

# HOW DEMOCRATIC ARE INITIATIVES?

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**Initiative, n.**, the right of a group of citizens to introduce a matter for legislation directly to the voters by a petition signed by a specified percentage of the voters.<sup>1</sup>

All significant amendments to the Colorado Constitution since the 1930s have originated as ballot initiatives.<sup>2</sup> California, Oregon, and several other states have similar histories.<sup>3</sup> This is a relatively recent change; the initiative right was seldom used for many years after it became available.<sup>4</sup> But in re-

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1. WEBSTER'S NEW WORLD DICTIONARY 695 (3d ed. 1988) (paraphrased).

2. The assertion in the text is the author's opinion on the importance of amendments. See COLO. CONST. art. II, § 30a (official English); art. II, § 30b (barring equality rights for gays); art. V, § 48 (Reapportionment Commission); art. V, § 50 (ban on public funding of most abortions); art. VI, §§ 20, 24, 25 (merit selection of judges); art. IX, § 17 (mandatory funding of public schools); art. X, § 20 (voters' approval required for increases in taxes, debt, or spending); art. XVIII, § 2 (state lottery); art. XVIII, § 9 (legalized gambling in three cities); art. XVIII, §§ 9, 11, 12, 12a (term limits); art. XXVI (ban on nuclear detonations); art. XXVII (Great Outdoors Colorado support for wildlife, open space & recreation); former art. X, § 20 & art. XI, § 10 (ban on public support for 1976 Winter Olympic Games in Colorado).

The alternative ways to amend the Colorado Constitution are by a new convention, never used, and by amendments referred by the legislature for popular ratification, which account for about seventy-one percent of adopted amendments and sixty-three percent of amendments adopted since the initiative became available. See COLO. CONST. art. XIX; percentages computed from data at: COMPILED L. COLO. 1921 (prior to 1912); Dennis Polhill, *Are Coloradans Fit to Make Their Own Laws? A Common-Sense Primer on the Initiative Process*, INDEPENDENCE INSTITUTE (Oct. 24, 1996), available at <http://i2i.org/SuptDocs/IssuPprs/ip0896.htm>; <http://www.sos.state.co.us/pubs/elections/main.htm> (last modified Sept. 20, 2001) (information provided by Colorado Secretary of State regarding recent state election results).

3. See Hans A. Linde, *Taking Oregon's Initiative Toward a New Century*, 34 WILLAMETTE L. REV. 391, 391-98 (1998); CALIFORNIA COMM'N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE (1992); PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 30 (1998).

4. For example, the Colorado initiative right was first available in 1912 and was avidly used that year and in 1914. Frequency then dropped sharply until the 1960s. See generally Initiative and Referendum Institute, at <http://www.iandrinststitute.org/> (last visited Sept. 20, 2001).

cent decades, initiated constitutional amendments have steadily increased in frequency and length, and have greatly outdistanced statutory initiatives.<sup>5</sup>

Scholarly interest in initiatives has grown accordingly. Legal scholars have been especially interested in judicial review of initiatives that appear to target unpopular minorities,<sup>6</sup> while political scientists have provided broader analyses and proposals to improve political processes.<sup>7</sup> Both have analyzed in detail the many differences between initiatives and representative democracy and have compared vices and virtues of the two systems of lawmaking.

This paper has two principal objectives. First, it discusses differences between initiatives and representative government in relation to majority rule. It concludes that there are significant differences, so that the degree to which direct majority rule is desirable is crucial to appraisal of the initiative method of lawmaking. Second, it discusses problems with initiative processes and proposes possible remedies. The paper concludes that most of the initiative's virtues are achieved when it is used to enact statutes, while many of its shortcomings arise principally when it is used to amend state constitutions. Therefore, it is desirable to make the initiative process easier for statutes and more difficult for constitutional amendments.

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5. For example, all Colorado amendments cited in note 2 were adopted after 1965. See sources cited *supra* note 2.

6. See Symposium, *Voices of the People: Essays on Constitutional Democracy in Memory of Professor Julian N. Eule*, 45 UCLA L. REV. No. 6 (1998); Symposium, *Redirected Democracy: An Evaluation of the Initiative Process*, 34 WILLAMETTE L. REV. Nos. 3-4 (1998); Symposium, *The Legitimacy of Direct Democracy: Ballot Initiatives and the Law*, 1996 ANN. SURV. AM. L. 371; Symposium, *The Bill of Rights vs. the Ballot Box: Constitutional Implications of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491 (1994); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

7. See ROBERT A. DAHL, *ON DEMOCRACY* (1998); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991); see also the recent book by my co-panelist, JOHN GASTIL, *BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS* (2000).

## I. DEMOCRACY AND MAJORITY RULE

Canada had a national election on November 27, 2000, that was quieter and cheaper than ours. All the votes were counted without any lawsuits. In the election campaign, Stockwell Day led the second strongest party and now heads the opposition in Parliament. Mr. Day likes the initiative process, and during the campaign, he advocated a national initiative right for Canada. His proposal received a lot of attention. On a televised political program, a journalist proposed the following initiative: "We demand that the government of Canada force Stockwell Day to change his first name to Doris."<sup>8</sup> More than a million signatures were quickly obtained on a petition to do just that, more than enough to force a vote under Mr. Day's proposal.<sup>9</sup>

This was an insightful way to highlight one of the problems with initiative lawmaking—its potential use against a targeted minority fueled by dislike rather than substantive policy. On the other hand, initiatives have brought about many useful reforms.<sup>10</sup>

Promoters of initiatives often preach that the initiative *is* democracy; they claim that the adjective in direct democracy is redundant or should be replaced by one that accentuates the noun, such as true democracy.<sup>11</sup> In his defense of Colorado's anti-gay initiative, Justice Scalia called the initiative "the most democratic of procedures."<sup>12</sup> Ironically, Scalia's beloved Framers defined it the same way, but they disapproved.<sup>13</sup> So did de Tocqueville.<sup>14</sup>

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8. <http://www.22minutes.com/featuredclip.php> (last visited Sept. 20, 2001).

9. *See id.*

10. For Colorado, see *supra* note 2.

11. *See* <http://philadelphiatwo.org/whatisdd.htm> (last visited Aug. 23, 2001) ("true direct democracy exists nowhere in the United States" because legislatures and courts regulate initiatives); Initiative and Referendum Institute, *supra* note 4.

12. *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting). Justice Scalia is less enthusiastic when initiators try to limit campaign contributions. *See* *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 382, 410 (2000) (Thomas, J., joined by Scalia, J., dissenting). Nor is he supportive when they try to legalize medical use of marijuana. *See* *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

13. *See* THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed., 1961). [A] pure Democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the

Some advocacy of majority rule is simply a continuation of the ancient battle against rule by minority elites, which has no serious modern defenders. Majority rule in some form is part of all definitions of democracy.<sup>15</sup> But democracy's definitions also invoke complex concepts of equality, such as "the principle of equality of rights, opportunity, and treatment."<sup>16</sup> The tension between direct majority rule and political equality is a central problem of political theory that informs appraisal of the initiative method of lawmaking. Alternatives to direct democracy are based on ultimate majority rule mediated by institutions that try to give political minorities a fair voice.

Historically, the dominant form of popular government is the model we associate with the British Parliament: voters choose representatives from single-member, geographic districts in elections won by local pluralities. This system modifies direct majority rule in familiar ways. Geography is a diversifier, as is the custom that a plurality of votes carries a district. As a result, coalitions are often necessary in legislatures. In this country, we increased majority influence by instituting popular election of a single executive. The 1913

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form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

*Id.* at 61-62.

14. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 254-70 (Henry Reeve text revised by Francis Bowen, Phillips Bradley ed., 1980).

15. See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 34 (1956). However, Dahl's own later work eliminated specific reference to majority rule in his definition of democracy. See ROBERT A. DAHL, *ON DEMOCRACY* 35-43 (1998). Dahl's most detailed exploration of the relationship between democracy and majority rule is in ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 162 (1989) (concluding that "the defects in majority rule are far too serious to be brushed aside [but] all the alternatives to majority rules are also seriously flawed.").

16. WEBSTER'S NEW WORLD DICTIONARY, *supra* note 1, at 366. See Frank I. Michelman, "Protecting the People from Themselves," or How Direct Can Democracy Be?, 45 *UCLA L. REV.* 1717 (1998).

change to direct, statewide election of United States senators significantly added to majority power.<sup>17</sup>

Initiatives short-circuit other structural devices that moderate direct majority rule. The oldest is separation of powers. Its ancient, first principle, to divide the power to make law from the power to enforce it, enhances majority rule by subjecting rulers to the rules.<sup>18</sup> This concept is fully consistent with the initiative power presently in use, which is limited to legislative actions.<sup>19</sup> The refinement of separation of powers into a three-branch government with bicameralism, veto, and protections against retroactive laws developed in the eighteenth century,<sup>20</sup> and its most visionary proponent remains James Madison. Madison's brilliant and familiar articulation of the problem of the tyranny of the majority, and the separation of powers doctrine as its solution remains unmatched.<sup>21</sup> In the twentieth century, powerful courts enforcing bills of rights and rights statutes became a significant addition to Madison's model.

A more recent structure designed to modify majority rule is proportional representation ("PR"). PR modifies elections of representatives so that more minority parties obtain seats in legislatures.<sup>22</sup> It has been tried in the United States only in local governments (and usually discarded), but it is national policy in most European and Latin American countries, among others, and is used to elect the European Parliament.<sup>23</sup> Swit-

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17. See Todd J. Zywicki, *Beyond the Shell and the Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997); Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1 (1996).

18. See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS, 23-82 (2d ed. 1998).

19. See, e.g., COLO. CONST. art. V, § 1 (initiative right in legislative article); ORE. CONST. art. IV, § 1 (same); Lane Transit Dist. v. Lane County, 957 P.2d 1217 (Ore. 1998) (no right of initiative to review administrative decision); City of Idaho Springs v. Blackwell, 731 P.2d 1250 (Colo. 1987) (same); Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565 (1980) (same).

20. See VILE, *supra* note 18, at 83-106, 131-76.

21. See THE FEDERALIST, *supra* note 13, Nos. 10 & 47-51.

22. PR refers to a number of related devices that achieve this purpose in different ways. See Center for Voting and Democracy at <http://www.fairvote.org/pr/intro.htm> (last visited Sept. 20, 2001).

23. See *id.*; Kathleen L. Barber, *The True Experience of Proportional Representation in American Cities*, available at [http://www.fairvote.org/library/history/true\\_experiences.htm](http://www.fairvote.org/library/history/true_experiences.htm) (last updated Aug. 23, 2000). There are a number of kinds of weighted voting explained on the Fairvote website. For an account of PR in an

zerland has both initiatives and PR. To many Americans, PR's most familiar use is in elections of the Israeli Knesset. PR is advocated by academic writers to empower American racial minorities,<sup>24</sup> and the concept has been part of the debate in Supreme Court decisions on racial and political gerrymandering.<sup>25</sup>

Federalism appears to straddle the debate, but as Madison perceived, it essentially works against direct majority rule.<sup>26</sup> It protects states' authority to decide on their own political systems, and this allows the majoritarian initiative to flourish in some. But its core purpose is to reduce the power of national majorities reflected in Congress and the President, and states invoke judicial authority against majoritarian federal power.<sup>27</sup>

In sum, our traditional concept of representative government is based on a complex set of institutions that mediate between direct and ultimate majority rule. As an open political system, it is challenged to address its imperfections. In terms of direct majority rule, proponents of initiatives want more; advocates of proportional representation, separation of powers, states' rights, and judicial review want less. Some groups perceive their self-interest in having more majoritarianism at the state level and less at the federal or vice versa. All sides can invoke a definition of democracy, so appeals to democracy beg the question.

## II. MINORITY INTERESTS IN REPRESENTATIVE AND INITIATIVE LAWMAKING

*Pierce v. Society of Sisters*<sup>28</sup> is the *Brown v. Board* of initiative law.<sup>29</sup> In 1922, Oregon voters amended the state's compul-

earlier era, see CLARENCE GILBERT HOAG & GEORGE HERVEY HALLETT, JR., *PROPORTIONAL REPRESENTATION* 275-91 (1926).

24. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

25. See *Shaw v. Reno*, 509 U.S. 630, 652 (1993); *id.* at 667 n.6, 674 (White, J., dissenting); *Davis v. Bandemer*, 479 U.S. 109, 144-61 (1986) (O'Connor, J., concurring in the judgment).

26. See *THE FEDERALIST*, *supra* note 13, No. 51 at 351-53.

27. See *United States v. Morrison*, 529 U.S. 598 (2000); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

28. 268 U.S. 510 (1925).

29. See Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 999 n.4 (1986) ("For a generation, one criterion for an acceptable constitutional theory has been whether

sory school attendance law to require all children between ages six and sixteen to attend public schools or be home-schooled. The measure was blatantly anti-Catholic, and the Supreme Court struck it down. Like *Brown*, *Pierce* is now universally considered correct, however debatable it might have been in its day. Compare *Pierce* with *Romer v. Evans*,<sup>30</sup> the Court's 1996 decision invalidating Colorado's blatantly anti-gay initiative. *Romer* has strong critics,<sup>31</sup> though perhaps when it, too, is over seventy-nine years old, there will be general agreement that the decision was right.

Apropos of *Pierce* and *Brown*, legal scholars' modern discourse about initiatives has focused on comparing how distinct minorities fare under initiatives and under representative governments. Analysis of judicial review under both has been prominent;<sup>32</sup> Julian Eule's article is the most widely cited.<sup>33</sup> Eule and others argued that African Americans and other racial minorities fare less well under initiative lawmaking than under representative legislatures, so that courts should heighten the standards for judicial review of initiated laws.<sup>34</sup> Critics of their thesis argued that superiority of representative government was not proved.<sup>35</sup> In any case, the critics claim

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that theory explains why the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), was correct.").

30. 517 U.S. 620 (1996).

31. See, e.g., Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345 (1997). Compare *Porterfield v. Webb*, 263 U.S. 225 (1923), which sustained a California initiated measure that forbade Japanese farmers from owning land, but would likely be invalid today.

32. See, e.g., Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487 (1998); Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review in Direct Legislation*, 1996 ANN. SURV. AM. L. 373; Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477; Baker, *supra* note 6; Eule, *supra* note 6; Bell, *supra* note 6.

33. See Eule, *supra* note 6; Symposium, *Voices of the People: Essays on Constitutional Democracy in Memory of Professor Julian N. Eule*, *supra* note 6.

34. Eule, *supra* note 6, at 1548–86; Bell, *supra* note 6. See also Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Julian N. Eule, *Representative Government: The People's Choice*, 67 CHI.-KENT L. REV. 777 (1991).

35. See Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 (1998); Baker, *supra* note 6, at 775–76. See also James Wenzel et al., *Direct Democracy and Minorities: Changing Attitudes about Minorities Targeted by Initiatives*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES*, 228–48 (Shaun Bowler et al., eds. 1998); Clayton P. Gillette, *Plebiscites, Participation, and Collective Ac-*

that heightened judicial review is not warranted, not feasible, or both.<sup>36</sup>

The difficulty with this discourse is its binary limits. It considers only the most prominent minority interests, and it discusses their interests only in terms of advantageous and disadvantageous legislation, ignoring any sort of compromise. This allows the initiative to control the discourse because it is binary in nature. Voters on initiatives choose yes or no. Each initiated law generates relatively clear winners and losers. Some of the most controversial initiatives are those such as Oregon's in *Pierce*, Colorado's in *Romer*, and California's Propositions 14 and 209,<sup>37</sup> which appear to target the most visible minority interests. However, these overt measures account for only a small proportion of initiated laws, allowing initiative proponents to wall them off as simply a problem for judicial review.<sup>38</sup> This obscures important differences at the core of the choice between representative government and initiatives and between different forms of the initiative power itself.

Scholars have analyzed many real and arguable differences between initiative and legislative lawmaking. They have explained the initiative's clear superiority in overcoming legislators' direct self-interest in reapportionment, term limits, campaign finance, corruption opportunities, and legislators' own salaries and perquisites of office.<sup>39</sup> They have explored such subjects as the influence of money, control of agenda-setting, voter confusion, logrolling, representatives' voting in the open versus secret voting on initiatives, intensity of preferences, efficiency of specialization in representative government, and the effects of bicameralism and executive veto.<sup>40</sup> Legisla-

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*tion in Local Government Law*, 86 MICH. L. REV. 930 (1986); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1364-66 (1985) (reviewing and criticizing DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES*).

36. See Baker, *supra* note 6, at 775; Tushnet, *supra* note 32.

37. See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (Proposition 14, forbidding fair housing laws); see also *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997) (Proposition 209, forbidding affirmative action).

38. See, e.g., Briffault, *supra* note 35, at 1364-65.

39. See Tushnet, *supra* note 32, at 377-78, 385-90.

40. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* 21-59 (1989); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 2-19, 27-30, 106-21, 159-64, 180-99 (1984); RICHARD A. POSNER, *BREAKING THE*

tive deliberation has been a particularly popular subject of discussion and debate.<sup>41</sup> Effects of the initiative on the geographic diversity provided by traditional forms of representative government—specifically on representatives' services to their constituents—have not been examined.

Shifting the focus to majority rule, some scholars argue that there is little difference in the degree to which initiative and representative governments reflect majoritarian preferences.<sup>42</sup> That assumption seems quite wrong, but it is easy to see why it is held when the focus of discussion is on discrimination against African Americans or gays. For highly visible groups, there has often been persistent bias reflected in both kinds of lawmaking. Yet even for these interests, prominent scholars such as Derrick Bell think representative lawmaking superior.<sup>43</sup> And advocates of proportional representation surely think their kind of legislatures better than direct democracy.<sup>44</sup>

The most important way that representative legislatures modify majority rule is by reflecting the intensity of minority preferences.<sup>45</sup> This is done systematically through political parties, which have an incentive to broaden their bases to accommodate different constituencies. In our predominantly two-party system, the parties are coalitions of minority interests. In proportional representation systems, they are less diverse, and accommodations occur in parliamentary coalitions. On particular issues in both systems, preferences are accommodated ad hoc in the drafting and revision of bills. Of course

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DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 20–26 (2001); Tushnet, *supra* note 32, at 374–76, 379–92; Baker, *supra* note 6, at 715–52; Eule, *supra* note 6, at 1522–30; Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 450–73 (1998).

41. See FISHKIN, *supra* note 7, at 35–53; Tushnet, *supra* note 32, at 379–83; Charlow, *supra* note 34, at 535–36; Baker, *supra* note 6 at 736–52; Eule, *supra* note 6, at 1520–21, 1526; Lawrence Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1414–15 (1978).

42. See, e.g., CRONIN, *supra* note 40, at 229; Briffault, *supra* note 35, at 1364–66.

43. See Bell, *supra* note 6; see also William E. Adams, Jr., *Is It Animus or a Difference of Opinion?: The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449 (1998); John C. Brittain, *Direct Democracy by the Majority Can Jeopardize the Civil Rights of Minority or Other Powerless Groups*, 1996 ANN. SURV. AM. L. 441.

44. See GUINIER, *supra* note 24, at 1–20. Guinier did not discuss initiatives, but she attacked unmodified majority rule.

45. See MAGLEBY, *supra* note 40, at 180–85; Clark, *supra* note 40, at 450–73.

within a legislature, some of this activity is classified as logrolling or vote trading and has a bad name because at times it has meant one corrupt vote traded for another.<sup>46</sup> The criticism is overdone; this sort of bargaining for votes is crucial to empowering minority voices.<sup>47</sup>

Americans should reflect on why many countries have maintained reasonable accommodations for minority rights and interests under systems of parliamentary supremacy that lack a bill of rights backed by judicial review. Place yourself in a shunned minority by assuming you are poor and accused of felony. Would you rather be tried by the courts of Texas, disciplined by state and federal bills of rights and the world's most powerful appellate judiciary, or by those of Australia, subject to neither? You might say Texas, but the choice would not be as easy as American political mythology suggests.<sup>48</sup>

Initiative lawmaking is not readily adaptable to coalition politics. Indeed, in many respects it is their antithesis. Most initiative proponents are relatively small groups who generate their proposals privately. They must, of course, gather many thousands of signatures and win a general vote, but they mostly accomplish this based on reactions against coalition politics and minority interests. They tap resentment against the legislature and appeal to majoritarian positions that legislative coalitions have suppressed. When resentment is caused by self-interest of legislators, as in reapportionment, corruption, and the like, the minority interest is the political class themselves, and the initiative does noble work. But in many other cases, the resentment is against minority interests of citizens. This has generated the cant phrase "special interests," now invoked by every interest group against every other. We are most likely to notice when racial or similar minority groups are affected, but the concept is far broader. Coalition politics involve every interest in society: farmers, greens, unions, gun enthusiasts, polluters, insurance companies, churches, miners, dog owners, universities, and so on. We are all special.

Another inspiration for initiatives is resentment against anti-majoritarian judicial decisions. In 1912, Colorado voters

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46. See COLO. CONST. art. V, § 40 (purporting to ban log-rolling, though never enforced); Tushnet, *supra* note 32, at 383-85.

47. See Clark, *supra* note 40, at 456-63; Michael J. Waggoner, *Log-Rolling and Judicial Review*, 52 U. COLO. L. REV. 33, 36 (1980).

48. See DAHL, *supra* note 15, at 187-91.

adopted an initiated amendment to the state constitution to forbid all state courts except the Colorado Supreme Court from holding any state law unconstitutional and to empower voters by petition to force a reviewing vote when the Supreme Court did so.<sup>49</sup> The Supreme Court had to stretch the federal Constitution to put down the populist rebellion against its authority.<sup>50</sup>

Initiatives driven by judicial decisions have become muted as the modern dominance of federal courts has placed decisions beyond initiators' reach, although anti-court politics fuel calls for a national right of initiative.<sup>51</sup> John Brittain noted that the Connecticut Supreme Court's decision respecting Hartford schools would probably have been overturned in an initiative state.<sup>52</sup> And an initiative disabled California courts from recognizing any rights of criminal defendants not compelled by federal law.<sup>53</sup> Here again, relevant minority interests are much broader than groups intended by use of the term minority in popular discourse. Courts have applied the notion that restrictions on personal liberty and property must be reasonable to protect a broad array of minority interests, such as those in family life, procreation, abortion, condominium owners against covenants, landowners against zoning, group homes, and many others.<sup>54</sup>

Initiatives are also well suited to reflect majoritarian positions of society's better off. The economic position of voters who participate gives these propositions an automatic head start. By limiting property tax increases unless property is sold, California's Proposition 13 favored property owners over others and

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49. See 1913 Colo. Laws 678, amending COLO. CONST. art. VI, § 1 (repealed).

50. See *People v. Max*, 198 P. 150 (Colo. 1921); *People v. Western Union Tel. Co.*, 198 P. 146 (Colo. 1921).

51. See *The National Initiative For Democracy*, at <http://philadelphiatwo.org/ni.htm> (last visited Sept. 20, 2001); COLO. CONST. art. XVIII, §§ 12, 12a (instructions to members of Congress on term limits in reaction to *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (*cf.*, *Morrissey v. State*, 951 P.2d 911 (Colo. 1998) (holding both sections to be unconstitutional)); Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1263-64 (1998) (backlash against courts shifting its focus to federal courts).

52. See Brittain, *supra* note 43, at 448-49, regarding *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (de facto segregation of Hartford schools violated state constitution).

53. See *Raven v. Deukmejian*, 801 P.2d 1077 (Calif. 1990) (sustaining Proposition 115, the Crime Victims Justice Reform Act).

54. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* ch. 11 (6th ed. 2000).

prior property owners over later ones.<sup>55</sup> Other anti-tax initiatives have similar purposes and effects. Colorado's prohibits progressive income taxes.<sup>56</sup> Oregon's new "taking" initiative favors property owners, particularly those with large holdings.<sup>57</sup> Rent control, anti-growth, and downzoning initiatives favor present residents over immigrants. Even pro-gambling initiatives, which reflect a mix of voter motivations, have regressive effects because lower-income folks spend more of their income on gambling. As the cost of initiatives has risen, the tendency to reflect interests of society's wealthier half has increased.<sup>58</sup>

On the other hand, self-interested lawmaking by initiative at least requires the broad support of a majority of those who vote on a measure. The special rent-seeking deals and back-room corruption that mar some representative lawmaking are avoided.<sup>59</sup> In this context, majority rule is superior.

In sum, the dominant effect of initiative rights is to increase the directness of majority rule and to eliminate measures of relative preferences.<sup>60</sup> Representative government can be described as weighted majority rule, initiatives as the opposite. This is not an indictment of initiatives; on any list of majoritarian positions, each of us will find some to love, some to hate, and many to shrug off. But distrust of the process by groups such as African Americans and gays, that are minorities on a broad range of issues, is a sensible perception of how initiatives work.

### III. INITIATIVES' PROBLEMS AND REMEDIES

Virtues of the initiative right are obvious and important. Initiatives directly empower citizens. They overcome the self-interest of legislators and reduce corruption. Final proposals

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55. See *Nordlinger v. Hahn*, 505 U.S. 1 (1992); PETER SCHRAG, *PARADISE LOST* (1998).

56. COLO. CONST. art. X, § 20(8)(a).

57. See ORE. CONST. art. I, § 18(a)-(f), available at <http://www.leg.state.or.us/orcons/orcons.html>. A legal challenge against the initiative is pending.

58. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 163-97 (2000).

59. See DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 1-25 (1989); Tushnet, *supra* note 32, at 383-85.

60. *But see* Gillette, *supra* note 35, at 968-69 (1988) (initiatives show relative preferences because uninterested voters do not participate).

are more publicly debated than legislative bills. Initiatives bask in the “mythic idea” of popular sovereignty and in the bedrock principle of consent of the governed.<sup>61</sup>

The right of initiative is enormously popular, and a number of admirable reforms have been brought about by the initiative process. Of course, an important reason initiatives are popular is their effective implementation of direct majority will, reflected in familiar political invocations of the silent majority and the moral majority. When and whether majoritarianism is a virtue are discussed in the previous parts of this paper. But even if initiatives disadvantage minority interests vis-à-vis representative governments, there is almost no chance that American use of initiatives will decline. Rather, the pressures are to broaden their reach to other states and to make them easier in states that have them. Ease of voting by electronic means, early voting, and mail ballots are touted as reasons to relax restrictions and extend use. Determined groups are bent on a national initiative right.<sup>62</sup> For these reasons, it is important to explore initiatives’ shortcomings and possible cures.

#### A. *Drafting and Amending*

Problems with drafting initiatives have been widely discussed.<sup>63</sup> Most legislatures employ professional drafting staffs, but many initiatives are amateur efforts done in private by ardent proponents with no critical counsel. Initiators make little effort to consider possible unforeseen consequences or to fit their measures into the body of preexisting law. Voter confusion is a frequent concern, and initiators are accused of bundling attractive issues with others that could not win alone.<sup>64</sup>

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61. See Frank I. Michelman, *Always Under Law?*, 12 CONST. COMMENT. 227, 231 (1995).

62. The most prominent group is former Senator Mike Gravel’s Philadelphia II. See Philadelphia II: Direct Democracy, at <http://philadelphiatwo.org> (Aug. 18, 2001). For examples of movements to extend the initiative to other states, see Initiative for Texas, <http://www.initiativefortexas.org> (n.d.); <http://www.simshome.com/iandr> (n.d.) (Delaware).

63. See DUBOIS & FEENEY, *supra* note 3, at 113–18; see also Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. COLO. L. REV. 47, 76–84 (1995); Eule, *supra* note 6, at 1516.

64. See DUBOIS & FEENEY, *supra* note 3, at 118–52; Collins & Oesterle, *supra* note 63, at 84–91.

Of course, bundling is also a curse of Congress and of some state legislatures.<sup>65</sup> Bundling is sometimes defended as a means to aid minority voices,<sup>66</sup> but its actual uses appear oriented toward rent-seeking favoritism for minorities who should not be protected, such as oil drillers.

Professional consultants are now hired to draft some initiatives, and focus groups are used to improve their efforts.<sup>67</sup> But this increases the cost, contributing to the high threshold that confines the process to well-financed interests.

Most American initiative procedures lock up the text early in the process, before any petitions have been signed. Errors are frozen. Because most initiatives can be amended only by another referendum, an enacted error is difficult to correct.<sup>68</sup>

A minor remedy used in a number of initiative states is to require initiative drafts to be submitted to the state's legislative staff for review and comments. That review is, of course, not binding on initiators.<sup>69</sup> A remedy for bundling is a single-subject rule, although this generates its own problems. Such rules present difficult judgments for reviewing authorities and can either unduly restrict the initiative right or become toothless conduits for most initiatives.<sup>70</sup> A possible answer is to allow multiple-part initiatives to be placed on the ballot so that voters can choose separately among discrete parts. However, this would make the process even more complex and could, like special jury verdicts, produce inconsistent votes.

The most comprehensive response to drafting and amending problems is the indirect initiative, used in Switzerland—the device's ancestral home—and in a few American states, such as Massachusetts and Mississippi.<sup>71</sup> Proposed initiatives,

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65. See L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year*, 18 PEPP. L. REV. 43 (1991).

66. See Clark, *supra* note 40, at 463–67.

67. See BRODER, *supra* note 58, at 70–83.

68. See DUBOIS & FEENEY, *supra* note 3, at 116–17; Collins & Oesterle, *supra* note 63, at 78. On amendment after enactment, see *infra*, text at notes 71–74.

69. *E.g.*, COLO. CONST. art. V, § 1(5).

70. Compare Clark, *supra* note 40, at 467–69 (California rule weak), with cases entitled *In re Title, Ballot Title and Submission Clause, and Summary for 1999–2000*, 977 P.2d 845, 849, 853, 856 (Colo. 1999), and cases entitled *Matter of Title, Ballot Title and Submission Clause, Summary for 1997–98*, 960 P.2d 648, 1192, 1204 (Colo. 1998) (Colorado rule fairly strict).

71. See DUBOIS & FEENEY, *supra* note 3, at 35–37, 46–50, 85–91; KRIS W. KOBACH, *THE REFERENDUM: DIRECT DEMOCRACY IN SWITZERLAND* 1–30, 87, 110 (1993).

either based on preliminary petition drives or some other threshold showing, must go before the legislature, which must hold hearings. The legislature can adopt the measure itself, suggest changes that a designated committee of initiators is empowered to accept, then adopt the amended measure or put it on the ballot.<sup>72</sup> The legislature can also place a competing measure on the ballot, giving voters an alternative that is usually more moderate or that takes apart a bundled measure.<sup>73</sup> In Switzerland, most laws adopted by referendum are modifications of or substitutes for the initiators' original proposal.<sup>74</sup>

### B. Long Ballots

Initiative enthusiasts claim that having the right of initiative increases voter turnout and thus promotes civic involvement.<sup>75</sup> However, studies refute this claim.<sup>76</sup> Moreover, the claim ignores the degree to which voters in initiative states show up and vote for candidates but decline to vote on some or all of the initiatives, so-called voter drop-off.<sup>77</sup> One cause is that as state and local initiatives proliferate, the number on a given ballot can become quite large.<sup>78</sup> For conventional voting, longer waits at polling stations are more frequent. This discourages voting, and dropouts are likely to be less educated and less well off. Even for those who vote, the likelihood of understanding every initiative diminishes. If one had been optimistic on this question, the Florida election information about voter confusion on the simple question of presidential balloting should be a stiff antidote. So far there has been no reported instance of deliberate flooding of the ballot, but it is a theoretical possibility. To look at the problem another way, note that such a far-reaching constitutional change as California's Proposition

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72. See DUBOIS & FEENEY, *supra* note 3, at 35–37, 49–50; KOBACH, *supra* note 71, at 87, 100.

73. See DUBOIS & FEENEY, *supra* note 3 at 49–50. The same is true in states that have the indirect initiative. *Id.* at 36–37.

74. See *id.* at 52.

75. See Initiative and Referendum Institute, *supra* note 4.

76. See MAGLEBY, *supra* note 40, at 95–98.

77. *Id.* at 90–95.

78. See DUBOIS & FEENEY, *supra* note 3, at 153–63; SECRETARY OF STATE OF OREGON, 1996 GENERAL ELECTION VOTERS' PAMPHLET (247 pages issued in two volumes). For a general argument that representative democracy is more efficient than direct, see POSNER, *supra* note 40.

13 was approved by only 26.9% of the state's adult residents.<sup>79</sup> The problem has been eased somewhat by greater use of absentee ballots, early voting, and in Oregon, voting entirely by mail. Initiative proponents tout electronic means as an answer. They want to allow Internet voting and petitioning. Their utopia is a world where popular consent is sought for every legislative proposal, whether originated by government or citizens.<sup>80</sup>

### C. Money

The original proponents of initiative lawmaking touted it as a corrective for what they believed was corruption of legislatures by money.<sup>81</sup> They would be appalled to find that money now has at least as much involvement in the initiative process as the legislative. According to David Broder, more money is now spent on statewide California initiatives than on state legislative campaigns.<sup>82</sup> The reasons are apparent: most initiatives require a lot of money to get on the ballot, before a dime has been spent on the referendum itself,<sup>83</sup> and initiative campaigns are statewide, in contrast to races local to legislative districts. As a result, the agenda for use of the initiative right is set by those who can raise a sufficient war chest to pay petition circulators and other expenses of qualifying for the ballot.<sup>84</sup> Proponents of electronic voting offer Internet petitioning as a way to reduce the cost of ballot access.<sup>85</sup> This seems promising, but concern about possible manipulation calls for caution.

Once a measure is on the ballot, initiatives become part of the general debate about campaign spending limits, including its First Amendment dimension.<sup>86</sup> For initiatives, the justifying purpose of avoiding the corruption of politicians by large

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79. See Collins & Oesterle, *supra* note 63, at 52 n.18.

80. See Initiative and Referendum Institute, *supra* note 4; see also <http://www.vote.org/streamline> (n.d.).

81. See CRONIN, *supra* note 40, at 53-57.

82. See BRODER, *supra* note 58, at 163-64.

83. *Id.* at 55-83, 163-97.

84. On the significance of agenda control, see William H. Riker, *Comment on Baker, Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 791 (1991).

85. See <http://www.vote.org/streamline> (n.d.).

86. See Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413, 418-19, 439-40 (First Amendment rule stricter for initiatives than for candidates).

contributions is weakened or eliminated.<sup>87</sup> Moreover, statewide votes on initiatives, like those for United States senators, involve much greater challenges to organize and raise large campaign funds than do local legislative races.<sup>88</sup> All these methods contrast sharply with the New Hampshire system of small legislative districts in which the cost of each campaign is modest.<sup>89</sup>

On the other hand, making initiatives less expensive would increase the power of direct majority rule. At present, the large cost of initiatives limits their statewide use to measures with substantial backing. If every question could be put to a referendum at little cost, the initiative and referendum could become the primary means of making legislative choices. Weighted minority opinions would disappear.

#### D. Judicial Review

Courts are the sole check on initiatives, which puts great pressures on judges. It starts with dissembling; judicial opinions gush over the sacredness of popular sovereignty reflected in the initiative right.<sup>90</sup> Yet the rate of invalidation is much greater for initiatives than for ordinary legislation.<sup>91</sup> This generates political efforts to muzzle the courts, such as the bill sponsored by the late Representative Sonny Bono,<sup>92</sup> and state proposals to impose short judicial terms and term limits.<sup>93</sup>

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87. See James P. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 393.

88. See Smith, *supra* note 17, at 65–66 (cost of running for Senate).

89. The New Hampshire lower house has 400 members elected from 195 districts for a state population of about 1.2 million, so each district has a small population, easily reachable without large media expenses. See N. H. CONST. pt. 2, art. 9; N. H. RSA 662:5; <http://www.census.gov/population/cen2000/tab02.txt> (Dec. 28, 2000) (2000 New Hampshire population reported as 1,235,786).

90. See, e.g., Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards* (paper for 1999 Annual Meeting of American Political Science Ass'n, available at <http://www.iandrinstitute.org>) at 5–6; *Evans v. Romer*, 854 P.2d 1270, 1286 (Colo. 1993), *aff'd on other grounds*, 517 U.S. 620 (1996) (“That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference.”); *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (“direct franchise . . . entitled to the highest degree of deference from the courts.”).

91. See Miller, *supra* note 90, at 3, 30.

92. H.R. 1170, 104th Cong. (1995). See Holman & Stern, *supra* note 51, at 1264 (favoring Bono’s proposal).

93. See, e.g., *Aisenberg v. Campbell*, 975 P.2d 175 (Colo. 1999).

State judges must face the electorate in regular, retention, or recall elections.<sup>94</sup> Some judges find it difficult to stand up to the argument that an initiative is the will of the people.<sup>95</sup>

Most initiative states have made the petitioning process the same to amend the state constitution as to enact a statute. Initiators tend to be ardent and impatient, so they much prefer the constitutional route. Indeed, in some states, they have made nominally statutory initiatives quasi-constitutional by disabling the legislature from amending them.<sup>96</sup> This has negative practical consequences when initiative measures include errors or significant unintended consequences that a legislature would amend if they arose in ordinary legislation. Courts feel pressures for imaginative efforts at interpretation.<sup>97</sup>

When initiators amend a state constitution, they disable any constitutional restraints under that constitution. State bills of rights are bypassed. State courts have no state-law basis to address constitutional issues other than their authority to interpret the initiative. The latter power is important and will meet many needs,<sup>98</sup> but it is plainly inadequate to address many others. This puts added pressure on federal constitutional norms, nationalizing still more individual rights issues. The "federalist" approach taken by the Supreme Court in *San Antonio Independent School District v. Rodriguez* is blocked.<sup>99</sup>

One remedy for the latter problem was found by the drafters of Mississippi's initiative power. Initiatives may be used to amend any part of the Mississippi Constitution except its bill of rights and the initiative provision itself.<sup>100</sup> Rights review at the state level is preserved, keeping more issues within the

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94. See Eule, *supra* note 6, at 1579–84.

95. See *id.*; *cf.*, Holman & Stern, *supra* note 51, at 1249 (arguing that state and federal courts apply different standards in reviewing initiatives).

96. See DUBOIS & FEENEY, *supra* note 3, at 78–81.

97. See, e.g., Interrogatories on S.B. 93–94, 852 P.2d 1, 4–11 (Colo. 1993).

98. See Frickey, *supra* note 32. On the problem of interpreting legislative intent of initiated laws, see Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

99. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), held that disparities in school district funding among Texas districts did not violate the Fourteenth Amendment. But the Supreme Court of Texas then held that the system violated the state constitution. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). Other states have similar decisions requiring school funding equalization. See Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101 (2000).

100. MISS. CONST. art. 15, § 273(5)(a), (d).

state's legal system. Were we to have a national right of initiated constitutional amendments, Mississippi's solution would become a very important model.

### *E. Statutory Initiatives*

Most of the virtues of initiated lawmaking are achieved by statutory initiatives, and most of the problems are much more severe for constitutional initiatives. The distinction is increased by intergenerational differences. Yesterday's constitutional initiative may have entrenched a rule that today's citizens would not approve, but the difficulty of amendment has powerful inertial effects.<sup>101</sup> (Of course, this problem applies as well to constitutional rules adopted by other means.)

For these reasons, an important remedy is to make initiatives amending state constitutions significantly more difficult to accomplish than those enacting state statutes. This is hard to achieve in states where amendments are already easy, both because initiative proponents will resist and because it poses difficult problems about amending previously initiated measures.<sup>102</sup> But it should be considered by states contemplating addition of the initiative right and in any formulation of a national right. One measure that would accord greater dignity to constitutions would be a requirement that an initiated change be approved twice in separate elections. Another is to use the indirect initiative for constitutional amendments but retain a direct procedure for statutes.

There are two basic differences between statutory and constitutional initiatives. In all states, a statute is subject to the state constitution, so that minority rights can be addressed under the state bill of rights. This process is healthier for federalism than exclusive reliance on federal rights. The Mississippi Constitution largely achieved this goal by placing its bill of rights out of reach of initiated amendments.<sup>103</sup> But statutory initiatives are subject to the entirety of a state constitution,

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101. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

102. A proposal to require sixty percent of votes cast to amend the Colorado Constitution but to continue the simple majority rule for initiated statutes, and to limit the general assembly's power to amend the latter, was voted down in 1996. See 1995 Colo. Laws 1422.

103. See *supra* text accompanying note 100.

and at times standards outside the bill of rights will be important.

The second difference is the possibility that an initiated statute can be amended by the legislature. Rules on this question vary considerably. In some states, such as Colorado, an initiated statute can be amended by ordinary legislation.<sup>104</sup> In others, such as Arkansas, initiated statutes can be amended only by a super-majority vote of the state legislature.<sup>105</sup> And in California, an initiated statute can be amended only by another referendum.<sup>106</sup> As stated above, the latter system makes initiated statutes quasi-constitutional, retaining the procedural difficulties of constitutional initiatives.

To allow mistakes and unforeseen consequences to be corrected, and laws to be integrated, the legislature ought to be able to amend initiated statutes. But to protect the hard-won achievement of initiators, amendment should not be easy. Of course, the fact of a favorable popular vote will have an *in terrorem* effect on the legislature. The best solution is to allow amendment only by a super-majority of the legislature, such as two-thirds. Another solution occasionally mentioned is to limit the legislature to amendments that do not repeal or alter the basic purpose of an initiative. However, this rule seems likely to generate complex and expensive litigation.

## CONCLUSION

The initiative's claim to be more democratic than representative government has much to do with its popularity. However, the claim depends on how one defines democracy in light of the interests of minorities (of every sort) who lose referendums. Traditional representative democracy better reflects the intensity of minority preferences, so it has a claim to achieve superior accommodations of social interests. Yet the initiative overcomes important defects in the practice of representative democracy arising from the self-interest of lawmakers. Because of the initiative's popularity, practical issues of public

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104. See In re Sen. Res. No. 4, 130 P. 333 (Colo. 1913).

105. ARK. CONST. amend. 7.

106. CALIF. CONST. art. 2, § 10(c). Arizona is nearly as strict. The legislature can make only technical amendments, and these require a three-quarter majority vote. See ARIZ. CONST. art. IV, § 6(B), (C). See BRODER, *supra* note 58, at 195-96.

policy are likely to arise most frequently in shaping procedures for initiatives. Decisions on these questions should take into account effects of accentuated, direct majority rule and problems related to drafting and amending initiatives, ballot length, and judicial review. Initiated constitutional amendments give rise to much more serious problems than do statutory initiatives. Adopting quicker and simpler procedures for statutory initiatives, and the indirect initiative and other safeguards for constitutional changes, would achieve a desirable balance between direct and representative democracy.

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