of the Constitution had a knockout response. At the Constitutional Convention in Philadelphia, a Maryland delegate cited a provision in

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48. U.S. CONST. art. V.

Maryland's Constitution governing its own amendment, and claimed that Maryland was not free to pursue any other mode.<sup>49</sup> James Madison replied:

[t]he difficulty in Maryland was no greater than in other States. . . . The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. . . . [F]irst principles might be resorted to.<sup>50</sup>

What were these "first principles"? That the People are sovereign, and enjoy the inalienable right to change their government. In the words of the Declaration of Independence: "[w]e hold these truths to be self-evident . . . that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . ." Similar statements appear in the various state constitutions and Bills or Declarations of Rights.<sup>51</sup>

Thus, the ratification of the Constitution was lawful even in states that did not follow provisions for amendment of their own constitutions. Such provisions, read carefully, did not set forth the only means of amendment. The adoption of the federal Constitution effectively amended the state constitutions by direct appeal to the People—a method understood as a "first principle" within all the states.

If this is the case, the notion that Article V presents the only means of amending the federal Constitution immediately becomes suspect. Didn't the principle that governed adoption of the Constitution itself—the right of the People to alter or abolish the government—survive adoption of the Constitution? It may be objected that this argument renders Article V a nullity. If the Constitution can be amended by the People directly, why did the Framers bother with the elaborate provisions of Article V? The answer is that Article V authorizes a mode of amendment that would have been otherwise unavailable. Absent explicit authority in the Constitution, ordinary organs of government (Congress and state legislatures) would not have been permitted to amend the document.<sup>52</sup>

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49. 1 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION, *supra* note 44, at 475.

50. *Id.* at 476.

51. See Amar, *supra* note 6, at 477-78 (citing and discussing provisions of various state constitutions).

52. So understood, it makes good sense why the Framers made the Article V

But giving the organs of government the power to amend the Constitution via Article V did not deprive the People themselves of the independent right to amend the Constitution. Indeed, this right is inalienable—it cannot be given up or waived—and was so recognized as a first principle in the Declaration of Independence and at the Constitutional Convention. The Federalist Papers also made several references to this first principle. For example, Federalist 78 alluded to “that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness.”<sup>53</sup>

The argument for constitutional amendment directly by the People receives support in the Constitution’s text. The Preamble’s declaration that “We the People of the United States . . . do ordain and establish this Constitution”<sup>54</sup> embodies the principle of popular sovereignty. If the People, acting by simple majority in each state, had the authority to ordain and establish the Constitution, how could they lack the authority to alter and abolish that Constitution by the same means?<sup>55</sup>

The Framers recognized a connection between the Preamble and the right of the People to alter or abolish the Constitution. James Wilson, author of the first draft of the Preamble, observed that the Constitution’s “leading principle” is that “the supreme power resides in the people,”<sup>56</sup> and made clear that he saw this principle implied in the Preamble. The Constitution, he observed:

opens with a solemn and practical recognition of that principle:—“We the people of the United States, in order to form a more perfect union, establish justice, &c., do ordain and establish this Constitution for the United States of America.” It is announced in their name—it receives its political existence from their authority: they ordain and establish. What is the necessary consequence? Those who ordain and establish have

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amendment process so cumbersome. Insofar as a major feature of the Constitution was its restraint on government officials, it would have been self-defeating to permit such officials to easily remove the restraints by amending them away.

53. THE FEDERALIST NO. 78, *supra* note 33, at 469.

54. U.S. CONST. pmb.

55. As the Constitution merged previously separate states into one nation, the relevant majority after ordainment and establishment became national, not the people within each state. But while the Constitution redefined the relevant polity, it did nothing to change the principle of popular sovereignty. To the contrary, the Preamble proudly proclaims popular sovereignty as—literally—the Constitution’s first principle.

56. 2 ELLIOT, *supra* note 40, at 434.

the power, if they think proper, to repeal and annul.<sup>57</sup>

Wilson was not alone in connecting the Preamble to the right of the People to alter or abolish the Constitution. Similar observations were made by James Iredell (later a United States Supreme Court Justice) at North Carolina's ratifying convention,<sup>58</sup> and Edmund Pendleton at Virginia's ratifying convention.<sup>59</sup>

In the First Congress, James Madison proposed amending the original Constitution by adding a prefix to the Preamble declaring that "the people have an indubitable, unalienable and indefeasible right to reform or change their Government."<sup>60</sup> The proposal was dropped only because it went without saying. For example, one congressman opined that the unamended Preamble amounted to a "practical recognition of the right of the people to ordain and establish Governments."<sup>61</sup> As the Framers recognized, it makes no sense to think of such a right apart from the companion right to reordain and reestablish the government.<sup>62</sup>

The Bill of Rights reinforces the point. The Ninth Amendment announces that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People,"<sup>63</sup> and the Tenth Amendment states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>64</sup> Historical evidence suggests that the Preamble, the Ninth Amendment, and Tenth Amendment all implicate the right of the People to alter or abolish their government.<sup>65</sup> Consider this proposed

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57. *Id.* at 434-35.

58. *Id.* at 9, 230.

59. *Id.* at 37.

60. See BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1026 (1971).

61. *Id.* at 1072 (remarks of James Jackson of Georgia).

62. The Preamble, of course, opened the original (that is, unamended) Constitution. Article VII concluded it. These two provisions tie together neatly. While the Preamble announces the People's action in establishing the Constitution, Article VII explains how such action is taken. Thus, the Preamble and Article VII, in tandem, declared and effected the right of the People to change their government through direct action. Article VII makes no mention of clauses governing the amendment process in the state constitutions, precisely because the Framers drew on a different method of amendment—the direct appeal to the People signaled by the Preamble.

63. U.S. CONST. amend. IX.

64. U.S. CONST. amend. X.

65. Of course, the Ninth and Tenth Amendments may have additional meaning beyond this core meaning.

formulation that surfaced at Virginia's ratifying convention:

[t]he powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them, and at their will; that, therefore, no right . . . can be canceled, abridged, restrained, or modified by [the federal government] except in those instances in which power is given by the Constitution for those purposes.<sup>66</sup>

This linkage of the Preamble with prototypes of the Ninth and Tenth Amendments, and all three provisions to the right of the People to change their government, was expressed at several other ratifying conventions as well.<sup>67</sup>

Additional evidence linking the Ninth and Tenth Amendments to the Preamble emerged during the First Congress, when a representative proposed amending an early version of the Tenth Amendment by adding as a prefix, "all powers being derived from the people," because "he thought this a better place to make this assertion than the introductory clause [the Preamble] of the Constitution."<sup>68</sup>

Eventually, the identical point—that all power is derived from the People—was made by the last three words of the Ninth and Tenth Amendments, which spoke, respectively, of rights retained "by the people" and reserved "to the people." These echo the Preamble's affirmation that "We the People" have the right to establish (and disestablish) a government.

The First Amendment also comes into play. It, too, refers to "the people," specifically "the right of the people peaceably to assemble."<sup>69</sup> At the time of the founding, "people," "assemble," and "convention" were found clustered in discussions of popular sovereignty.<sup>70</sup> In 1789, the right of the People to assemble generally referred to the right to assemble in convention.<sup>71</sup> Thus, the First Amendment helps protect the People's right to alter the Constitution, by forbidding the government from preventing them from assembling at a convention for that purpose.

One key clarification is in order. I have spoken throughout of

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66. 4 ELLIOT, *supra* note 40, at 327.

67. *See, e.g.*, Amar, *supra* note 6, at 492-93.

68. SCHWARTZ, *supra* note 60, at 1118.

69. U.S. CONST. amend. I.

70. *See* AMAR & HIRSCH, *supra* note 6, at 15.

71. *Id.* This was not the only meaning, of course.

the right of the People to amend the Constitution. But what constitutes the voice of the People—a majority? Two thirds? Unanimous vote only? While the People retain the inalienable right to amend the Constitution, what is the margin necessary to do so?

The answer seems obvious; in a regime where all citizens are considered equal, only a majority could reflect the will of the People. Nothing else treats all voters equally. The special status of majority rule was clear to the Founders. As Thomas Jefferson wrote James Madison in 1787: “It is my principle that the will of the Majority should always prevail. If they approve the proposed [constitution] I shall concur in it cheerfully, in the hopes that they [a majority] will amend it whenever they shall find it work wrong.”<sup>72</sup> Jefferson considered majority rule “the fundamental law of every society of equal rights.”<sup>73</sup>

He was not alone. The distinguished judge and scholar Joseph Story, writing about the Declaration of Independence’s reference to the right of the People to alter the government, parenthetically added that the document “plainly intend[ed] the majority of the People” as a proxy for the People.<sup>74</sup> Gordon Wood’s study of America’s pre-Constitution confederacy contains numerous contemporaneous references to the right of the majority to alter a governing charter.<sup>75</sup>

We also find references to majority rule during the Philadelphia Convention of 1787, in *The Federalist Papers*, and at the state ratifying conventions. For example, James Wilson noted that the Constitution belongs to the People, who “have the right to mould, to preserve, to improve, to refine, and to finish as they please. If so; can it be doubted, that they have the right likewise to change it?”<sup>76</sup> To remove any doubt, Wilson added that “[a] majority of society is sufficient for this purpose.”<sup>77</sup>

Even more conclusive than the Framers’ words are their deeds. Although Article VII did not specify that majority rule would apply in each state’s ratifying convention, this was universally understood. There is no evidence of any opponent of the Constitution arguing that

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72. THE PORTABLE THOMAS JEFFERSON 432 (Peterson ed., 1975).

73. THE WRITINGS OF THOMAS JEFFERSON 89 (Ford ed., 1899) (1817 letter to Baron F.H. Alexander von Humboldt).

74. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 330 (1833).

75. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

76. 1 THE WORKS OF JAMES WILSON 304 (McCloskey ed., 1967).

77. *Id.*

a supermajority should be required for ratification. In many states ratification squeaked by:<sup>78</sup> why did none of the resourceful, zealous opponents of ratification insist on a supermajority requirement? Because majority rule literally went without saying.<sup>79</sup>

In sum, Article V cannot be taken as evidence that the Framers resisted directed democracy. To the contrary, the history of the Constitution's adoption, and the text and structure of the document itself, suggest the Framers' intention that the Constitution may be amended by a majority of the People.

#### **D. The Case of Mr. Madison**

Despite all of the above, some may point to Federalist 10 as evidence of the Framers' distrust of direct democracy. It is, after all, written by the anointed father of the Constitution, and does express serious misgivings about direct democracy. For several reasons, however, one must be careful about enlisting Madison as an opponent of direct democracy—even beyond the fact that he appealed to direct democracy to justify adoption of the Constitution.

Madison's views are not limited to Federalist 10. In Federalist 53, he observed the "great importance in a republic not only to guard against the oppression of the rulers, but to guard one part of the society against the injustice of the other."<sup>80</sup> Legal scholars have focused almost exclusively on Madison's second issue (protection of minority from majority), while ignoring his first (protection of the

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78. See AMAR & HIRSCH, *supra* note 6, at 17.

79. Because Article VII required ratification by nine of the thirteen states, one might be tempted to see nine/thirteenths, rather than majority rule, as the relevant requirement. That would be a mistake. As Article VII makes clear, any states that did not ratify the Constitution would not be forced into the Union—the nine/thirteenths requirement had no binding effect on them. The nine states needed for ratification simply represented a term in the new contract, based on what the Framers regarded as necessary for a feasible union. They may have had good reason for choosing the number nine, but it has no significance as a matter of principle—they could just as easily have chosen eight or ten. The same could not be said for the requirement that ratification in each state required majority approval. As noted, the assumption of simple majority vote to determine ratification was so universally shared that, even absent mention in Article VII, no one questioned it.

To be sure, the Constitution requires supermajorities for certain actions: ratification of treaties, convictions of impeachment, overridings of presidential vetoes, and constitutional amendments pursuant to Article V. However, these involve acts by government entities exercising powers delegated to them by the People. There is no hint in the Constitution, or elsewhere, that the People wished to delegate away their right to amend the Constitution (which is, in any event, inalienable and thus cannot be delegated away). That right was understood to reside with a simple majority.

80. THE FEDERALIST NO. 53 (James Madison), *supra* note 13, at 323.



People against self-interested government). In fact, Madison, along with other Framers, was deeply concerned about governmental self-dealing.

To minimize this risk, he helped design an elaborate edifice. On the most familiar level, he divided the federal government into three branches that would check and balance one another. The Constitution further split Congress into two branches, and divided power between competing governments—state and federal. Equally important, if less recognized, the Constitution gives ordinary citizens direct power to restrain all branches of government. Specifically, it empowers the People to elect their representatives, and to serve on juries and grand juries and in the militia.<sup>81</sup>

Jury and militia service have proven more limited than was envisioned,<sup>82</sup> and voting for representatives alone is clearly inadequate to safeguard against self-dealing government.<sup>83</sup> If James Madison were alive today, he would have to balance his misgivings about direct democracy against the value of direct democracy in restraining representatives.

In Federalist 10, Madison did opine that representative democracy diminishes the risk of tyranny of the majority.<sup>84</sup> However, his broad concern was tyranny of *any* faction, which he defined as “a number of citizens whether amounting to a majority *or minority* of the whole.”<sup>85</sup> As it happens, he thought that minority factions posed little risk, because the majority “can defeat its sinister views by regular vote.”<sup>86</sup> But note that Madison did not envision a nation in which an extreme imbalance of wealth mocked the notion of equality

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81. See AMAR & HIRSCH, *supra* note 6, at xiii-xv (discussing interaction among these powers, and their role in restraining government). The significance of the jury and militia in the constitutional scheme is discussed in more detail *infra* text accompanying notes 128-43.

82. See *infra* text accompanying notes 148-51.

83. See *infra* text accompanying notes 133-35. The congressional pay raise of 1991 provides an illustration. The public overwhelmingly opposed the raise and, in theory, voters could have thrown out members of Congress at the next election. But Congress contrived various means to protect itself (e.g., avoiding a “yes/no” vote that would put each member on the record, and the two parties reaching an agreement not to endorse any candidate who made the pay raise a campaign issue). Moreover, as noted, see THE FEDERALIST NO. 48, *supra* note 14, the seniority system in Congress gives voters a strong disincentive to remove their representative.

84. THE FEDERALIST NO. 10, *supra* note 21, at 81-84.

85. *Id.* at 78 (emphasis added).

86. *Id.* at 80.

at the ballot box.<sup>87</sup> While Bill Gates and a homeless man receive the same vote, and General Motors and the mom-and-pop grocery store are each free to make campaign contributions, formal equality provides no guarantee that a majority can protect itself through its representatives. Close observers of the political scene confirm the obvious: on many issues, a powerful minority controls policy.<sup>88</sup> One way to ameliorate this problem is greater resort to direct democracy.<sup>89</sup>

In short, James Madison's fear of direct democracy should not be wrenched from context, nor applied unthinkingly to a very different context two centuries later. He also expressed fear of self-dealing government, and tyranny by factions—including minority factions. Insofar as representative government has not prevented self-dealing government and a kind of minority tyranny, we should not lightly invoke Madison as an opponent of direct democracy. Direct democracy may be a partial solution to problems Madison deemed fundamental.

In sum, the notion that the Framers opposed direct democracy does not hold up. They established representative government at the federal level because America was too large for anything else. They guaranteed states a "republican form of government," but did not regard this commitment as preventing states from utilizing direct democracy. While they established a cumbersome means for government officials to amend the Constitution, they recognized that the People themselves retain the right to amend the Constitution directly. James Madison embraced the right of the People to control their government, and the misgivings he expressed about direct democracy are inconclusive when seen in the context of his larger goals and developments in contemporary society.

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87. To be sure, there was an enormous imbalance between the haves and have-nots in 1787. However, because the polity disenfranchised have-nots (virtually all blacks, and anyone who could not afford a poll tax), there was greater equality among voters than there is today.

88. *See generally* ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS* (1999).

89. Of course, even in a direct democracy, imbalance of wealth can create imbalance of power. *See infra* text accompanying notes 246-49.

## II. Direct Democracy—Arguments and Experience

### A. Defending Initiatives Against the Bogeymen<sup>90</sup>

Public opinion polls show that most Americans favor the availability of direct lawmaking.<sup>91</sup> Many states have in fact established and increasingly use citizen “initiatives” whereby the People at large directly pass laws or even amend their constitutions,<sup>92</sup> rather than rely exclusively on their elected representatives.<sup>93</sup>

On its face, the citizen initiative seems to embody democracy in action.<sup>94</sup> But even as this popular method of lawmaking spreads, so does opposition to it. A chorus of legal scholars assails direct democracy, citing two primary (related) concerns: (i) that it will tyrannize minorities,<sup>95</sup> and (ii) that it will produce short-sighted, selfish legislation rather than public-spirited deliberation.<sup>96</sup>

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90. See Jeremy Waldron, *Reading Your Rights*, N.Y. TIMES BOOK REVIEW 20, Mar. 8, 1998 (noting the “bogeymen with which populism is often discredited”).

91. For example, a 1992 poll by the Gordan Black Corporation found that 92% of registered voters nationwide favor the availability of initiatives in their state. (This and other polling data were provided to the author by the Roper Center at the University of Connecticut.) See also CRONIN, *supra* note 15, at 78-79. In addition, polling data provided by the Roper Center shows that a substantial majority of Americans favor national direct democracy. For example, a 1993 poll of national adults conducted by the Los Angeles Times found that 65% favored a system of national referenda.

92. Presently, twenty-four states and the District of Columbia provide for citizen lawmaking. Of these, fifteen authorize initiatives for both statutes and constitutional amendment, whereas six plus the District of Columbia permit initiatives for statute only and three permit initiatives for constitutional amendment only.

93. While the precise form of initiatives varies from state to state, they generally take one of two basic forms: “direct initiative” and “indirect initiative.” Under direct initiative, if private citizens present a sufficient number of signatures in support of a particular bill, it must be placed on a ballot for consideration by the electorate at a future date. Under indirect initiative, the measure first requires some action by the legislature. Presently fourteen states and the District of Columbia permit only direct initiative, five use only indirect initiative, three use indirect initiative for statutes and direct initiative for constitutional amendment, and two use both direct and indirect initiative for statutes.

94. See *James v. Valtierra*, 402 U.S. 137, 141 (1971) (emergence of the initiative reflects Americans’ “devotion to democracy”).

95. See, e.g., Marci Hamilton, *Perspective on Direct Democracy: The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 13 (1997) (“[D]irect democracy . . . invites majoritarian tyranny.”); Robin Charlow, *Judicial Review, Equal Protection And The Problem With Plebiscites*, 79 CORNELL L. REV. 527, 581 (1994) (“[W]ith regards to the peril of majoritarian tyranny, plebiscites are supposedly worse than legislatures.”); Cynthia Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality Of Legislating By Initiative*, 61 S. CAL. L. REV. 733, 750 (1988) (casually referring to the “majority tyranny that results from direct democracy”).

96. See, e.g., Sherman Clark, *Tales of Popular Sovereignty: Direct Democracy in*

Does direct democracy leave minorities—including racial minorities, but also homosexuals, aliens, and other underrepresented groups—at the mercy of majorities? The risk that citizen lawmaking will be (mis)used to punish the weakest or least popular members of a community rests on a vision of an atomized populace voting its fears, prejudices, and unenlightened self-interests.<sup>97</sup> To the extent this phenomenon exists, we should not regard it as unalterable. If the citizenry lacks civic virtue, that may be because it has been alienated from civic responsibility. Involving people in the process of making laws is a step in the direction of fostering public-spiritedness. By contrast, allowing people to vote only for representatives, who often duck hard choices and place their own ambitions ahead of public service, is a prescription for a selfish and apathetic citizenry. To the extent that initiatives inspire citizens to participate in collective self-government, they could prove a partial corrective.<sup>98</sup>

Certainly voters will, on occasion, fail to respect the rights of their fellow citizens. However, as we shall see, this occurs infrequently<sup>99</sup> and, when it does, various structural safeguards are available.<sup>100</sup>

Beyond the specific fear of oppression, critics of direct democracy argue that initiatives will inevitably yield legislation without reflection, and the triumph of self-interest over the public good. This notion reflects an unjustified faith in legislatures and debasement of the public. Legal scholar Lynn Baker (among others) has argued at length that the average initiative voter is no less likely than the average legislator to vote in a thoughtful and public-spirited

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*America*, 97 MICH. L. REV. 1560, 1573 (1998) (Initiatives result in “poor or short-sighted decisionmaking”); Hamilton, *supra* note 95, at 15 (“The individual [initiative voter] typically asks only, ‘What’s in it for me?’ . . . Direct democracy, or the public initiative, lends itself to misguided yes/no votes, not to the scrutiny, [and] deliberation . . . necessary to solve hard social problems.”).

97. Before assuming the worst about ordinary citizens, we should reflect that the citizenry’s capacity for self-government underlies our nation’s experiment with democracy. See THE FEDERALIST NO. 55, *supra* note 31, at 346 (“As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.”).

98. Thus a rare politician to endorse national initiative said: “I feel as strongly as I do about this reform because I believe it goes to the heart of our national malaise.” JACK KEMP, AN AMERICAN RENAISSANCE: A STRATEGY FOR THE 1980S 190 (1979).

99. See *infra* text accompanying notes 109-12.

100. See *infra* text accompanying notes 113-18.

manner.<sup>101</sup>

Legislatures do not always conform to the civics class model. One California legislator titled his memoirs, *What Makes You Think We Read the Bills?*<sup>102</sup> His book clarified what students of state legislatures already knew—representatives often don't read the bills they vote on, nor listen to debate. Instead, they respond to their party leaders or major campaign contributors.<sup>103</sup> Indeed, the initiative arose out of the Populist and Progressive movements at the turn of this century, in response to the control that party bosses and political machines, themselves enmeshed with corporate interests, had attained over the political process.<sup>104</sup>

No one argues that initiatives always work better than the ordinary legislative process, or that states should abandon lawmaking by legislatures in favor of lawmaking by initiative. Indirect lawmaking has major advantages, especially the benefit of specialization of labor. The legislature can set up committees, gather information, and develop expertise. There is much to be said for a system of government in which a relatively small number of citizens stand in for the polity as a whole in conducting day to day affairs.

But we don't confront an either/or proposition. We can benefit from the advantages of a representative system, subject to the availability of initiatives when citizens find representation inadequate. As Woodrow Wilson said, direct democracy is intended "to restore, not destroy, representative government."<sup>105</sup> Even when they fail to produce laws, initiatives may put issues on the agenda that otherwise suffer neglect from politicians. Many landmark reforms, eventually enacted by national legislation or constitutional amendment, originated as initiatives in the states: women's suffrage, and abolition of poll taxes, among others.<sup>106</sup>

Opponents of direct democracy trot out examples of initiatives too complicated for voters to understand, or campaigns dominated by

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101. See Lynn Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT. L. REV. 707 (1991).

102. H. RICHARDSON, *WHAT MAKES YOU THINK WE READ THE BILLS?* (1978).

103. See Spitzer, *supra* note 46, at 39 ("[I]f the legislators read anything, it is the summary of the bill prepared by the relevant committee. More often, however, the legislators do not even read the summary.").

104. DAVID SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 5-10 (1989).

105. 2 *THE PUBLIC PAPERS OF WOODROW WILSON* 287-88 (Baker & Dodd, eds., 1925).

106. Baker, *supra* note 101, at 754.

well-mobilized interest groups. But flaws in direct democracy constitute grounds for reform, not abolition. If the initiative process does not always conform to the ideal, we should try to fix it rather than abandon it. If perfection were required, we would have to throw out legislatures too.

Moreover, concern that initiatives lack proper deliberation suggests an opportunity as much as a risk. Assorted measures can be taken to ensure that voters possess more familiarity with issues.<sup>107</sup> The appropriate model of direct democracy is not a simple vote in a private booth, but a process that brings citizens together to discuss an issue. This, in turn, contributes to a more deliberative and community-minded citizenry. In other words, we should turn on its head the argument that direct democracy produces laws uninformed by deliberation. Initiatives should be used to inspire deliberation, producing both better laws and better citizens.

### **B. How Are we Doing?: The Experience with Direct Democracy**

We need not theorize in a vacuum: We can draw on almost a full century of experimentation with direct democracy. However, students of the states' experiences with initiatives reach very different conclusions. While few maintain that the initiative has lived up to the hopes of its early champions, some argue that it has been primarily positive—enhancing participation and, on balance, producing beneficial legislation. Others insist that the experience has been primarily negative.<sup>108</sup>

But some things emerge with reasonable clarity from perusal of all the studies and the raw data (the votes on initiatives themselves). First and foremost, concern about majority tyranny has proven largely unsubstantiated. Back in 1939, highly-respected political scientist V.O. Key coauthored an analysis of California's initiative experience, and concluded that "[t]he initiative has not brought about the enactment of legislation seriously detrimental to property rights or tyrannical toward minority interests, as was feared by its opponents."<sup>109</sup> Four decades later, surveying the situation nationwide, a commentator observed that "the history of the initiative is

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107. See *infra* text accompanying notes 201-43.

108. See PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* 18-26 (1998) (summarizing studies).

109. V.O. KEY JR. & WINSTON CROUCH, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA* 442 (1939).

remarkably free of the enactment of abusive legislation."<sup>110</sup>

Indeed, a tiny percentage of proposed initiatives are aimed at restricting civil rights, and most of these are defeated.<sup>111</sup> Citizens have used direct democracy less to oppress vulnerable minorities than to (i) reform government processes through campaign finance laws, restrictions on lobbying, and conflict of interest statutes, (ii) restrict their tax burden, and (iii) protect the environment.<sup>112</sup>

To be sure, initiatives can result in what might be characterized as majority tyranny.<sup>113</sup> To take one prominent illustration, in 1992 Colorado voters amended the state Constitution to ban anti-discrimination laws protecting homosexuals.<sup>114</sup> But that episode actually illustrates why fear of majority tyranny via initiative is exaggerated: The measure was held unconstitutional by the Colorado Supreme Court and the United States Supreme Court.<sup>115</sup> Laws enacted by the People through initiatives, like laws enacted by state legislatures, are subject to judicial review.

There are other safeguards as well. Under the United States Constitution, federal laws take precedence over state laws with which they conflict.<sup>116</sup> Thus, for example, were Congress to enact a law banning discrimination on the basis of sexual orientation, the discriminatory practices of many states would be overridden.<sup>117</sup> Another safeguard is the freedom to vote with one's feet. Gay men and lesbians in Colorado, like citizens of every other state, can migrate to a more congenial locale.<sup>118</sup>

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110. Ronald Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1021 (1978).

111. See CRONIN, *supra* note 15, at 92.

112. See SCHMIDT, *supra* note 104, at 287-94 (listing initiatives passed in each state from 1970-1986).

113. Of course, we should not lose sight of the fact that Madison's ingenious arrangement for preventing legislatures from producing majority tyranny has itself often fallen well short of the mark. Slavery and Jim Crow are prominent examples.

114. COLO. CONST. art. II, § 30 cl. b.

115. *Romer v. Evans*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996).

116. U.S. CONST. art. VI.

117. It should be noted that the anti-gay Colorado initiative notwithstanding, homosexuals have suffered far more at the hands of legislators than at the hands of the people. The legislatures of many states, not the People, have criminalized gay sex. In contrast, the people of California and Oregon have rejected anti-gay initiatives by large margins.

118. While this option is obviously not always practical, the availability of a safe haven for oppressed groups can be a godsend. It would have been infinitely preferable for blacks to have enjoyed equal rights everywhere, but the fact that many southern blacks moved north, where they could vote and enjoy other rights, both eased their plight and helped

The track record suggests that citizen lawmaking not only avoids majority tyranny, but serves no particular ideological agenda.<sup>119</sup> Initiatives have enacted the death penalty, usually thought of as a conservative position, and have de-criminalized marijuana, usually thought of as liberal. They have been used to enact anti-smoking measures and many other laws which fall into neither category.<sup>120</sup> In general, the substantive outcomes produced by initiatives should give little concern about their continuance or expansion. Naturally one will oppose this or that outcome, just as no one is pleased with every result produced by every legislature. The historical record in no way suggests that citizen lawmaking will, as a general matter, produce particularly undesirable or dangerous legislation.<sup>121</sup>

On the other hand, experience suggests that pessimism about the initiative *process* has proven justified. Most students of initiative conclude that campaigns are frequently dominated by money,<sup>122</sup> and generally lack reasoned debate and deliberation.<sup>123</sup>

Before we overreact to the shortcomings of the initiative process, we should note that these flaws often mar the representative process as well. Insofar as initiatives give citizens more control of their lives and government,<sup>124</sup> and have not proven a vehicle of majority tyranny

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launch the modern civil rights movement. Our country was founded by people fleeing religious oppression. As long as any forms of oppression exist within our own borders, it is salutary that we have many mini-polities within those borders, and free movement among them.

119. See SCHMIDT, *supra* note 104, at 37 (“In 1977-1986 liberal, environmentalist, or left-leaning groups secured ballot placement for 96 state-level Initiatives, and voters approved 43 of them. During that same period, conservative-oriented groups put 91 Initiatives on state ballots, and voters approved 41 of them.”).

120. In part because initiatives have not produced predictably liberal or conservative results, but have helped keep elected officials from feathering their own nests and corrupting the political process, one finds prominent supporters of direct democracy spanning the political spectrum: from Ralph Nader on the left, to Ross Perot in the center, and Jack Kemp on the right.

121. Nor is it the case that citizens pass laws promiscuously. Few states average more than a handful of initiatives per year, and a majority of initiatives are defeated. See DUBOIS & FEENEY, *supra* note 108, at 30-32.

122. See, e.g., BRODER, *supra* note 4, at 163 (Money “is almost always a major—even dominant—factor” in initiative campaigns.); Richard Collins & Dale Oesterle, *Governing by Initiative: Structuring the Initiative Ballot: Procedures that Do and Don’t Work*, 66 COLO. L. REV. 47, 56 (1995) (“[I]t is generally agreed that money is at least as important in initiative campaigns as in elections.”).

123. See DUBOIS & FEENEY, *supra* note 108.

124. One commentator denies that direct democracy is more democratic than representative democracy. See Sherman Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998). Clark argues that direct democracy fails to account for the



or otherwise produced disaster, flaws in the initiative process seem to be grounds for reforming rather than rejecting the process.<sup>125</sup>

### III. Initiative as a Means to Civic Maturation

Even if the case for direct democracy has bested the case against, the defense should not rest. Arguably the strongest argument in favor of direct democracy has not really been made (or at least not made as sharply and explicitly as it needs to be). Initiative is an important means of achieving the civic maturation of Americans individually and of our polity collectively.

One oft-stated goal of democracy is the growth of individuals.<sup>126</sup> Hence, the double meaning of “*self-government*”: in the course of participating in public affairs, individuals become more complete people (or “selves”) with richer lives.<sup>127</sup> The converse is equally true: if self-government promotes better, more mature selves, so too the latter makes effective self-government possible.<sup>128</sup> Unless citizens develop sufficient knowledge, independence, and public-spiritedness,

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intensity of preferences. First, because of the lack of legislative tools like logrolling and filibuster, initiatives “fail to take into account that, for any particular issue, some individuals will care more—have more at stake—than will others.” *Id.* at 450. This claim strikes me as weak. Those who feel intensely about an issue invest more energy and resources in the initiative campaign, and therefore exercise a disproportionate impact. Clark also observes that each voter cares more intensely about some issues than others. Since initiatives are voted on singly, not as part of a package resulting from a process involving horse-trading and compromise, a voter’s preference is expressed in a vacuum. As a result “[a] majority of citizens, though in favor of Proposition A in the abstract, might actually prefer a world in which Proposition A is defeated, if sacrificing that outcome would allow them to secure preferred outcomes on other issues about which they are more intensely concerned.” *Id.* at 451. Even if representative government better expresses the overall priorities of some people, that hardly makes it more democratic. It would be more democratic only if most people would willingly forfeit a vote on issues in the belief that representative government comes closer to achieving their optimal overall outcome. Many people have an intense preference *for* direct democracy. Thus their optimal outcome includes the ability to vote directly on many issues, even if that doesn’t produce the substantive results they most prefer. Certainly dissatisfaction with results has not produced a significant movement to repeal the initiative in the states which have it.

125. See Spitzer, *supra* note 46, at 38 (criticizing opponents of direct democracy for comparing the “aspirational ideals” of representative democracy with the real-world shortcomings of the initiative process).

126. See JOHN STUART MILL, ON LIBERTY 38-40 (1859).

127. See 1 THE WORKS OF JAMES WILSON, *supra* note 76, at 403 (noting in self-government the “powerful tendency to open, to enlighten, to enlarge, and to exalt [the] mind”).

128. No one was more sensitive to this point than Thomas Jefferson. See JEAN YARBROUGH, AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE 102-52 (1998).

they cannot handle the responsibilities of self-government. Thus, when the Soviet Union and its eastern bloc dissolved, observers widely wondered whether the people of the newly-freed countries had the wherewithal to sustain democratic government.<sup>129</sup> These people, after all, had no experience with the blessings and burdens of freedom.

While a certain trust in ordinary people undergirded America's experiment with democracy,<sup>130</sup> whether the citizenry would prove worthy of that trust remained an open question.<sup>131</sup> The Founders believed the experiment necessary because non-democratic government was inherently undesirable. They knew both from political theory and painful personal experience with Great Britain that power corrupts and absolute power corrupts absolutely. They drafted a Constitution that gives the people at large a crucial role in safeguarding against power-hungry and despotic government.<sup>132</sup>

Even if the citizenry did nothing but elect representatives, an able citizenry would be critical. If people are apathetic, they will not vote. If they are corrupt, they will be bribed. If they are ill-informed, they will be swayed by demagoguery or sophistry. If they are fearful or obsequious, they will be bullied. And if they are selfish, they will vote only for their own interests and never the public interest.<sup>133</sup>

Accordingly, an educated, engaged, and public-spirited citizenry is always valuable. It is particularly valuable, indeed indispensable, when the People are entrusted with more than the vote. The Framers recognized that the vote would not be enough to restrain government officials. Accordingly, the Constitution also gives the People, in their respective roles as jurors and militia members, crucial responsibility for administering justice and protecting national security.<sup>134</sup> The jury and the militia were essential institutions to the Framers—they

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129. See, e.g., Gaddis Smith, *Building a Democracy; Is this a Russian Government, Or Just a Fight Between a 'Donkey' and a 'Fool,'?* L.A. TIMES, Mar. 28, 1993, at 1.

130. See THE FEDERALIST NO. 55, *supra* note 31.

131. This belief is nicely captured by Benjamin Franklin's famous remark after the Constitutional Convention. Asked by a woman what form of government the Framers had come up with, he replied, "[a] Republic, if you can keep it." 1 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION, *supra* note 44, at 85.

132. The traditional story emphasizes how the Framers sought to restrain power by dividing it among governmental entities. Less noted, but equally important, the Framers gave ordinary citizens direct means of restraining government officials. See AMAR & HIRSCH, *supra* note 6, at ix-xxi.

133. See *id.* at 186-87.

134. See *id.* at xiii-xv, 51-58, 129-134.

played a prominent role in the original Constitution, and an even more central role in the Bill of Rights.<sup>135</sup>

These institutions safeguarded against tyranny. As jurors, and grand jurors, the People would deter and punish government oppression or corruption. As militia members, they would thwart foreign invasion or domestic siege. The militia and jury were both local bodies composed of ordinary citizens working together to carry out collective governmental responsibilities. They represented twin duties of citizenship and, for the most part, those eligible to serve on one (adult white males) were eligible to serve on the other.<sup>136</sup>

However, it was impossible for the jury and militia to perform their roles adequately unless their members were of sound and independent judgment, probity, and courage, as well as educated in public affairs and committed to the well-being of the community and nation.<sup>137</sup> How were they to attain these traits? By service in the jury and militia! These institutions were valued as forums for educating the citizenry in the skills and knowledge necessary for self-government more broadly. In other words, the jury and militia not only required, but also provided, the civic maturation needed for a thriving (or even just surviving) democracy.<sup>138</sup>

This was keenly understood by Alexis de Tocqueville, who characterized the jury as a “public school ever open, in which every

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135. So too, because the Constitution guarantees to every state a “republican form of government,” citizens will also assume various responsibilities at the state and local level that are of paramount importance—for example, serving on boards of education. Cf. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 613 (1970) (“Ultimately any system of freedom of expression depends upon the existence of an educated, independent, mature citizenry.”).

136. Both the militia and jury reflected suspicion of paid, professional officials—a central standing army on the one hand, and judges, prosecutors, and bureaucrats on the other. These roles, and various implications of them, are discussed at length in AMAR & HIRSCH, *supra* note 6, at 51-182.

137. The notion that a virtuous citizenry is indispensable to the nation’s republican aspirations was commonplace at the time. See ROBERT HUGHES, *AMERICAN VISIONS* 108 (1997) (This notion was “shared by all literate citizens of the new Republic, in the wake of the Revolution.”); Richard Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 *GEO. WASH. L. REV.* 149, 155 (1987) (“[C]ivic virtue surely was an important concern in political theory both before and during the framing of our constitution.”).

138. This point has been incisively developed by a few constitutional scholars: Vikram Amar (in the case of the jury) and David Williams (in the case of the militia). See Vikram Amar, *Jury Service as Political Participation Akin to Voting*, 80 *CORNELL L. REV.* 203 (1995); David Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *YALE. L.J.* 551 (1991).

juror learns to exercise his rights”<sup>139</sup> and added: “I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial for [the jurors] . . . . [It is] one of the most efficacious means for the education of the people which society can employ.”<sup>140</sup> Indeed, the jurors’ education involved an almost formal quality: “judges often seized the occasion to educate the jurors about legal and political values ranging well beyond the narrow issues before them.”<sup>141</sup> Trials would sometimes produce “an open and public discussion of all causes . . . [which is] the means by which the people are let into the knowledge of public affairs.”<sup>142</sup>

The education jurors received transcended the knowledge they acquired. As Akhil Amar put it, “[t]hrough the jury, citizens would learn self-government by doing self-government.”<sup>143</sup> De Tocqueville explained that jury service instills the spirit and habits of the judicial mind into every citizen, providing “the soundest preparation for free institutions.”<sup>144</sup>

Jury service provided not only knowledge and skills conducive to effective citizenship, but also the necessary commitment. Again, de Tocqueville captures the point. Jury service, he said

makes all men feel the duties which they are bound to discharge toward society, and the part which they take in the Government. 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.<sup>145</sup>

Because of all that jury service gave to jurors (knowledge, skills, commitment), de Tocqueville declared the jury “the most efficacious means of teaching [the people] to rule well.”<sup>146</sup>

The militia, too, was expected to create superior citizens. As David Williams observed, militia service could be burdensome, and the militiaman “was expected to bear these burdens with the

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139. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (Commager ed., Reeve trans., 1946).

140. *Id.* at 181-82.

141. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127 (1967).

142. *Letters From The Federal Farmer (XV)*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Storing ed., 1981).

143. Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1187 (1991).

144. DE TOCQUEVILLE, *supra* note 139, at 181.

145. *Id.*

146. *Id.* at 182.

knowledge that he was keeping the Republic safe. The experience of working with fellow citizens could cement this perspective of self-sacrifice to the common good.”<sup>147</sup> Because the militia was expected to protect against not only foreign foes, but also the federal government if the latter proved oppressive, militiamen would have to determine if the federal government overstepped its authority. Accordingly, militia service “served to engender virtue by inducing the experience of independent self-government.”<sup>148</sup> Militia service would create more active and independent citizens, committed to the public good but confident in their right to disagree with the government.

Both jury service and militia service, then, conferred on ordinary people crucial specific powers (with respect to the administration of justice and national security), and enhanced their capacity as citizens generally. This was a crucial part of the vibrant democratic-republican vision underlying the Constitution.

But it would be folly to pretend that this vision endures in contemporary America. In 1787, America was a comparatively tiny country with a constricted notion of citizenship—white males only. Two centuries later, both our population and our definition of citizenship have expanded enormously. As a result, jury service is something people experience rarely, and usually for a very brief period.<sup>149</sup> Moreover, the jury has come to be regarded as much as a nuisance to be avoided as a shining badge of citizenship.<sup>150</sup> Under the circumstances, it hardly plays a major role in inculcating commitment to and skill in self-government.

The militia even less so. The citizen-army envisioned by the Framers has all but disappeared: it survives, as a shell of its constitutional self, in the state national guards, where only a minuscule percentage of America citizens serve.<sup>151</sup>

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147. Williams, *supra* note 138, at 580.

148. *Id.*

149. This was not always the case. See, e.g., RAYMOND FOSDICK ET AL., CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 352 (During winter of 1920-21, forty jurors—seeking income during a recession—served six two-week terms each.).

150. See, e.g., Taylor, *Want to Duck Jury Duty? They've Heard Them All*, NAT'L L. J. Nov. 27, 1995, at A-24; Andrea Gerlin, *Jury-Duty Scofflaws Try Patience of Courts*, WALL ST. J., Aug. 9, 1995, at B1. To be sure, there is evidence that from the beginning many Americans sought to escape jury service. See Nancy King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673 (1996).

151. For a full discussion of the evolution of the militia, see Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 55 U. CIN. L. REV. 919 (1988).

In short, the means envisioned by the Framers for developing a citizenry necessary for thriving self-government are no longer available. But it does not follow that we must abandon concern for civic virtue and maturation. Rather, we must look in different places. Thus, after lamenting the militia's demise, David Williams urges that we find other means to promote "direct control by the people of their own government"<sup>152</sup> or at least "giv[e] the people a direct hand in their government."<sup>153</sup>

In seeking to recapture the founding vision, Williams is not alone. In recent years a cadre of prominent legal scholars, sometimes referred to as "New Republicans,"<sup>154</sup> has bemoaned the distancing of American citizens from self-government and the decline of deliberative public-spirited democracy. Legal scholars Bruce Ackerman, Cass Sunstein, and Frank Michelman, among others, have offered various prescriptions for reconnecting the People with their government.<sup>155</sup>

The New Republicans emphasize that citizens are not atomized individuals: they are part of an organic society whose claims must sometimes take precedence over their own interests.<sup>156</sup> This result must occur "through deliberative debate and the unforced agreement flowing from it."<sup>157</sup> A more virtuous, mature citizenry is both cause and effect of these other values. That is, a deliberative, public-spirited polity requires a virtuous citizenry, and the process of public-spirited deliberation reinforces and enhances a polity's civic virtue.

As Richard Epstein observed, "[c]losely akin to civic virtue . . . is the idea of extensive general 'participation' in public government by individuals drawn from all orders of society."<sup>158</sup> As noted, in this regard the Framers' vision, while inspiring, was also cramped. The Framers excluded women and non-whites from political participation, and expected office-holding, jury service, and political involvement

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152. Williams, *supra* note 138, at 612.

153. *Id.* at 613.

154. See ANTHONY KRONMAN, *THE LOST LAWYER* 26 (1994).

155. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1502 (1988); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1985); Bruce Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

156. See KRONMAN, *supra* note 154, at 26 (New Republicans believe society must seek to satisfy not an aggregate of individual interests, but rather "the best among competing interpretations of the public good.").

157. *Id.*

158. Richard Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 155-56 (1987).

generally to be the enclave of the propertied class.<sup>159</sup> By contrast, “[t]he new republicans have repudiated the elitist tradition of republican thought and propose a republican vision that includes direct participation by all citizens.”<sup>160</sup>

An idea is in the air. Akhil Amar and Vikram Amar celebrate the republican function of the jury; David Williams laments the demise of the militia and seeks ways to replace its democratic culture; the New Republicans call for a more public-spirited discourse. One vision predominates: political participation producing a superior republic, with the citizenry and polity maturing in tandem.<sup>161</sup> Closing the gap between this luminous ideal and the dark reality of today’s democracy presents a great challenge. How can the People cultivate their capacity as citizens and create a thriving polity, one that lives up to the name and promise of self-government?

One obvious potential solution has received surprisingly short shrift. Recall that Williams beckons us to a future in which Americans have “direct control” of and a more “direct hand” in government.<sup>162</sup> He proposes a reconstituted militia, universal public service, and various campaign reforms designed to enhance the voice of ordinary citizens.<sup>163</sup> Yet he ignores the most direct participatory avenue: voter initiative.<sup>164</sup> So, too, Frank Michelman advocates a republican politics conceived of as a “process in which private-

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159. In addition, not all the Founders held out much hope for a virtuous citizenry. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 556-60 (1986).

160. Dorothy Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 648 (1993). To be sure, the founding republicanism and neo-republicanism each have strands of both elitism and populism. See Pope, *supra* note 23, at 303.

161. More generally, the importance of developing a virtuous citizenry has become widely recognized. See YARBROUGH, *supra* note 128, at xvii:

“[T]he big news in the nineties was that the concern for virtue was everywhere . . . . When William J. Bennett’s *BOOK OF VIRTUES* appeared in 1993, it immediately soared to the top of the best-seller lists, and stayed there. A year later, *Newsweek*’s cover story was ‘The Politics of Virtue’ . . . . [Political theorists] set to work at developing a composite of the virtues appropriate to a modern liberal republic . . . . [T]hese theorists often relied on the findings of public policy analysts, who themselves, after a silence of several decades, were rediscovering the importance of character and virtue for the health of the polity.”

162. See Williams, *supra* notes 147-48 and accompanying text.

163. See *id.*

164. See Pope, *supra* note 23, at 294 (noting tendency of New Republicans to embrace “elitist solutions”). Professor Ackerman is a partial exception. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 414-16 (1998) (proposing “Popular Sovereignty Initiative,” authorizing constitutional amendment when a second-term President submits a proposed amendment that is approved by two-thirds vote in Congress and by voters at the next two presidential elections).

regarding 'men' become public-regarding citizens and thus members of a people."<sup>165</sup> In his vision, "citizenship—participation as an equal in public affairs, in pursuit of a common good—appears as a primary, indeed constitutive, interest of the person."<sup>166</sup> Michelman envisions this process of public spirited participation in "town meetings and local government agencies; civic and voluntary organizations; social and recreational clubs; schools public and private; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life; and so on."<sup>167</sup> And so on? His litany seems to include every conceivable means of citizen participation except lawmaking.<sup>168</sup>

It is time to consider whether exercise of their sovereign power to make laws could help the People mature into full-fledged citizens, and help produce a more mature polity in every respect. Today, we are forfeiting one of the major virtues of self-government as

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165. Michelman, *supra* note 155, at 1502.

166. *Id.* at 1503.

167. *Id.* at 1531.

168. In a subsequent piece, Michelman explicitly rejected direct democracy. Frank Michelman, "Protecting the People from Themselves," or How Direct Can Democracy Be? 45 UCLA L. REV. 1717 (1998). He observed:

[T]here are some decisions, among them some of the most important that will ever face any political community, that cannot conceivably be made by a fair majority vote, because they are decisions about exactly what a fair majority vote . . . properly means . . . Democracy thus defined cannot conceptually deliver the answers we need.

*Id.* at 1729, 1730. This argument proves too much. An infinite regress results when any kind of democracy—or any form of government—seeks to define the pre-conditions of decisionmaking. Michelman succeeds only in showing that direct democracy lacks an unattainable purity. He also argues that the coercive nature of direct democracy contradicts the spirit of *self-government*:

[A]ll real-world votes have losers, and none is ever decided by the independent action of any individual. How, then, is everyone to regard himself or herself as self-governing through political events from which he or she may have dissented and in which, in any event, there is no real chance that his or her own vote, or speech, or other political action decided the outcome?

*Id.* at 1732. Again, no system of government avoids this criticism: the insistence on perfect self-government entails anarchism. In the end, Michelman's opposition to direct democracy is puzzling. Is not the "process in which private-regarding 'men' become public-regarding citizens and thus members of a people" likely to find more substantial fulfillment in lawmaking than in recreational clubs? Is not the goal of citizens' "participation as an equal in public affairs, in pursuit of a common good" promoted when citizens partake in the drafting of laws? Michelman usefully reminds us that the case for direct democracy cannot be made deductively or definitionally, because democracy entails more than a vote. However, he fails to address the empirical case for (or against) direct democracy, i.e., whether greater resort to the initiative process might further his own republican ideals.



proclaimed by Aristotle and echoed through the ages: the cultivation of more virtuous people living more fulfilled lives.<sup>169</sup> And we risk forfeiting something even more important: the willingness and ability of citizens to perform their constitutional and political roles—to elect representatives, to serve on juries or in the military, and to monitor all the workings of government on every level.

Opponents of direct democracy insist that it plays to the selfishness of people.<sup>170</sup> Might we not build a more unselfish citizenry by giving people direct responsibility for decisions that affect them collectively? The human newborn is egocentric. Early in infancy, she recognizes that her parents and siblings are independent creatures with interests of their own. Fuller development requires awareness that these others are part of the child's own organic community: her well-being and this community's are inextricably linked. The fullest development comes as she takes responsibility for this community, and makes decisions that affect it with an eye towards its common good. This process by which an infant becomes a mature member of a family (with the family itself maturing in the process) applies as well to citizens in a polity.<sup>171</sup> It is unlikely to happen, however, when our sole participation consists of electing someone else to make decisions for us.<sup>172</sup>

Skeptics may respond that, however one evaluates the initiative experience in the Twentieth Century, the process has not visibly enhanced America's civic maturation. But has direct democracy been tried enough, and properly enough, for us to foreclose it as a solution to the problem of an atrophied citizenry?<sup>173</sup>

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169. See David Hoeweler, *Original Intent and the Politics of Republicanism*, 75 MARQ. L. REV. 863, 879 (1992) ("Classical Republicanism, rooted in Aristotle, ascribes to individuals a telos, or end, that can be answered through the calling of citizenship."); Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 106 (1986) ("Jefferson's linkage of local self-government and republican virtue has proved an enormously influential source of political imagery since its inception.").

170. See, e.g., Hans A. Linde, Symposium: *Voices of the People: Essays on Constitutional Democracy in Memory of Professor Julian N. Eule: Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1744 n. 21 (1998) (Direct democracy consists of polarized groups which "scratch and claw at each other.").

171. See generally 1 THE WORKS OF JAMES WILSON, *supra* note 76.

172. See Brian Beedham, *Full Democracy*, THE ECONOMIST, December 21, 1996, at 11 (A major purpose of direct democracy is "to encourage ordinary people to grow more responsible, and to shoulder more of the burden of government themselves—in short, to become better citizens.").

173. Williams and Michelman are not the only modern day republicans who neglect to consider whether civic maturation might be promoted by direct democracy. Suzanna

#### IV. Direct Democracy Across the Board—A New Approach

The tendency has been to compartmentalize direct democracy by jurisdiction. For most of this century the push for initiatives has been almost exclusively at the state and local levels.<sup>174</sup> By contrast, a proposed constitutional amendment in the 1970s would have established national initiative but would have done nothing to bring direct democracy to the many states that make no provision for citizen lawmaking.<sup>175</sup> A new approach, advocated by a group called “Philadelphia II,”<sup>176</sup> reflects the view that the case for direct democracy anywhere impels the push for direct democracy everywhere.

This group has sponsored what it calls the National Initiative For Democracy, a constitutional amendment and concurrent federal legislation authorizing citizen lawmaking in every governmental jurisdiction—federal, state, and local—in the United States.

The proposed constitutional amendment creates a “legislature of the People” in every governmental jurisdiction of the United States. The accompanying statute, known as the Democracy Act (henceforth “DA”), stipulates specific procedures whereby this legislature of the People may pass initiatives. It includes the means by which an initiative becomes “qualified” (i.e., gets on a ballot) and the way the initiative campaign is conducted.

##### A. Qualification

DA provides three means of qualifying a proposed initiative for consideration by the voters: (i) approval by the legislature;<sup>177</sup> (ii)

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Sherry seeks a more communitarian society, noting that our current individualist bent “stunts our capacity for growth.” Sherry, *supra* note 159, at 615. However, her solution is a public-spirited “jurisprudence.” Why not public-spirited lawmaking? If the goal is the growth of all individuals (as well as the polity collectively), why consign the means of promoting growth to a very narrow slice of society?

174. See SCHMIDT, *supra* note 104, at 174 (noting that “[t]he demise of the Progressive movement in the years just after World War I ended discussion of a national Initiative process for nearly 50 years”).

175. Senate Joint Resolution 67, co-sponsored by Senators Abourezk and Hatfield, was sent to the Judiciary subcommittee on the Constitution but failed to make it to the floor. See S. J. Res. 67, 95th Cong., 1st Sess., 123 CONG. REC. § 11584 (1977). It was re-introduced the following year, but again never emerged from committee.

176. The group was started and is led by former United States Senator Mike Gravel (D. Alaska).

177. According to the Proposed Democracy Act (“DA”) Section 3(B)(1): “[t]he legislative body of the relevant jurisdiction (federal, state, or local) may by resolution, qualify an initiative for election as it is submitted by its sponsors.” As this proposed

sufficient numbers of signatures of registered voters within the jurisdiction;<sup>178</sup> and (iii) public opinion poll.<sup>179</sup>

Currently, many states that use the initiative process rely exclusively on the gathering of signatures to qualify an initiative, though some states permit legislatures to place issues on the ballot for consideration by voters.<sup>180</sup> By adding a new means—public opinion poll—DA would enable the qualification of measures that may be desirable and/or popular<sup>181</sup> but are not supported by individuals or groups with sufficient resources to gather signatures or move representatives.<sup>182</sup>

Gathering signatures requires substantial resources.<sup>183</sup> While a signature requirement thus deters frivolous or excessive numbers of initiatives,<sup>184</sup> it does so without reference to whether a particular

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statute, and the accompanying constitutional amendment, remain a package in progress, all references to their provisions are as of February 25, 2002. Readers can find the latest iteration at [www.ni4d.org](http://www.ni4d.org).

178. *Id.*, § 3(B)(2).

Initiatives that propose laws, changes to laws, or expressions of public policy shall qualify for election if a petition is signed, manually or electronically, by a number of registered voters within the relevant jurisdiction equal to at least two percent of those voting in the presidential election. . . . Initiatives that propose changes to constitutions or charters shall qualify for election if a petition is signed by a number of registered voters within the relevant jurisdiction equal to at least five percent of the number voting in the last presidential election. . . . The time period allotted to gather qualifying petition signatures shall be more than two years. . . .

*Id.*

179. *Id.*, § 3(B)(3). “Initiatives that propose or alter constitutions, charters and laws, or expressions of public policy shall qualify for election if at least fifty percent of the respondents in public opinion poll express their desire that the initiative qualified for election. . . .”

*Id.* A further provision governing the supervision of the polling process is quoted *infra* note 189.

180. At a glance it may seem odd that legislators would ever resort to such a procedure rather than simply adopting the measure in question. But it may be that some legislators, while opposed to or undecided about a measure, nevertheless believe that the voice of the people should be heard.

181. See Collins & Oesterle, *supra* note 122, at 64 (restrictions on ballot access derive from notion that “initiators ought to be able to demonstrate substantial public support before the state is put to the expense of conducting a vote.”).

182. See David Magleby, *Governing By Initiative: Let The Voters Decide? An Assessment of The Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 36 (1995) (“Most citizens and ‘grass roots’ groups lack the resources or organizational commitment to get their issues on statewide ballots.”).

183. Most states require that the signatures constitute a certain percentage (usually around 8%) of the number of voters in the previous gubernatorial election. Some states require signatures equaling as much as 15% of that total.

184. See DUBOIS & FEENEY, *supra* note 108, at 94 (finding a statistically significant

measure enjoys popular support. Anyone with enough money can gather sufficient signatures for almost anything,<sup>185</sup> since many people sign petitions without reading or focusing on them.<sup>186</sup> Conversely, a widely supported measure may fail to attain sufficient signatures simply because supporters lack the requisite resources to circulate petitions.<sup>187</sup>

If a large percentage of the voters of a jurisdiction favor a particular measure, they should not be deprived from voting on it solely because supporters lack wealth. While some have proposed addressing this problem by fiddling with the signature-gathering machinery,<sup>188</sup> the crafters of DA propose an alternative path to qualify initiatives—polling.<sup>189</sup>

Of course, polling is not perfectly scientific. The very essence of a poll involves built-in error. The only way to know how all the People feel is to have all the People vote.<sup>190</sup> Polls sample only some of the People, and thus come accompanied by a “margin for error”—a confession of imprecision. In addition, the way poll questions are worded can determine the outcome.<sup>191</sup> For these and other reasons,<sup>192</sup>

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correlation between the signature requirement and the number of qualifying initiatives).

185. See Daniel Lowenstein & Robert Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 199 (1989) (noting emergence of an industry of paid signature-gatherers who can “buy a place on the ballot” for “anyone willing to put up the funds.”).

186. See *id.* at 194-200; DUBOIS & FEENEY, *supra* note 108, at 96.

187. See, e.g., DUBOIS & FEENEY, *supra* note 108, at 97 (noting that signature requirement of 700,000 in California leaves the initiative process “available only to those who can mount the kind of highly organized petition circulation effort needed to gather such a large number of signatures in the 150 days allowed by law.”).

188. See, e.g., *id.* at 100-102.

189. A few commentators have briefly considered and rejected polling as an alternative means to qualify ballot access, but without a serious rationale. For example, DUBOIS & FEENEY, *supra* note 108, at 106, acknowledge that polls “might be useful for identifying general areas of public concern or discontent,” but claim they are “not suitable means for asking voters to evaluate specific detailed proposals.” They offer no basis for this assertion.

190. Of course, this too does not gauge public sentiment perfectly, since not all people vote. It does not even gauge perfectly the sentiments of those who wish to vote, since presumably some people would like to do so but cannot make it to the polls.

191. See, e.g., Michael Kagay & Janet Elder, *Numbers Are No Problem for Pollsters: Words Are*, N.Y. TIMES, Aug. 9, 1992, §4, at 5 (documenting dramatic differences in results of differently worded polls on same subject).

192. For example, different sorts of people tend to be home when pollsters call, or tend to cooperate with pollsters, among other factors that can skew poll results and are difficult for pollsters to control.

different polls on the same subject can yield very different results.<sup>193</sup>

But in the context of using polling to qualify initiatives, these problems are insignificant. The poll could not create law: it could only achieve ballot access. Surely, polling has become sufficiently accurate for that purpose.<sup>194</sup> Under DA, a proposed measure becomes qualified if 50% of the voters of a jurisdiction want it qualified.<sup>195</sup> Obviously a poll that understates the degree of support does no harm (except to the party that wants the measure qualified, who then has other available routes). But suppose a poll finds that 52% want measure X qualified, whereas the real figure is 48%. The measure qualifies, but little harm is done: it won't be adopted unless a majority of voters are persuaded to support it. To be sure, we don't want every conceivable initiative proposal to qualify. The 50% requirement should suffice to screen out measures that lack significant support.

Of course, we posited only a slight polling error. What about bias and the wording of questions, factors that can influence outcomes more substantially? DA anticipates these problems effectively. It stipulates that for an initiative to qualify by means of poll, the proposed poll question must be submitted along with the proposed initiative, to be evaluated by a neutral governing body.<sup>196</sup> Unless this body verifies the bona fides of the proposed poll and polling organization, the poll will not be approved.<sup>197</sup> Assuming this governing body can be trusted to act with integrity and competence, this seems like a reasonable safeguard against abuse of the polling option.<sup>198</sup>

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193. This is even true where the wording problem is minimal, such as in candidate elections. Eric Lekus, *Rivals Question Pollster's Success*, NEWSDAY, Nov. 12, 1996, at 7A (noting that in final 1996 pre-election polls by eight news organizations, Bill Clinton's lead over Bob Dole ranged from 7% to 18%).

194. Polling is now used to determine which presidential candidates may participate in televised debates. Since this can affect who becomes President, it involves far greater stakes than whether any particular initiative makes it to a ballot.

195. To be more precise, 50% must "express their desire that the initiative qualify for election." Proposed Democracy Act § 3(B)(3), at <http://www.ni4d.org> ("Proposed DA"). This makes sense. Some voters may personally oppose a measure but still feel that it should be subject to majority will.

196. *Id.*

197. *Id.*

198. The viability of this body, the "Electoral Trust," is discussed *infra* text accompanying notes 236-42.

## B. Campaign

DA's most significant measures are designed to promote a fair and robust campaign process once an initiative qualifies. The drafters of DA believe that the current initiative process reflects some of the same flaws that mar the legislative process, especially absence of deliberation and excessive influence of money and special influence.<sup>199</sup> DA specifies procedures designed to remedy these problems.

The constitutional amendment accompanying DA would create a governing body to oversee and administer the entire process: the "Electoral Trust."<sup>200</sup> This agency would be authorized to "administer the procedures" of DA across the nation.<sup>201</sup> The Electoral Trust, to be funded by the federal government,<sup>202</sup> has a three-part statutorily-defined mission: (i) making voter registration "as simple and automatic as possible, with the goal of achieving universal lifetime registration of eligible voting-age citizens;"<sup>203</sup> (ii) seeing to it that "[f]air and balanced information" on all qualified initiatives shall be presented to voters in "English"<sup>204</sup> and; (iii) ensuring that voting shall be "as convenient and as easy as possible for all citizens registered to vote, including the non-reading, disabled, hospitalized, homebound, homeless and indigent."<sup>205</sup>

DA specifies that the Electoral Trust will be governed by a Board of Trustees and a Director.<sup>206</sup> The Director, appointed by the President of the United States, and confirmed by a majority vote of the Trustees, shall serve one six-year term.<sup>207</sup> While DA gives the Electoral Trust some flexibility in administering the initiative

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199. The drafters are quick to note that the people at large are not to blame—the initiative process has invariably been enacted by representatives. See MIKE GRAVEL & DON KEMNER, A PEACEFUL AMERICAN REVOLUTION: INITIATIVE VIA PHILADELPHIA II 27 (1999) (unpublished manuscript on file with author).

200. Proposed DA § 4.

201. *Id.*

202. *Id.* § 4(F).

203. *Id.* § 4(A)(1). This aspect of the mission statement receives elaboration in section 4(E)(2): "[t]he Electoral Trust shall develop simplified, voter registration procedures and requirements aimed at universal lifetime registration, which shall be usable and binding in every government jurisdiction where the voter is a legal resident."

204. *Id.* § 4(A)(2).

205. *Id.* § 4(A)(3). This aspect of the mission statement receives elaboration in section 4(E)(7): "[t]he Electoral Trust shall take advantage of contemporary technology in developing voting procedures for national, state and local initiative elections to facilitate the citizens' exercise of their legislative power."

206. *Id.* §§ 4(B) & (C).

207. *Id.* § 4(C).

campaign, it spells out a series of binding procedures designed to create a fair, deliberative process. These include:

1. *Public Hearing*

When “an initiative qualifies for election, the Electoral Trust shall appoint a Hearing Officer to conduct public hearings . . . The testimony of citizens, proponents, opponents, and experts shall be solicited” and “their testimony shall be published as the Hearing Record.”<sup>208</sup>

2. *Deliberative Committees*

The Electoral Trust must organize and convene a committee of randomly selected ordinary citizens from the relevant jurisdiction who review the transcript of the hearings, “deliberate the merits of the initiative, and prepare a written report of its deliberations with its recommendations.”<sup>209</sup> By two-thirds vote the Committee can amend the text of the initiative, provided that any changes “are consistent with the stated purposes of the initiative.”<sup>210</sup>

3. *Legislative Advisory Vote*

Following the public hearing, and upon receipt of the recommendation by the Deliberative Committee, the legislative body of the relevant jurisdiction must conduct a public vote on the initiative within sixty days.<sup>211</sup> The vote serves as a non-binding recommendation.<sup>212</sup>

4. *Public Information*

The Electoral Trust is required to provide a pamphlet about each qualified initiative with a balanced pro and con analysis of the subject along with “a summary of the Hearing Record, the Deliberative Committee report, the results of the Legislative Advisory Vote, and statements prepared by proponents and opponents.”<sup>213</sup> This information must also be published on a web site and “to the extent feasible” disseminated to newspapers, radio stations and other

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208. *Id.* § 3(C).

209. *Id.* § 3(D).

210. *Id.*

211. *Id.* § 3(E).

212. *Id.*

213. *Id.* § 3(L).

media.<sup>214</sup>

### 5. *Campaign Financing*

Funding in support of or opposition to initiatives is permitted by “neutral persons” only, with an explicit ban of contributions from “corporations, industry groups, labor unions, political action committees and associations. . . .”<sup>215</sup> So too, “[s]uch entities are prohibited from coercing or inducing employees, stockholders, clients, customers, members, or any other associated persons to support or oppose an initiative.”<sup>216</sup> Violation of this prohibition would be a felony.<sup>217</sup>

### 6. *Disclosure*

Material identifying those involved in the effort to promote and defeat the initiative shall also be made public.<sup>218</sup> The names and relevant organizational affiliations of sponsors of the initiative “shall appear on the face of the initiative, the petition, and on any printed matter or other media advocating the initiative. . . .”<sup>219</sup> The Electoral Trust shall also establish financial reporting requirements for both proponents and opponents of the initiative.<sup>220</sup> Failure to comply with these requirements shall be a felony.<sup>221</sup>

These features are accompanied by additional safeguards. Each initiative is limited to 5,000 words (“exclusive of the Preamble and language that quotes existing law”),<sup>222</sup> may “address only one subject” (though it “may include related or mutually dependent parts”), and must include a summary that “accurately summarizes the initiative’s content.”<sup>223</sup> Also, DA explicitly authorizes judicial review to ensure the constitutionality of an initiative.<sup>224</sup>

What, then, are we to make of this proposed statute? Are the means equal to the lofty goal of promoting a superior version of

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214. *Id.* § 3(L)(2).

215. *Id.* § 3(J).

216. *Id.*

217. *Id.*

218. *Id.* § 3(H).

219. *Id.*

220. *Id.* § 3(K).

221. *Id.*

222. *Id.* § 3(A).

223. *Id.*

224. *Id.* § 3(F).



direct democracy throughout America?<sup>225</sup> There is clearly much to recommend DA. By virtue of the deliberative committees, public hearings, legislative roll call, and mandatory dispersal of information in both the broadcast and print media, interested citizens would potentially receive far more and better balanced information than is currently the norm.<sup>226</sup> By virtue of some of these features, as well as the restrictions on funding, the campaigns would seem less subject to manipulation.

The crafters of DA were attentive to flaws in the current initiative process (as well as procedures that have proven somewhat effective). For example, initiatives are sometimes poorly worded.<sup>227</sup> DA commands the Electoral Trust to establish and operate a legislative drafting service to assist in the preparation of initiatives.<sup>228</sup> DA also provides for changes to the text of initiatives, when a need becomes apparent during hearings.<sup>229</sup>

So, too, under the status quo certain initiatives are too long to be digested and easily understood.<sup>230</sup> As noted, DA limits initiatives to 5,000 words.<sup>231</sup> Related, in some states initiatives may embrace

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225. One other striking feature of DA, the means of its enactment, *see infra* at text accompanying notes 316-26.

226. Under current law, only one state, California, requires any kind of hearing on initiatives: a legislative hearing. A few other states with indirect initiatives sometimes use such hearings, whereas no states with direct initiatives do so. The fact that states with indirect initiatives (meaning initiatives first voted on by the legislature) have hearings, and those with direct initiatives generally do not, suggests that these limited hearings are aimed at assisting the legislature, not the public. In any case, legislative hearings have not significantly enhanced public involvement in initiatives. *See* DUBOIS & FEENEY, *supra* note 108, at 42.

227. *Id.* at 113 (“A persistent complaint about initiative proposals is that many are poorly drafted.”).

228. Proposed DA § 4(E)(3). Under current law, only eight jurisdictions offer any formal drafting assistance to initiative proponents; this is a significant problem. *See* Collins & Oesterle, *supra* note 122, at 77 (“The problem of inept drafting arises in large part from the way initiatives are drafted. . . . [The drafters] can be inexperienced in the drafting of legislation.”).

229. *See* Collins & Oesterle, *supra* note 122, at 78 (“The drafting problem is severely magnified by early freezes of initiatives’ wording.”). *See also* Allen, *supra* note 110, at 1005 (“The critics of initiative also argue that these bills must be taken as given—there is no way to amend an initiative once the qualifying procedure has begun.”).

230. To take one extreme example, in 1988 California voters faced four initiatives on automobile insurance. Three of them were more than 10,000 words long and one of them nearly 30,000 words.

231. Proposed DA § 3(A); *see also* Collins & Oesterle, *supra* note 122, at 109 (recommending 5,000 word limit).

several subjects, making them difficult for voters to evaluate.<sup>232</sup> DA limits initiatives to a single subject.<sup>233</sup> In a similar vein, DA's disclosure provisions spring from recognition that knowing who is behind a measure<sup>234</sup> is relevant to the public's assessment<sup>235</sup> and that the initiative process has been marred by deliberate concealment.<sup>236</sup>

The devil is in the details. In their exuberance over democratizing America, leaders of the early initiative movement paid scant attention to process: roll out the ballots and let the People vote, they proclaimed, and all will be well.<sup>237</sup> The drafters of DA, by contrast, have drawn on a century's experience to offer a carefully crafted approach.<sup>238</sup>

The virtues of DA are illuminated by reference to James Fishkin's incisive description of the American dilemma. Fishkin described the "fork in the road for American Democracy" as follows:

[d]own one road, we would have kept the conditions that make

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232. Eight states place no limit on the number of subjects that may be addressed by an initiative. See Collins & Oesterle, *supra* note 122, at 85 ("Bundling of issues is a recognized abuse" of the initiative process.). Not only are multi-subject initiatives more difficult to follow, but they force voters to "decide whether to swallow the bitter to get the sweet." *Id.* at 111.

233. Proposed DA §3(A) This adopts the process followed in California and a few other states. See Magleby, *supra* note 182, at 25-26.

234. DA would require the listing of all significant sponsors of the initiative. Proposed DA § 3(H). Under current law, only four states require the listing of sponsors.

235. The Supreme Court has recognized as much. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.").

236. This, too, the Court has recognized. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1991) ("[W]hen individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source."). In a different case, the Court nevertheless struck down an Ohio disclosure law which prevented distribution of anonymous campaign literature. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Ohio Elections Commission imposed a fine on a woman who distributed a handbill signed by "concerned parents and tax payers." However, the Court limited its protection to "individuals acting independently and using only their own modest resources." *Id.* at 351. This is unlikely to pose an obstacle to DA's requirement of disclosure of sponsors and significant contributors, especially since the Court acknowledged the propriety of most laws requiring financial disclosure of contributions. See *id.* at 349.

237. See DUBOIS & FEENEY, *supra* note 108, at 127 ("The reformers who brought about the adoption of the initiative did not devote a lot of attention to the mechanics of the initiative process.").

238. See Collins & Oesterle, *supra* note 122, at 126-27 ("Abuses of the initiative are largely caused by structural and procedural flaws. If they are corrected, the initiative can work . . . . [Q]uestions of structure and procedure should be an essential part of America's debate on the merits of state ballot initiatives and proposals for a national initiative.").

deliberation together possible, even if we would thereby have limited participation. Traveling the other road, we emphasize participation even when conditions for deliberation and discussion are absent. The first road was defended by the Founders; the second road leads to referendums, primaries, and the other institutions of mass democracy.<sup>239</sup>

DA seeks to bridge the divide, refusing to accept a dichotomy between deliberative democracy and mass democracy. In that regard, its “deliberative committees” are a key innovation. By gathering ordinary citizens together in committee, it seeks to capitalize on the value of face-to-face discussions. The public hearing serves a similar function, buttressed by the legislative roll call. DA goes to great lengths to avoid a vote in a vacuum.

Another potentially compelling feature of DA is highlighted by a separate discussion of Fishkin’s, one recalling the theme of civic maturation. Drawing on the work of economist Anthony Downs,<sup>240</sup> Fishkin explained that

[c]itizens in large nation-states have incentives to be “rationally ignorant.” If I have only one vote in millions, why should I spend a lot of time and effort attempting to inform myself about the positions of competing candidates, competing parties, or competing alternatives in an election or a referendum? My individual vote has such a small chance of making any difference to the outcome that time and effort invested in deciding how best to cast that vote will not make any appreciable difference. . . . [F]or most citizens, ignorance is, unfortunately, the rational choice.<sup>241</sup>

DA addresses this problem by providing for initiatives at every level of government, from the town and village up. One’s vote on a national initiative may seem fruitless, but that perspective weakens as one moves down to the lower rungs of the democratic ladder.

This point becomes strengthened when one broadens the perspective beyond the mathematics of voting. The average citizen can have little impact on the debate over a national initiative, but more so on state issues and potentially a significant influence on local issues. And the process of becoming engaged and informed may become habitual for the citizen whose involvement starts at the local level.

Indeed, by requiring the availability of initiative in every jurisdiction, DA seeks to do for popular participation what Founding

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239. FISHKIN, *supra* note 18, at 26.

240. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1956).

241. FISHKIN, *supra* note 18, at 21-22.

Father James Wilson shrewdly saw the Constitution as doing for the concept of representation: “defusing this vital principle throughout all the different divisions and departments of the government.”<sup>242</sup> Today, a citizen of a state which permits initiatives may regard the availability of this option as adventitious, merely a choice of the state in which she happens to reside. After all, she will not find provisions for citizen lawmaking at the federal level, or (in all likelihood) at the local level, nor in all other states. DA would change that, and thus change the thinking about direct democracy. No matter how often the initiative was used, it would be seen as a pervasive tool of citizenship and thus would recast the role of citizens in government.

In short, DA could create a citizenry far more engaged in civic affairs. Rather than simply empowering people to vote on issues, it would establish procedures promoting an informed, deliberative polity.<sup>243</sup> All this may sound Pollyannaish. Certainly, DA faces obstacles which need to be considered.

### C. The Ban on Corporate Financing

One important feature of DA would be vulnerable to rejection by the Supreme Court. As noted, DA limits contributions to initiative campaigns to “persons.”<sup>244</sup> This provision could help liberate the initiative process from domination by political action committees and well-heeled corporate entities. However, in 1978 the Supreme Court struck down a Massachusetts statute that banned banks and various other corporations from making expenditures on certain initiative issues.<sup>245</sup> Is the provision in DA limiting financing to “persons” therefore doomed?

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242. 1 THE WORKS OF JAMES WILSON, *supra* note 76, at 312.

243. Significantly, the DA would supplement, not replace, representative government. (Indeed, within the initiative process itself, the legislative bodies would weigh in.) This point bears emphasis, insofar as some critics of direct democracy claim that initiative “does not supplement representation, it sits above representation.” Clark, *supra* note 96, at 1569. Clark asserts that “[d]irect democracy, where it exists in the United States, always trumps representative democracy. An initiative can overrule the legislature.” *Id.* In fact, unless state law stipulates to the contrary, a statute passed by the legislature can overrule an initiative as easily as the other way around. Half the states that permit initiatives place no restrictions on legislative repeal, and in most of the other states restrictions are minor. DA itself places no limits on legislative action.

244. Proposed DA § 3(J).

245. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767 (1978). Specifically, the statute prohibited appellants from making contributions or expenditures “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.” *Id.* at 768.

Not necessarily. The divided Court, in a case twenty years ago (when only two current members of the Court served),<sup>246</sup> did not rule out measures limiting or eliminating corporate expenditures in the initiative process. Rather, it demanded a stronger showing than Massachusetts had mustered that such measures are necessary to promote a fairer process. The Court based its decision largely on an empirical judgment that seems outdated today: “there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.”<sup>247</sup> The Court implied that such a showing could justify legislation banning corporate expenditures on initiative campaigns:

[a]ccording to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee’s arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.<sup>248</sup>

Were the Court to revisit the issue of campaign limitations on initiatives, it would be forced to ponder much data.<sup>249</sup> With the benefit of two more decades of initiatives, and an astronomical rise in spending by “non-persons,” proponents of DA would provide the Court an ample basis to jettison *Bellotti*.

The Court was unmoved by the claim that limitations on corporate expenditures would reduce corruption. Acknowledging a risk of corruption in candidate elections, the Court maintained that this risk “simply is not present in a popular vote on a public issue.”<sup>250</sup> It is hard to imagine the Court endorsing that sentiment today. Supporters and opponents of direct democracy are united in the recognition that initiative campaigns have been tainted by corruption.<sup>251</sup>

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246. One of those members, now-Chief Justice Rehnquist, dissented (on the ground that corporations are not “persons” entitled to Fourteenth Amendment protection). *Id.* at 822.

247. *Id.* at 789-90.

248. *Id.* at 789.

249. For example, in California more than 80% of contributions of more than \$100 to ballot measure committees are made by political action committees. Charlene Simmons, 1997 CAL. RESEARCH BUREAU 12-13 (1997).

250. *Belotti*, 435 U.S. at 790.

251. See, e.g., DUBOIS & FEENEY, *supra* note 108, at 199 (disputing Court’s contention

#### D. The Role of the Electoral Trust

A potentially serious criticism of DA is that a government agency cannot be expected to administer elections fairly and effectively all over America.<sup>252</sup> Especially given the fact that one rationale for DA is distrust of government institutions, why should we expect the Electoral Trust to be incorruptible? Wouldn't it inevitably be at the beck and call of the very representatives (and powerful private entities) we distrust?

However, the drafters of DA had a successful model to work from—the Federal Reserve Board (“FED”), which oversees America’s banking system. The FED arose from a perceived need for an agency with appropriate expertise to govern America’s monetary policy in a way that is free from political interference but not free of all accountability. Accordingly, the chairman is appointed by the President to a renewable four-year term. This guards against a dangerous, unaccountable leader (as does the fact that the chairman is answerable to a board), but most of what the FED does is free of governmental interference.<sup>253</sup>

The FED has become the envy of government-run banking institutions worldwide<sup>254</sup> and perhaps a suitable model for other institutions as well.<sup>255</sup> While obviously some observers disapprove the policies of this or that FED Board, few dispute that the organization has maintained the independence and integrity necessary for effective policy-making. Indeed, the few critics of the FED as an institution tend to complain that it is *too* independent and powerful.<sup>256</sup>

DA’s Electoral Trust seems loosely modeled after the FED.<sup>257</sup>

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that initiatives are free of corruption and noting “extensive history” to the contrary).

252. While a national Electoral Trust is a novel idea, one commentator has proposed that states create an “independent commission to oversee the initiative process.” Arne Leonard, *In Search Of The Deliberative Initiative: A Proposal For A New Method Of Constitutional Change*, 69 TEMP. L. REV. 1203, 1227 (1996).

253. See DONALD KETTL, LEADERSHIP AT THE FED 1-17 (1986).

254. See, e.g., Colin Narbrough, *Independent Banks Lose Shine*, LONDON TIMES, Apr. 15, 1991 (noting that Governor of the Bank of England, unhappy with dependence of England’s central bank on the government, “may have found a role model. America’s Federal Reserve Board, even freer of political interference than the Bundesbank, has provided evidence of the merits of independence.”).

255. See, e.g., James Guthrie, *American Education Reform: What is Needed is ‘National,’ Not ‘Federal,’* 17 ST. LOUIS U. PUB. L. REV. 125 (1997) (proposing Federal Reserve Board as a model for American educational system).

256. See, e.g., WILLIAM GREIDER, SECRETS OF THE TEMPLE (1995).

257. The drafters of DA may also have benefited from a negative model. The Federal Election Commission, which enforces federal campaign finance and election law, is widely

Like the FED, the Electoral Trust will essentially be an independent agency, though with a degree of accountability to the political branches. The director is appointed by the President and Congress controls its purse strings.<sup>258</sup> The director is limited to one term and operates at the discretion of a Board.<sup>259</sup> As the FED has maintained its independence, there is no reason to assume that the Electoral Trust would fail to do so.<sup>260</sup>

## E. Potential Problems with National Initiative

### 1. Professor Black's Critique

National initiative creates some risks different from and greater than those at the state level, and the outcome is less certain. We lack not only experience, but analysis. Scrutiny of direct democracy has focused on its variants at the state level, because that's where the action is. Before taking the plunge into something as far-reaching as national initiative, we must carefully consider possible drawbacks.

In the late 1970s, the United States Congress briefly considered a constitutional amendment to create national initiative.<sup>261</sup> Far less developed than DA, the Hatfield/Abourezk proposal essentially provided for the enactment of laws by majority vote in a national election. It contained no procedures to promote deliberation, disclosure, or fairness.<sup>262</sup> During the pendency of this amendment,

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regarded as "a weak and ineffective agency unable to fulfill its mandate." Amanda S. LaForge, Note, *The Toothless Tiger: Structural, Political, and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L. J. AM U. 351, 352 (1996). The FEC's problems include the lack of a structurally strong chairperson. *See id.* at 362-65. Six commissioners serve rotating one-year terms as chair, essentially a figure-head position. *See id.* Also problematic is the highly partisan and politicized appointment process (with heavy involvement of Congress) of all commissioners. *See id.*

258. Proposed DA §§ 4(C) & (D).

259. Proposed DA § 4(C).

260. The Electoral Trust's task is daunting—overseeing the initiative process in hundreds of jurisdictions. Needless to say, it would have to delegate and decentralize responsibilities. In this way, too, it resembles the Federal Reserve Board—the FED's operations are conducted by twelve Federal Reserve Banks in cities throughout the country.

261. S. J. Res. 67, 95th Cong., 1st Sess., 123 CONG. REC. § 11584 (1977).

262. The relevant sections were as follows:

Section 2: A law is proposed by presenting to the chief law enforcement officer of the United States a petition that sets forth the text of the proposed law and contains signatures, collected within the eighteen months prior to such presentation, of registered voters equal in number to 3 percent of the ballots cast in the last general election for President and which includes the signatures of registered voters in each of ten states . . . . Within 90 days of such presentation,

Professor Charles Black, a rare legal scholar to address the unique problems of national direct democracy, wrote a harsh critique.<sup>263</sup> It is instructive to explore the viability of his attack, and the extent to which DA is susceptible to it. Some of Professor Black's criticisms apply equally to statewide initiative,<sup>264</sup> and some we have already addressed.<sup>265</sup> The most significant criticisms, for present purposes, are

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the chief law enforcement officer of the United States shall determine the validity of the signatures contained in such petition . . . . Upon a determination that such petition contains the required number of valid signatures, he shall certify such petition [and have it placed on the ballot of the next national election].

Section 3: A proposed law shall be enacted upon approval by a majority of the people casting votes with respect to such proposed laws.

*Id.*, see also Charles L. Black Jr., *National Lawmaking by Citizen Initiative? Let's Think Twice*, in *THE HUMANE IMAGINATION* 108-09 n.1 (1986).

263. See Black, *supra* note 262, at 106-17.

264. For example, Professor Black argues that Congress makes law in a larger context, with the big picture in view, whereas initiatives would produce measures voted on in isolation; the mix of laws might be poor, and no one will consider the mix. *Id.* As he puts it, national initiative "leads to and supports no *system* or *plan* of government," whereas in Congress, "a great deal is known and considered . . . about the interactions and interrelations of particular provisions. Such knowledge and consideration at least makes possible, if it does not always produce, legislation that works well within the general frame." *Id.* at 114-15 (emphasis in original). Lacking a view of the "general frame," initiative voters would produce "a series of *ad hoc* interventions either ineffective or wreaking needless havoc." *Id.* at 115. National initiative would "encourage[] simplistic solutions to problems piecemeal—a recipe for chaos" and could "easily produce 50 or 100 proposals on every biennial ballot." *Id.*

DA proponents can make two replies. First, DA provides a deliberative process (which involves representatives). If a particular initiative would not fit within a larger system or plan, that would be an argument against it. Second, DA in no way replaces representative government: if national initiative produced some jagged or discordant pieces of law, our elected officials would retain the ability to mold them into a coherent structure. See Richard Briffault, *Distrust of Democracy*, 63 *TEX. L. REV.* 1347, 1350 (1985) (book review) ("[T]he legislature and the initiative not only coexist but interact in a system of lawmaking."). Finally, not even the harshest critics of state initiatives (which generally lack the kind of deliberation that DA contemplates) maintain that they have wreaked havoc in the states. The amount of legislation proposed and passed has been relatively small. See *supra* note 121.

265. For example, Professor Black observed that Hatfield/Abourezk lacked "provision for any responsible deliberation." BLACK, *supra* note 262, at 112. He noted that congressional lawmaking proceeds through the committee process, aided by specialists and staff. See *id.* at 113. The process involves "give-and-take, of perception and tackling of problems as to substance and as to wording—the process, in other words, by which sensible people try to reach a sensible result in a binding enactment." *Id.* Professor Black acknowledged that "this process does not always work at its ideal best," but observed that the proposed national initiative "contains not so much as a possibility of anything of the sort." *Id.* Instead, any deliberation or debate would be through "some unmandated and unofficial process . . . voluntary in the particular case." *Id.* Moreover, there would presumably be a long lag time between the initial gathering of signatures and the eventual



those which apply primarily or exclusively to nationwide initiative.<sup>266</sup>

#### Absence of Presidential veto

Professor Black noted that Hatfield/Abourezk left no place for the presidential veto, “incomparably the greatest of the presidential powers.”<sup>267</sup> Removing this power, Black warned, would “enormously weaken the presidency.”<sup>268</sup> However, he failed to explain how national initiative would weaken the presidency, and it is unclear why it would have a profound effect. There is little reason to believe that citizens would attempt to micromanage foreign policy or intrude on other basic presidential prerogatives.

By analogy, state initiatives bypass the governor’s veto, but no one has alleged that they have eviscerated the power of governors. Indeed, the initiative process can strengthen the hand of governors. Governors are more visible and audible than legislators, and thus generally have more influence on the public. Some have wielded this power to influence the course of initiative voting and have threatened to go over the heads of legislators as a means to achieving more favorable legislation.<sup>269</sup>

Because of his unmatched visibility, the President typically wields even more influence with the public than any governor. National initiative would enhance the potency of one of the

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vote, “with no possibility of change to meet new thoughts or new circumstances.” *Id.* This analysis posed persuasive objections to Hatfield/Abourezk, but not to DA. DA, we have seen, establishes a process of deliberation, and permits amendment along the way. *Id.* at 113.

Professor Black also argues that the national initiative process would be at the mercy of money. He notes that “[m]oney could . . . get pretty much any proposal on the ballot” and “would have an immense advantage, too, in putting the affirmative case forward, through all the so-called media, toward election day, the day of the plebiscite.” *Id.* at 115-16. While it is true that signature-gathering comes down to resources, DA stipulates polling as an alternative means of qualifying an initiative. Proposed DA § 3(B)(3). Once an initiative is qualified, DA’s procedures would impede financial dominance. *See supra* text accompanying notes 215-17.

The process of legislation by our representatives, currently the only means of national lawmaking, has certainly become hostage to financial power. DA would reduce, not increase that advantage. Does anyone doubt, for example, that over the last several decades gun control measures would have fared better if placed on a ballot before the American people than they fared in Washington where the gun lobby had disproportionate influence because of its superior resources?

266. While the American people have not clamored for national initiative, they appear to favor the concept. *See supra* note 91.

267. BLACK, *supra* note 262, at 111.

268. *Id.* at 112.

269. *See Magleby, supra* note 182, at 29.

President's chief weapons—the bully pulpit.<sup>270</sup> This might more than compensate for the President's inability to veto laws produced by initiative.

### Bypass of Senate

Professor Black also argued that national initiative essentially bypasses the United States Senate. Whereas measures passed via a national initiative would likely pass the House,<sup>271</sup> they may well fail in the Senate, where each state receives equal representation regardless of population.<sup>272</sup> Professor Black argues that this de facto Senate bypass violates the spirit and perhaps letter of Article V of the United States Constitution, which seems to lock into place equal representation of states in the Senate.<sup>273</sup>

This argument mistakenly assumes that Article V is the only means of amending the Constitution. As discussed in Part I, the more persuasive reading recognizes that Article V provides only one means of amending the Constitution, and direct amendment by the People another. Under this reading, the provision prohibiting amendments that compromise equality of Senate representation limits Article V amendment only.

However, Professor Black's concern about the Senate bypass transcends the Article V wrinkle. He notes that the Senate emerged as “an indispensable part of the Great Compromise of 1787,”<sup>274</sup> recognizing that an appeal to tradition carries limited weight.<sup>275</sup> He

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270. See Michael Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 890 (1996) (“[O]ne of the most important devices of a modern president is his ability to mobilize support through the bully pulpit. . .”).

271. Since each representative represents roughly the same number of constituents, a bill supported by a majority of Americans will typically be supported in a majority of congressional districts. At least to the extent house members read their mail, and wish to remain in office, they will often be persuaded to adopt a measure strongly and visibly supported by their constituents.

272. Where the Senate is concerned, all the voters of California have no more weight than all the voters of Alaska. As a result, when a measure supported by the majority of Americans is not supported by a majority of states, it will likely be rejected by the Senate.

273. See U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal suffrage in the Senate.”).

274. BLACK, *supra* note 262, at 110.

275. After all, several unsavory features of the Constitution, especially clauses protecting slavery, also emerged as crucial compromises. See Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?* 13 J.L. & POL. 21, 22 (1997) (noting, in the context of equal representation in the Senate, that “historical explanation is not contemporary justification”).

adds that it “is not at all clear that [the Great Compromise] is not of great benefit even today . . . .”<sup>276</sup>

He offers no elaboration. Nor have others taken up this point.<sup>277</sup> For that matter, as a general proposition, the Senate has received scant scholarly attention.<sup>278</sup> This neglect may reflect the fact that the Great Compromise has little ongoing significance, i.e., the Senate does not play a distinctive role. Nevertheless, we ought to consider whether Professor Black was on to something. Should we be concerned that national initiative effects a kind of end run around the Senate?

The Great Compromise protected small states by giving the states equal representation in one branch of the legislature. Such protection could be sacrificed by national initiative. Take, for example, oil exploration in Alaskan wilderness. This might be popular nationwide but unpopular in Alaska. In a national initiative, the people of Alaska would be outnumbered by literally hundreds of millions. In the United States Senate, though, they are outnumbered only forty-nine to one, and their two senators can exercise disproportionate influence through a filibuster or the usual horse-trading. Or imagine a measure that would benefit urban America at the expense of family farms. Such a measure might enjoy majority support nationally but would be detrimental to enough states that it might fail to pass the Senate.

Isn't such protection of states exactly what the Framers had in mind by giving each state two senators? Not really. To be sure, the Framers recognized that in the Senate “the influence of the states should prevail to a certain extent.”<sup>279</sup> However, as Professor Vikram Amar has demonstrated, the Framers envisioned equal

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276. BLACK, *supra* note 262, at 110.

277. This is partly because most scholarship on direct democracy focuses on state initiative. One other commentator who addressed national initiative also expressed concern about the Senate bypass. However, he too failed to provide much elaboration. See Allen, *supra* note 110, at 1044.

278. See Vikram D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1112 (1988) (The Senate “has largely been ignored in the legal literature.”). The literature on the legislative branch generally “discuss[es] Congress without distinguishing between the two Houses” and thus there has been little “analysis of the Senate’s place and function in the constitutional scheme.” *Id.*

279. 4 ELLIOT, *supra* note 40, at 319. See also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 179 (1833) (Equal vote in the Senate is a “constitutional recognition” of state sovereignty and an “instrument for the preservation of it.” It safeguards against “a consolidation of the states into one simple republic.”).

representation as protecting states' *rights* rather than *interests*.<sup>280</sup> The Framers' own words<sup>281</sup> and assorted features of the Constitution,<sup>282</sup> support Amar's conclusion that "when the interests of the state and those of the union pointed in opposite directions, the Senator was to look to the good of the *entire public*."<sup>283</sup>

If this were true in 1787, imagine how much more so today. Reconstruction and other developments have enhanced the sense of America as a *nation*. Despite the Supreme Court's minirevival of Tenth Amendment federalism,<sup>284</sup> the notion of states' rights packs far less wallop than it once did. So too, the adoption of the Seventeenth Amendment, providing direct election of senators rather than selection by state legislatures, further diminished the sense of the Senate as a body beholden to the states.<sup>285</sup> To the extent the national initiative effectively bypasses the Senate, it merely continues a two-century trend toward nationalization.<sup>286</sup>

It may be argued that another important feature distinguishes the Senate from the House: senators have longer terms than House members which, in turn, insulates senators from public opinion. The Senate can resist rash action and assure deliberation and consideration of the big-picture. As George Washington allegedly put it, "we pour legislation into the senatorial saucer to cool it."<sup>287</sup> Would not national initiative compromise that crucial role of the Senate?

In reality, this role of the Senate has already disappeared.<sup>288</sup>

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280. See Amar, *supra* note 278, at 1116-18.

281. See *id.* (citing assorted founding comments).

282. See *id.* at 1130 ("Senators were to vote individually, not as a block from each state. Second, senators were unrecalable. Third, Senators were paid from the national treasury, not those of home states.").

283. *Id.* at 1117 (emphasis in original).

284. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Tenth Amendment prohibits Congress from regulating guns in schools).

285. See Amar, *supra* note 278, at 1128-29 ("If state legislatures have a more coherent vision of a state's interests than the citizens do, direct election may make it easier for a Senator to consider the interests of the union, not just those of his state.").

286. At the end of the day, if national initiative infringes not just the interests but the constitutional *rights* of states, judicial review by an independent judiciary will be available. Proposed DA § 3 (F).

287. See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 285 (1996).

288. See, e.g., George Will, *Senate: Impediment to the People?* TIMES-PACAYUNE, Apr. 30, 1995, at B7 (noting Framers' vision of Senate as detached and deliberative body, but observing that "today the Senate is a far cry from what the Founders intended. . .").

Because of the abolition of indirect election, and the rise of careerism in the Senate (among other things), the difference between the House and Senate has waned.<sup>289</sup> Senators still have longer terms, but six years pass quickly enough and senators, no less than House members, are fearful of losing their seats.<sup>290</sup> Where public opinion is strong and visible, senators generally fail to resist it.<sup>291</sup>

Moreover, we need not assume that national initiative will itself lack deliberation and coolheadedness. To the extent national initiative promotes a deliberative process, concern about the Senate bypass becomes even more attenuated.<sup>292</sup>

### Too Risky

The states provide laboratories for experimentation,<sup>293</sup> and failure in any one is not catastrophic. Initiatives in a given state cannot destroy the national economy, or national security, or the nation's social fabric. National initiative involves higher stakes.

Professor Black makes this point by way of medical metaphor. He considers national initiative "deeply invasive and hazardous,"<sup>294</sup> and opines that "no competent doctor would perform comparably

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289. See John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 289 (1999); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985).

290. See Will, *supra* note 288 (Senators, "almost as much as house members, are in a constant campaign mode" and "subservience to [public] opinion . . . is at least as pervasive in the Senate as in the House.").

291. See, e.g., ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 151-52, 158-59, 288-90 (1989) (noting impact of polling data on senators votes' on Bork nomination); Overby et al., *Courting Constituents? An Analysis of the Senate Confirmation Vote on Judge Clarence Thomas*, 86 AM. POL. SCI. REV. 997, 1002 (1992) (same with respect to Thomas nomination). This is not to suggest that representatives are always responsive to the views of their constituents. When the public is not vigorously engaged, Congress is far less likely to be responsive. And Congress will sometimes directly defy the will of the public, albeit as quietly as possible. See Michael Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L. J. 677, 679 (1993) (noting "Senate's 'midnight pay raise' of 1991").

292. One other distinctive constitutional feature of the Senate is its exclusive responsibility for certain actions—confirming presidential appointments, ratifying treaties, and trying impeachments. However, this feature would be unaffected by national initiative. Even assuming the Framers had good reason to give the Senate special responsibilities, and that these reasons retain their vitality today, national initiative poses no threat to them.

293. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

294. BLACK, *supra* note 262, at 108.

drastic surgery on the ground that it might do a little good to a patient not very sick.”<sup>295</sup> He cautions that our representative government is “very, very far from being so defective as to justify major and risky surgery”<sup>296</sup> and “[o]ur representative democracy can and . . . will respond to whatever energy, conviction and knowledge the American people can bring to choosing representatives and to presenting to those representatives their desires and thoughts.”<sup>297</sup>

If this last observation seems quaint, one must remember that it was written two decades ago—two decades that brought check-bouncing, post-midnight pay hikes, government shut-downs, a partisan presidential impeachment, and a campaign finance system widely perceived as corrupt.

If Professor Black evinces overconfidence in the prospect of representatives reforming representative government, he may also exaggerate the risk of the national initiative. He worries that it could destroy integral parts of our constitutional scheme. He notes, for example, the delicate power of Congress to reduce or expand the jurisdiction of the courts, and asks rhetorically: “do you think well of a scheme that would subject powers over the jurisdiction of the federal courts to the hazard of agitation for some three million signatures, followed by a plebiscite?”<sup>298</sup>

Professor Black did not consult the experience with state initiatives, where voters have not upset basic structures of government.<sup>299</sup> And if they did? Unless one assumes that our current system is perfect, we need not cringe at the thought that American citizens, after a serious deliberative process, may decide to change things like courts’ jurisdiction (subject to revisiting by either the legislature or the People, at any point down the road).

Another weakness in Professor Black’s surgery analogy lies in his incomplete diagnosis of the ailment. If we focus only on the state of

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295. *Id.*

296. *Id.* at 117.

297. *Id.*

298. *Id.* at 115.

299. And the risk may well be smaller in national initiatives than statewide initiatives. As one commentator observes:

National initiatives will undoubtedly be subjected to much greater scrutiny than state initiatives. Who is backing a bill and why, is more likely to be exposed, and the actual strengths and weaknesses of any particular measure surely will receive even greater attention than is now the case in the states. Reason suggests, then, that the results on national initiatives will be at least as commendable as the results we have gotten in the states.

Allen, *supra* note 110, at 1041.

the union narrowly construed, e.g., economic growth and foreign affairs, we will surely conclude that America requires no major surgery. If we focus instead on whether self-government has matured our people and polity, we may reach a different conclusion.

Today, even educated and once-active citizens fail to register or to vote, much less to keep abreast of public affairs. One could cite such apathy as evidence of the folly of citizen lawmaking, but this conclusion perpetuates a Catch-22. People who feel detached from government will not become trained in the exercise of self-government. The relegation of public issues to government officials has caused the People's civic muscles to atrophy through disuse.

Overwrought politicians sometimes declare America to be on the verge of collapse.<sup>300</sup> Such apocalyptic predictions should not blind us to a more realistic risk: a continued deterioration of our polity to the point where we have self-government in name only.<sup>301</sup>

So understood, the condition of our country is worse than Professor Black implied (not to mention worse than it was when he weighed in). Additionally, the risks of direct democracy are not as great as he implied, at least if we were to adopt DA rather than the comparatively primitive initiative proposal Black critiqued.<sup>302</sup>

All that said, DA would establish such far-reaching change that it would make sense to experiment with its procedures in a few states before deciding whether to adopt it nationwide. That way we would see whether the Electoral Trust could perform its functions as envisioned, and whether the various procedures set forth by DA would indeed result in a fairer, more deliberative process. Needless to say, reforms do not always turn out as hoped, and sometimes produce negative unforeseen consequences.

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300. See, e.g., Maureen Dowd, *Liberties; Keyes Goes Kaboom*, N.Y. Times, Dec. 5, 1999 at 4-17. (noting presidential candidate Alan Keyes' "apocalyptic declarations," including: "[b]race yourself for immediate disintegration").

301. See Broder, *supra* note 1 (citing astonishing level of apathy among Americans as revealed in recent national poll, and noting that the pollsters, the respected Peter Hart and Robert Teeter, "emphasized that the poll represents a sense that government no longer belongs to the people").

302. Here, two points warrant repeating. First, DA would not replace representative government. It is not as if the people at large would suddenly draft the federal budget or decide troop deployments. Second, DA explicitly affirms the availability of judicial review—initiatives that violate the Constitution will be struck down.

## 2. *Majority Tyranny Revisited*

Earlier we argued that the fear that direct democracy will tyrannize minorities is exaggerated.<sup>303</sup> However, that argument was in the context of state initiatives. Shouldn't we be more fearful of majority tyranny by *national* initiative?

To be sure, one key safeguard against state oppression, freedom to migrate to another state, is not available where national initiatives are enacted. However, America's large, heterogeneous population mitigates against oppressive majoritarian action at the national level. No stable majority emerges across all issues. People know they will sometimes be in a minority, and thus may hedge their bets, by exercising restraint when they are in a majority.<sup>304</sup> As James Madison reminded us, an individual state is far more likely to be dominated by a single tyrannical majority faction than is the nation.<sup>305</sup> Indeed, while there remain instances of what might be called majority tyranny in some states,<sup>306</sup> this is rarely the case at the national level.

Apart from the safety in numbers, it may be that the American people are more virtuous than they are given credit for. I say this, of course, not unmindful of the nation's shameful historical treatment of blacks and other minorities. Note, however, that much of the mistreatment occurred at the state and local rather than national level.<sup>307</sup> (Moreover, most of it was effected<sup>308</sup> by legislatures rather than the People at large.)

## 3. *The Special Risk of Constitutional Amendment*

Earlier we noted that one safeguard against improper citizen

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303. See *supra* text accompanying notes 115-19.

304. Because each citizen sees herself in the minority on some issues, each is likely to embrace—consciously or unconsciously—a general idea of minority rights. For example, a conservative Catholic, tempted to constitutionalize his values and ban contraception, will recognize the dangers (and perhaps also the unfairness) of doing so when a very different majority threatens a constitutional amendment that would take away his gun. Recognizing that their party will not always be in power, most people want limits on governmental authority, out of long-term self-interest if not out of respect for others. Strong majorities would likely always rally behind some protection of minority or individual rights to property, privacy, free exercise of religion, due process, equal protection, and so on.

305. See THE FEDERALIST NO. 10, *supra* note 21, at 83-84.

306. Laws criminalizing the sexual intimacy of homosexuals seem like a reasonable candidate for that designation.

307. HIRSCH & AMAR, *supra* note 6, at 24.

308. *Id.* at 37.



lawmaking is judicial review—laws that contravene the Constitution will be overturned. How about initiatives that *change* the Constitution?<sup>309</sup> Even if we accept the risks of national initiatives that produce statutes, shouldn't we dread the prospect of citizens amending the federal Constitution?<sup>310</sup>

One response is that not everything in the Constitution is amendable: certain key provisions cannot be erased without essentially abolishing the Constitution itself.<sup>311</sup> Since the Constitution recognizes popular sovereignty as an inalienable right of the People,<sup>312</sup> then popular sovereignty cannot be amended away. "We the People" can alter our government provided that we do not undermine the very basis of our right—or the right of future generations—to so act. This means, at a minimum, that national initiative could not amend the Constitution to freeze all or part of it.

Other amendments, too, would impermissibly impede popular sovereignty. We cannot abolish elections, or eliminate free speech, or reduce its scope to the point that self-government becomes impossible.<sup>313</sup>

Perhaps such limitations on amendment by initiative will be deemed trivial. National initiative is less likely to undermine popular sovereignty in the ways described above than to trample the rights of minorities in various invidious ways. I have argued that this fear is exaggerated, but what if I am wrong? Suppose a nationwide majority

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309. These DA explicitly exempts from judicial review, except in the case of fraud. Proposed DA, § 3(F).

310. In Part I, I argued that the People already enjoy the inalienable right to amend the Constitution through national initiative. Nevertheless, by formalizing this right, and providing a mechanism for its exercise, DA would obviously exacerbate the risks associated with this right.

311. See 1 THE WORKS OF JAMES WILSON, *supra* note 76, at 304 (arguing that the People may make any amendment except one "contrary to the act of original association").

312. See *supra* text accompanying notes 51-85.

313. To be sure, these restrictions cannot be externally enforced. See AMAR & HIRSCH, *supra* note 6, at 21 (noting that since "the People could—legitimately—amend the Supreme Court (or its powers of judicial review) out of existence," the courts generally lack power to review amendments passed directly by the people). This conclusion may seem surprising, but is inevitable. After all, *someone* must be the ultimate arbiter of the Constitution; in a regime where the people are sovereign, that power falls to them. By analogy, in England certain actions are off-limits to Parliament, but Parliament remains the ultimate arbiter. The principle—sovereignty—is the same in America, except here the People are the sovereign body. The fact that limits on constitutional amendments by initiative cannot be externally enforced does not render the limits meaningless. Parliament generally respects limits on its authority: why assume the American people would do otherwise? The restrictions on amendment should guide deliberation.

deemed homosexuality a crime punishable by incarceration? Or, perhaps, resegregated schools? Or stripped from the Constitution any semblance of a right to privacy?

Under current law, the Constitution's Equal Protection Clause and Due Process Clause prevent these sorts of actions: if Congress or a state passes the kinds of measures described above, the courts will declare them unconstitutional. What happens, though, when a zealous majority uses national initiative to repeal the Equal Protection Clause and other foundational constitutional protections?<sup>314</sup> Can we afford to take the chance that certain classes of citizens would be oppressed?

The flaw in this attack is its assumption that a representative regime poses no such risk. Representative government, not citizen lawmaking, protected slavery and Jim Crow. The risk lies not in self-government, but in government: no regime is perfect. A regime that supplements representative democracy with citizen lawmaking at all levels is not utopian but should not be compared to some utopian ideal. If our citizenry and polity have not and will not achieve civic maturation under a representative regime, we should give serious thought to putting our *selves* into self-government. We should not be deterred by the possibility that direct democracy (like representative democracy) will be severely flawed, or the certainty that it will be imperfect.

In any event, the drafters of the National Initiative For Democracy were sensitive to the heightened risk of constitutional amendments. Accordingly, the proposed constitutional amendment stipulates that initiatives that modify constitutions or charters require affirmation in two elections separated by at least six months.<sup>315</sup> The second election, which will likely attract a healthy dose of media attention, should enhance the deliberative process and safeguard against ill-conceived amendments.

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314. Again, though, it is extremely unlikely that anything resembling this parade of horrors would actually transpire. As an empirical matter, citizen lawmaking at the state level has not unleashed majority tyranny (where it is far more likely to occur than at the national level), and many states permit citizens to amend their state Constitution through popular vote.

315. Proposed Deomocracy Amendment to the Constitution §2, at <http://www.ni4d.org> (last visited April 7, 2002) ("Proposed Democracy Amendment").

## V. Means of Enacting DA

Because the crafters of DA are convinced that elected representatives would never enact it, they have sought other means of enactment.<sup>316</sup> Initially they sought to utilize the initiative process within a single state, asking the voters of that state to approve a measure enacting DA within its own borders and creating the Electoral Trust to promote it nationwide. That effort was struck down by the Supreme Court of Washington,<sup>317</sup> and Philadelphia II now pursues a different means of enactment.

As noted, the group will now formally present to the United States electorate, in ballot form, two measures simultaneously: a constitutional amendment and a legislative act (DA). The amendment establishes the legitimacy of the concurrent act, and creates the Electoral Trust to administer the system of nationwide initiative provided for by the concurrent act. The package, called the National Initiative For Democracy (henceforth "NID"), will take effect when it receives votes from registered voters equaling fifty percent of the number of votes cast in the most recent presidential election. The measure must, however, gain the requisite support within seven years of its date of submission, and citizens who vote in favor of the amendment may withdraw their vote at any point prior to its adoption.<sup>318</sup>

Can a constitutional amendment be adopted directly by the American people in this fashion? As I have argued in Part I, and Professor Amar and I have argued elsewhere,<sup>319</sup> the Constitution recognizes the inalienable right of the American people to amend the Constitution directly through majority vote. However, as Professor Amar and I observed, not all purported means of expressing majority preference are legitimate. We noted, among other things, the Framers' respect for majority "judgment" as opposed to mere "will," and argued that any process of direct amendment must safeguard against rash or transient action.<sup>320</sup>

Before assessing whether NID's direct vote mechanism conforms to these criteria, we must ask whether it meets the *sine qua non* of any

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316. See GRAVEL & KEMNER, *supra* note 199, at 35 ("If history be our guide . . . there is little likelihood representative government will bring forward [DA].").

317. Philadelphia II v. Gregoire, 128 Wash. 2d 707; 911 P.2d 389 (1996).

318. Proposed Democracy Amendment § 7.

319. AMAR & HIRSCH, *supra* note 6, at 5-19.

320. *Id.* at 26-27.

direct amendment: will it necessarily reflect the will and judgment of the *majority*? Here, things get tricky. There is, inescapably, this question: majority of *what*? NID calls for a majority of the number of voters in the most recent presidential election.<sup>321</sup> It may be improper to define the relevant polity in this fashion. Citizens are entitled not to vote without forfeiting their citizenship. This problem can be solved by changing the criterion for NID passage to half of all *registered* voters.

A second question arises: what if voters wish to change their minds? After all, seven years is a long time.<sup>322</sup> NID appropriately addresses this issue by authorizing voters to rescind their vote at any time prior to passage.<sup>323</sup> As a corollary, NID might stipulate that the majority voting to adopt it must be in place for a certain period of time. Thus, for example, NID may take effect a year after a majority has approved it—provided that it remains a majority, i.e., there have not been sufficient rescissions to take support below a majority.

With these changes, NID seems to present a reasonable means of adoption of a constitutional amendment. It sets the bar high in several respects: requiring substantial support by defining the relevant majority in an inclusive way; ensuring that support is relatively stable by limiting passage to seven years (as some Article V amendments do); and further ensuring stability by permitting rescission at any point along the way, including for a period after the amendment initially achieves majority support.

Nevertheless, it would be preferable if nationwide initiative were passed as a statute by Congress (or an amendment pursuant to Article V procedures), thus avoiding any debate about the propriety of its enactment.<sup>324</sup> It is not inconceivable that Congress would deprive itself of its monopoly over national lawmaking. Remember term limits. Term limits invade the turf of representatives far more

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321. Proposed Democracy Amendment § 7.

322. This is also a problem in connection with the Article V amendment, where *states* may wish to rescind their support for an amendment. See *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PA. L. REV. 494 (1978).

323. See Proposed Democracy Amendment § 7.

324. To be sure, it is unclear whether Congress has the authority to enact NID as federal legislation. Congress might have such authority pursuant to Article IV's Guarantee Clause, but arguably that clause grants power to the President, not to Congress. See Adam Kurland, *The Guarantee Clause as a Basis for Federal Prosecutors of State and Local Officials*, 62 S. CAL. L. REV. 367, 416 (1989) ("Among the powers granted to the federal government, those granted in Article IV are unique because they are not assigned to any particular branch of government.").

than national initiative: term limits cost representatives their jobs. Nevertheless, the representatives of Utah enacted term limits for themselves<sup>325</sup> and the United States Congress came reasonably close to doing so.<sup>326</sup>

Representatives who want to keep their jobs badly enough, and who understand that direct democracy supplements rather than replaces representative democracy, might support nationwide initiative if sufficient public pressure were mounted. The legislative enactment of nationwide initiative would mark an appropriate beginning of the envisioned partnership between representatives and the People.

Again, though, the case for adopting this amendment (regardless of the means of doing so) would be greatly strengthened if the initiative procedures it implements were first experimented with in some states.

### Conclusion

In a ballyhooed article, Francis Fukuyama argued that the fall of communism marked “the end of history,” or at least a consensus that liberal democracy was *the* proper form of government.<sup>327</sup> He subsequently clarified his thesis:

liberal democracy may constitute the “end point of mankind’s ideological evolution” and the “final form of human government . . . .” That is, while earlier forms of government were characterized by grave defects and irrationalities that led to their eventual collapse, liberal democracy [is] arguably free from such fundamental internal contradictions.<sup>328</sup>

Fukuyama may have overstated the case. American self-government depends on, and was partly designed to achieve, a more mature citizenry and polity. This has not happened. Whether or not one characterizes this failure as a “contradiction,” our ideological evolution remains incomplete. Mankind may have arrived at democracy as the only legitimate form of government, but the precise form of that democracy remains an open question.

I have argued that a more direct democracy could be an important means of promoting civic maturation. For those who

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325. UTAH CODE ANN. § 20A-10-201 (2001).

326. Of course, the experience with term limits might be viewed more skeptically. Even in the face of popular support of term limits, and the pledge of the majority party to enact them, term limits did not become law.

327. Francis Fukuyama, *The End of History*, 16 NAT’L INTEREST 3 (1989).

328. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* xi (1992).

agree, it may be time to start thinking about possible blueprints.