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Men Are Not Angels: The Realpolitik of Direct Democracy

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MEN ARE NOT ANGELS: THE REALPOLITIK OF DIRECT DEMOCRACY AND WHAT WE CAN DO ABOUT IT*

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I. INTRODUCTION

My task is to compare the processes of American representative democracy, or deliberative democracy, with those of direct democracy, or direct initiative lawmaking. By direct democracy I mean a form of lawmaking that allows a state's citizens to initiate amendments to statutes or constitutions for public consideration through a referendum. Included within this definition are systems that permit opportunity for legislative action prior to a referendum.

Comparing representative democracy and direct democracy involves more than an acontextual analysis of the steps in each process. Lawmaking processes are the exercise of real power. They regulate behavior, redistribute wealth, and indicate who has power in society. They also relate our own history and offer views of human conduct. "[W]hat is government itself," Madison wrote, "but the greatest of all reflections on human nature."[1] To compare these processes, we must explore not only their

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I thank Willamette Law Review's editors for the opportunity to speak at the Symposium and to develop my thinking about initiative and legislative processes. I would also like to thank Professor Hans Linde for his ever keen and practical insights and Joyce Talmadge, Fritz Schwarz, and Karen Burstein for providing comments on the text. Two Hofstra law students, Elaine Sammon and Diane Corrigan, provided extremely valuable research assistance. Finally, as always, I must thank Hofstra Law School and its Dean, Stuart Rabinowitz, for their generous support of this effort.

1. THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed., 1961).

steps, but their purposes and underlying premises.

Although limited to twenty-four states, direct democracy affects us all.[2] American direct democracy, as it has evolved and most recently has been used, is a criticism of representative democracy—the form of government under which we all live. Proponents of direct democracy see it as the tonic for the ills of representative democracy.

Direct democracy is a product of the Progressive Movement, which sought to limit the power of increasingly powerful state legislatures at the end of the Nineteenth and beginning of the Twentieth Centuries. It is also the product of an incorrect utopian view of human conduct. Simply put, Americans left to their own devices do not know and cannot champion the public good over their own views or interests. Left by themselves, people usually and naturally regard the public good as synonymous with their own views or interests. Pursuing these views or interests leaves them little time or opportunity to do more.

If true, this view of human conduct strips direct democracy of its virtue and exposes it as a process through which people can pursue their goals without any of the deliberative or representative protections afforded by indirect democracy. It provides no protection from the majority's impatient, heated, or foolish will, nor, perhaps to Madison's surprise, does it protect against an organized minority. Absent from this process is the representative, accessible, and deliberate characteristics of even the worst American legislatures.

Despite this view of direct democracy, which leads me to oppose its institution in any state, I cannot imagine a state easily abandoning it. Thus, arguing for an end to direct initiatives in states that have them is not useful. Instead, I suggest changes to the direct initiative processes that may afford more protection from its greatest dangers.

In making various comparisons between the processes of direct and representative democracy, I heed the advice of Machiavelli: "[S]ince my intention is to say something that will prove of practical use to the inquirer, I have thought it proper to represent things as they are in real truth rather than they are

2. Tables A and B set forth as an Appendix to this Essay reflect states that have forms of direct democracy and the petition and voting requirements for each.

imagined."[3] Despite my commitment to representative government,[4] I am not a legislative rococoist attempting to beautify something ugly. In 1997, I wrote about my beloved New York State legislature, where I served as the Senate Democrats' chief counsel for six years:

> The Legislature's practices violate every principle of good lawmaking: they exclude most of the people's elected legislators from the process, squelch deliberation and the injection of new ideas, and deny the people any meaningful say in legislation or even the information they need to hold their elected officials accountable.[5]

I emphasize this point because I share Professor Richard Briffault's concern that any comparison with the legislative process has to be with actual lawmaking, not an idealized model.[6] But with imperfect legislative processes as the point of comparison, direct democracy still does not provide procedures as accessible or deliberative as representative democracy.

II. WHY ARE WE TALKING ABOUT THIS?

Twenty-four state constitutions authorize direct initiative lawmaking authority. Of these states, nineteen adopted their initiative lawmaking authorization during the Progressive Period.[7] One of these states, Montana, adopted the authority for direct statutory amendments in 1906 and for direct constitutional amendments in 1972.[8]

In almost all of these states, direct democracy is an easy process. The signature requirements are low, and enactment requires only a majority of those voting on the question. In Oregon, for example, statutory amendment by initiative requires a petition signed "by a number of qualified voters equal to six percent of the total number of votes cast for all candidates for Gov-

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3. NICCOLO MACHIAVELLI, THE PRINCE 90 (Penguin ed., 1981).

4. ABNER J. MIKVA & ERIC LANE, THE LEGISLATIVE PROCESS XXIV (1995) [hereinafter MIKVA & LANE, THE LEGISLATIVE PROCESS]; ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 189 (1997).

5. Eric Lane, *Albany's Travesty of Democracy*, 7 THE CITY J. 49 (1997).

6. *See* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347 (1985).

7. *See infra* text accompanying notes 20-31.

8. CONGRESSIONAL RESEARCH OFFICE, CITIZEN INITIATIVE PROPOSALS APPEAR ON STATE BALLOTS 1976-1992 26 (1995) (hereinafter CRS REPORT).

ernor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition."[9] That number changes to eight percent for direct amendment of the Oregon constitution.[10] Additionally, either type of initiative becomes law on the basis of the support of a majority of those casting their votes, not on the basis of a majority of those registered to vote.[11] On the other hand, for the legislature to enact a statute in Oregon, the constitution, like those of most states, requires the votes of a majority of its entire membership.[12]

In Wyoming, a state in which an initiative process was adopted in 1968, signatures equaling fifteen percent of qualified voters and a majority of the total number of voters voting in the election is required.[13]

However, this Symposium is not concerned with the number of states authorizing initiative lawmaking or the details of their processes. Rather, it is concerned with the increase in the use of initiatives during the last twenty years to enact controversial policies into law. Between 1976 and 1992, there were 414 attempts to amend either statutes or constitutions through direct initiatives, 176 (42.5%) of which passed. This number of initiatives is about two-and-one-half times the number of initiatives (165) occurring between 1958 and 1975.[14] Furthermore, the number of initiatives is rising dramatically. For example, according to the *New York Times,* there were ninety citizens' initiatives in 1996 alone.[15]

More importantly, the initiatives of the last several decades have included an increasing number of controversial topics as initiative supporters have become dissatisfied with a perceived failure of legislatures to enact their programs into law. Such programs have included initiatives affecting voters' rights, gays, immigrants, taxpayers, minorities, crime victims, and the termi-

9. OR. CONST. art. IV, § 1(2)(b).

10. *Id.*

11. OR. CONST. art. IV, § 1(3)(b).

12. OR. CONST. art. IV, § 19.

13. See Table A set forth in the Appendix.

14. CRS REPORT, *supra* note 8, at 6. By way of further comparison, during the 18 years (1904-1921) in which the direct initiative process was being adopted by the bulk of states that now authorize it, 357 attempts at direct initiatives occurred.

15. B. Drummond Ayres, Jr., *Voters Facing a Record Year for Initiatives*, N.Y. TIMES, Oct. 24, 1996, at A1.

nally ill. Initiatives also have addressed auto insurance rights, abortion, and language. Such activity raises concerns over the initiative lawmaking process.

The cost and professionalization of the initiative process has created additional concerns. Initiatives are now a business, in which the people's role is almost insignificant. This view is typified by an observation from the *Denver Post*:

> [T]he notion of the initiative as a populist tool against the monied interest has been turned on its head in Colorado in the past decade since the U.S. Supreme Court struck down a state law that prohibited paying people to circulate such petitions .... There is a great deal of irony in using paid professionals to put a measure on the ballot that would devastate nonprofit and charitable groups. Hiram Johnson must be spinning in his grave to see the initiative process turned against the very grassroots organizations the Progressives sought to empower.[16]

Similarly, *USA Today* reported that more than $200 million was spent on initiatives in 1996, primarily for paid petitioners and television advertising,[17] while the *Cincinnati Enquirer* reported that proponents of an initiative to legalize casino gambling "spent about $5.4 million, including $2.7 million to produce and air TV commercials. The rest went to circulate petitions to get the initiatives on the ballot and pay for campaign literature, lawyers, consultants and polling."[18]

Not only do business interests resort to paid petition circulators, or bounty hunters, government reform groups such as Common Cause and the League of Women Voters have also relied on bounty hunters for their signatures.[19] This use of bounty hunters, who usually reside outside the state, can be quite seamy. To illustrate, a *Denver Post* editorial revealed an effort to garner signatures by state term limit supporters who supported a national constitutional convention, explaining:

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16. Bob Ewegen, *De Tocqueville's America is Alive and Well in Colorado*, DENVER POST, Oct. 14, 1996, at B11. The Supreme Court decision referred to is *Meyer v. Grant*, 486 U.S. 414 (1988).

17. Bill Varner, *Citizens Initiate a Record 94 Ballot Questions*, USA TODAY, Oct. 17, 1996, at 4A.

18. Sandy Theis, *Gambling Backers Have Money on Their Side*, CINCINNATI ENQUIRER, Oct. 25, 1996, at A1.

19. Ernest Tollerson, *Hired Hands Carrying Democracy's Petitions*, N.Y. TIMES July 9, 1996, at A1.

> Testimony in trial to determine if the "con-con" initiative would be placed on the ballot demonstrated that paid petition circulators financed by the out of state interests who bankrolled this latest drive repeatedly glossed over the fact that it called for a U.S. constitutional convention. Instead, citizens testified that they were only told that they were *signing a petition supporting term limits.*[20]

III. A HISTORICAL DEFINITION OF INITIATIVES

The direct initiative is a product of an explosive period in American history referred to as the Progressive Period. Some description of this period is needed to provide a context for understanding the purposes and underlying premises of direct democracy in the states in which it was then adopted.

This was a period of great social turbulence as the country began its transformation from rural to urban, agrarian-mercantile to industrial, aristocratic to democratic, small to large, slow to fast, middle class to working class or peasant, Anglo-Saxon to European, Protestant to a mixture of religions, and religious to secular. An economic tradition that, at least in theory, defined success based on personal character changed to a tradition that based success on strength and guile alone. Finally, the country changed from a political tradition that claimed to honor the disinterested citizen government participant to a system where gaining a piece of the pie through parties, bosses, legislatures, and political professionals became an accepted approach to governance.[21]

From this period flow at least two narratives. The first is the tale of the small farmer trampled by the robber barons, the civility and community of rural life fatally soiled by the dirt and materialism of urban life, the craftsmen overrun by new technology, and the civic-minded smitten by the self-interested in both economic and political spheres.

The second is the tale of nativist opposition to immigrant masses, Protestants opposed to Catholics and Jews, and, as for-

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20. Editorial, DENVER POST, Sept. 1, 1996, at F2 (emphasis in original).

21. *See* RICHARD HOFSTADTER, THE AGE OF REFORM 9-11 (1955); *see generally* MATTHEW JOSEPHSON, THE ROBBER BARONS (1962); JAMES A. MORONE, THE DEMOCRATIC WISH (1990); ROBERT H. WIEBE, SELF RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY (1995).

mer slaves spread throughout the country, whites against blacks. Old wealth resented new wealth, and those with economic and political power oppressed those without. In short, the defenders of the existing faith battled against change.

During this period, lawmaking transformed from active courts and quiescent legislatures to active legislatures.[22] This change reflected the demands of the social and economic changes just outlined. As America became crowded, diverse, and economically complex, individual efforts alone, at least for an extraordinarily large percentage of the population, no longer sufficed. Organization of interests became essential for the protection and advancement of the people. In this environment of limitation, competition between such organizations or groups for resources and opportunities became endemic.

According to legal historian Lawrence Friedman: "Organization was a law of life, not merely because life was so complicated, but also because life seemed to be a competitive struggle, jungle warfare over limited resources . . . ."[23] Legislation flourished in these conditions. As Willard Hurst observed:

> Legislation bulked larger in social regulation when more numerous and varied interests began to press claims for attention, and when politically effective opinion sensed a need to bring more factors into policy calculations. In that context both petitioners and lawmakers began to realize the process implications of the open-door jurisdiction of the legislative branch in contrast to the narrower avenues of access to judicial lawmaking.[24]

This transformation of lawmaking also has its opposing narratives. The first is the tale of corrupt state legislatures populated by illiterate representatives and controlled by party leaders and robber barons such as Jay Gould, who supposedly bragged, "I wanted the legislatures of four states, so I made them with my own money."[25]

The second tale concerns a loss of power and prestige by the nation's long dominant Protestant economic and political lead-

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22. *See* MIKVA & LANE, THE LEGISLATIVE PROCESS, *supra* note 4, at 5-12.

23. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 339 (2d ed. 1985).

24. J. WILLARD HURST, DEALING WITH STATUTES 12 (1982) (footnote omitted).

25. MORONE, *supra* note 21, at 107.

ers. As described by historian Richard Hofstadter: "Progressivism, in short, was to a very considerable extent led by men who suffered from the events of their time not through a shrinkage in their means but through the changed pattern in the distribution of deference and power."[26] These men included the members of the bench and bar who were vested in the judge-made law of their time and often horrified by changes brought by statutory law.[27] As explained by Roscoe Pound: "It is fashionable to point out the deficiencies of legislation and to declare that there are things that legislators cannot do try how they will. It is fashionable to preach the superiority of judge-made law . . . ."[28]

Regardless of one's interpretation of this transformation, the thrust of the Progressives' political agenda, which included direct democracy, was to weaken the growing legislative strength. Professor Morone described their agenda aptly: "[The Progressives'] democratic reforms were all aimed at minimizing, even spurning, the role of the representative intermediaries that stood between the public and its government—parties, legislators, private interests, ultimately politics itself."[29]

IV. "THE GREATEST OF ALL REFLECTIONS ON HUMAN NATURE"

The direct democracy movement was not, at least in its advocacy, simply a nihilistic attack on the reigning institutions of power. It was not posited merely as an alternative to representative democracy, but as means for capturing the civic spirit of American citizens. Premised on a view of human conduct unlike that of representative democracy, "[i]t was not," according to Professor Morone, "merely a negative vision, restricted to razing the party state. Along with popular participation came the restoration of the classic republican constituency. Reformers would

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26. HOFSTADTER, *supra* note 21, at 135.

27. *See* MIKVA & LANE, THE LEGISLATIVE PROCESS, *supra* note 4, at 12-13.

28. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383-84 (1908) (footnotes omitted).

29. MORONE, *supra* note 21, at 112. The adoption of direct democracy in Oregon is part of this story, although each state has its own unique political history. As Morone explained: "At the close of the nineteenth century, Oregon [had] many of the prerequisites for progressive reform: a widely-shared belief that existing political institutions were corrupt; an organized cadre with access to well defined radical ideas; and a population familiar with and receptive to these ideas." *Id.*

put Madison aside."[30] Understanding what it means to "put Madison aside" is fundamental to comparing representative democracy and direct democracy. It references the idea that government is the greatest reflection on human nature. To "put Madison aside," then, means to put Madison's view of human nature aside and substitute a view of human nature justifying direct democracy.

What is Madison's need-to-be-disposed-of view? Simply put, it is that individuals within society organize themselves into factions to advance their individual interests and passions. The term "passion" refers to noneconomic interests such as religion or ideology.[31] Factions are groups "who are united and actuated by some common impulse of passion, or of interest, adverse to the permanent and aggregate interests of the community."[32] In *The Federalist No. 10*, Madison expressed the view of human conduct on which our system of representative democracy is based:

> The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning Government and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property.[33]

It is this view of human conduct that had to be "put aside"

30. *Id.*

31. *See generally* Hans A. Linde, *When Initiative Lawmaking is Not Republican Government: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19-45 (1993).

32. THE FEDERALIST NO. 10, at 57 (James Madison) (J. Cooke ed., 1961).

33. *Id.* at 58-59.

by the advocates of direct democracy in order to justify the very form of government Madison and the other Framers believed would result in the triumph of passions and interests. To acknowledge the Madisonian view of human conduct would have meant that the Progressives were advocating a system in which people's narrow interests and passions would triumph. To avoid this consequence, they returned to the same romantic image of man popularized by the radical Whig republicans to contest British rule at the time of Independence and rejected by the framers as untrue. This was the rustic, sturdy yeoman—frugal, industrious, temperate, and simple.[34] And its Progressive Period progeny was John Q. Public, the Average Man, the Man of Good Will, the Forgotten Man possessing all of the virtues of the sturdy yeoman plus more. As Professor Hofstadter described him:

> His approach to politics was, in a sense, individualistic: He would study the issues and think them through, rather than learn them through pursuing his needs. Furthermore, it was assumed that somehow he would be really capable of informing himself in ample detail about the many issues that he would come to pass on, and that he could master their intricacies sufficiently to pass intelligent judgment.[35]

Therein lies the premise for direct democracy. A man, John Q. Public, possesses the inclination and time to participate continuously in the lawmaking of his nation, state, or locality and is able to discern and pursue the common good without regard to self-interest.[36]

This view of human nature was the wave upon which the ship *Progressive* predictably foundered. John Q. Public, as used by the Progressives, was a necessary construct to rationalize a government that conflicted with representative democracy. As Hofstadter wrote: "Without such assumptions the entire movement for such reforms as the initiative and referendum . . . is unintelligible."[37] As its supporters soon recognized, the move-

34. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 48-53 (1969).

35. HOFSTADTER, *supra* note 21, at 259.

36. Self-interest is not limited to economic benefit. It includes one's view of the world, whether it dictates support or opposition to term limits, gay rights, affirmative action, or physician-assisted suicide. *See* Linde, *supra* note 31, at 19-45.

37. HOFSTADTER, *supra* note 21, at 259.

ment quickly became unintelligible. Walter Lippmann, an early advocate of the selfless man, best described this phenomenon in stating:

> In ordinary circumstances voters cannot be expected to transcend their particular, localized and self-regarding opinions. [We might as] well expect men laboring in the valley to see the land as from a mountain top. In their circumstances, which as private persons they cannot readily surmount, the voters are most likely to suppose that whatever seems obviously good to them must be good for the country, and good in the sight of God.[38]

Likewise, Hofstadter wrote:

> Confronted by an array of technical questions, often phrased in legal language, the voters shrank from the responsibilities the new system attempted to put upon them. Small and highly organized groups with plenty of funds and skillful publicity could make use of these devices, but such were not the results the proponents of initiative and referendum sought; nor was the additional derationalization of politics that came with the propaganda campaigns demanded by referendums.[39]

David Frohnmayer, one of Oregon's most prominent sons, wrote of the most recent emergence of initiatives:

> I hear an ancient noise rising in Oregon. To my ears it is a raucous, ragged sound. . . .
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> It is the reemergence of what I call tribal politics. We've seen it breaking forth on a global scale recently. . . . And we've seen it in the U.S., too, in a slightly different form, in which the tribes are made of people who zealously support narrowly focused political issues. In all my years as a public servant, I've never seen the resulting enmity and anger as strong as it is today in Oregon and throughout the nation. This is a politics in which questions of who is right and who is wrong pales beside the changes being wrought in the nature of our public dialogue. We are seeing the growth of a politics based upon narrow concerns, rooted in the exploitation division of class, cash, gender, region, ethnicity, morality and ideology—a give no quarter and take no prisoners activism that demands satisfaction and accepts no compromise. I believe it

38. WALTER LIPPMANN, THE PUBLIC PHILOSOPHY 41 (2d ed. 1992).

39. HOFSTADTER, *supra* note 21, at 266.

threatens our future.[40]

In addition to John Q. Public's demasking, the corrupt railroad and robber baron legislatures of the last century have been virtually eliminated. This does not mean that today's legislatures are free from direct corruption, or that campaign costs and regulations have not had a corrupting effect on some legislators. However, as legislative activity in every government level has grown exponentially throughout this century because of the public's demand for regulatory and redistributive changes,[41] legislative corruption has diminished.[42]

Stripped of its underlying assumption of human nature, initiative lawmaking is an alternative lawmaking method used primarily by the impatient, and often intolerant, outcomists who want their views to be law, no matter the cost. This may sound harsh, but why else would someone undertake an initiative, but to avoid the obstacles and delays built into our system of representative democracy?

Most people, of course, can point to an initiative-made law that they supported, yet that failed in the legislature. I, for example, favor Oregon's physician-assisted suicide law and California's medical use of marijuana. But that is the point; these are simply *my* policy goals that I want enacted into law. The point of representative democracy is to make sure such policies do not become law unless they are tested by a system that weighs against change. Even the most procedurally deficient legislative bodies provide more assurance of such fairness than an initiative process that structurally separates us, discourages discourse, and emphasizes outcome over process.

I would add one caveat to this point. As a result of my participation in drafting legislative district lines in 1981, I have argued that legislative districting should be outside the province of

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40. David Frohnmayer, *The New Tribalism,* OLD OREGON, Autumn 1992, at 16-19.

41. *See* MIKVA & LANE, THE LEGISLATIVE PROCESS, *supra* note 4, at 11-13.

42. Alan Rosenthal, the nation's leading scholar on state legislatures, premised his book on state legislative ethics, by stating, "legislators and legislatures, on the whole, are ethical bodies, considerably less corrupt than in earlier periods." ALAN ROSENTHAL, DRAWING THE LINE, LEGISLATIVE ETHICS IN THE STATES 5 (1996). My own experience in New York provides additional evidence for this observation. During my six years as counsel to the New York State Senate Minority and in observing the state's processes for thirteen years, I did not observe any legislative misbehavior relating to the enactment process nor significant legislator misbehavior.

legislative authority. In this exercise of legislative power, most legislators fail to recognize interests outside their own. Indeed, because of the unified legislative interest in protecting its own positions from change, the legislative process in such cases denies the protections otherwise available to the public. According to Professor Hans Linde, initiatives are useful in these structural cases.[43] This is an attractive idea, if, as discussed later, it is effected through a strenuous initiative system.

V. THE OBSTACLES AND DELAYS IN THE LEGISLATIVE PROCESS

What then are these obstacles and delays that make legislative bodies so unattractive to "initiators," and why are they part of our lawmaking system? In outline, the process by which legislation is enacted is elementary and familiar. Elected legislators introduce a proposed laws in the form of bills. Bills are sent to committees and, if adopted, may reach the floor of the legislature. If passed there, they are sent to the other legislative house[44] where the same process occurs. If an identical bill is passed by both houses, it is sent to the executive. The executive can either approve or veto the bill. If vetoed, the bill returns to the legislature, which can override the veto by a supermajority.

Although accurate, this simplistic description is unrevealing. The real legislative process is more like "a three-ring circus, with action occurring everywhere and at the same time."[45] At each phase of the enactment process, a bill's progress can be delayed or halted. Advancement requires support from varying numbers of legislative colleagues or coalitions of colleagues, who rarely share each others' exact ideas, concerns, or constituencies. Winning support is the product of numerous factors, including persuasive debate, compromises, favors, trades, political contributions, and political force. Such activity is complicated, difficult to observe, and often hard to digest.

Through this tortuous process, legislation is not only enacted, but legitimized by tempering naked group interests or, in Frohnmayer's words, "tribal passions." These are the same in-

43. *See* Linde, *supra* note 31, at 19-45.

44. The federal and 49 state governments have bicameral legislatures. Nebraska operates under a unicameral system.

45. ALAN ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS PARTICIPATION AND POWER IN STATE LEGISLATURES 160 (1998).

terests and passions that are left unchecked, encouraged, and vindicated by direct democracy. This point is most important because the function of our legislatures is not simply to enact laws, but to arrive at consensus on the nature of demands that ought to be addressed and the manner in which they ought to be accommodated. It occurs through a process of conflict and compromise among broadly representative legislators.

This process is more important than any single statute. It is also the most misunderstood goal of the system because of its complexity and because of the difficulty of heralding process, particularly a process that often leads to no action, over outcome. It is far easier to identify with and measure outcomes than to understand the significance of a messy process that often does not deliver what you want. As explained by Professor Alan Rosenthal:

> David Broder [a nationally syndicated columnist and *Washington Post* reporter]... admonished his colleagues for describing the essential characteristics of the legislative process as failures of the system instead of remarking that they were requisites for democracy. In his view, legislatures are "collecting points for conflicting views." The debate and the conflicts occur as interests and agendas clash, he says, is healthy, not pathological. "We ought not to make it appear as if debate and fights and even impasses are train wrecks," he cautioned his colleagues. Just as conflict [is] inevitable in legislative bodies, so is compromise.... "We don't have to trash deal making; we don't have to trash people who change their positions".... "We have to be willing to say that this is part of the work of representative government."[46]

The "essential characteristics" referred to by Rosenthal were those intended to legitimize representative democracy. These characteristics are representativeness, accessibility, and deliberativeness. All have evolved through various means as the attitudes and demographics of the country have changed, and all are absent from direct democracy.

A. Representativeness

The fundamental and evident difference between direct and indirect democracy is that in direct democracy the people vote

46. *Id.* at 2-3.

directly for or against a law, while in indirect democracy, they vote for representatives who exercise the legislative power on their behalf. The framers purposefully selected representative democracy. Representative democracy was necessary to govern areas larger than towns or villages and was intended "to refine and enlarge the public view."[47] In a manner similar to town meetings, representatives with different and competing voices could be heard and a consensus developed. As Professor Philip Frickey observed:

> It would be useful, I think, to explode one myth—that direct democracy today is somehow analogous to the old New England-style town meeting. Colonial New England town meetings involved the citizenry of very homogeneous little towns. The only persons allowed to participate were property-owners, who were all of the same race, gender, and religious faith. These meetings were tightly run, to allow all entitled to speak to have an opportunity to do so. The meetings were designed to promote consensus.[48]

The need for such a system is greater now than at the beginning of the Republic. As the nation and its states have grown and industrialized, the population has become more disparate in its interests and passions. In such a setting, the importance of a form of government that allows for the consideration of many voices is essential to a fair and stable democracy. While the nation's legislatures are not perfectly reflective of the breadth of its population or its interests, universal suffrage and the removal of many obstacles to the exercise of the franchise have resulted in far more representative legislatures. This in turn legitimizes their decisions, but makes it more difficult to arrive at them.[49]

Direct democracy stands in direct contrast to this model, and it thrives as a result of it. Frustrated by structural and other obstacles (e.g., legislators who are usually less extreme than initiators), initiators can push their agendas through the initiative processes. No deference need be paid to competing interests or passions. A policy preference can become law in most states

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47. THE FEDERALIST NO. 10, at 62 (James Madison) (J. Cooke ed., 1961).

48. Philip Frickey, *The Communion of Strangers: Representative Government, direct Democracy and the Privatization of the Public Sphere,* 34 WILLAMETTE L. REV. 421 (1998).

49. *See generally* MIKVA & LANE, THE LEGISLATIVE PROCESS, *supra* note 4, at 365; ROSENTHAL, *supra* note 45, at 27-32.

simply by a majority of those actually voting on the question[50]—an often small amount. Additionally, because initiative voters need only concern themselves with their own interests or passions, they have little exposure to competing ideas and context for their votes. Legislators, on the other hand, must consider an array of factors in arriving at their decisions, including: the views of their colleagues and constituents; the historical setting for the proposal; the impact on other regulatory or redistributive schemes; and internal politics.

This isolation of initiative voters is often the goal of initiators. They want to reduce debate to emotional appeals and the perceived basic self-interest of their potential supporters. As Professor Julian Eule explained:

> No one would be so naive as to deny that the deliberative ideal breaks down with disturbing frequency. The legislature often has trouble hearing voices from the margin. The Framers' vision, however, combined a deliberative idealism—which inspired representative government—with a pluralistic realism—which prompted cautionary checks. . . .
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> The problem with substitutive democracy is different. When naked preferences emerge from a plebiscite, it is not a consequence of system breakdown. Naked preferences are precisely what the system seeks to measure. Aggregation is all that it cares about. The threat to minority rights and interests here is structural. This is how the system is supposed to work.[51]

Another aspect of representativeness is that it allows people to pursue their own lives without dedicating the considerable ex-

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50. *See* Appendix.

51. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1551 (1990). On this point, Derrick A. Bell, Jr. stated 20 years ago that the use of the initiative raises voting rights issues—that is, it creates situations in which anti-minority views are expressed through initiatives in states where minorities have gained legislative footholds. *See* Derrick A. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV 1, 13 (1978). As Bell explained:

> Throughout this country's history, politicians have succumbed to the temptation to wage a campaign appealing to the desire of whites to dominate blacks. More recently, however, the growing black vote has begun to have an impact and even effected "Road to Damascus" conversions on more than a few political Pauls, some whom even claim "born again" experiences during midterm. This impact may be subverted if voting majorities may enact controversial legislation directly.

Id.

tra resources necessary to participate meaningfully in direct democracy. Contrary to the view of the initiators, most people do not have the necessary interest, time, experience, or knowledge to understand some initiatives and participate in direct lawmaking. As Thomas Cronin wrote:

> Direct democracy processes have not brought about rule by the common people. Government by the people has been a dream for many, but most Americans want their legislators and other elected officials to represent them as best they can and to make the vast bulk of public policy decisions.[52]

Furthermore, as Professor Morone observed: "The ostensibly democratic device clearly favored educated voters who could fathom the complex questions being put to them. . . ."[53] Even this view may be too optimistic, according to the humorist Russell Baker:

> Making sensible judgments on these things would have required bringing a lawyer and accountant into the booth with me. Since there wasn't room enough for three I decided to simplify the problem. So with my first vote, I pulled down "yes" on all bond issues and "no" on all constitutional amendments. Next election I reversed field: "yes" on all constitutional amendments; "no" on all bond issues.[54]

For the most part, people need not concern themselves with daily governance questions. Despite the criticism that legislators do not know any more about legislation than initiative voters, they possess substantially more knowledge about legislation than voters do about initiatives. Professor Rosenthal's extensive study of state legislators illustrated this point:

> Legislators have far more information available to them than do rank-and-file citizens. And they have far greater incentive to make use of it. Moreover, they have probably worked with the issues in question longer, perhaps specializing by virtues of a standing committee assignment. They, or trusted colleagues to whom they can turn, will know the ins and outs of many of the issues that come before the legislature for resolution. Citizens, in contrast, are more apt to be satisfied with their feelings than with the images and slogans

52. THOMAS E. CRONIN, DIRECT DEMOCRACY 225 (1989).

53. MORONE, *supra* note 21, at 124.

54. Russell Baker, *Tips for Votes,* N.Y. TIMES, Nov. 2, 1996, at 23.

that get their attention.[55]

One source of information about which I can provide direct testimony is staff briefings. During my tenure as Counsel to the New York State Senate Democrats, every bill that was addressed by a committee or the Senate was first briefed by the Counsel's staff or the Office of the Committee on Finance and then shared both in writing and orally with Democratic members of the Senate.

Legislators use this information to make judgments about bills based on their own policy preferences. The phrase "their own policy preferences" is not intended to spark debate over whether legislators act as agents or trustees for their constituents. Although such a debate is valuable for framing discussions of legislative activity from a legislator's perspective, it is, for the most part, meaningless.[56] Legislators vote most often based on the merits of an issue, and their judgments are usually quite similar to the mainstream views of their constituents.[57]

A colleague at Hofstra Law School recently raised one final point of comparison on representativeness. Does not the election of representatives suffer the same frailties as those of initiatives in that people know little about their representatives, vote on the basis of party, money dominates, and meaningful debate constitutes jargon, accusation, and institution bashing? Without defending the vices of our election process, this question misses two important points. First, legislators are elected and must be re-elected to continue their positions. Their records are continuously monitored by a myriad of groups interested in legislative outcomes or procedures. Legislators are constantly judged by their records, which also become part of any re-election campaign. Second, an election for a representative is only the first step in a complex process for converting policies to laws. Voting for an initiative, on the other hand, is the first and only step in the initiative process.

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55. ROSENTHAL, *supra* note 45, at 41.

56. *See* MIKVA & LANE, THE LEGISLATIVE PROCESS, *supra* note 4, at 503-07.

57. *See id.*; *see generally* JOHN C. WAHLKE ET AL., THE LEGISLATIVE SYSTEM (1962); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS (1992); ROSENTHAL, *supra* note 45, at 9-11.

B. Accessibility

The second legitimizing characteristic of the American legislative process is its accessibility or openness. Representative government requires public accessibility to insure its accountability, responsibility, and integrity.[58] When legislators introduce legislation, they must think about its impact on constituents, colleagues, and others within the legislative process. "Legislators are on record, not for everything they do, but for quite a lot. They have to defend their records, justify their decisions in terms of constituency interests, and fend off attack if their election is contested."[59] They also have to defend their views to their own colleagues, the wider public, and posterity. This discourages succumbing to personal prejudices, fears, insecurities, and ignorance. It also encourages legislators to justify their position in terms acceptable to their colleagues, constituents, and the community.

Initiative lawmaking is inaccessible. The agenda is set by individuals who want their views to become law and who have no incentive to include people with different views in their agenda setting. In creating a proposal, initiators must be loyal only to their interests and interest groups. This allows initiators to approach issues in a more extreme manner. No opportunity exists for public engagement, only public reaction. Also, voting occurs in the privacy of the voting booth where prejudices remain unchecked. As Professor Eule observed: "[V]oters register their decisions in the privacy of the voting booth. They are unaccountable to others for their preferences and their biases. Their individual commitment to a consistent and fair course of conduct can neither be measured nor questioned."[60] This can make a big difference. As Professor William Adams, an advocate of homosexual civil rights laws, explained following the recent legislative defeat of such a law by the Dade County, Florida

58. These rights are formalized in constitutions and statutes that require, for example, public notice of prospective legislative meetings and legislation, the maintenance of public journals of legislative votes, and open legislative meetings. *See generally* MIKVA & LANE, THE LEGISLATIVE PROCESS, *supra* note 4, Chs. 2, 8.

59. ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY, *supra* note 45, at 43.

60. Aaron Wildavsky, *Representative vs. Direct Democracy: Excessive Initiatives, Too Short Terms, Too Little Respect for Politics and Politicians,* THE RESPONSIVE COMMUNITY 31, 34 (Summer 1992).

legislature:

> After the '77 defeat (of an anti-discrimination initiative) many people left the community. It took twenty years for the people in our community to feel even up to bringing it before our legislative body again. Because what happens when you lose the ballot measure . . . is like people choose against you in a closet. I knew the next day the seven people [members of the legislature] that voted against me, and I knew that there were opportunities for me to talk and explain to them and also find out why you're against me. Is it because you hate me, or is it because you're fearful of civil rights measures . . . . But at least if you don't hate me I can still feel that I can be part of this community, and I can continue to try to persuade you otherwise. When people who have been discriminated against wake up after a ballot measure, they know that for some reason fifty-plus percent of their community has decided they're not entitled to protection from discrimination. And it is important if you want those people to still feel they're a part of the community, and if you still want those people to feel they have a chance and a process to understand why it is these people voted against you. You don't even know who they are. You don't know if it's the person across the street. You don't know which of the five; which of the ten people you see in the line at the grocery store voted against you. And you don't know which of them responded to the last minute brochure which always comes in these campaigns at the last minute, saying, "gays are child molesters," "gays spread diseases," and things like that. Because the votes change at the end, people perceive that some people believe that. And it has a deteriorating, corrosive effect on community. It has a deteriorating, corrosive effect on the belief that the system can be worked with, and that you can get a response.[61]

C. Deliberativeness

Deliberativeness is the third legitimizing characteristic of representative lawmaking and the most undervalued. Deliberativeness is not debate, although debate may be a part of it. Deliberativeness defines those structures and steps of the legislative process (e.g., bicameralism and the executive veto) that slow

61. William E. Adams, Jr., Remarks at the *Willamette Law Review* Symposium: Redirected Democracy: An Evaluation of the Initiative Process (Feb. 28, 1998).

legislative decision making and distance it from the immediacy of legislators' and various constituencies' passions and desires.

Such slowness and screening thwarts the goals of initiators. Their issue is paramount. Debating their issue's significance or their proposed solutions is unimportant. Even after the initiative is on the ballot, the only debate that occurs is an exchange of reductive war cries by both sides.

I offer one example from my own experience as Counsel to the New York City Charter Revision Commission. The Commission was responsible for preparing a new charter proposal to the public for referendum, which it accomplished by holding a series of public meetings and hearings to engender public debate and deliberation. Once the referendum campaign commenced, the debate became: "save the city from unconstitutional government" against "don't let worms out of the can." The latter position was graphically depicted by a television commercial with live succulent night-crawlers escaping a soup can.

A successful deliberative system requires compromise. It is not a zero-sum game. It tries to avoid clear winners and losers and provides continuous hope that another day can bring a different result. Through compromise, bills advance, and the views of competing groups and legislators are tempered and blended together into a statute. Compromise builds consensus. While mythic may be the person who stands on principle alone, from a legislative perspective, "half a loaf" is almost always better than none.

Compromise is also the product of legislative assemblage where legislators become increasingly familiar with each other's views and interests. In short, they come to appreciate other policy views and interests. A former Speaker of the New York State Assembly, Stanley Fink, described this process by stating:

> I went to Albany as a New York City representative, to pursue an urban agenda. But through formal and informal interactions with my colleagues across the state, I began to recognize and appreciate the views and interests of representatives from other areas. The result of this education, was that my advocacy for urban interests was frequently tempered by my understanding of its impact on the interest of others.[62]

62. Interview with Stanley Fink *in* MODERN NEW YORK STATE LEGISLATURE

On a national level, Tennessee Representative Zach Wamp, who was a member of the firebrand House Republican Class of '94, "went [to Congress] thinking that [it] was a bunch of greedy, egotistical members who were out of touch." He later said, "As a class our attitude has changed about Congress .... The general membership of the class believes that members of Congress are decent and good and without ulterior motives."[63]

In contrast, direct democracy does not allow for learning or compromise. Once the petition process begins, the bill cannot be changed. Initiative lawmaking is a zero-sum game. This intolerance for compromise reflects the initiator's goal of "my way or the highway," and with enough money and manipulation, this goal will be met. As Professor Magleby argued: "Voter decision making in direct legislation is typically the result of snap judgments based upon superficial emotional appeals broadcast on television. The legislative process is more deliberative, substantive, and rational."[64]

VI. THE PARADOX OF THE COMPARISON

Bruce Merrill, a "longtime pollster and political observer at Arizona State University," recently said, "The irony is [initiatives] were initially there to protect voters. It's actually become the easiest way for any special-interest group to change the law."[65] While the original purpose for initiatives is disputable, there is little doubt they now serve various impatient special interests. Despite this fact, support for initiatives within initiative states remains strong. However, in non-initiative states, the pressure for introducing an initiative process is, at best, erratic. One reason for such support is that public skepticism of legislatures and legislators remains high. For example, in its report on Oregon's initiative lawmaking, the City Club of Portland wrote:

> Polling in the national press makes clear that a large segment of the public has lost confidence in federal and state legislators and in legislative processes. Legislators are seen as sub-

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107, 118-19 (Gerald Benjamin & Robert T. Nakamura eds., 1991).

63. Carroll J. Doherty & Jeffrey L. Katz, *Firebrand GOP Class of '94 Warms to Life on the Inside*, 56 CONG. Q. WKLY. REP. 155, 163 (1998).

64. DAVID B. MAGLEBY, DIRECT LEGISLATION 188 (1984).

65. Chris Moeser, *Limits Sought on Initiatives; Plan Hampers Voters, Foes Say*, THE ARIZONA REPUBLIC, Feb. 19, 1998, at A1.

> ject to control by special interests concerned primarily about reelection, unresponsive to the people and undeserving of thanks for their public service.[66]

These views are unfortunate, of course, and result from a number of factors, including a low level of civic literacy and a penchant for campaigns to bash the institutions in which they are trying to secure their candidate's membership. This description of legislators is also untrue, leading perhaps to the troubling paradox of people subjectively believing that the objectively less fair initiative system results in greater fairness than the objectively more fair representative system.[67]

Skepticism about legislators is not the only factor that maintains initiative systems. Even some strong critics of initiatives do not want to repeal them. This I think has to do with Americans' perhaps inbred distrust of government and their historical Democratic Wish, characterized by Professor James Morone as the wish for "direct participation of a united people pursuing a shared communal interest."[68]

One recent exchange I had with an initiative state colleague illustrates Morone's observation. This colleague told me of a variety of instances where she felt that bicameralism and several other checks on legislative lawmaking were important and had made a difference in issues about which she was concerned. Conversely, she was also critical of initiatives. In what, at the time, seemed a surprising response to my question of whether she would favor repeal of the initiative system in her state, she said, "Absolutely not." When I asked why, she said, "I just couldn't give it up."

Overcoming such resistance requires more than simply urging the elimination of direct democracy. The following discussion suggests six avenues for improving initiative processes to reduce the effects of factions. However, regardless of the procedural benefits, legislators must be prepared for the ferocious response that follows any suggestion to change the initiative process.[69]

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66. THE CITY CLUB OF PORTLAND, THE INITIATIVE AND REFERENDUM IN OREGON 28 (1996).

67. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 1-5 (1988).

68. MORONE, *supra* note 21, at 5.

69. One striking example of initiator ferocity comes from Arizona. Representa-

A. Narrowing Initiative Subjects

Several states allow initiatives only for statutory amendment. At first glance, it is unseemly and threatening to allow constitutional change through an initiative process that, for example, permits enactment based on a majority of votes. However, such a suggestion only has meaning if there is some clear way to delineate between what is constitutional and what is statutory—a difficult task when looking at state constitutions. A better approach is to follow Professor Linde's suggestion that an initiative system be used only for structural changes. If this is too extreme, initiatives should not apply, at the very least, to local or private laws, dedicated revenues, or appropriation or tax caps.

B. Formulating the Proposal

Before petitions may be circulated, states should require sponsors to file an initiative proposal with a designated state authority. This authority then would provide general public notice of the proposal's receipt and its contents. In addition, it would provide specific notice to the press, elected and governmental officials, and other interested groups or individuals. This would be followed by an opportunity for interested persons to comment at public hearings. The sponsors would be required to reply to those comments in person or in writing. These hearings would become part of the public record. This system apparently was proposed by a legislator in Arizona this year.[70]

While this might not result in dramatic changes to the process, sponsors might moderate their views to accommodate potential supporters, particularly those who oppose the initiative based on the sponsors' rigidity. More importantly, such notice provides an early opportunity for the public to assess and com-

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tive Gardner suggested that the elimination of paying bounty hunters on a per-signature basis and holding hearings on all proposals would "open up the process, limit the influence of special interests groups and give voters more information about initiatives." Chris Moeser, *Recall Targets Rep. Gardner; Group Calls Him Public Enemy of Initiatives*, THE ARIZONA REPUBLIC, Feb. 26. 1998, at B2. Following these suggestions, Gardner was labeled "an enemy to the will of the people," and recall petitions were circulated. *Id.* With a flourish of self-righteousness and the hubris of Dorian Gray, a leader of the recall movement stated, "I'm offended at the arrogance—that [Gardner] would try to wrest this power from the people." *Id.*

70. *Id.*

ment on the proposal. This could also reduce potential deceit by petition circulators.

C. The Petition Process

Following the comment period, petitions for the proposal, in its original or amended form, could be circulated. A substantial signature requirement of approximately fifteen percent of all participating voters in the last gubernatorial election should be required. A lesser percentage would be appropriate if it is based on the number of registered voters. Critics argue that this requirement will further increase the price of initiatives and make them accessible only to the rich. Perhaps this is true, but the public is not competing with the well-resourced. The well-resourced are competing with each other. Raising the percentage requirement may limit the number of ballot initiatives and allow voters a better opportunity to understand them.

States should also require statewide geographic distribution. As demonstrated in Tables A and B, a number of states already have such a system in place. When the numbers are substantial, this requirement improves the representative characteristic of the initiative process.

These suggestions are directed toward a more deliberative and representative initiative process. If initiatives are justified by legislative gridlock or contribution-induced decisions contrary to the public good, the legitimacy of such arguments should at least be tested by a substantial number of knowledgeable voters, not a zealous or deceived few.

Finally, to prevent fraud, instead of paying petition circulators on a per-signature basis, they should receive an hourly wage. Owners of initiative businesses should also bear some responsibility for signature verification. States should penalize such businesses for substantial signature failures and unprofessional behavior by their petition circulators. Some states have proposed a licensing requirement for paid petitioners to help eliminate fraud and deception. At a minimum, states should require paid petitioners to disclose their real names, their employer's name, and how much they are paid.

D. Legislative Review

Once petitions have been certified, initiators should send

their proposals to the legislature. Within a reasonable fixed time, the proposals would be subject to whatever level of deliberation the legislature chooses to allow. Because legislators determine their own priorities, the legislature should not be required to consider an initiative. Otherwise, initiators would control the legislative agenda. If the legislature rejects the initiative proposal by inaction or by a vote, the initiative would then go to referendum at the next general election.

If the legislature enacts a law that amends the proposal, the original proposal should be allowed on the ballot only if the sponsors recirculated petitions and obtained half the number of signatures originally required. Prior signatories could re-sign, but all signatories would have to be informed of the legislative action. This system would improve the process by allowing previous signatories an opportunity to validate the legislature's action by refusing to support the original proposal.

E. The Campaign

From a regulatory perspective, it is difficult to control the nature of campaigns. However, limiting campaign contributions and requiring disclosure of contributors are essential to the process. The government could improve initiative campaigning by providing more opportunities for people to understand the issues. Currently, voters' guides in most states are simply impenetrable.

F. The Vote

Amending a constitution or a statute should require more than a majority of those voting. Most legislative bodies require a majority of the entire number of the representatives. This maximizes representative opportunities and avoids minority-enacted laws. Groups such as the City Club of Portland argued that requiring "the majority of registered voters [to] approve an amendment would enable voters who fail to vote to affect the outcome."[71] This argument is unpersuasive. Why should a proposal become law without a majority consensus? The burden to change the law should lie with the sponsors. It should not be the public burden to stop the change.

71. THE CITY CLUB OF PORTLAND, *supra* note 66, at 37.

VII. CONCLUSION

I am keenly aware of the active tense and sharpness of my remarks. This is not simply an academic exercise. It is a small part of an ongoing struggle to maintain our national hallmark of representative government. The existence or exercise of direct democracy alone will not tumble our governmental walls. But these walls are assailable and are always under assault. As Alexander Hamilton observed, after recounting the agitated history of other democracies: "If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends to liberty would have been obliged to abandon the cause of that species of government as indefensible."[72] I refuse to abandon this cause.

72. THE FEDERALIST NO. 9, at 51 (Alexander Hamilton) (J. Cook ed., 1961).

Appendix

A. Requirements for Initiating and Passing Statutes

State	Signatures Required for Balloting	Votes Needed to Pass
Alaska	10% GD[73] (ALASKA CONST. art. 11, § 3)	Majority (ALASKA STAT. § 15.45.220)
Arizona	10% (AZ. CONST. art. 4, Pt. 1, § 1)	Majority (*Id.*)
Arkansas	8% GD (ARK. CONST. amend. 7)	Majority (*Id.*)
California	5% (CAL. CONST. art. 2, § 8)	Majority (*Id.* § 10)
Colorado	5% (COLO. CONST. art. 5, § 1)	Majority (*Id.*)
Idaho	6%[74] GD (IDAHO CONST. art. III, § 1; *id.* § 34-1805)	Majority (IDAHO CODE § 34-1804)
Maine	10% (ME. CONST. art. 4, Pt. 3, § 18)	Majority (*Id.*)
Massachusetts	3% + 5%[75] (MASS. CONST. amend. XLVIII, Pt. 5, § 1)	3% & majority[76]
Michigan	8% (MICH. CONST. art. II, § 9)	Majority (*Id.*)
Missouri	5% (MO. CONST. art. 3, § 50)	Majority (*Id.* § 51)
Montana	5% (MONT. CONST. art. III, § 4)	Majority (MONT. CODE ANN. tit. 13, ch. 27, § 204)
Nebraska	7%[77] (NEB. CONST. art. III, § 2)	Majority and not less than 35% of total votes cast (*Id.* § 4)
Nevada	10% (NEV. CONST. art. 19, § 2)	Majority (*Id.*)
North Dakota	2% (N.D. CONST. art. III, § 4)	Majority (*Id.* § 8)
Ohio	3% (OHIO CONST. art. II, § 1B)	Majority (*Id.*)

73. In Alaska, before a petition can be circulated, an application bearing the signatures of at least 100 qualified voters must be submitted. *See* ALASKA STAT. § 15.45.030 (1997).

74. Idaho requires 20 qualified electors to sign an application before a petition can be circulated. *See* IDAHO CODE § 34-1804 (1997).

75. Massachusetts has a system in which, before the initiative is placed on the ballot, the legislature has an opportunity to enact the initiative proposal. If the initiative proposal is not enacted and if an additional .5% of signatures are secured, it is placed on the ballot. *See* MASS. CONST. art. XLVIII, Pt. 5, § 1.

76. The majority must equal 30% of the total votes cast. *See* MASS. CONST. art. IXVIII, Pt. 5, § 1.

77. For an initiative to pass in Nebraska, it must receive a majority of the votes cast but not less than 35% of the votes cast at the election. *See* NEB. CONST. art. III, § 4.

State	Signatures Required for Balloting	Votes Needed to Pass
Oklahoma	8% (OKLA. CONST. art. V, § 2)	Majority (*Id.* § 3)
Oregon	6% (OR. CONST. art. IV, § 1)	Majority (*Id.* § 1)
South Dakota	5% (S.D. CONST. art. 3, § 1; S.D. COD. LAWS § 2-1-1)	Majority (S.D. COD. LAWS § 2-1-1)
Utah	10% (UTAH CONST. art. 6, § 1; UTAH CODE ANN. § 20A-7-201)	Majority (UTAH CODE ANN. § 20A-7-201)
Washington	8% (WASH. CONST. art. 2, § 1; WASH. REV. CODE ANN. § 29.79.120)	Majority (WASH. CONST. art. 2, § 1)
Wyoming	15% (WYO. CONST. art. 3, § 52)	Majority of all (*Id.*; WYO. STAT. ANN. § 22-23-1004)

B. Requirements for Initiating and Passing Constitutional Amendments

State	Signatures Required for Balloting	Votes Needed to Pass
Arizona	15% (AZ. CONST. art. 4, Pt. 1, § 1)	Majority (*Id.*)
Arkansas	10% GD (ARK. CONST. amend. 7)	Majority (*Id.*)
California	8% (CAL. CONST. art. 2, § 8)	Majority (*Id.* § 10)
Colorado	5% (COLO. CONST. art. 5, § 1)	Majority (*Id.*)
Florida	8%[78] GD (FLA. CONST. art. 11)	Majority (*Id.*)
Illinois	8% (ILL. CONST. art. XIV, § 3)	3/5 of those voting on amendment or majority of those voting in election (*Id.*)
Massachusetts	3%[79] (MASS. CONST. amend. XLVIII, Pt. 4, § 2)	6% & majority (*Id.* § 5)
Michigan	10% (MICH. CONST. art. XII, § 2)	Majority (*Id.*)

78. Florida's signature requirement is based on the preceding presidential election. *See* FLA. CONST. art. XI, § 3.

79. *See* MASS. CONST. art. IXVIII, Pt. 4, § 5.

State	Signatures Required for Balloting	Votes Needed to Pass
Mississippi[80]	12% (MISS. CONST. art. 15, § 273)	Majority[81] (*Id.*)
Missouri	8% (MO. CONST. art. 3, § 50)	Majority (*Id.* § 51)
Montana	10% (MONT. CONST. art. XIV, § 9)	Majority (*Id.*)
Nebraska	10% (NEB. CONST. art. III, § 2)	Majority and not less than 35% of total votes cast (*Id.* § 4)
Nevada	10% (NEV. CONST. art. 19, § 2)	Majority (*Id.*)
North Dakota	4% (N.D. CONST. art. III, § 9)	Majority (*Id.* §§ 8, 9)
Ohio	10% (OHIO CONST. art. II, § 1A)	Majority (*Id.* § 1B)
Oklahoma	15% (OKLA. CONST. art. V, § 2)	Majority (*Id.* § 3)
Oregon	8% (OR. CONST. art. IV, § 1)	Majority (*Id.*; OR. CONST. art. XVII, § 1)
South Dakota	10% (S.D. CONST. art. 23, § 1)	Majority (S.D. CODIFIED LAWS § 2-1-12)

80. Mississippi requires initiative amendments to the constitution to be sent to the legislature for enactment. If not enacted, they then are placed on the ballot. *See* MISS. CONST. art. IV, § 273(6).

81. For an initiative to pass in Mississippi, it must receive a majority of the votes cast but not less than 40% of the votes cast at the election. *See id.* § 273(6).