

THERE'S MORE THAN ONE WAY TO LEGISLATE: AN INTEGRATION OF REPRESENTATIVE, DIRECT, AND DELIBERATIVE APPROACHES TO DEMOCRATIC GOVERNANCE

JOHN GASTIL^{*}
MARK A. SMITH^{**}
CINDY SIMMONS^{***}

INTRODUCTION

Democracy, Richard Collins notes, is a complex and multifaceted concept whose meaning has varied throughout history.¹ Given this complexity, it is difficult to make a summary judgment about the virtues of initiatives as a democratic process. Nonetheless, it is possible to examine what consequences initiatives produce with regard to some of the most common dimensions of any definition of democracy, so long as one clearly defines those dimensions at the outset. This is precisely what we attempt to do in this paper, comparing the democratic vices and virtues of initiatives with those of their logical alternative, representative government.

We choose this comparative approach not only because Collins uses it in his paper, but also because initiatives simply cannot be evaluated in a vacuum. If one is committed to the idea of democratic governance yet finds the initiative process deficient, one would still have to ask what would be the best available means of policymaking. If initiatives were not used at the state level, public policy decisions—barring occasions when legislatures perceive the desirability of placing matters before the public for a vote—would be made directly only by

^{*} Associate Professor, Department of Speech Communication, University of Washington.

^{**} Assistant Professor, Department of Political Science, University of Washington.

^{***} Managing Editor, Energy NewsData.

1. This paper is written as a reply to Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983 (2001).

elected officials. After all, this is the institutional arrangement in the twenty-four states that permit neither initiatives nor popular referenda. Thus, we seek to compare the effects on various dimensions of democracy that initiatives produce to those resulting from representative government. It is only through such a comparison that one can venture a meaningful evaluation of the relationship between initiatives and democracy. In the end, initiatives may, indeed, have some of the flaws that Collins sees in them, but the real question is whether they are any worse than their legislative counterpart.

I. DEMOCRATIC THEORY

It is not our purpose to discuss democratic theory at length. Instead, we simply propose that there are at least five important aspects of the democratic process. They are majority rule, rights and liberties, civic capacity and political participation, political equality, and information and deliberation.² Probably all readers would agree that these principles are each desirable in the abstract, though many would disagree about how they can be combined or reached at the same time. As is demonstrated by the ongoing debate over what limitations on campaign contributions are consistent with the First Amendment, some people would be willing to give up political equality, for example, if necessary to protect a strong conception of rights and liberties. For our purposes, we will treat each of these features as desirable, while leaving aside the question of which should take precedence over the others. It is our belief that a reformed initiative process could, in fact, be consistent with all five principles simultaneously.

A. *Majority Rule*

In any political system, a decision rule must be adopted to resolve disagreements. If multiple actors share formal authority over decisions, then preferences must be aggregated before policies can be adopted. Ideally, one would strive for unanimity in reaching decisions, but as a practical matter, unanimity

2. This conception of democracy draws upon two basic sources. *See generally* BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

rarely occurs. For any binary decision, some will see their preferences prevail while others are defeated. Using majority rule as the decision rule facilitates action without giving undue blocking power to the minority. Citizens and scholars alike recognize this property of majority rule intuitively, which helps to explain its widespread currency and appeal.³ Indeed, anyone proposing that a majority should be overridden, even on a single issue, has a high hurdle to overcome.

In representative government as it usually operates at the state level in the United States, a candidate must win a plurality of the votes to win office. In practice, that plurality is usually a majority since third parties rarely receive many votes. Thus, representative government appears to rest on a footing of majority rule. When it comes to making decisions on specific issues, however, that appearance often does not translate into reality. Candidates often de-emphasize issues during their campaigns, for taking positions on substantive issues inevitably repels some voters. Candidates have clear incentives to show ambiguity on issues and to focus on themes that could resonate with all, or nearly all, voters.⁴

For candidates running an initial campaign or seeking a new office, the most common themes are their personal background and professional experience. Newcomers want to project personal characteristics that allow them to gain the trust and confidence of voters. Incumbents can complement that image with emphasis on the benefits they have provided their constituency. Calling attention to money appropriated for roads, buildings, or other projects is a time-honored campaign technique.⁵ Not surprisingly, voters react to the campaigns they see and normally do not examine specific issues when making their voting decisions. At all levels of government, incumbents begin the race with a substantial advantage in name recognition and fundraising, which usually translates into voters opting for incumbents over their challengers. The personal

3. See JOHN GASTIL, *DEMOCRACY IN SMALL GROUPS: PARTICIPATION, DECISION MAKING, AND COMMUNICATION* 49-60 (1993). See generally BARBER, *supra* note 2; DAHL, *supra* note 2.

4. See generally BENJAMIN I. PAGE, *CHOICES AND ECHOES IN PRESIDENTIAL ELECTIONS: RATIONAL MAN AND ELECTORAL DEMOCRACY* (1978).

5. See generally RICHARD F. FENNO, *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

qualities of candidates, such as whether a candidate is likeable or trustworthy, also affects who wins and loses.⁶

These features of candidate and voter behavior mean that election outcomes cannot in any meaningful way be construed to tap majority preferences for any specific set of issue positions. Moreover, even to the extent that voters do make decisions based upon substantive issues, they may care about a variety of issues but can only choose one candidate. At best, the winning candidate can represent a voter's preferences when all those issues are combined, and the chosen candidate is the one who best approximates the overall average.

Campaigns on initiatives, by contrast, cannot help but focus exclusively on issues. One should not overstate the point, for initiative campaigns can degenerate into slogans and symbols. But if we compared all candidate campaigns to all initiative campaigns, the latter certainly devote a higher degree of attention to substantive issues. When the final vote is taken, one hears the voice of the people on a specific issue.⁷ Given that a majority of voters is necessary to pass an initiative, we can say that initiatives, in a very direct way, promote majority rule.

B. Rights and Liberties

That initiatives promote majority rule is not a matter in dispute. Even initiative opponents, like Collins, recognize this, but they take this as a starting place from which to criticize direct democracy.⁸ According to this line of reasoning, initiatives can easily be used by a majority to usurp the rights of a minority. Prominent initiatives such as California's Proposition 209, targeting immigrants, and Colorado's Amendment Two, targeting gays, are often cited as examples.

We should keep in mind, however, that legislatures are also quite capable of usurping minority rights. All of the sodomy laws on the books were passed by legislatures, as were all

6. See JOHN GASTIL, *BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS* 38-42 (2000).

7. This is not a *deliberative* voice, as defined in GASTIL, *supra* note 6, at 91-92. We discuss this issue in greater depth below.

8. See Collins, *supra* note 1, at 994.

Jim Crow laws.⁹ Whether a statute arises through an initiative or through a legislature, a threat to minority rights always remains a possibility. In either case, judicial review is the most effective way to eliminate those violations. It is worth remembering that Proposition 209 in California and Amendment Two in Colorado were both overturned by the courts. These laws, then, were ultimately not failures of the initiative process, because the courts were able to utilize the same checks they would have employed had the laws been passed by legislatures. To establish the case that initiatives threaten minority rights, one would have to point to cases where initiatives took away minority rights and were *not* overturned by the courts. Similarly, one would have to establish that enacted initiatives were *more* likely to usurp minority rights and remain on the books than were statutes enacted by legislatures. No study of which we are aware has examined the question when posed in that form, but we suspect that the results would show that initiatives fare no worse than laws passed by elected legislatures.¹⁰

The picture is more complicated, though, when it comes to minority *interests*, as opposed to minority rights. As a flip side of enhancing majority rule, initiatives make it harder for minority interests to prevail in policymaking. Indeed, such a result arises by definition of what it means to have majority rule, and this should be recognized as a disadvantage of initiatives. Nevertheless, the particular minority that loses out usually will change from one initiative to another. Take a look, for example, at the set of six initiatives that appeared on the ballot in 2000 in the state of Washington. The initiatives sought to devote more transportation dollars to road-building, outlaw steel-jawed traps, require public votes on tax and fee increases, reduce class sizes, increase teacher pay, and establish charter schools. The groups of people in opposition varied across each initiative, and such a result is to be expected. Each initiative generates its own unique body of supporters and opponents. The issue-based nature of the pro and con sides to each initia-

9. For an extended version of this argument, see generally THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989).

10. Collins suggests that initiatives should be restricted from making laws that affect basic rights enumerated in state constitutions. We endorse this idea, which Collins notes has already been instituted in Mississippi. See Collins, *supra* note 1, at 1000-01.

tive means that no single group will be systematically and repeatedly disadvantaged through the initiative process.

Richard Collins points out that minority interests often fare well under representative government, through both coalition-building within parties and through logrolling within legislatures.¹¹ There is, however, a large downside to minority interests prevailing in this way. Namely, many of the policies that benefit an organized minority would not stand if the broader public were aware of what was happening. For example, a wide array of subsidies, tax breaks, and regulatory exemptions granted to specific corporations and industries survive because those groups are highly organized, there are no active opposing groups, decision-making takes place behind closed doors, and there is little incentive for politicians to respond to or anticipate constituent opinion.¹² Yet the broader taxpaying public gets stuck with the bills. Thus, we should hesitate before calling the protection representative government affords to minority interests a positive outcome.

Moreover, certain kinds of minorities with intense preferences might be better off under initiatives than under representative government, provided that they have backing from the general public. Many initiatives are, in practice, backed by passionate minorities who provide both money and volunteers to collect signatures and conduct a campaign for passage. The distinction between initiatives and representative government comes in the fact that in the former, those minorities need the assent of a majority of voters for their preferences to become law. The animal rights movement provides a case in point. Animal rights supporters have enjoyed only limited success in state legislatures but have often prevailed in initiative campaigns that have banned a variety of hunting and trapping practices. They succeeded in the latter domain by winning over the voting public to their side. In other words, initiatives force legitimate minority interests to prevail through the democratic process—by winning support among the rest of the population.

In addition, we hypothesize that minority groups who have passionate supporters but can raise little money succeed with initiative campaigns more readily than with lobbying. Such a

11. *See id.* at 991.

12. *See generally* MARK A. SMITH, AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY (2000).

group can mobilize a volunteer base only on a focused issue and only for a limited period of time. The initiative campaign gives such groups a focal point for their organizing and a clear end-date for the effort. A lobbying effort, by contrast, requires diligent supporters to both follow a legislative process and, if unsuccessful on the first try, turn out in crucial districts during a reelection campaign to defeat key legislative opponents.

C. Civic Capacity and Political Participation

A third dimension of democracy involves the capacity and active participation of the citizenry. An active and engaged citizenry is important because it is only through political participation, including voting but going beyond it, that citizens can effectively develop and communicate their preferences to policymakers and to fellow citizens.¹³ A citizenry that has little interest in or knowledge of politics will find it difficult to exert any kind of systematic influence over policy decisions. Thus, without civic capacity and political participation, majority rule will be meaningless. It is here that one of the central advantages of initiatives over representative government emerges.

At the close of the nineteenth century, a wide range of American journalists, social critics, and political activists predicted that initiatives would give citizens the motivation and the means to fulfill the roles that democratic theory requires of them. As a byproduct of stimulating greater participation and decision-making by the citizenry, the argument ran, direct legislation could create a more knowledgeable citizenry. In this view, Americans were often uninformed about politics and public affairs, but this ignorance had nothing to do with the capacity or competence of individual citizens. If people gained a real voice in legislation by voting on issues rather than merely candidates, citizens would take the steps necessary to inform themselves. Early advocates of amending state and national constitutions to permit ballot initiatives asserted that this new process would lead to this spreading and deepening of civic education in government and public affairs.¹⁴

13. See generally BARBER, *supra* note 2.

14. On the history of the initiative, see generally CRONIN, *supra* note 9.

One writer proclaimed that its ability to promote political learning made direct legislation "The People's University."¹⁵ Another argued that under such a system, each citizen "would consequently acquire education in his role, and develop a lively interest in the public affairs."¹⁶ Jonathan Bourne, who served in the United States Senate from 1909–1914, echoed these sentiments, contending that direct legislation "not only encourages the development of each individual, but tends to elevate the entire electorate to the place of those who are most advanced."¹⁷ The potential capacities of initiatives and referenda to foster civic education were among the strongest arguments that could be mustered in defense of them. Contemporary advocates, as well, believe that initiatives can educate and inform the public.¹⁸

Similar ideas are developed in a more rigorous way by various political philosophers and theorists. The school of thought often referred to as "participatory democracy" advocates involving ordinary citizens, regularly and thoroughly, in political decisions affecting their locality, region, and nation. Participatory democrats stress, among other benefits, the educative effects of participation. In the words of Carole Pateman, "The more the individual citizen participates the better able he is to do so."¹⁹ Deciding upon initiatives is one kind of participation that could promote civic education. Recent research suggests that initiatives succeed in achieving that function.²⁰

Beyond increasing the civic capacity of voters, supporters of initiatives claim that direct legislation creates a more engaged citizenry in other ways. Initiatives provide a means of participation by soliciting petitions. While California's initiative process has become dominated by paid signature gather-

15. See FRANK PARSONS, *DIRECT LEGISLATION OR THE VETO POWER IN THE HANDS OF THE PEOPLE* 101 (1900).

16. J. W. SULLIVAN, *DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM* 93 (1893).

17. Jonathan Bourne, Jr., *A Defense of Direct Legislation*, *ATLANTIC MONTHLY*, Jan. 1912, at 122, 126.

18. See generally DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989).

19. CAROL PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 25 (1970).

20. See, e.g., Mark A. Smith, *Ballot Initiatives and the Democratic Citizen*, 29 *AM. POL. Q.* (forthcoming 2001). Evidence on this issue in Canada is provided by Matthew Mendelsohn & Fred Cutler, *The Effect of Referendums on Democratic Citizens: Information, Politicization, Efficacy, and Tolerance*, 30 *BRIT. J. POL. SCI.* 685 (2000).

ers, in many other states volunteers do most of the work. Thus, initiatives can draw people into politics by inspiring them to work on campaigns to collect signatures or pass those initiatives that clear the signature threshold. In addition, advocates assert that direct legislation can boost voter turnout in states that use it. By implication, more extensive use of direct legislation in states, or a constitutional amendment allowing for national initiatives, could help reverse the decline of voter turnout in the United States. Both historical and contemporary backers of initiatives and popular referenda advance the argument that ballot measures increase aggregate levels of turnout.²¹ The claim also frequently appears in media stories covering elections.²²

There are, in fact, some good reasons to expect initiatives to draw additional voters to the polls. Given the lack of frank policy discussion in many candidate races and the tendency for the mass media to treat elections like horse races, contests for public office may fail to spark an interest in politics among some citizens. Initiatives and referenda could provide a remedy by allowing those citizens to shape policy directly. Efforts by competing campaigns to pass or defeat a ballot measure cannot help but focus attention upon its policy merits. The resulting attention could encourage higher election-day turnout among citizens for whom gaining a voice in policymaking represents an important incentive to vote.

The most recent research on this matter finds that the turnout boost resulting from initiatives does arise, but only when initiatives are highly salient to voters and when there is not a presidential race on the ballot that would already draw voters to the polls.²³ When combined with the effects of initiatives on people's substantive knowledge of politics, this boost in turnout points to the positive effect of initiatives on the civic capacity and political participation of citizens.

21. See generally NATHAN CREE, *DIRECT LEGISLATION BY THE PEOPLE* (1892); DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989).

22. See, e.g., Mark Z. Barabak, *Big Democratic Turnout Aids Candidates, Causes Impact: Fierce Three-Way Governor's Race, Anti-Union Prop. 226 Galvanize the Party, Times Exit Polls*, L.A. TIMES, June 3, 1998, at A1.

23. See Mark A. Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700 (2001).

D. Political Equality

It is because of a belief in political equality—the notion that every person’s voice should count equally when decisions are made—that we uphold the principle of “one person, one vote.” We do not allow someone to vote multiple times by purchasing the vote of someone else, even if such a transaction would make both parties better off. While differences among citizens in the economic domain are inevitable in a capitalist economy, we prohibit outright vote-buying due to our belief in equality among citizens in the political sphere.

Yet this belief in political equality only extends so far. Some people participate in politics more than others and will consequently have a greater influence on public policy.²⁴ The only way to enforce political equality would be to restrict association rights and the ability of people to petition government for redress of grievances. In the area of campaign finance, divergences from political equality become especially stark. Given the Supreme Court’s holding in *Buckley v. Valeo*²⁵ that spending money on campaigns is a form of speech, only direct contributions to candidates can be constitutionally limited. Thus, inequalities among citizens pervade our political system.

For the purposes of this paper, the relevant question is whether those inequalities are greater for initiative campaigns than under representative government. David Broder has argued that, despite the intentions of their earliest advocates, initiatives have become just as vulnerable to domination by the well-heeled as have legislatures.²⁶ Spending on initiative campaigns has skyrocketed, and contributions to initiative campaigns, unlike contributions to individual candidates, cannot be constitutionally limited under current precedents. While there is political equality among the citizens who ultimately vote on initiatives, there is inequality among the citizens in regard to the forces that set the agenda, define the choices at stake, and ultimately shape those votes. Yet all of those same problems plague legislatures. Inequality among citizens in lobbying, campaign contributions, and access to the mass media make

24. See generally SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995).

25. 424 U.S. 1 (1976).

26. See generally DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

deviations from political equality a constant in legislatures. While they may not end up much better, there is no reason to believe that initiatives fare worse on political equality than decision-making by legislatures.

E. Information and Deliberation

On two of the dimensions of democracy—majority rule and civic capacity—we have seen that initiatives are superior to representative government, while on two other dimensions—rights and liberties and political equality—the two means of legislating are roughly equivalent. When it comes to the fifth dimension, however, representative government would appear superior, at least on first glance. This fifth democratic principle holds that public choices should rest upon a solid information base and be reached through careful deliberation, which incorporates a broad range of interests representing the larger polity.²⁷

Part of the problem here with initiatives relates to mass politics in general. Whatever the subject matter or issue, Americans are woefully under-informed. Large percentages of citizens do not know basic facts about the people, processes, and institutions of our political system. Only about half, for example, know that there are two United States Senators from their state.²⁸ When it comes to initiatives, people routinely state that they wish they had more and better information on which to base their decisions.²⁹ Despite their support for the initiative process in general, they frequently find the specific initiatives before them to be overly complicated and difficult to understand.

Representative government looks much better in this area. For starters, it is from a jurisdiction's pool of the most politically knowledgeable and experienced citizens that candidates are drawn. After winning office, legislators serve on committees that allow them to specialize in a certain area. Through intensive study of a policy domain, they gain expertise that

27. See generally JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991).

28. See MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 70 (1996).

29. See generally CRONIN, *supra* note 9; DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984).

serves as a public good for the broader chamber. The result is more informed decision-making than would be achieved if each legislator were expected to be an expert in every area.³⁰ For these reasons, it is clear that legislators utilize a broader and deeper base of information when making political decisions than does the general public.

The information advantage of representative government over initiatives stems as well from the contrasting designs of each process. Collins correctly points to a central flaw in many initiatives in that their language is fixed before signature gathering even begins, meaning that technical errors and inconsistencies with existing statutes cannot be corrected.³¹ Moreover, there is no opportunity for opponents of the initiative to propose amendments. When it comes time to vote, most citizens have not had the opportunity to thoroughly examine the initiative and discuss it with their peers. Instead, their reactions to the initiative are based upon a non-deliberative process of responding to campaign messages, as well as often futile attempts to decipher the meaning of the initiative language itself.

By contrast, the legislative process is better able to incorporate available information. Rather than compelling an up-or-down vote as initiatives do, legislative bills are debated and amended at every stage. When opponents point to problems with certain provisions, those provisions can be amended to strengthen the bill as a whole. The varying provisions, meanwhile, are thoroughly scrutinized. A wide variety of voices—individual constituents, executive branch officials, interest groups, and legislators themselves—are brought into the legislative process. Legislators themselves, or at least those serving on the relevant committees, will spend considerable amounts of time assimilating this information. As a result, the final product is likely to be better. Although representative government still falls short of achieving deliberation, as we argue below, it does make fuller use of information than does the initiative process.

30. See generally KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991).

31. See Collins, *supra* note 1, at 996.

II. DELIBERATION AND INITIATIVES

The preceding analysis shows that initiatives either surpass or equal representative government on many democratic criteria. Only with regard to deliberation and information do initiatives appear deficient. The purpose of this section is to explore this fifth criterion in greater depth. After clarifying the meaning of deliberation, we examine the extent to which representative government is deliberative and suggest how, theoretically, the initiative process could be made more deliberative. Having done this, the final section will examine in detail a specific proposal for deliberative initiative elections.

A. *Democratic Deliberation Defined*

We define public deliberation as discussion that involves reasoned argument, forthright emotional expression, critical listening, and earnest decision-making. Though a deliberative process need not be entirely linear, it must entail careful examination of a problem or issue, the identification of a wide range of possible solutions, the establishment or reaffirmation of evaluative criteria, and the use of these criteria in making a decision. As in the case of an initiative election, deliberation sometimes starts with a given set of choices (yea or nay), but it always involves problem analysis, criteria specification, and evaluation.³²

Beyond such formal rules of problem analysis, we define deliberation to include personal testimony, personal narratives, and other emotional or non-linear modes of argument. Those more accustomed to a notion of deliberation that excludes anything but reasoned analysis might wonder at our inclusion of emotional appeals. This choice draws upon the insight of political philosopher Jane Mansbridge, who insists, "We must avoid the traditional, frequently male, mandate to 'keep emotions out of it.' . . . Appeals for the common good require an

32. This definition is taken from GASTIL, *supra* note 3, at 15-33. It also has much in common with the critical group decision-making functions described and studied by Dennis S. Gouran & Randy Y. Hirokawa, *Functional Theory and Communication in Decision-Making and Problem-Solving Groups: An Expanded View*, in COMMUNICATION AND GROUP DECISION-MAKING 55 (R.Y. Hirokawa & M.S. Poole eds., 1996). On the historical meanings and roles of deliberation in American politics, see generally JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* (1995).

emotional and cognitive probing of one's own feelings of empathy, admiration, revulsion, or horror."³³ As Mansbridge acknowledges, "[a]ppeals to emotion *can* be dangerous," but one can simply insist that emotional expressions are, ultimately, required to "stand up to reflection in tranquility."³⁴

Fully democratic deliberation has additional qualities, as well.³⁵ It must include a diverse and representative body of participants drawn from the larger public. Democratic deliberation should use an egalitarian decision rule (consensus, majority rule, or proportional outcomes) to resolve conflicts among participants.³⁶ Some deliberative theorists, such as Joshua Cohen, argue that "ideal deliberation aims to arrive at a rationally motivated *consensus*," but striving toward consensus does not require the use of a strict consensus procedure.³⁷ Strong consensus would give each participant veto power over any collective decisions, and we do not recommend such a procedure for larger polities, such as states and nations.

In addition, participants in democratic deliberation must have equal and adequate opportunities to speak, as well as the opportunity to comprehend other participants' statements. These rights are balanced by related responsibilities: participants must avoid manipulative discourse, provide others with any relevant knowledge they possess, and consider carefully what others have to say.³⁸ To the extent that a discussion meets all of these criteria, we call it democratic deliberation.

B. Legislative Deliberation

As stated earlier, legislatures are designed to be deliberative bodies. A legislature uses committee hearings, floor de-

33. Jane J. Mansbridge, *Reconstructing Democracy*, in REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 125 (Nancy J. Hirschmann & Christine DiStefano eds., 1996).

34. *Id.* at 125. On the pros and cons of emotion in argumentation, see generally DOUGLAS WALTON, *THE PLACE OF EMOTION IN ARGUMENT* (1992).

35. This definition is developed further in GASTIL, *supra* note 6, at 15-31.

36. See GASTIL, *supra* note 3, at 49-60. See generally JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1983).

37. Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 23 (Alan Hamlin & Philip Pettit eds., 1989).

38. Using Jürgen Habermas's terms, an "ideal speech situation" gives participants the chance to examine the meaning of each other's statements and to challenge one another's "validity claims." See JÜRGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (1979).

bate, and innumerable informal exchanges to examine issues and weigh the merits of bills and amendments. Ideally, these bodies are designed to deliberate on behalf of the larger constituencies they represent. Joseph Bessette, in *The Mild Voice of Reason*,³⁹ argues that some members of Congress do act in this manner and have considerable influence over their peers. Bessette's careful study of recent legislative history finds instances where representatives' final votes appear to have been influenced, at least in part, by the reasoned arguments put forward by their colleagues. Even Bessette, however, sees an ominous trend in federal policymaking:

The demise of so many Congressional constraints on mere self-seeking suggests that the Congress as a whole has become a less deliberative institution in recent decades. Less and less do the members of the House and Senate seem willing to sacrifice their private advantage for the sake of responsible lawmaking.⁴⁰

It is tempting to assume that legislatures are deliberative, but beyond Bessette's uncertain findings, there is little direct evidence that they do, in fact, deliberate on the major public issues before them.⁴¹ Certainly there are elected representatives who seek to make the most informed and reflective judgments possible, but such efforts are, as Bessette finds, exceptional. Because representatives are elected, it would be necessary to show how careful and independent judgment benefits officials when they run for re-election. Alternatively, one might assume that deliberative judgments are made behind closed doors, permitting representatives to campaign using simplistic arguments but to govern according to more sophisticated judgments. But given the widespread adoption of sunshine laws and other institutional reforms designed to scrutinize even informal meetings among elected officials, public servants rarely have this luxury of private deliberation.⁴²

A more convincing model of legislative judgment maintains that representatives make decisions using political logic, rather

39. JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON* (1994).

40. *Id.* at 149.

41. We acknowledge that legislatures may be quite deliberative on relatively non-controversial matters, i.e., those which are nearly administrative. Thus, we focus this discussion on major public issues, which tend to spark partisan clashes.

42. See generally BESSETTE, *supra* note 39.

than any independent moral philosophical standard. This means that the deliberative quality of judgments made in office are constrained to the degree that judgments made during elections are non-deliberative. Unfortunately, modern American elections are the antithesis of careful deliberation.⁴³ Most voters do not know what they want from public officials. Without deliberation, voters do not know what is in their own self-interest, let alone the public interest. Just as survey respondents give top-of-the-head answers when asked to express their opinions, voters also rely on cognitive shortcuts to evaluate candidates. The literature that finds relatively sophisticated voting is actually focused on a minority of the electorate and a minority of elections, particularly the Presidential race. In a typical campaign, there is no collective deliberation on candidates; neither the voters nor the candidates show much interest in such activity. Many observers believe that citizens make rational voting decisions by choosing a political party and supporting that party's candidates. Nevertheless, party is often a misleading indicator of representatives' behavior, the proportion of "independent" voters who reject partisanship is on the rise, and most elections do not have a party cue at all (e.g., primaries and nonpartisan races). Moreover, the advantages of incumbency are so tremendous that many elections provide voters with only one viable candidate. As a result, incumbents are elected with tremendous regularity. Were this re-election a reflection of popular will, one would expect tremendous satisfaction with government—but quite the opposite is the case. The public's growing awareness of its flawed electoral system is resulting in increased public cynicism and apathy, along with persistently low levels of electoral participation.

Once again, we do not argue that legislators never deliberate, and we do not deny that, in theory, there is value in electing a representative body to carry out the business of deliberative lawmaking. Rather, we argue that the legislative process is less deliberative than democratic theorists had imagined due to the lack of deliberation that takes place during elections.

Moreover, we argue that because of the pattern of non-voting in the United States, the interests represented in legis-

43. In this paper, we sketch the basic features of this argument. For a complete presentation, with more detailed analysis and scrutiny of available evidence, see GASTIL, *supra* note 6, at 32-67.

latures do not match those in the larger public. In other words, legislative deliberation does not incorporate a broad spectrum, let alone a balance, of competing interests. Compared to non-voters, average voters are older, more affluent, and have more formal education.⁴⁴ Polling data notwithstanding, it is reasonable to expect these demographic differences to result in non-voters as a group being more concerned about class issues—social welfare, job training, and other government programs that aid the economically disadvantaged. Among political scientists, there is considerable debate about the degree to which these demographic differences result in attitudinal differences.⁴⁵ At a minimum, however, it is likely that differences in class interests result in skewed policymaking. Consistent with this view, Michael Parenti points out many ways in which the United States government over-represents the interests of the wealthy.⁴⁶ Research by Kim Hill and her colleagues has shown that social welfare programs fare better when lower-class voters turn out to vote in greater numbers.⁴⁷ Thus, states with more liberal elected officials tend to encourage greater voter registration and turnout because it serves their interests.⁴⁸ In sum, legislatures are rarely deliberative; even when they discuss issues in depth, those exchanges seldom incorporate a representative spectrum of interests, including those of both voting and nonvoting constituencies.

C. *Deliberative Initiative Elections*

This is not to say that typical initiative elections are, by comparison, any more deliberative or representative than their legislative counterparts. Surveys have found that “as many as one-third to a majority of those voting [report feeling] uncomfortable about voting because they needed more information or more time to discuss the issue or to read the voter pamphlet

44. See generally VERBA, *supra* note 24.

45. See Stephen E. Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 AM. J. POL. SCI. 771 (1990). See generally VERBA, *supra* note 24.

46. See generally MICHAEL PARENTI, *DEMOCRACY FOR THE FEW* (6th ed. 1995).

47. See Kim Qaile Hill et al., *Lower-Class Mobilization and Policy Linkage in the U.S. States*, 39 AM. J. POL. SCI. 75 (1995).

48. See Robert A. Jackson et al., *Registration, Turnout, and the Electoral Representativeness of U.S. State Electorates*, 26 AM. POL. Q. 259 (1998).

more carefully, or found that the statement was too hard to read and comprehend.⁴⁹ When an initiative on the ballot receives little notice, voters may have nothing to base their vote upon other than the confusing wording of the initiative itself. In relatively high-intensity referendum elections, such as the recent votes on affirmative action and the civil rights of homosexuals in Western states, average voters have much more information, though much of it is misleading, deceptive, or simply inaccurate. Moreover, turnout in initiative elections is as low as in legislative ones, with the same over-representation of affluent, educated, and senior voters.

The point is that the flaws of lawmaking by initiative or by legislature can be traced back to the same source—non-deliberative elections. In the remainder of this paper, we argue for an institutional reform that could strengthen the initiative process, but we hope that readers will also note that similar reforms could be applied to legislative elections.⁵⁰

Modern experiments in deliberation suggest that new forms of public discussion could create more engaged citizens and reveal feasible solutions to pressing national and local policy problems.⁵¹ Deliberative civic education programs, such as study circles and the National Issues Forums, can create more enlightened interests, as well as the preconditions for the effective public voice.⁵² Community deliberation shows how face-to-face talk among citizens can reveal common ground and the basis for agreement and coordinated action. Random sample forums, such as citizen juries and experiments in deliberative polling, also show how deliberation can be representative and, if modified, perhaps influential. In each of these forms, deliberation appears to develop citizens' interests, strengthen the psychological precursors, and clarify common ground.⁵³ What has yet to happen is for public deliberation to find its way into the mainstream electoral process. Innovations, such as the 1996 National Issues Convention, have proven that citizens can deliberate meaningfully on candidates as well as issues, but deliberation and elections remain largely unconnected in Ameri-

49. CRONIN, *supra* note 9, at 230.

50. *See* GASTIL, *supra* note 6, at 137–63.

51. *See id.* at 112–36.

52. *See id.*

53. *See id.* On deliberative polling, see generally FISHKIN, *supra* note 32.

can politics.⁵⁴ The electoral impact of these experiments remains questionable.

For our purposes, the most relevant illustration is the use of citizen juries, which were developed by Ned Crosby, the founder of the Jefferson Center for New Democratic Processes. The Center has held a handful of juries on issues and candidates appearing on voters' ballots, and the best example of such a jury is the case of the Orono Board of Education. In April 1998, the Center convened a jury to decide whether the school district needed to raise funds to improve its educational facilities and services. Previous bond issue referenda had failed when placed on the ballot in 1995 and 1997, but district officials hoped that a representative group of citizens would, after deliberation, recommend the passage of such a ballot measure. For five days, twenty-four jurors heard arguments and spoke with one another about education and financing. Their final judgment was that the Orono schools did, indeed, need additional funds, and the jury presented a draft bond referendum. When a similarly-worded measure passed in the September 1998 election, district officials credited its passage to both the jury verdict itself and their own efforts to make the larger public aware of the jury's deliberations.⁵⁵

Our basic proposal extends this idea to institutionalize citizen deliberation and the mechanisms that convey deliberative judgments to the electorate. To make it easier for voters to make meaningful, substantive evaluations of ballot initiatives, voters should have access to the results of representative citizen deliberation on the issues that appear on their ballots. Using random samples of the general public, county clerks, secretaries of state, or newly-created government offices could sponsor deliberative citizen panels on each initiative scheduled to appear on the ballot. Panel participants could summarize the results of their deliberations, and election officials could communicate those results to voters through elaborate Internet sites, printed voter guides, and simple information printed on the ballots themselves. Average voters would spend no more time researching ballot measures than they do today, but they

54. On the National Issues Convention, see generally *THE POLL WITH A HUMAN FACE: THE NATIONAL ISSUES CONVENTION EXPERIMENT IN POLITICAL COMMUNICATION* (Maxwell McCombs & Amy Reynolds eds., 1999).

55. See *GASTIL*, *supra* note 6, at 195-96.

would have the chance to check their impressions against those of a deliberative body of their peers.

For the citizen panels to achieve their intended purpose, they would have to produce high-quality decisions, and citizens must be willing and able to use panel judgments when voting. If designed properly, citizen panels should typically be able to avoid self-deception, groupthink, and other small group decision-making illnesses. To reach sound judgments, citizen panelists would need to utilize diverse sources of information, stay motivated throughout the process, and avoid the twin pitfalls of conformity pressure and polarization. The following section will discuss the panel design in greater depth, but the point here is that design issues are not trivial. Sound and representative judgments are only likely if one is willing to pay participants to deliberate, convene panels over a period of several days, incorporate cross-examination and second-guessing, and facilitate open, honest discussions.⁵⁶

If successful in their deliberations, it is likely that the panels' judgments would prove influential in elections. The panels should provide voters with relevant and straightforward information that voters will respect. We grant that the most sophisticated voters would probably find the panel recommendations an unnecessary guide when voting in highly visible initiative elections. Most ballot measures, however, are below the public's radar. Also, since most voters lack both political skills and a keen interest in campaigns, it is likely that they would find panel evaluations helpful in choosing candidates.⁵⁷ A recent national survey conducted by the League of Women Voters found that seventy-six percent of voters said they did not have "enough accurate information" to make meaningful decisions in the voting booth.⁵⁸ Voters habitually follow cognitive shortcuts to compensate for their self-acknowledged ignorance, and citizen panel recommendations would give voters a simple and reliable shortcut.

If the citizen panels succeed in these two respects, the panels could change many other features of American politics. Institutionalized citizen panels could reduce civic neglect, dampen the cynicism of public officials, promote ongoing delib-

56. See GASTIL, *supra* note 6, at 164–86.

57. See *id.*

58. See League of Women Voters, *Charting the Health of American Democracy* (June 1997), at http://www.lwv.org/elibrary/pub/chad_1c.html.

eration, and change the nature of American initiative campaigns. After all, if voters begin to rely on citizen panel deliberations for issue analysis and, for some voters, voting choices themselves, this process will shortcut the modern media-based initiative campaign. For many initiatives, campaigners would do well to put much of their energy into preparing testimony for the panels themselves. Voter mobilization would still be valuable, but many voters would be inoculated against the high-priced television blitzes and snowstorms of direct mail that currently characterize the initiative process.⁵⁹

III. WASHINGTON'S CITIZEN INITIATIVE REVIEW PROPOSAL

Fortunately, the citizen panel proposal is far from fantasy. In this final section, we summarize a very real effort to institutionalize such a process in the form of a Citizen Initiative Review. Ned Crosby, the aforementioned founder of the Jefferson Center, has been working in the state of Washington for more than a year to create citizen panels that would give voters information on initiatives.

His proposal, the Citizens Initiative Review, would set up randomly selected panels, adjusted to reflect the demographics and political ideologies of the state.⁶⁰ These groups of eighteen to twenty-four citizens would come together for five days. They would take testimony on a single initiative on the ballot in a format similar to court presentations by attorneys except that the citizen jurors would be encouraged to actively ask questions of the advocates. Neutral experts would be on hand if the citizen jurors needed help parsing answers. After the presentations, panel members would deliberate as a group, drawing on their life experiences and perspectives as residents of different parts of the state. They would vote on whether they support the initiative in question, then report back to the state's electorate on what each panel member decided and why. Briefing papers and documents presented to the citizen panel by the ad-

59. See GASTIL, *supra* note 6, at 164-86.

60. The Citizen Initiative Review was previously called the Plan for Health Democracy. It is based on the model of the Jefferson Center's citizen juries. On the jury process, see Ned Crosby, *Citizen Juries: One Solution for Difficult Environmental Questions*, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 157 (Ortwin Renn et al., eds., 1995). See also Graham Smith & Corinne Wales, *The Theory and Practice of Citizens' Juries*, 27 POLY & POL. 295 (1999).

vocates would be available to the public. The panel's report to voters would be printed in the state's voter pamphlet.

While the Citizen Initiative Review would only be advisory to voters, there are good reasons to believe such a program would be educational and ultimately produce a more informed electorate that would be better able to make sound decisions on initiatives. Cindy Simmons conducted a series of thirty-four interviews with political activists to gauge their support for the Citizen Initiative Review concept.⁶¹ She found that many interviewees said they had trouble finding information on initiatives. They also complained that they did not trust that the information they could find was accurate and unbiased.

Simmons found a pattern of support in her interviews with activists. Liberals with low success in political arenas were enthusiastic. Liberals who felt well-served by state and local legislative bodies were more likely to eye the proposal with suspicion, sometimes saying it would usurp the deliberative role of the state legislature. Conservatives universally opposed the program, primarily on the grounds that it would be unnecessary government spending. When asked if they would support such a project if it were run by a non-profit organization, conservatives' enthusiasm was close to that of politically unsuccessful liberals.

It would seem that this combination of attitudes among political players, if it held among legislators themselves, would make it extremely unlikely for a tax-funded Citizen Initiative Review to be passed into law by the Washington Legislature. But recent passage of initiatives that restrict how lawmakers can allocate money in the state budget has created a new chorus of legislators who want voters to be better educated on the initiatives before them.

To take the most cynical view, elected representatives likely oppose the right of initiative because it takes power away from the state legislature. In recent years in Washington, initiatives have reduced taxes and placed restrictions on how some tax money can be spent. One could assume that legisla-

61. Simmons's research consisted of semi-structured, in-depth interviews using a snowball recruitment technique. These interviews, as well as four focus groups conducted by Market Trends, were paid for by supporters of the Citizen Initiative Review proposal. The focus groups, using random samples of people from different regions of Washington, elicited similar comments from participants, who were largely favorable toward the proposal.

tors want to control as much tax money as possible. Even anti-tax lawmakers could crave the political points that would come from being able to take credit for tax cuts. Yet in Washington, a state where citizens traditionally revere their initiative rights, it would not behoove legislators intending to seek reelection to denigrate the initiative process.

This leaves lawmakers in a difficult position. Initiatives passed by voters have severely limited the tax money available to provide needed state services, such as transit, ferry service, institutional care for mentally ill adults, and vocational rehabilitation for people with disabilities.

State employees, including legislators, may not use state facilities to campaign for or against an initiative. Rep. Jim Buck (R-Joyce) said that this prohibition "has a chilling effect for anyone in government to make any comment at all. We're in a situation right now where we are totally unable to communicate with our constituents about how initiatives affect our budget."⁶² Even if legislators could use their offices to support or oppose initiatives, they know any attempts on their part to limit the right of initiative will probably be viewed cynically by the electorate. From this predicament has grown a set of bills aimed at increasing the amount of useful information available on initiatives.

During the same hearing at which Buck spoke, Rep. Jim Clements (R-Seelah) took the political middle ground in introducing his bill, which would require fiscal and constitutional review of initiatives. "I hold it as the Holy Grail that the citizens have the right to offer initiatives without the Legislature," Clements said, however, he added, "[t]here have been some problems with communication." Clements then posed the question of the day: "How, in fact, can we give the voters of this state information [on initiatives] that is not advisory?"⁶³

The answer is that legislators, who suffer the same generalized lack of trust as used car dealers, will probably not be taken as objective messengers on initiatives. Panels they set up may suffer the taint as well. But panels in which ordinary citizens, the power base for initiatives, report to each other may earn the trust of the electorate.

62. *Hearing on H.B. 1414, HB 1559, H.J.M. 4002, H.J.R. 4206, and H.J.R. 4207 Before the House Committee on State Government, 2001 Leg., 57th Sess. (Wash. 2001)* (statement of Rep. Jim Buck, sponsor of H.J.R. 4206).

63. *Id.* (statement of Rep. Jim Clements).

CONCLUSION

To summarize, we contend that direct and representative democracy are not conflicting principles; they can be integrated in practice, as they are in many modern states. More precisely, initiative elections and representative legislatures can both serve democratic ends. We argue that initiatives score at least as well as typical state legislatures on four basic criteria for the democratic process: majority rule, the protection of basic rights, civic capacity and political participation, and political equality. With regard to our fifth criterion, legislatures appear more deliberative, on first glance, but they actually rest on the same non-deliberative electoral process as initiatives.

Consequently, we argue that both legislatures and initiatives would benefit from elections in which voters make more deliberative choices. We advocate the use of randomly-selected citizen panels to inform the judgment of the mass electorate, and we sketch the basic features of such a system. Though such a scheme may sound far-fetched, early versions of citizen panels have already been employed in local elections. Voters in the state of Washington may soon have the chance to consider adopting citizen panels by supporting a Citizen Initiative Review proposal in an upcoming initiative election. It is our hope that, despite its flaws, the existing initiative process will be able to recognize the need to reform itself—something that legislatures, as Collins himself acknowledges, are rarely able to do.⁶⁴

64. See Collins, *supra* note 1, at 990.