

1979

The National Initiative Proposal: A Preliminary Analysis

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Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 Neb. L. Rev. 965 (1979)

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By Ronald J. Allen*

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* Professor of Law, University of Iowa College of Law. I am deeply indebted to my colleagues, David Baldus, Gregory Williams, and David Vernon, and to John Shockley of the Western Illinois University Dept. of Political Science, for having read and commented upon earlier drafts of this article. I am also indebted for the research assistance provided by Peter Durant, in his third year at SUNY/Buffalo Faculty of Law and Jurisprudence, and by Thomas Melloy, a 1979 graduate of the University of Iowa College of Law.

I. INTRODUCTION

Senate Joint Resolution 67¹ proposes to alter the fundamental allocation of power in our constitutional scheme. If passed by Congress and ratified by the states, it would provide for a national statutory initiative process.² The Resolution echoes in many ways the call for direct democracy at a national level that emerged with the Progressive Movement's introduction of the initiative, referendum³ and recall⁴ in a number of states early this century.⁵ Not much came of these early suggestions for national initiative, referendum and recall procedures, and wisely so. In a matter as important as the constitutional allocation of legislative power, wisdom dictates caution. Serious doubts as to the effect of the trilogy of reforms were raised⁶ when the reforms were first introduced, and the Progressive Movement's adherents in response could only speculate.⁷ It was not until 1898 that the first state—South Da-

1. S.J. Res. 67, 95th Cong., 1st Sess. (1977). See Appendix, *infra*, at 1051 for the text of the resolution. There are other similar proposals. See, *Joint Resolution Proposing an Amendment to the Constitution of the United States With Respect to the Proposal and the Enactment of Laws by Popular Vote of the People of the United States: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 24-27, 30-33 (1977) [hereinafter cited as *Hearings*]. Because hearings have been held on S.J. Res. 67, but not on any of the other proposals, and because it is the most carefully drafted of the various proposals, I have emphasized it in this article more than the other proposals. But see note 13 *infra*. S.J. Res. 67 was reintroduced into the 96th Congress, by Senator DeConcini as S.J. Res. 33. It was again referred to the Subcommittee on the Constitution of the Senate Committee on the Judiciary.
2. The statutory initiative is a process by which voters may place proposed laws on the ballot and either accept or reject the proposal at the polls. Under S.J. Res. 67, it would probably take close to four million signatures on petitions in order to obtain sufficient valid signatures to place a measure on the ballot. See note 395 *infra*. If a sufficient number of voters (usually a majority of those voting on the measure, but see note 395 *infra*) vote for it, it becomes law.
3. A referendum is a process by which citizens or the legislature may place on the ballot a statute enacted by the legislature and signed by the governor and vote it up or down. See, e.g., MASS. CONST., as amended, art. 48, pt. 1; MD. CONST., as amended, art. XVI, § 1.
4. A recall is a method of allowing voters to decide whether an elected official should be permitted to stay in office. See IDAHO CONST. art. 6, § 6; IDAHO ELECTION CODE, Ch. 17, §§ 34.1701-1715; COLO. CONST. art. XXI, § 1.
5. See J. POLLOCK, THE INITIATIVE AND REFERENDUM IN MICHIGAN 2-4 (1940). For proposals of direct democracy at a national level, see D. WILCOX, GOVERNMENT BY ALL THE PEOPLE 305-12 (1912). See also J. BOYLE, THE INITIATIVE AND REFERENDUM (1912); Lowell, *The Referendum in the United States*, in THE INITIATIVE, REFERENDUM AND RECALL 126 (W. Munro ed. 1912); Everett, *Federal Initiative and Referendum*, 11 S. ATL. Q. 350 (1912).
6. See generally, J. BOYLE, *supra* note 5.
7. See, e.g., D. WILCOX, *supra* note 5. For summaries of the theoretical positions that are still current, see Sen. Owens's remarks, 49 CONG. REC. 4713-50 (1913),

kota—explicitly embraced any of the reforms;⁸ thus there was no significant body of experience by which to test the trilogy when they were first proposed at the national level.⁹

Wisdom still dictates caution, of course. In light of the tremendous increase in the responsibilities of the federal government, the allocation of legislative power is more important now than ever. Yet, that very same expansion demands that we reconsider whether the present distribution of responsibilities remains the one most likely to fulfill our fundamental goals. A contemporary evaluation of the federal law-making machinery also makes sense apart from the growth in the power and responsibility of the central government. The Founding Fathers had virtually no experience with federated constitutional democracies. Theirs was a creation based more upon extrapolation from theory rather than fact.¹⁰ We, by contrast, have had nearly two hundred years of experience with their theoretical constructs and can now test their creation by that experience.

The renewal of interest in one of the Progressives' reforms—the initiative—comes, then, at a most propitious time. It comes at a time when it makes good sense to reconsider our basic law-making scheme, a reconsideration which can effectively be accomplished through an exploration of the wisdom of the national initiative proposal.¹¹ More importantly, it comes at a time when the major difficulty that originally inhibited serious consideration of a national initiative process may in large part be overcome. We no longer

and the debates on admitting Arizona to the Union, 47 CONG. REC. 2793-2803, 3633-46 (1911).

8. S.D. CONST. art. III, § 1; 1897 S.D. Sess. Laws, Ch. XXXIX.

9. Prior to the adoption of the initiative and referendum in South Dakota, a number of states had used popular referenda on an ad hoc basis for various purposes. For a history of popular law-making that is not limited to the initiative, referendum, and recall, see C. LOBINGIER, *THE PEOPLE'S LAW* (1909). The progressive movement was heavily influenced by the use of national referenda in Switzerland. See L. TALLIAN, *DIRECT DEMOCRACY* 9-21 (1977). For an account of the Swiss experience, or more precisely, the experience of the Swiss canton of Graubünden, see B. BARBER, *THE DEATH OF COMMUNAL LIBERTY: A HISTORY OF FREEDOM IN A SWISS MOUNTAIN CANTON* (1974).

10. Their experience under the Articles of Confederation was surely of value, however.

11. I will assume throughout this article that a constitutional amendment is necessary in order to provide for a national initiative process. An argument to the contrary could be constructed based on the ninth and tenth amendments and on the specific language of art. I, § 1 ("All legislative powers herein granted . . ."), but I doubt it would be very convincing. At the state level, the cases have held that a constitutional amendment is necessary, although a legislature may condition the implementation of a bill, especially at the local level, upon a contingency. See Note, *The Constitutionality of a Delegation of Legislative Power to the People*, 17 IOWA L. REV. 239 (1932).

have merely the insignificant experience of a handful of unrepresentative states from which to draw our inferences. We now have close to a century of experience in an impressive variety of states that ranges from some of the least to the most populated, industrialized and urbanized. In addition, the political theory that we can draw on to aid the analysis is richer than ever before and, more importantly, our understanding of political institutions has advanced dramatically. Accordingly, we are in a position where the proposal for a national initiative procedure can be evaluated in a depth and fashion unattainable when it was first advanced. My purpose here is to make what contribution I presently can to that evaluation.

Before proceeding, however, I wish to emphasize that this is indeed a *preliminary* evaluation. The range of issues relevant to the national initiative proposal is wide and the relevant scholarship and experience extensive—too wide and too extensive, I fear, to be captured fully by a single individual trained in a single discipline. Thus, my effort here is limited to placing the national initiative proposal in its proper perspective and beginning the process of analyzing the various issues it raises, relying on whatever materials appear relevant. What subsequently will result, hopefully, will be corrections and refinements of the analysis as those from other disciplines bring their particular expertise to bear on the issues within their special competence. In that spirit, then, in full awareness that the views expressed herein will be towards the first rather than the last word, I offer this preliminary evaluation of the national initiative proposal.¹²

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12. This analysis is limited to the initiative for a number of reasons. One is that S.J. Res. 67 only involves the initiative. Another, more important, reason is that there is little that can be gained by a referendum that cannot be gained by an initiative, whereas the reverse is not true. A referendum can only accept or reject a policy of the legislature. An initiative can accomplish those ends and more by enacting a proposal or repealing a bill passed by the legislature.

There is one noteworthy difference between initiative and referenda, however; with most referendum procedures the legislative bill does not go into effect until after the election. Thus, a referendum can stop an enactment from ever being implemented, whereas a repealing initiative usually can only repeal an enactment at some time after it has been implemented. This time-gap problem is a two-edged sword, however. Although it is superficially appealing to allow the legislative policy choices to be held in abeyance pending approval by the electorate, the result is also to allow a small minority of persons—whatever the petition process calls for—to disrupt what may be important governmental services. An example of this occurred in Oregon, where the funding for the state university was twice suspended pending the outcome of a referendum. Holman, *The Unfavorable Results of Direct Legislation in Oregon*, in *THE INITIATIVE, REFERENDUM AND RECALL* 279, 287-88 (W. Munro ed. 1912).

The analysis begins in Part II with an examination of the potential contribution of a national initiative process to our system of government. The issues addressed are the deficiencies in the federal legislative process, the potential ameliorative effects of a national statutory initiative procedure, and the risks such a procedure entails. Part III examines the experience of the states that employ initiatives to determine whether that experience either confirms or disposes of any of the aspirations for, or the objections raised to, the initiative process. Part IV concludes the analysis with a brief consideration of the specific proposal contained in Senate Joint Resolution 67, and a few modifications are suggested.¹³

II. THE INITIATIVE'S POTENTIAL CONTRIBUTION TO THE POLITICAL STRUCTURE OF THE FEDERAL GOVERNMENT

An examination of the potential contribution of the initiative requires a complex analysis. First, the primary objectives of the federal legislative process need to be articulated, which can only be done through an examination of the development of democratic theory in the United States.¹⁴ Next, the performance of Congress must be gauged by our political ideals to determine where ideal and fact have diverged.¹⁵ Finally, the initiative process must be examined to see if it might further the pursuit of our ideals—and if so, at what risk.¹⁶

A. Democratic Theory and the Federal Government

As Robert Dahl has commented, in any analysis of democratic government, "[o]ne of the difficulties one must face at the outset is that there is no democratic theory—there are only democratic the-

There is also a potential cost to not allowing referenda—that cost is that the electorate may repeal a statute and some harm may occur from the time of the effective date of the statute to its repeal. *See generally* J. CORRY & H. ABRAHAM, *ELEMENTS OF DEMOCRATIC GOVERNMENT* 379 (4th ed. 1964). Nonetheless, the potential costs of a referendum procedure are significant enough to dissuade me from extending this analysis to argue for it.

As for the recall, it may be a very good idea at the national level, but it is an idea independent of the initiative and deserving of treatment in its own right.

13. Whether the idea of a national initiative proposal is worth pursuing must be addressed before the merits of any specific proposal can be examined in depth. Thus, §§ II & III of text proceed without any significant reference to S.J. Res. 67, and § IV of text discusses only those aspects of it that are directly related to the analysis in §§ II & III of text.

14. *See* § II-A of text *infra*.

15. *See* § II-B of text *infra*.

16. *See* § II-C of text *infra*.

ories."¹⁷ Nonetheless, one can distill from the dominant patterns of democratic thought in this country many common concerns and insights helpful in analyzing the national initiative proposal.

The progression of American democratic theory can be crudely classified into three, perhaps four, stages. The stages are Madisonian democracy, populist democratic theory, elitism, and the present period that is probably best characterized as one of reaction. Since no simplistic classification scheme could encompass the complexities of democratic theory, this taxonomy is proffered simply as a useful way of looking at the general development of democratic theory in order to further the process of drawing inferences from that development that are relevant to the analysis of the initiative process.

Madisonian democratic theory probably has had the greatest impact of all political theories on our national psyche. Its basic tenets, and its fundamental flaws, are so well known as to not require complete recitation here.¹⁸ Nonetheless, a general consideration of the structure that was heavily influenced by Madisonian concepts should prove quite useful.

Simply put, our forebears faced a difficult dilemma. They recognized a need for a central government, but they also knew of the risks that attend the creation of any authority empowered to exercise coercive control. After all, they experienced both sides of the dilemma—from their perspective the English government had been oppressive,¹⁹ and the institutions created by the Articles of Confederation proved to be ineffectual.²⁰ Accordingly, they viewed their task as the creation of a government sufficiently strong to be effective but sufficiently restricted so as to reduce the chances of an oppressive regime developing,²¹ and their views were colored by a fundamental bias in favor of personal autonomy and against

17. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 1 (1956). Throughout this article I will use the term "democracy" and its derivatives as generic terms whose referents are governments that are expected to act to a large degree consistent with the views of a significant portion of the electorate, and whose officers are chosen, directly or indirectly, by the electorate. For helpful discussions of "democracy," see J. CORRY & H. ABRAHAM, *supra* note 12; R. DAHL, *supra*; THE FEDERALIST No. 39 (J. Madison) (J. Cooke ed. 1961).

18. See generally R. DAHL, *supra* note 17.

19. See, e.g., THE DECLARATION OF INDEPENDENCE. If the conditions of the colonists are compared to the conditions of other nations, however, it becomes quite clear that the colonists enjoyed extraordinary freedoms. S. MORRISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 172 (1965); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 3 (1969).

20. J. HOWE, THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 150 (1966); 2 D. MALONE, JEFFERSON AND HIS TIME 161 (1951); C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 39-40 (1964).

21. See THE FEDERALIST No. 37 (J. Madison) (J. Cooke ed. 1961).

governmental interference in private affairs.²² All of this was qualified by a concern that rights of minorities not be trampled in a rush to majority rule,²³ and by a recognition that a constitution can do little more than create a basic framework.²⁴

To accomplish their task, widely shared value judgments were specifically incorporated into the Constitution, to the extent possible, to protect those interests deemed so important as to deserve explicit protection from governmental interference. Thus, we have the specific provisions in the body of the Constitution²⁵ as well as those in the Bill of Rights. Beyond that the task became more difficult, and all that could be done was to create the conditions of acceptable government and leave its development to the character of the nation.

A basic postulate was that the citizenry would not, in the long run, voluntarily act against its own interests.²⁶ Thus, Congress was to be selected by the people—the House directly, the Senate indirectly—and frequent elections were mandated. The bias against governmental action was implemented by making legislation difficult to enact. Not only must a bill receive approval in the House, it must also receive approval by the less representative Senate. And even if the Senate does not guarantee protection of any identifiable interests,²⁷ its mere existence makes legislation more difficult to enact. Thus, the Senate should preserve individual freedom from governmental oppression by preserving the status quo, as is also true of the presidential veto.²⁸

The question of the protection of minorities in less random fashion than that provided by the Senate²⁹ and by presidential veto³⁰ provided more intractable problems, however. The solution lay for the most part in the makeup of the House and in reliance on the character of the nation.³¹ By providing for a relatively large

22. H. COMMAGER, *THE EMPIRE OF REASON* 176-84 (1977).

23. *See generally* THE FEDERALIST No. 10 (J. Madison) (J. Cooke ed. 1961).

24. H. COMMAGER, *supra* note 22, at 232-33; J. HOWE, *supra* note 20, at 158-59.

25. In particular, *see* U.S. CONST. art. I, § 9; art. III, § 2; art. IV, §§ 1, 2.

26. *See, e.g.*, THE FEDERALIST No. 55 (A. Hamilton or J. Madison) (J. Cooke ed. 1961).

27. Although the Senate, as a result of its structure, on occasion may act to protect minority rights, it does so in a completely random fashion determined entirely by the fortuity of demographics. *See* R. DAHL, *supra* note 17, at 112-19.

28. U.S. CONST. art. I, § 7.

29. *See* note 27 *supra*.

30. The difficulties with the presidential veto as a means of protecting minority interests are, first, that it can only operate after Congress has affirmatively acted; and, second, as the conditions calling for its use become more egregious, its exercise becomes politically more costly.

31. The method of electing the Senate was viewed as providing a further check

legislative chamber with Representatives having a fairly small constituency,³² conditions were created by which minority interests would often be represented, either directly or indirectly.³³ The result is not a guarantee that the interests of minorities will be respected, since their representatives can be outvoted. Rather, the result is to provide minorities access to legislative deliberations. If bills are proposed that would adversely affect the interests of a significant portion of a representative's constituency, he would be able to argue for alternatives. Thus, one of the primary functions of popular representation in the House is to provide a forum for the expression of views where the representatives of those interests adversely affected by legislation could argue the unfairness of the measure.³⁴ More importantly, however, the implicit assumption must have been that often those views would be accorded respect. The assumption must have been, in other words, that it would be a significant check upon oppressive legislation to allow its oppressive characteristics to be exposed in the deliberative process. While minority views may be overridden at times, it appears that the Framers anticipated, or at least hoped, that our government would generally proceed on the basis of a search for equitable resolutions of problems and conflicts in an atmosphere charged with a philosophical bias against governmental activity³⁵ rather than solely on the basis of constituent self-interest narrowly conceived.

Thus, the primary concerns of Madisonian theory appear to be representativeness and access to the legislative process by all legitimate groups in order to minimize the chances of abusive legislation being enacted:³⁶ concerns that were influenced by a healthy,

on undesirable legislation. Given its longer terms of office, it would be in a better position, politically, to kill hasty, ill-conceived legislation sparked by the heat of the moment that further consideration would prove to be unwise. See THE FEDERALIST Nos. 62, 63 (A. Hamilton or J. Madison) (J. Cooke ed. 1961).

32. Each Representative was to have a constituency of approximately 30,000 people. See THE FEDERALIST No. 56 (A. Hamilton or J. Madison) (J. Cooke ed. 1961). Some felt even that was too large. *Id.*

33. See THE FEDERALIST No. 35 (A. Hamilton) (J. Cooke ed. 1961).

34. *Id.*

35. THE FEDERALIST No. 57 (A. Hamilton or J. Madison) (J. Cooke ed. 1961).

For now it was not government seeking, usually in vain, to limit and control the conflicting ingredients of the social order, but society limiting government through 'charters of power granted by liberty.' John Adams and Alexander Hamilton and Gouverneur Morris might conjure up dangers from the people, but what the vast majority of Americans feared was danger from government.

H. COMMAGER, *supra* note 22, at 212. See also J. HOWE, *supra* note 20, at 93-95.

36. There are many other concerns of lesser importance, of course, as a quick

although not unabashed, respect for the citizenry.³⁷ These same concerns are woven throughout the mutations that democratic political theory has undergone over the past two centuries. In fact, the primary distinguishing trait of the various phases through which democratic political theory has passed is the view held of the electorate. The roles of representativeness and access to the legislative process have generally held their place, although the view of the appropriate contours of those roles has varied somewhat. What has caused this variance is the dramatically different views of the populace that have been held from time to time. The progression of political theory from Madisonian concepts through populism to elitism demonstrates this clearly.

The predominant tendency in democratic thought from the time of Madison until the middle of this century was one of ever-increasing confidence in the citizenry. The view of the "common man," in the words of Professor Peter Bachrach, was that he "inherently was capable of good judgment and that his occasional manifestations of irrationality and hostility toward the democratic process were symptomatic of a malfunctioning society."³⁸

More important than the judgment, however, is its justification.

Events reaffirmed the faith of the liberal democrat. Especially in England and America, it was the great mass of people, first the middle and then the working classes, who were the major force in extending democracy and constitutional liberties. In exerting continuous pressure for the expansion of the franchise, they were instrumental in building the foundations of modern democratic constitutionalism And if the working classes had not waged a long and bitter struggle for essential economic and social reform, it is doubtful that even a remnant of constitutionalism would have survived in the world today. . . . [I]t appeared . . . that Jefferson was basically right: that in the last analysis, it is the mass of the people, not the elite, who are the true guardian of liberty.³⁹

It appeared, in other words, as though the rhetoric of the revolution was being translated into reality. The "common man"

reading of the Federalist Papers or the debates in the constitutional conventions makes abundantly clear.

37. See, e.g., THE FEDERALIST NOS. 14 (J. Madison), 49, 55, 63 (A. Hamilton or J. Madison) (J. Cooke ed. 1961). Each of the assertions in the text could be qualified endlessly, of course. To paraphrase Prof. Dahl, there is no "view" of the Founding Fathers; there are only "views." Moreover, there is no way of knowing what to them was a substantive argument and what was political rhetoric. Thus, if the text at times appears somewhat simplistic or idealized at points, I have no defense except that my purpose here is broad outlines, not a historical treatise on political ideas.

38. P. BACHRACH, THE THEORY OF DEMOCRATIC ELITISM 27 (1967) (footnote omitted).

39. *Id.* at 28 (footnote omitted). For examples of this perspective, see C. BECKER, MODERN DEMOCRACY (1941); M. LERNER, IT IS LATER THAN YOU THINK (1943). But see B. CRICK, AMERICAN SCIENCE OF POLITICS (1956).

was proving more trustworthy than the "uncommon men" who represented him. Talk of "representativeness" in this context seemed to miss the point. To the extent our institutions were unrepresentative they were perceived as tyrannical, oppressive, or, at the very least, engaged in a rearguard action to preserve the position of favored elites for as long as possible.⁴⁰ Similarly, the "people" seemed less inclined to abuse the interests of minorities than was the government. Thus, the Democratic Populist saw the problem as one of furthering essentially the same interests of Madisonian theory—representation and protection of minority interests—by increasing the involvement of the citizenry in the governmental process.⁴¹

The faith of the Populist in the "common man" was sorely tested, however, by developments in this century. The result was the demise of the beneficent view of the man on the street as a foundation for democratic thought. The rise of fascism in Italy and Germany, as well as the atrocities of Stalinist Russia, began the process of turning the political theorists from their faith in the people. The rise of McCarthyism in America during a time of affluence apparently concluded it. Even if Hitler and Mussolini could be explained, in part, as the result of unique historical forces, and Russia's toleration of Stalin explained by her sad history of virtual enslavement, McCarthyism could not be explained in a way consistent with populist theory. Forthwith, democratic theory was modified. No longer was the common man trumpeted as the protector of constitutional democracy. He was no longer viewed as the solution but as the problem.⁴²

The result of the revised view of the populace⁴³ was the resur-

40. See C. BECKER, *supra* note 39.

41. Classical democratic theory also conceived of participation in civic affairs as necessary to the full attainment of one's intellectual and moral capabilities. Davis, *Cost of Realism: Contemporary Restatement of Democracy*, 17 W. POL. Q. 37 (1964); Duncan & Lukes, *New Democracy*, 2 POL. STUD. 156 (1963); Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285 (1966), at 458-62. This perspective goes at least as far back as J. S. MILL, REPRESENTATIVE GOVERNMENT 203-05 (Everyman ed. 1975), cited in P. BACHRACH, *supra* note 38, at 3-4.

42. For an example of this shift in view, compare M. LERNER, *supra* note 39, with M. LERNER, *AMERICA AS CIVILIZATION* (1957). See also F. NEUMAN, *THE DEMOCRATIC AND AUTHORITARIAN STATE* (1957). It is not at all clear, however, that McCarthy drew most of his strength from the masses. See, e.g., M. ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* (1967).

43. All elite theories are founded on two basic assumptions: First, that the masses are inherently incompetent, and second that they are, at best, pliable, inert stuff or, at worst, aroused unruly creatures possessing an insatiable proclivity to undermine both culture and liberty.

P. BACHRACH, *supra* note 38, at 2.

rection of elite theories of democracies. Harkening back to the work of Mosca,⁴⁴ Pareto,⁴⁵ and the more recent work of Schumpeter,⁴⁶ democratic theorists began to argue that democracy's only hope of survival was elite leadership.⁴⁷ The masses had proven themselves uncommitted to democratic government; and if any significant powers were placed in their hands, the result would be to risk the destruction of democratic constitutionalism.⁴⁸ Thus, the elite theorists urged that the role of the masses be limited to choosing among competing elites for leadership positions. The elites, in turn, would be expected to preserve democratic constitutionalism due to their greater commitment to it resulting from their greater understanding of it.⁴⁹

A number of serious problems with elite theory were soon perceived, however. Perhaps the most disturbing is that it is basically unrealistic.⁵⁰ Its conception of the the American electorate is remarkably wide of the mark, as are its twin notions of public opinion formation and the relationship between the masses and the elites.⁵¹ There is another major difficulty as well—who are those

44. G. MOSCA, *THE RULING CLASS* (1896).

45. V. PARETO, *THE MIND AND SOCIETY* (1883).

46. J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942). See also H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950).

47. See, e.g., G. SARTORI, *DEMOCRATIC THEORY* (1962). For an account of this development, see P. BACHRACH, *supra* note 38.

48. See, e.g., T. DYE & L. ZEIGLER, *THE IRONY OF DEMOCRACY* 14 (1975). The destruction was thought most likely to come from the rise of a demagogue, which demonstrates the implicit influence of the Italian and German experience. See, e.g., G. SARTORI, *supra* note 47, at 102. See also Truman, *The American System in Crisis*, 74 *POL. SCI. Q.* 481 (1959).

49. For a more detailed account of elite theory, see P. BACHRACH, *supra* note 38. In discussing elite theory, normative judgments must be kept distinct from empirical observations. Much of elite theory is premised on the view that, in an ever more complex world, more and more decisions of necessity will have to be made by specialists. As Suzanne Keller has said: "[t]he democratic ethos notwithstanding, men must become accustomed to bigger, more extensive and specialized elites in their midst as long as industrial societies keep growing and becoming more specialized, and as the technical need for formal organizations increases." S. KELLER, *BEYOND THE RULING CLASS* 71-72 (1963). See generally C. MILLS, *THE POWER ELITE* (1956). See also P. BACHRACH, *supra* note 38, at 1. Although Keller is surely correct, that does not dispose of the issue of wider participation in decision-making when circumstances permit it.

50. See P. BACHRACH, *supra* note 38, at 62-63; Walker, *supra* note 41. For normative criticisms, see the authorities cited in Walker, *supra* note 41, at 457 n.17.

51. See § III of text *infra*. The discrepancy between theory and fact may result from an insuperable barrier:

The difference between government as reported by the political scientist and government as it actually takes place is much like the difference between learned descriptions of *amour* and *amour* itself. . . . Even more than the theoreticians of *amour*, who sometimes

informed, beneficent elites who so magnanimously will act to preserve constitutional democracy? Unfortunately, there were, and are, no obvious candidates for the position. Thus, elite theory began to toy with various schemes to correct the deficiency, ranging from "intellectuals" arguing for intellectuals, "university professors" for university professors,⁵² to schemes so complex as to essentially work a reconciliation between elite theory and its precursors.⁵³

Notwithstanding these difficulties, elite theory is helpful to this analysis due to its conception of the system the elites were to preserve. It was not a system which primarily secured the interests of the elites, as the cynic might think.⁵⁴ Quite to the contrary, the system that the elites were to protect is one which embraces the primary goals of Madisonian theory. Elite accountability to the masses at periodic elections, in order to preserve a rough congruence between governmental actions and the wishes of the people, is an accepted tenet, although the elites are also viewed as having the further burden of influencing public opinion through their discussions of the alternative policies available at the moment.⁵⁵ Still, the primary objective of elite theorists is the construction of a system that is designed to resist the demands of the populace in primarily one area—those demands that would lead to the destruction of democratic constitutionalism and toward the creation of a totalitarian state.⁵⁶ Thus elite theory does not reject the basic goals of Madisonian theory. Indeed, elite theory arose as a re-

have the advantage of being tentative practitioners themselves, the political scientist is at a disadvantage. . . . The terrain, clearly, belongs in the particular jurisdiction of someone else, as *amour* lies in the jurisdiction of the poet or madman.

F. LUNDBERG, *THE RICH AND THE SUPER-RICH* 514 (1968).

52. See, e.g., A. BERLE, JR., *POWER WITHOUT PROPERTY* (1959); C. MILLS, *CAUSES OF WORLD WAR THREE* (1958); C. MILLS, *SOCIOLOGICAL IMAGINATION* (1959).

53. See, e.g., R. DAHL, *DEMOCRACY IN THE UNITED STATES* (1972); R. DAHL, *supra* note 17; D. RICCI, *COMMUNITY POWER AND DEMOCRATIC THEORY* (1971); A. ROSE, *THE POWER STRUCTURE* (1967); P. TRUMAN, *THE AMERICAN SYSTEM IN CRISIS, in POLITICAL ELITES IN A DEMOCRACY* (P. Bachrach ed. 1971).

54. It is difficult not to become skeptical. See note 52 & accompanying text *supra*. See also note 58 *infra*.

55. See, e.g., Plamenatz, *Electoral Studies and Democratic Theory*, 6 *POL. STUD.* 1 (1958). There are more extreme views occasionally expressed that suggest utter contempt for the general populace. See, e.g., H. FERRY, *ECONOMY UNDER LAW* 51-58 (1960). There are also those who are not concerned with representativeness and would prefer to see the elites immunized from mass influence almost entirely. See, e.g., G. SARTORI, *supra* note 47, at 107-09.

56. See, e.g., W. KORNHAUSER, *THE POLITICS OF MASS SOCIETY* (1959). Apart from the electoral process, the elites were to be kept in check by intra-elite competition, and by overlapping memberships. See, e.g., S. KELLER, *supra* note 49, at 273-74 (1963); P. TRUMAN, *THE GOVERNMENTAL PROCESS* 514 (1951). See generally R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* (1967).

sponse to perceived conditions that would undermine the political institutions capable of achieving those ends.⁵⁷ Once again we see political theory undergoing mutations in order to justify institutional arrangements designed to preserve a generally representative government that is dedicated to the equitable treatment of all parties.⁵⁸

Characterizing the present mood of political theorists is difficult. It seems as though we are now either in a general phase of reaction, where the assumptions of previous views are being questioned and where there is an emphasis on attempting to substantiate empirical assertions,⁵⁹ or we may be in a transition from older theories to ones not yet formulated. Whatever the case, to my knowledge our political theorists are not now engaged in the process of forsaking the primary goals of Madisonian theory.

Thus, throughout our history the concern for representation and minority interests has remained fairly dominant as well as fairly constant in our political thought. We cannot say in detail or with certainty what we mean by the phrase "respect for minority interests"—beyond the equally ambiguous notion of fairness. There is widespread agreement that those words encapture a notion of political relationships that a civilized nation of the sort we wish to live in must accommodate. This accommodation is achieved primarily by guaranteeing that minority viewpoints have access to governmental deliberations. Thus, "[a] central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decisions."⁶⁰ At the same time, we

57. The "time-boundedness" of the theory has been noted in the literature. See, e.g., Walker, *A Reply to "Further Reflections on the Elitist Theory of Democracy,"* 60 AM. POL. SCI. REV. 391 (1966). In fact, the progression of political theory generally has been tied to perceived conditions of society, making it less "theory" and more "reaction."

58. The thrust of elite theory is made clear not only by its adherents but also by its critics, who argue that the result of elite decision-making is that the values underlying policy choices are those of the elites rather than the populace. See, e.g., T. DYE & L. ZEIGLER, *supra* note 48; E. GREENBERG, *SERVING THE FEW* (1974); D. LOCKARD, *THE PERVERTED PRIORITIES OF AMERICAN POLITICS* (1971); F. LUNDBERG, *supra* note 51.

59. See generally R. AMACHER, R. TOLLISON & T. WILLET, *THE ECONOMIC APPROACH TO PUBLIC POLICY* (1976); P. BACHRACH, *supra* note 38; R. BELL, D. EDWARDS & R. WAGNER, *POLITICAL POWER* (1969); H. HAHN, *PEOPLE AND POLITICS IN URBAN SOCIETY* (1972); N. LUTTBURG, *PUBLIC OPINION AND PUBLIC POLICY* (1968); Pomper, *From Confusion to Clarity: Issues and American Voters, 1956-1968*, 66 AM. POL. SCI. REV. 415 (1972); Walker, *supra* note 41.

60. R. DAHL, *supra* note 17, at 137. The definition of "legitimate groups" assumes major importance of course. See Gamson, *Stable Unrepresentation in American Society*, 12 AM. BEHAVIORAL SCIENTIST (No. 2) 15 (1967).

have consistently believed that our government must proceed with the consent of the governed; that "at a minimum . . . democratic theory is concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders."⁶¹

It is in this context that the national initiative must be placed. In order to do so requires that we address two related considerations: first, how well does our present political structure meet our fundamental goals; and second, what effect would a national initiative process have?

B. The Unrepresentative Tendencies of the Federal Government

Congressional decision-making can be examined, and an initiative procedure justified, in either of two ways. One is to specify the congressional policy choices that are inconsistent with the wishes of at least a majority of the electorate. Alternatively, the forces that tend to immunize representatives from the electoral process can be isolated, with examples given of where undesirable results may have occurred. The primary difference of the two approaches is that the former looks to anti-majoritarian decisions and the latter to anti-majoritarian tendencies of government. If either analytical method results in the conclusion that Congress is inappropriately unrepresentative,⁶² an initiative procedure could conceivably correct the deficiency.⁶³

There are, however, a number of difficulties with the first

61. *Id.* at 3. See also J. CORRY & H. ABRAHAM, *supra* note 12, at 379, 683.

62. I have put aside for the moment the concern for protecting minority interests. I return to that in § II-B-5 of text *infra*.

63. There is a third, more structural, argument for a national initiative. The original conception of the federal government anticipated that it could be controlled effectively by the states:

The state governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.

THE FEDERALIST No. 45 (J. Madison) (J. Cooke ed. 1961).

The superior position of the states was a function of their claim to the loyalty of their citizens; their greater financial and military strength, and certain structural aspects of the Constitution. The states directly controlled the Senate through the appointment power, indirectly controlled the Presidency, and probably had a significant influence on the House.

The original conception no longer is very accurate, however. *But see* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Senate is now elected directly; the Presidency is now elected in a way that almost eliminates the role of the states, and we can argue over the view our Representatives have of their job description. Fur-

method. It treats policy choices as tangible data existing only in the present. Yet, what may appear as today's unrepresentative law may simply be yesterday's best answer and tomorrow's repealed statute.⁶⁴ Furthermore, the fact that Congress may have enacted a number of statutes that were ill-considered or inconsistent with the views of its constituency argues more for reconsideration of those statutes rather than institutional change. Only if mistakes are endemic or if reconsideration is precluded is institutional change warranted as a means of reversing specific policies.

While I may risk being overly cautious in opting for the status quo if it cannot be shown that errors are uncorrectible,⁶⁵ certainly the argument for an initiative process is considerably strengthened if the reason for the pattern of errors is exposed, or if a strong probability can be demonstrated that reconsideration of some policy choices is virtually precluded notwithstanding apparent public opinion to the contrary. Accordingly, I will proceed by attempting to isolate those forces at play in the political process that encourage, or at least permit, anti-majoritarian policies to be embraced by Congress.⁶⁶ Examples will be offered, quite tentatively,

thermore, the military and financial balance has swung tremendously in favor of the central government.

As the ability of the states to contain the federal government was decreasing, the potential power of the central government was increasing. The Sixteenth Amendment was passed, allowing direct taxation. The Civil War Amendments were enacted, laying the groundwork for a tremendous expansion of federal power; and the Commerce Clause was given an almost limitless reading. The dynamic, thus, was one of decreasing state power and increasing federal power, and nothing arose to fill the void left by the decline of the states. Another argument for the initiative is that it could fill that void.

64. R. DAHL, *supra* note 17, at 52.

65. For a superb discussion of a similar problem in an unrelated area, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

66. Not surprisingly, many who have studied the representative process have concluded that our institutions are generally responsive to their constituencies, although there are well-recognized exceptions. See Crane, *Do Representatives Represent?*, 22 J. POL. SCI. 295 (1960); Crutcher & McCrone, *The Linkage Between Constituency Attitudes and Congressional Voting Behavior: A Causal Model*, 60 AM. POL. SCI. REV. 66 (1966); Froman, *Inter-Party Constituency Differences and Congressional Voting Behavior*, 57 AM. POL. SCI. REV. 57 (1963); Ingram, *The Impact of Constituency on the Process of Legislating*, 22 W. POL. SCI. Q. 265 (1969); Jones, *Representation in Congress: The Case of the House Agricultural Committee*, 55 AM. POL. SCI. REV. 358 (1961); Miller & Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45 (1963). See generally A. DE GRAZIE, PUBLIC AND REPUBLIC—POLITICAL REPRESENTATION IN AMERICA (1951); J. HOGAN, ELECTION AND REPRESENTATION (1945); Beard & Lewis, *Representative Government in Evolution*, 26 AM. POL. SCI. REV. 223 (1932); Eulau, Wohlke, Buchanan & Ferguson, *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AM. POL. SCI. REV. 742 (1959). See also R. SCAMMON & B. WATTENBERG, THE

where these forces may have been effective.⁶⁷ The analysis will require the examination of four areas: the methods used by Congress to read public opinion;⁶⁸ the role of special interests;⁶⁹ the internal functioning of the legislative process;⁷⁰ and the functioning of the electoral process.⁷¹ A final, somewhat paradoxical question must also be addressed—do these forces result in decisions that we are willing to accept notwithstanding their unrepresentative character?⁷²

1. *Public Opinion*

Congress can be representative only if its members know the wishes of their constituency. Ideally there would be a two-way flow of communication between representative⁷³ and electorate. In reality, there is very little communication, and what does occur is quite often misleading.

The primary difficulty inhibiting accurate communication is the size of congressional constituencies. They are much too large to allow communication between a congressman and any significant portion of his constituency.⁷⁴ To the extent communication occurs, it occurs between a representative and a very small group of persons; moreover, those who do communicate with congressmen are

REAL MAJORITY 15-16 (1971). Unfortunately, these studies are not entirely satisfactory. They tend to look at relatively discreet issues and to limit the inquiry to whether the voting record of a representative on these issues is consistent with his constituency's views. The result of the limited scope of these studies is that they yield little on the broader issues of representativeness. Not much can be gleaned from them concerning such issues as to what extent representatives attempt to convince their colleagues as compared to simply voting on a measure; to what extent are there patterns of voting behavior in other areas of legislation; is the work product of Congress as a whole instructive when compared to individual votes of congressmen; and what of the proposals that never reach the floor to be voted on?

67. I will supplement the examples offered with citation of the results of various public opinion polls. The limitations of that method of proceeding must be clearly recognized. Most public opinion polls, for example, are too crude to expose respondents' motivation, and generally no distinction is made between the voter and the nonvoter. More importantly, people are approached and asked their views without forewarning, without time or reason to think and deliberate.

68. See § II-B-1 of text *infra*.

69. See § II-B-2 of text *infra*.

70. See § II-B-3 of text *infra*.

71. See § II-B-4 of text *infra*.

72. See § II-B-5 of text *infra*.

73. "Representative" and "congressmen" will refer to members of both Houses of Congress, unless it is clearly indicated to the contrary.

74. The smallest congressional district is Alaska, with a population of 300,000. U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, 1970 U.S. CENSUS OF POPULATION.

not representative themselves. For example the upper-middle class apparently composes the most significant group of correspondents, but that class is rarely the typical constituent.⁷⁵ As a result, divergent views and different perspectives may never reach our representatives. And as Professor Blumer has said:

[I]n *any realistic* sense public opinion consists of the pattern of diverse views and positions on the issue *that came to the individuals who have to act in response to public opinion*. Public opinion . . . which never came to the attention of those who have to act on public opinion would be impotent and meaningless as far as affecting the action or operation of society is concerned.⁷⁶

Not only do our representatives have pressed upon them the concerns and outlook of atypical electorates,⁷⁷ but unfortunately very few congressmen do much to rectify the situation. A review of the literature that is disgorged from congressional offices discloses little informational content, and much rhetoric, political propaganda and self-serving statement, although there are some notable exceptions.⁷⁸ Still, taken as a whole, the material is not designed to spark intelligent communication between representative and constituent. Similarly, the attempts to elicit "voter reaction" that often accompany missives from Washington are typically quite crude, their purpose often being to score political points rather than to obtain information.⁷⁹

There is one other, closely related difficulty—the communication blitz. On certain issues—an ever-increasing number, it seems—congressmen are inundated with letters, telegraphs and phone calls from small but cohesive groups.⁸⁰ The desired effect of

75. S. VERBA & N. NIE, *PARTICIPATION IN AMERICA* 97-99 (1972). Such people are also more likely to vote. *Id.* Were that to be true in initiative elections, the implementation of a national initiative would not provide a method of correcting congressional misapprehension of "public opinion". There are, however, other deficiencies in congressional law-making that an initiative process could compensate for at least in part. See § II-B-2 to -5 of text *infra*.

Testimony before congressional committees also comes predominantly from the higher social strata. Van Der Silk & Stinger, *Citizen Witnesses Before Congressional Committees*, 92 POL. SCI. Q. 465, 467 (1977).

76. Blumer, *Public Opinion and Public Opinion Polling*, 13 AM. SOC. REV. 542 (1948).

77. See Miller & Stokes, *supra* note 66, at 54.

78. A subjective evaluation to be sure, but one that is charitable, if anything. See Hechler, *Abuse of a Privilege*, 222 THE NATION 339 (March 20, 1976); *Under Fire: Free Mail for Congress*, U.S. NEWS & WORLD REPORT, March 15, 1976, at 20. See also Comment, *Congressional Prerequisites and Four Elections: The Case of the Franking Privilege*, 83 YALE L.J. 1055 (1974). The literature of Jacob Javits of New York is a good example of one of the exceptions.

79. See Hechler, *supra* note 78.

80. See, e.g., J. CORRY & H. ABRAHAM, *supra* note 12, at 362. The National Rifle Association, various "right to life" groups, and the "Jewish lobby" are noted examples.

a communication blitz is to distort a representative's perception of public opinion by inundating him with one particular perspective. If there is no well-organized opponent to respond in kind, the letters and telegrams reaching Washington will predominate on one side of an issue regardless of the actual state of public opinion. If, on the other hand, there is an opponent, the input the representative receives may be more a function of organization than the actual state of public opinion. Furthermore, the more specific a controversy becomes, as we move, for example, from whether women should receive equal treatment to whether the deadline for the Equal Rights Amendment should be extended, the greater are the chances of a communication blitz. Thus, as it becomes more important for a representative to know his constituency's views—as a vote gets nearer—the greater are the chances that he will receive a distorted perspective.⁸¹

Our representatives are surely aware of these problems and judge the content of their mail with some care. Moreover, there are other ways by which representatives receive clues from the public—reading newspapers and holding meetings in legislative districts are two obvious examples. Nevertheless, that can only partially correct for the fact that “the Representative knows his constituents mostly from dealing with people who *do* write letters, who *will* attend meetings, who *have* an interest in his legislative stand.”⁸² The views of those who do not write letters, who lack the time to attend meetings, who do not have an *expressed* interest in legislative positions, and those, I might add, who have an irrepressible distaste for politicians, simply are not serious factors in a representative's appraisal of public opinion.⁸³

There is, then, room for doubt about the accuracy of the communication between representative and constituency,⁸⁴ a condition that obviously facilitates the acceptance of anti-majoritarian policies by Congress.⁸⁵ Moreover, there are other factors of that kind as well.⁸⁶

81. See, e.g., *The Swarming Lobbyists*, TIME, Aug. 7, 1978, at 17-18, 21 [hereinafter cited as *The Swarming Lobbyists*].

82. Miller & Stokes, *supra* note 66, at 54.

83. See, e.g., J. CORRY & H. ABRAHAM, *supra* note 12, at 398; Dexter, *The Representative and His District*, in NEW PERSPECTIVES ON THE HOUSE OF REPRESENTATIVES 3, 11-14 (R. Peabody & N. Polsey ed. 1969). Miller & Stokes, *supra* note 66, at 56; Radin, *Popular Legislation in California*, 23 MINN. L. REV. 559 (1939).

84. For some empirical verification of that doubt, see A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, ELECTIONS AND THE POLITICAL ORDER 362-66 (1966).

85. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 835-36 (1974).

86. There are two further complexities that deserve mention. I have assumed that congressmen would credit each citizen's view equally. That is undoubtedly false. As Prof. Blumer has noted, the “public servant” has to assess

2. *The Effect of Organized Interest Lobbying*

Lobbying has been one of our true growth industries over the past twenty years.⁸⁷ When the federal government was fairly small and relatively limited, there was little lobbying. As private industry began to feed from the federal trough, more and more lobbying activity began to occur, as economists would expect. In the words of Buchanan and Tullock,⁸⁸ as the public sector grows relative to the private, "the increased investment in organization aimed at securing differential gains by political means is a predictable result."⁸⁹ As the investments began to return dividends, other types of organized interests were stimulated to send their own lobbyists to Washington.⁹⁰

The mere existence and spectacular growth of organized lobbying does not prove that lobbyists have an undesirable effect on legislative deliberations, of course. In fact, lobbyists clearly perform several important functions. They often furnish very useful information that otherwise would be difficult to obtain, although it is often a little biased.⁹¹ More importantly, they may help to fill the information gap by providing a link between Congress and the people back home.⁹² In light of these functions, and given the limitations of Congress, it is probably true that lobbying is "indispensable to law-making."⁹³ There is reason to suspect, however, that despite the beneficial contributions of lobbying, it may also have some untoward effects.

Lobbyists may well serve as a link between Congress and *some* people back home, but not very many. As E. E. Schattschneider has observed, "the flaw in the pluralists' heaven is that the heavenly chorus sings with a strong upperclass accent. Probably about ninety per cent of the people cannot get into the pressure sys-

what he hears, and "in this assessment consideration is given to expressions only to the extent to which they are judged to 'count.'" Blumer, *supra* note 76, at 546.

Secondly, much of the public is unorganized, and have no spokesmen for their views. This explains why it often appears that public opinion does not "form" on many issues, although on occasion the appearance is accurate. See, e.g., Erikson, Luttbeg & Holloway, *Knowing One's District: How Legislators Predict Referendum Voting*, 19 AM. J. POL. SCI. 231 (1975).

87. *Single-Issue Politics*, NEWSWEEK, Nov. 6, 1978, at 48-60 [hereinafter cited as *Single-Issue Politics*]; *The Swarming Lobbyists*, *supra* note 81, at 14-15.

88. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962).

89. *Id.* at 287.

90. See, *New Breed of Lobbyists Plug for Cities, States*, U.S. NEWS & WORLD REPORT, Sept. 4, 1978, at 39; *Single-Issue Politics*, *supra* note 87, at 48; *The Swarming Lobbyists*, *supra* note 81, at 14.

91. See J. CORRY & H. ABRAHAM, *supra* note 12, at 361.

92. See Choper, *supra* note 85, at 844-46.

93. J. CORRY & H. ABRAHAM, *supra* note 12, at 353.

tem."⁹⁴ Moreover, the beautiful music of the "heavenly chorus" is often accompanied by gifts of "kingly," if not "heavenly," value; and often these gifts are given to those in a position to favor the interests of the donor. A striking example is the campaign contributions of the American Medical Association (AMA) and the Federation of American Hospitals made when legislation that would have put a limit on the rise of hospital costs was being considered, a bill that the AMA and the Federation did not favor. They contributed heavily to the members of the health subcommittee of the House Ways and Means Committee. The subcommittee bottled up the bill and effectively killed it.⁹⁵

It may be, of course, that the AMA and the Federation sincerely believed that the members of the subcommittee were, on their merits, deserving of campaign contributions. It may also be that they thought that relatively large campaign contributions might influence the votes of the subcommittee members. I do not know which of these alternatives more accurately reflects reality, but the case of committee member, Omar Burleson, certainly is troublesome. He has run *unopposed* in his last four elections, yet he received a campaign contributions of close to \$10,000 from the AMA and the Federation.⁹⁶ A disinterested observer would be hard pressed, I fear, not to conclude that this is an example of a special interest trying to buy a congressman. Unfortunately, this is just one of many examples that could be offered.⁹⁷ I do not know what effect the contributions had on Burleson or his colleagues, but the entire incident creates an unfortunate impression. Unmistakably there is reason to suspect that campaign contributions may influence the outcome of legislative deliberations.⁹⁸

The sanguine view of special interest lobbying that is occasionally expressed,⁹⁹ in short, must be tempered. The purpose of lobbying is to further personal or organizational self-interest, not the

94. E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE* 35 (1960). For more recent elaborations on this theme, see G. DOMHOFF, *THE HIGHER CIRCLES* (1970); G. DOMHOFF, *WHO RULES AMERICA?* (1967).

95. Cloherty, *Public Financing Supported*, Iowa City Press-Citizen, Oct. 28, 1978, at 4A, col. 6. Obviously, what motivated the committee members is unknown.

96. *Id.*

97. See Clymer, *Looking Out for the Folks Back Home—And Oneself*, The N.Y. Times, Mar. 5, 1978, § IV, at 3, col. 1. See also H. ALEXANDER, *FINANCING POLITICS* 101-30 (1976); D. MAYHEW, *THE ELECTORAL CONNECTION* 41 n.63, 44 (1974).

98. For a journalistic account of the effect of lobbying, see R. WINTER-BERGER, *THE WASHINGTON PAY-OFF* (1972). See generally Herber, *Special Interests Gaining Power as Voter Disillusionment Grows*, The N.Y. Times, Nov. 14, 1978, at 1, col. 1. But see H. ALEXANDER, *MONEY IN POLITICS* 137-64 (1972).

99. See, e.g., Choper, *supra* note 85, at 845.

interests of the rest of us;¹⁰⁰ and what is lobbied for usually ends up being financed by the rest of us.¹⁰¹ It is not very surprising, then, that the "average citizen, who has no one to lobby for him, is angered by the ease with which organized interests maintain close and intimate connection with government, and he comes to the common sense conclusion that the practice would not be continued unless it pays dividends."¹⁰² More importantly, it may very well be true that

[i]n the face of observable pressure-group activity with its demonstrable results on the outcome of specific issues presented and debated in legislative assemblies, that behavioral premise that calls for the legislator to follow a selfless pursuit of the 'public interest' or the 'general welfare' as something independent of and apart from private economic interest is severely threatened.¹⁰³

If further study corroborates the common sense conclusion of the average citizen and puts an end to the behavioral premise of the political scientists, the case for a national initiative would be considerably enhanced. An initiative procedure would provide a method of limiting Congress' largesse by providing spending limitations. Moreover, a national initiative could possibly defuse the effect of lobbying through regulation—something Congress has refused to do in any significant way.¹⁰⁴ Still, further study is needed, but if we eventually conclude that organized interests play too dominant a role in the legislative process and that Congress will not limit that role of its own accord, a case will have been made for seriously considering institutional reform designed to enhance the accountability of the lawmaking process by enhancing the potential role of the citizen in it.

3. *The Legislative Process in Operation*

There need be no extended discussion of Congress' well known, and generally applauded, capacity for inhibiting the passage of leg-

100. See, e.g., J. BUCHANAN & G. TULLOCK, *supra* note 88, at 241; J. CORRY & H. ABRAHAM, *supra* note 12, at 348, 366-67.

101. For example, "[T]he largely unorganized consumer interests always pay for the services that government provides for producer groups." J. CORRY & H. ABRAHAM, *supra* note 12, at 348.

102. *Id.* To be sure, a number of self-styled "average-citizen," "consumer-oriented" lobbies have formed in recent years, but who they represent, and how well, is not altogether clear. See, e.g., *Carter Dealt Major Defeat on Consumer Bill*, 36 CONG. Q. WK. REP. 323 (Feb. 11, 1978).

103. J. BUCHANAN & G. TULLOCK, *supra* note 88, at 283.

104. Twice in the last three years Congress has defeated attempts at major reforms. The most recent attempt died in committee. *The Swarming Lobbyists*, *supra* note 81, at 14. See also, *Lobby Disclosure Bill Near Death*, 36 CONG. Q. WK. REP. 1918 (July 29, 1978); *Time Ran Out for Lobby Revision Bill*, 32 CONG. Q. ALMANAC 477 (1976).

isolation.¹⁰⁵ It is deserving of mention, however, that as more and more laws are placed on the books, the less laudable it is that Congress is structured to inhibit legislation. Whereas originally that meant that government could not easily meddle in private affairs, it is coming more and more to mean that government cannot easily be prevented from continuing its meddlesome behavior. Still, on balance, the "negative bias" of Congress probably remains beneficial. There are, however, other aspects of the legislative process that may have undesirable consequences, and the role of committees is the most important.

The congressional legislative process is dominated by the committee system, a method of organization that has many commendable features. It provides, for example, built-in organization and also stimulates the development of legislative expertise. Nonetheless, the committee system has its drawbacks. It is largely in the committees that the crucial decisions are made, and Congress does not frequently change what a committee has done.¹⁰⁶ That may be a necessary concession to expediency, but it also means that most important decisions are being made by very small groups of very unrepresentative individuals.¹⁰⁷ As a result "the representative character of deliberations on lawmaking is greatly impaired."¹⁰⁸

There are two further undesirable consequences of the committee system. First, the system develops powerful people—predominantly committee chairmen—who need to be appeased. The appeasement comes in the form of favored treatment by other congressmen and by other governmental agencies. An example of the former is the role Wayne Hayes played before his exit from Washington.¹⁰⁹ A good example of the latter is the Pentagon's practice of channeling expenditures into the districts of key representatives who vote on its budget.¹¹⁰ The consequences are that congressmen do not possess equal power or influence and that benefits are weighed in favor of the powerful, a result not easily reconcilable with basic notions of representative government.¹¹¹

105. Choper, *supra* note 85.

106. See J. CORRY & H. ABRAHAM, *supra* note 12, at 499-501; L. RIESELBACH, CONGRESSIONAL POLITICS 237 (1973).

107. R. SHERRILL, WHY THEY CALL IT POLITICS 87-88 (1972).

108. J. CORRY & H. ABRAHAM, *supra* note 12, at 501.

109. See, *The Liz Ray Reform Kit*, TIME, July 5, 1976; *Democratic Caucus Approves Reform*, N.Y. Times, June 24, 1976, at 1, col. 2. The Democratic Party did respond to the Wayne Hayes affair with an attempt at reform. *Id.*

110. Amacher, Tollison & Willett, *Risk Avoidance and Political Advertising: Neglected Issues in the Literature on Budget Size in a Democracy*, in THE ECONOMIC APPROACH TO PUBLIC POLICY 405, 423 (R. Amacher, R. Tollison & T. Willett ed. (1976)); Clymer, *supra* note 97.

111. There have been a number of congressional reforms recently. See, e.g., Hopkins, *Congressional Reform Advances in the Ninety-Third Congress*, 60 A.B.A.

Moreover, the budgets and programs of the government are voted on in committee primarily by individuals who have gained much politically and stand to gain more from those programs, creating obvious conflicts of interest.

The second undesirable effect of the committee system is that Congress tends to view problems as singular issues.¹¹² Thus, there is rarely a look at the broader concerns—Congress lacks “broad issue” committees or subcommittees—that might emerge from the simultaneous but mutually oblivious operation of separate committees.¹¹³ The most obvious potential problem here is the budget. Most decisions are made on discrete spending proposals and little concern is expressed for the overall financial impact of the accumulation of the discrete programs.¹¹⁴ The overlapping, inefficient jurisdictions of federal agencies and the haphazard way some major legislative initiatives proceed are other examples.¹¹⁵

Apart from the committee system, there is one final point concerning the legislative process that deserves mention—the role of political parties. Like committees, political parties serve important functions,¹¹⁶ and it is difficult to see how we could function without them. Still, in the deliberative process that ought to be the heart of lawmaking, parties can be disruptive on occasion, and at times counter-productive. As Professors Corry and Abraham have described the problem: “the psychological atmosphere . . . generated [by political parties] is one of struggle, and when the parties are freely deployed in the legislature they tend to contest every inch of ground, whether or not truth and the public interest are at stake.”¹¹⁷ Others have concluded that political parties result in too much power in hands that are too parochial, resulting in compromises that favor minority over majority interests.¹¹⁸

J. 47 (Jan. 1974); *Senate Approves Committee Changes*, 35 CONG. Q. WK. REP. 279 (Feb. 4, 1977). They do not appear to have changed things very much for the better, however. See Clymer, *supra* note 97; *Democrats Still Arguing Over Party Caucus Role on Legislative Issues*, 36 CONG. Q. WK. REP. 868 (Apr. 8, 1978).

112. J. CORRY & H. ABRAHAM, *supra* note 12, at 501.

113. *But see* note 148 *infra*.

114. D. MAYHEW, *supra* note 97, at 128. See also text accompanying note 150 *infra*.

115. See S. BAILEY, CONGRESS IN THE SEVENTIES 59 (1970); W. MORROW, CONGRESSIONAL COMMITTEES 26-27 (1969); L. REISELBACK, CONGRESSIONAL POLITICS 80-81 (1973). See also, *Federal Regulations: Catch-22 for Business*, U.S. NEWS & WORLD REPORT, Jan. 22, 1979, at 60; Greer, *Civil War Among the Federal Agencies*, BARRISTER, Fall, 1978, at 8.

116. See generally V. O. KEY, JR., POLITICS, PARTIES AND PRESSURE GROUPS (1958). See also Jaros & Mason, *Party Choice and Support for Demagogues: An Experimental Examination*, 63 AM. POL. SCI. REV. 100 (1969).

117. J. CORRY & H. ABRAHAM, *supra* note 12, at 497.

118. See, e.g., S. BAILEY, THE CONDITIONS OF OUR NATIONAL POLITICAL PARTIES (1955).

The criticisms of the role of political parties are somewhat suspect because of their time-boundedness. When Southern Democrats dominated Congress, unmistakably minority interests were favored, but that is no longer the case.¹¹⁹ Similarly, it is difficult to give recent examples of party squabbles impeding beneficial legislation, although certainly some would argue that the Labor Reform Bill filibuster is a good example. Nonetheless, the conditions that generated these criticisms could recur, and thus we should take note that conceivably anti-majoritarian forces may emanate from the political parties.¹²⁰ When this possibility is conjoined with the other potential anti-majoritarian aspects of Congress already discussed, it becomes clear that the legislative process may frequently operate in an unacceptable fashion. This gives sustenance to the view that change may be in order, although again more work is in order before final judgment should be reached. Still, should further study yield the firm conclusion that the legislative process suffers from the disabilities discussed here and that Congress is unwilling or unable to rectify the situation, an initiative process may emerge as an attractive solution. By allowing laws to be enacted without subjecting them to the legislative process, the initiative procedure provides a method of circumventing the undesirable aspects of congressional lawmaking. Of course, initiatives also lack some of the positive aspects of the legislative process. Whether on balance that results in a net gain or loss is an issue that must be considered. Before doing so, however, there is one final matter that deserves discussion.

4. *Congress: The Electoral Connection*¹²¹

I realize that an impartial observer could easily think at this point that not much of a case for institutional reform has yet been made, even if further research irrefutably establishes all of the potential limitations of the legislative process discussed previously, because the traditional solution—vote the bums out—should be sufficient for all the problems so far presented. If Congress is misreading our views, we can send different congressmen to Washington who better understand our positions. If our representatives have been too cozy with organized interests, we can replace them

119. See Sherrill, *Congress Now Reformed: How Much Better Is It?*, The Des Moines Register, Jan. 7, 1979, at 1-B, col. 1.

120. Moreover, the decline in political parties may be partially responsible for the increasing difficulties caused by single-interest politics, although it is difficult to determine which is cause and which is effect. See text accompanying notes 160-62 *infra*.

121. I have borrowed the title for this section from the book of the same name by David Mayhew, *supra* note 97, in honor of the debt that I owe to his analysis.

with individuals of greater integrity. If our representatives have been unwilling to change the undesirable internal mechanisms of Congress, we can elect people who are committed to doing so.¹²² Unfortunately, however, the electoral process may not be sufficient for the task.

The primary difficulty is that very rarely will a constituency regard their legislator as being "wrong" on every important issue. Life is too complex to permit such a case to arise with any frequency, although occasionally a single issue will dominate an election. Thus, the task of the voter is not to decide whether a representative is "right" or "wrong" in his views. The voter must choose among imperfect alternatives by weighing areas of agreement with those of disagreement. Invariably the candidate voted for will disagree with the voter on certain issues that are, at the least, annoying to the voter. In fact, there may be disagreement on major issues. The complexities of our society make it not at all unlikely "for a resounding majority of voters to elect a candidate all of whose policies are the first choice of only a minority."¹²³

The limitations of the electoral process go far beyond this, however. Serious problems beset the voter in that most issues that their representative will face will not be examined during the campaigns. As Professor Choper points out, "the specific details of most solutions ultimately passed upon by the legislature cannot . . . be in the minds of the voters at the time of the election."¹²⁴ Many, perhaps most, of the problems a representative will face are either unknown or only dimly perceived at election time, while still others are deliberately avoided by the candidates.¹²⁵ It is not only not surprising, then, but downright laudable that the citizenry often seems to base its judgment on more subjective factors than articulated positions on selected issues. While those positions are helpful, they typically cover a very limited range, and resort must be had to more subjective criteria in order to attempt to fill in the enormous gaps in knowledge.

The electoral process, in short, can do little to modify the many-faceted existence we now pursue. Perhaps at one time issues were so obvious, so limited, and so few, and positions so clearly delineated, that elections could serve as direct referenda, but that is not true today. Presently, there is very little reason to believe that elections can or will "provide much insurance that decisions will

122. See, e.g., J. BOYLE, *supra* note 5, at 39.

123. R. DAHL, *supra* note 17, at 128.

124. Choper, *supra* note 85, at 834.

125. For a commentary on a recent election of this sort, see Flansburg, *Near Mud-Slinging in Senate Race*, The Des Moines Register, Oct. 29, 1978, at 2-B, col. 1.

accord with the preferences of a majority of adult voters."¹²⁶

Reliance on the electoral process to provide governmental accountability suffers from other infirmities as well. It assumes that reasonable opposition candidates can be found and thus ignores the fact that congressional candidates may compose a fairly homogenous group.¹²⁷ To the extent that the characteristics of these individuals transcend ideological bounds, the chances of a voter having a clear choice on election day are reduced.¹²⁸ Similarly, the nominating process is often under the domination of a few members of political parties.¹²⁹ Thus, a discontented populace cannot always affect who runs unless it is willing to take over the parties or form new ones, and it is unrealistic to expect unpaid private citizens to engage in such pursuits on any significant scale.¹³⁰ Thus, what the citizenry gets may not at all be what it would prefer, both because of who is willing to run for office and who the political parties are willing to support, aspects of our political process that obviously tend to diminish governmental accountability to the electorate.

Once an individual is elected, other pressures assert themselves that may further immunize certain policy choices from the electoral process. At the crudest level, crass self-interest has the potential to affect every individual elected to Congress. Thus, we have the Speaker of the House using a huge self-inflicted pay increase for members of Congress as an example of how on occasion the good of the nation requires Congress to act inconsistently with the will of the people.¹³¹ There are, periodically, other more contemptible examples of direct conflicts of interest. Such practices

126. R. DAHL, *supra* note 17, at 131.

127. Certainly the ones elected are fairly homogenous. In the 94th & 95th Congresses, for example, there were very few women (19 and 17, respectively), very few minorities (*e.g.*, 17 blacks), too many lawyers (288 and 291), too many veterans of the Armed Forces (380 in the 94th Congress), and too many Ivy Leaguers (95 and 92). This information can be gleaned from the Congressional Directories of the 94th and 95th Congresses. Things may be changing, however. See Roberts, *Senate's New Class Reflects Changing Political Standards*, N.Y. Times, Nov. 15, 1978, at A18 col. 1. See also 37 CONG. Q. WK. REP. 43 (Jan. 13, 1979).

128. See, *e.g.*, D. MAYHEW, *supra* note 97, at 118 n.73; Van Hoffman, *Just One Word for Congress—Typical*, The Daily Iowan, Sept. 13, 1978, at 4. For a quaint view of the qualifications of our representatives, see Campbell, *The Initiative and Referendum*, 10 MICH. L. REV. 427, 435 (1912).

129. T. DYE & L. ZEIGLER, *THE IRONY OF DEMOCRACY* 251 (1975); F. SORAUF, *PARTY POLITICS IN AMERICA* 79-80 (1972).

130. Qualifying initiatives and conducting campaigns take time and effort also, of course. But the investment in a single initiative campaign is surely less than is required to take our existing political parties.

131. *Peoples' Will Ignored on Raise*, Buffalo Courier Express, Feb. 2, 1977, at 1, col. 6.

are, thankfully, of limited effect; the Republic will not fall because some congressmen may attempt to line their pockets at the expense of the rest of us, although I must say the problem is still quite annoying.¹³² Unfortunately, crude financial self-interest is not the only nor the most important force at play that may immunize representatives from the electoral process. And although these other forces also may not cause cracks in the Republic's foundation, they are much more troublesome than the proclivity to self-enrichment that some of our representatives occasionally exhibit.

The most important of the remaining immunizing tendencies of our political system appears at first blush to be internally inconsistent. One of the most serious deficiencies in the legislative process stems from the fact that congressmen generally wish to be re-elected to office.¹³³ One would think that a desire for reelection would encourage representatives to act consistently with the wishes of their districts, and to a large extent it does.¹³⁴ Nonetheless, the desire for reelection affects the manner in which congressmen approach their tasks, and that approach is in some respects unsatisfactory. As David Mayhew has demonstrated, the desire for reelection has two primary regrettable consequences—it results in a quest for credit-claiming and in encouraging posturing instead of action by congressmen.¹³⁵

Many of our representatives apparently believe that the furnishing of particularized benefits, like jobs or support to local institutions, impresses the voters and is a prime factor in guaranteeing reelection. As a result, much congressional activity appears to be an endless quest for particularized benefits for which representatives can take credit. Consequently, congressional decision-making often appears to be perverted by a "strong tendency to wrap policies in packages that are salable as particularized benefits" to

132. See, e.g., R. SHERRILL, *supra* note 107, at 96-105. See generally Amacher, Tolison & Willet, *supra* note 110. Representatives responding to self-interest is nothing new, of course. See, e.g., D. WILCOX, *supra* note 5 at 293. See also, *Federal Waste; The 50-Billion-Dollar Rathole*, U.S. NEWS & WORLD REPORT, Sept. 18, 1978, at 29.

133. See, e.g., D. MAYHEW, *supra* note 97, at 14. We now appear to be more in a period of transition than when Mayhew wrote. See CONG. Q. WK. REP. 19 (Jan. 1, 1977); CONG. Q. GUIDE TO CONG. 1523-29 (1975). But see Fenno, *U.S. House Members in Their Constituencies: An Exploration*, 71 AM. POL. SCI. REV. 883 (1977).

134. See, e.g., Choper, *supra* note 85, at 835, 836.

135. D. MAYHEW, *supra* note 97, at 57-59. See generally Fiorini, *The Case of the Vanishing Marginals: The Bureaucracy Did It*, 71 AM. POL. SCI. REV. 177 (1977). And it is not inconceivable that some congressional behavior is motivated by the desire to help campaign benefactors. See text accompanying notes 95-99 *supra*.

the people back home.¹³⁶ The tendency is so strong that Congress often gives "a particularistic cast to matters that do not obviously require it."¹³⁷

The most disturbing consequence emanating from Congress' enthusiasm for credit-claiming is that rarely does Congress seem concerned with the financial impact of its various projects;¹³⁸ the only serious concern is with the distribution of benefits.¹³⁹ Furthermore, there will tend to be undue investment in programs financed from general revenues that specifically benefit discrete groups, since the "benefits are highly visible to the beneficiaries whereas costs are not so visible to the general taxpayer."¹⁴⁰

The other major consequence of the desire for reelection—posturing—does not facilitate the subjugation of majority interests to those of minorities nearly as much as the desire for credit-claiming, but it does provide further evidence of the limitations in the electoral process.

Apart from attempting to secure particularized benefits, the primary concern of many congressmen often seems to be the taking of positions *solely* for the purpose of home consumption. Although there obviously are numerous exceptions, many congressman apparently mobilize support for their views on many bills only if "somebody of consequence is watching, [or] when there is credit to be gained for legislative maneuvers."¹⁴¹ As Professor Mayhew has said, "[m]embers in both houses seem to offer a lot of floor amendments with nothing accompanying them except speeches."¹⁴²

Congressmen may be right, that as long as particularized benefits are not in the offing, taking a position is more important than winning or losing on the vote, but that merely demonstrates the difficulty the voter faces when evaluating the performance of his

136. D. MAYHEW, *supra* note 97, at 127. See also Dexter, *Congress and the Making of Military Policy*, in *NEW PERSPECTIVES ON THE HOUSE OF REPRESENTATIVES* 175 (R. Peabody & N. Palsby ed., 2d ed. 1969).

137. D. MAYHEW, *supra* note 97, at 128.

138. See, e.g., U.S. NEWS & WORLD REPORT, *supra* note 132; *Unending Tale of Fraud, Waste in Government*, U.S. NEWS & WORLD REPORT, Oct. 2, 1978, at 66.

139. D. MAYHEW, *supra* note 97, at 128. See also R. FENNO, *CONGRESSMEN IN COMMITTEES* (1973); J. MANLEY, *THE POLITICS OF FINANCE* (1970).

140. B. BARRY, *POLITICAL ARGUMENT* 318 (1965). See, e.g., Burton, *The 1976 Amendments to the Fishermen's Protective Agency*, 71 AM. J. INT. L. 740 (1977). Shrimp eaters will be happy to hear that the Fishermen's Protective Act has been expanded by the Antarctic Convention Act of 1978, § 14, 22 U.S.C. 1971.

141. J. KIRBY, *CONGRESS AND THE PUBLIC TRUST* 9 (1970) quoting a "senior Congressman": "All we need do is be present for votes, introduce bills without necessarily pressing them forward, and issue frequent press releases." D. MAYHEW, *supra* note 97, at 115.

142. D. MAYHEW, *supra* note 97, at 119.

congressman. After all, "[a] congressman can hardly be blamed if there are not enough right thinking members around to allow him to carry his motions. He's fighting the good fight."¹⁴³ A representative certainly cannot be blamed for the refusal of others to act.¹⁴⁴ He cannot be blamed, that is, as long as the "good fight" is honestly fought and not done just for show. Yet, consider the difficulty of determining which is the case. It would require a detailed study of time spent, arguments made and bargaining done on each bill. Even if serious inquiry was attempted, if posturing is as dear to our representatives as it sometimes appears, most likely congressmen would simply supplement floor speeches with committee testimony and, perhaps, informal accounts of purported back room bargaining. It would be, in short, difficult to determine when congressmen were acting sincerely instead of just acting.

The extent to which Congress as a whole is influenced by the collective desires of its membership for credit-claiming and posturing is quite clear. As Professor Mayhew has summarized the situation:

[T]he organization of Congress meets remarkably well the electoral needs of its members. . . . [I]f a group of planners sat down and tried to design a pair of American national assemblies with the goal of serving the members' electoral needs year in and year out, they would be hard pressed to improve on what exists.¹⁴⁵

The committee system permits members to specialize and thus claim credit for the matters dealt with by the committee.¹⁴⁶ As a supplement to the committee system, Congress collectively acts out of a sense of universalism—which crudely put, means that they spread the goodies around, and which has "the appearance of a cross-party conspiracy among incumbents to keep their jobs."¹⁴⁷ The actual working of this spirit is illustrated by a member of the House Public Works Committee when he said:

[There is] a rule on the committee, it's not a rule of the Committee, it's not written down or anything, but it's just the way we do things. Any time any member of the Committee wants something, or wants to get a bill out, we get it out for him. . . . Makes no difference—Republican or Democrat. We are all Americans when it comes to that.¹⁴⁸

143. *Id.* at 117.

144. This tends to explain why "we love our congressmen" but "we do not love our Congress" *id.* at 164, and why congressmen tend to "run for Congress by running against Congress," *id.* at 145 n.130 (quoting Richard Fenno). See also Fenno, *supra* note 133, at 914.

145. D. MAYHEW, *supra* note 97, at 81-82.

146. *Id.* at 59.

147. *Id.* at 105.

148. *Id.* at 90, citing Murphy, Partisanship and the House Public Works Committee (paper presented to American Political Science Association, 1968). See also B. BARRY, *supra* note 140; Amacher, Tollison & Willet, *supra* note 110, at 412.

The rule may not be "written down or anything," but that does not stop it from being enforced, and representatives who violate its implicit commands—in either House—run the risk of being penalized. When, for example, Senator James Buckley of New York attempted to stop forty-four public works projects in committee, the committee voted against all of his amendments except those eliminating projects in New York.¹⁴⁹

Not only are defectors from the "cult of universalism" sanctioned, but most disturbing of all, the "cross-party conspiracy" is often fed by deficit financing which provides Congress with nearly inexhaustible financial resources (viewed from its perspective) to satisfy the congressional appetite for electoral advantage. Moreover, there is little evidence to suggest that Congress' recent reassertion of control over the budgetary process has had any effect other than facilitating the particularistic tendencies of Congress. It has not acted to restrain Congress but merely to shift the balance of power between Congress and the Executive.¹⁵⁰

An unwritten rule also protects congressional posturing: congressmen are not to engage in personal attacks on one another.¹⁵¹ And "[a]s long as congressmen do not attack each other . . . any member can champion the most extraordinary cause without inconveniencing any of his colleagues."¹⁵²

The protection given to posturing can be seen in two other practices—one formal, the other informal. The formal practice concerns the Congressional Record. As Professor Mayhew has

The House Appropriations Committee and the Ways and Means Committee may tend to inhibit the House's unlimited desire to spread benefits around. *Id.* at 154-58. Presidential veto also may limit Congress's tendencies. *See, e.g., Carter's "Pork Barrel" War With Congress*, U.S. NEWS & WORLD REPORT, Oct. 16, 1978, at 72. The House Rules Committee has acted to inhibit legislation coming to the floor in the past, but it is not doing so presently. *See, e.g., Sherrill, supra* note 119.

149. Reeves, *Isn't It Time We Had a Senator?*, NEW YORK, Feb. 25, 1974, at 38. *See also* J. KIRBY, *supra* note 142, at 18.

150. *Budget Process Assessed*, 36 CONG. Q. WK. REP. 103 (Jan. 21, 1978). *Compare* Cameron, *Waking Up to the Budget Menace*, FORTUNE, July 3, 1978, at 50, *with Everyone's Wild Over Alice*, TIME, July 18, 1977, at 66. *See also* *Budget Committee at the Center of Crucial 1979 Policy Fight*, 37 CONG. Q. WK. REP. 11 (1979). For general discussions of the budget process, *see* Amacher, Tollison & Willet, *supra* note 110, at 406-10; D. MAYHEW, *supra* note 97, at 142.

151. Again, transgressors are sanctioned. *See* J. KIRBY, *supra* note 142, at 16-17.

152. D. MAYHEW, *supra* note 97, at 82-83. *See generally* D. MATTHEWS, U.S. SENATORS AND THEIR WORLD (1960). *See also* C. CLAPP, THE CONGRESSMAN 16-17 (1963). Exemplificative are the senatorial campaigns of James Vardaman that called for the repeal of the 15th Amendment. As V.O. Key, Jr., has said, it was "an utterly hopeless proposal and for that reason an ideal campaign issue." V.O. KEY, SOUTHERN POLITICS 232 (1942). Attacks are permitted "on the issues," of course, which can be mutually beneficial if constituencies differ. D. MAYHEW, *supra* note 97, at 83 n.2.

observed: "the Congressional Record is largely a series of disjointed insertions prepared for the eyes of relevant political actors, with each member enjoying final editing rights on his material."¹⁵³ The informal practice, again quoting Professor Mayhew, is that on "[a] controversial issue a Capitol Hill office normally prepares two form letters to send out to constituent letter writers—one for the pros and one (not directly contradictory) for the antis."¹⁵⁴ If instructions on this form of posturing are needed, they are available from political professionals.¹⁵⁵

In addition to credit-claiming and posturing, there are a number of other factors that facilitate Congress acting in a less than ideal fashion. For example, the existence of the federal bureaucracy provides support for congressional posturing by providing a convenient scapegoat. Individual congressmen may argue that their lack of success on a particular issue was due to the bureaucratic system, placing it beyond their immediate control. The creation of bureaucracies also allows Congress to serve symbolic needs—a first cousin of posturing, if indeed there is any difference at all—even though there is little concern for actual results. Thus, for example, "when water pollution became an issue, it was more or less predictable that Congress would pass a law characterized as an anti-pollution act, that the law would take the form of a grant program for localities, and that it would not achieve its proclaimed end."¹⁵⁶ Moreover, the case of water pollution is not an isolated example. The history of bureaucratic regulation in the United States is characterized by vague, rhetorical goals that often go unfulfilled,¹⁵⁷ a condition Congress is apparently willing to accept¹⁵⁸ and which lends support to the view that often the primary purpose of the entire scenario is political consumption.¹⁵⁹

A final factor that tends to diminish the importance of the electoral process as a means of ensuring accountability in government is the consequences of single-issue politics. There are certain issues upon which Congress seems unwilling to act, notwithstanding strong popular sentiment to the contrary. The best known exam-

153. D. MAYHEW, *supra* note 97, at 83.

154. *Id.* at 64 (footnotes omitted).

155. D. TACHERON & M. UDALL, *THE JOB OF THE CONGRESSMAN* 73-74 (1966). *But see* Fenno, *supra* note 133, at 914.

156. D. MAYHEW, *supra* note 97, at 134 (footnotes omitted). *See also* Sherrill, *supra* note 119.

157. For studies of the phenomenon of regulation, see D. MAYHEW, *supra* note 97, at 135 n.113.

158. *Id.* at 134-35.

159. A problem at least tangentially related to the growth of bureaucracies is the growth of legislative staffs. *See* Reston, *Have Congressional Staffs Become "an Unelected Legislature"?*, Des Moines Register, Jan 16, 1978, at 7-A.

ple is gun control, where the conventional wisdom is that the National Rifle Association has largely been responsible for inhibiting national gun control legislation in the face of large majorities who apparently favor national regulation of firearms.¹⁶⁰ Unfortunately, there is reason to believe that "single-issue politics" is increasingly prevalent on our political landscape, and is an increasingly troublesome issue due to its disproportionate impact on the political process.¹⁶¹

The power of a single-issue group stems from its apparent willingness to vote in a block against any official who violates its norms. If the great majority of individuals who disagree with any group's norms are not similarly blinded to all other issues, the cohesive group possesses great leverage. Since the votes of the rest of the populace will be distributed among the candidates on the basis of many other issues, the group may be able to swing an election by its members voting fairly uniformly. Accordingly, a candidate cannot risk alienating such a group unless his opponent has already done so. The result is that candidates generally take care not to offend cohesive groups that are unopposed by equally cohesive antagonists. Consequently, these groups may gain a veto power over the actions of government that, although limited in scope, is out of proportion to their size.¹⁶²

There are other factors that could be addressed that tend to immunize the government from popular influence,¹⁶³ but the point has been sufficiently explored for the present. That point is, of course, that there is good reason to suspect that the idealized conception of the electoral process as ensuring a close congruence between the will of the electorate and the policy choices of the government may need serious qualification. What remains to be

160. See, e.g., THE GALLUP OPINION INDEX, Nov. 1974 (113) at 12. Seventy-two percent of those polled favored the registration of all firearms; *The Swarming Lobbyists*, *supra* note 81, at 22. A proposal to ban handguns in Massachusetts was defeated in 1976.

161. *Hearings*, *supra* note 1, at 457. See Broder, *Are One Issue Advocates Killing Party Politics?*, Des Moines Register, Sept. 13, 1978, at 8A; Flansburg, *Single-Issue Groups; Pals Who Have It Both Ways*, Des Moines Register, Oct. 5, 1978, at 13A, col. 1; Lewis, *A Singular Issue*, The N.Y. Times, Nov. 16, 1978, at A27, col. 5; Stone, *Whose Interests Come First?*, U.S. NEWS & WORLD REPORT, Aug. 21, 1978, at 88; Trippett, *The Menace of Fanatic Factions*, TIME, Oct. 23, 1978, at 73.

162. See generally D. MAYHEW, *supra* note 97, at 130-31.

163. An important factor, is the electoral advantage of the incumbency. See generally Ferejohn, *On the Decline of Competition in Congressional Elections*, 71 AM. POL. SCI. REV. 166 (1977); Kostroski, *Party and Incumbency in Postwar Senate Elections*, 67 AM. POL. SCI. REV. 1213 (1973). Another, less closely related one, is the severe limitations on taxpayer suits. See generally Lappas, *Taxpayer Standing in the Wake of Flast v. Cohen*, 81 DICK. L. REV. 495 (1977).

discussed, then, is whether most of us would view the substance of that qualification, assuming it to be accurate, as beneficial.

5. *The Nature of Congressional Unrepresentativeness*

Anti-majoritarian biases are not necessarily to be regretted. There are certain values that we cherish more dearly than majoritarian law-making—such as respect and tolerance for minority interests and views—and to the extent these values are served by anti-majoritarian tendencies of government, these tendencies are to be applauded. The question here is whether Congress' anti-majoritarianism is of the sort, on balance, that we are willing to accept—whether, in other words, the beneficial aspects of congressional unrepresentativeness outweigh the objectionable. That is a question much easier to pose than to resolve. Much of what may be objectionable in Congress' behavior has already been discussed, but I have neither the space nor the expertise to place all of the relevant workproduct of Congress into its proper context and then analyze it from the perspective of its beneficial anti-majoritarianism. Nevertheless, there are a number of issues that can be addressed that will at least be helpful in this regard. Before proceeding, however, there is one difficulty that must be faced at the outset. Many of the values we hold dear are already insulated from legislative action by the Constitution. Thus, we must address those issues on which a sufficient consensus has not emerged to justify "constitutionalizing" them. One very instructive issue of that kind is the protection of civil rights that goes beyond explicit constitutional provisions.

It seems fairly clear that the civil rights legislation that emerged from Washington in the middle-sixties is not an example of a wise, beneficent government leading the way—at least not a wise, beneficent Congress. Rather, the evidence strongly suggests that Congress was reacting to its perception of the country's mood following the Democratic landslide of 1964 that kept Lyndon Johnson in the White House and put a solid Democratic majority in Congress. The public opinion polls, for example, demonstrated strong support for the 1964 civil rights legislation.¹⁶⁴ Similarly, the only recent Congress to receive a favorable rating from a majority of the populace is the one responsible for enacting President Johnson's programs,¹⁶⁵ all the more impressive in light of the fact that

164. D. MAYHEW, *supra* note 97, at 31. By January, 1964, 61% of those polled expressed support for a public accommodations bill. G. GALLUP, 3 THE GALLUP POLL 1863 (1972); *see also id.* at 1827, 1837.

165. R. SHERRILL, *supra* note 107, at 87. The favorable rating did not stop Republicans from making the traditional opposition party gains in the 1966 elections. *See* D. MAYHEW, *supra* note 97, at 31.

rarely does Congress receive a favorable rating from as much as one-third of the population.¹⁶⁶

Most impressive of all, though, is that the refusal of Congress in the late-sixties and early-seventies to repeal many of the advances made a few years earlier cannot easily be attributed to Congress resisting reactionary pressures from a fickle populace. The late-sixties was unmistakably a time of "white backlash"—a time when white America thought that minorities were not only asking for too much, too quickly, but also that they were one of the primary causes of the lawlessness of the times. This was especially true of the riots in the major cities.¹⁶⁷ At the same time, however, a large majority agreed that "America has discriminated against Negroes for too long,"¹⁶⁸ nearly two-thirds of the population felt that "[u]ntil there is justice for minorities, there will not be law and order,"¹⁶⁹ and over two-thirds indicated that if their "party nominated a generally well-qualified man for President and he happened to be a Negro"¹⁷⁰ that they would vote for him.¹⁷¹ Although it is difficult to know for sure, I suspect that attitudes of this sort rather than congressional beneficence explain Congress' failure to cut back significantly on the civil rights legislation and also probably explain the absence of any broadly based, grass-roots movement to do so.¹⁷²

That Congress was led by the emergent national concern for civil rights rather than having led it is also supported by the studies of constituency influence on Congress. The evidence we have indicates that the votes of individual representatives on civil rights issues are greatly influenced by the views of their constituencies.¹⁷³ In fact, I have been unable to find any recent literature that casts doubt upon this conclusion, and congressional action seems consistently to reflect public opinion on these issues.¹⁷⁴

166. R. SHERRILL, *supra* note 107, at 87.

167. *See, e.g.*, R. SCAMMON & B. WATTENBERG, *supra* note 66, at 94-97.

168. *Id.* at 99.

169. *Id.*

170. *Id.*

171. The percentage keeps increasing. *See* Gallup, *77% Say They'd Vote for Black for President*, Des Moines Sunday Register, Aug. 27, 1978, at 1. *See also* Gallup, *Poll Finds Sex, Race, Faith Matter Little to Voters*, Des Moines Register, Sept. 21, 1978, at 14A.

172. For another indication of a continuing decline in explicit racist views, *see* Gallup, *Poll Finds Huge Change in Favor of Mixed Marriages*, Des Moines Register, Aug. 28, 1978, at 2-B.

173. Miller & Stokes, *supra* note 66. One area in which Representatives are not greatly influenced by constituent views is foreign affairs, where Congress typically defers to the Presidency. *Id.*

174. Recent events are also consistent with that conclusion. For example, in 1974, a Gallup poll found that 66% of those polled felt the federal government, "should not reduce spending for social programs such as health, education

The close correlation between congressional action and the views of the nation on civil rights, which also appears to be the case on matters of social and economic welfare,¹⁷⁵ that may dispose of these areas as possible bastions of acceptable anti-majoritarianism, is also evident in recent events.¹⁷⁶ The refusal of Congress to allocate federal funds to defray any of the costs of court-ordered busing may be an example.¹⁷⁷ Another is the debacle over the use of federal funds for abortions.¹⁷⁸ Other, somewhat tangential, examples are the stripping of the Humphrey-Hawkins bill of any serious content,¹⁷⁹ and the refusal to allow tuition tax credits for parochial schools.¹⁸⁰ Whatever one's views on the merits of these issues, it seems clear that Congress is responding to the national debates rather than boldly leading the nation to a moral consensus. By contrast, when Congress' electoral needs are at issue, our representatives show a willingness to resist the public view. Thus, to date Congress has refused to provide for public financing of congressional campaigns in the face of strong public support,¹⁸¹ and the spending limits that may eventually be imposed may very well redound to the benefit of incumbents.¹⁸²

These examples do not prove that Congress' anti-majoritarian tendencies are generally met with disapproval. I must say, however, that the civil rights area, in particular, is an impressive reminder of the limitations of an idealized conception of Congress.¹⁸³

and welfare programs." *Gallup Opinion Index*, Nov. 1974 (113) at 11. Only with the recent emergence of the taxpayer revolt have congressmen begun talking of spending cuts.

175. A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *ELECTIONS AND THE POLITICAL ORDER* 371 (1966).

176. For some not so recent events—such as the treatment of American Indians, see S. TYLER, *A HISTORY OF INDIAN POLICY* (1973).

177. See 33 CONG. Q. ALMANAC 450 (1977). Busing of students has never been favored by the populace as the proper method of desegregating the schools. G. GALLUP, 3 THE GALLUP POLL 2323, 2328, 2243-44 (1972). By contrast, desegregation has been supported. *Id.* at 1723.

178. See 33 CONG. Q. ALMANAC 295-97 (1977). There appears to be a growing sentiment opposed to abortions. Compare G. GALLUP, 1 THE GALLUP POLL 247, 509 (1978), with G. GALLUP, 2 THE GALLUP POLL 669 (1978).

179. *Humphrey-Hawkins Bill Compromise Passed*, 36 CONG. Q. WK. REP. 3102 (Oct. 21, 1978), which is also another example of Congress engaging in meaningless symbolic acts.

180. *College Student Aid Increased; Tuition Tax Credit Killed*, 36 CONG. Q. WK. REP. 3071 (Oct. 21, 1978).

181. G. GALLUP, 1 THE GALLUP POLL 1060 (1978).

182. See 33 CONG. Q. ALMANAC 801-05 (1977). But cf. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124 (1970) (city council voted for a politically unpopular open-housing law). In 1971, Congress passed campaign expenditures limits that were found to be unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976).

183. See, e.g., Bond, *Initiative and Referendum Under the Federal Constitution*, 56

When that example is viewed in light of the credit-claiming desires of congressmen and the effect of special interest lobbying, what emerges is a picture of an institution that is generally responsive to its occasionally erroneous perception of the public will, except when the best interests of its own members are at stake. When obtaining electoral advantage is not a concern, Congress acts very democratically and provides, typically, relatively blunt, popular answers to questions regardless of an issue's complexity. When credit-claiming or electoral advantage is available, Congress typically makes the most of it regardless of what solution would be optimal.¹⁸⁴

There is then, significant evidence that the electoral process does not provide an adequate means of controlling the government. While in part this is due to the complexities of modern life, it is also due, in part, to pressures that are inherent in our political structure. The upshot may very well be, if I may quote Professor Mayhew one last time, that "the electoral process guarantees not that there will be a fiduciary relationship, but only that politicians will make it *appear* as if there were one."¹⁸⁵ And, I might add, the divergence between appearances and reality would not appear to be one that many of us would favor, although again we must postpone judgment in anticipation of more thorough analysis of contemporary congressional decision-making. If Professor Mayhew's characterization proves to be accurate, however, it goes far in explaining why the general public, as well as most commentators, have consistently held Congress in such low esteem.¹⁸⁶ What must be asked is whether anything can be done. Admittedly, it would not be impossible to elect a reform Congress that might attempt to solve some of the problems that appear to afflict congressional law-making. However, the chances of such an election occurring are slim.¹⁸⁷ The chances of a reform Congress effecting lasting change seem to be even slimmer. Too many times we have seen the resurrection of an abusive practice (or its first cousin) once the public clamor for reform has subsided. We have seen it too often to have

CENT. L.J. 444 (1903). The Vietnam peace movement is another example of a broadly based popular movement preceding and probably stimulating governmental action. See N. NIE, S. VERBA & J. PETROCIK, *THE CHANGING AMERICAN VOTER* 343-44 (1976).

184. See generally D. MAYHEW, *supra* note 97, at 138.

185. D. MAYHEW, *supra* note 97, at 114 n.68.

186. See R. SHERRILL *supra* note 107. See also, e.g., A. MACDONALD, *AMERICAN STATE GOVERNMENT AND ADMINISTRATION* 146 (5th ed. 1955); R. SHERRILL, *supra* note 107; L. TALLIAN, *supra* note 9, at 4-5; D. WILCOX, *supra* note 5, at 293; Gardner, *Problems of Percentages in Direct Government*, 10 AM. POL. SCI. REV. 500 (1916); Radin, *supra* note 83, at 564; Radin, *Popular Legislation in California: 1936-46*, 35 CALIF. L. REV. 171 (1947).

187. See note 144 *supra*.

much hope that "politics as usual" will be permanently modified without institutional change.¹⁸⁸ In fact, we have embraced institutional change in response to our dissatisfaction with Congress; we have given the Presidency increasing power, but that is a dangerous tactic for a democratic republic.¹⁸⁹ There may be, however, another way to ensure greater responsibility in our legislative process that is at least deserving of consideration, and to that we can now turn.

C. The Potential Role of a National Initiative Process

The role that a national initiative process could conceivably play is so obvious as to require but brief elaboration. Although a national initiative would not directly affect any of the deficiencies in congressional decision-making, it would provide the means of reversing any policy decision resulting from those deficiencies. An initiative procedure could provide, in short, a method to translate widely shared value preferences into law that would not be captive to the forces that skew congressional decision-making.¹⁹⁰ If, for example, we feel that the federal government distributes public works projects across the country in an equitable fashion, but that the government spends too much on public works, an initiative process would allow us to set limits on the spending of Congress without affecting its distributive mechanisms. Similarly, if we think that our representatives have treated themselves or others too lavishly at taxpayer expense, we could limit their expenditures accordingly. Or, if we are convinced that the time has come for public financing of congressional campaigns but Congress continues its recalcitrant behavior, we could provide the necessary procedures without congressional approval. And if we think Congress has been overly influenced by a small group on a specific issue, we could correct the imbalance.

The list of examples is endless, of course, and they would all make the same, simple point—that an initiative would allow us to act in the face of an unresponsive legislature. It would allow us to implement specific policies, and more importantly—much more importantly—it would allow us to provide parameters for the activ-

188. A recent example is the Senate's postponement of the curbs on outside earnings that only took effect January 1, 1979. See, *Congress's Ethics Drive Goes Into Reverse*, U.S. NEWS & WORLD REPORT, March 26, 1979, at 28.

189. See, e.g., D. MAYHEW, *supra* note 97, at 169-74.

190. See § III of text *infra*. Moreover, even if we should take our civic duties seriously and elect better men to office (see J. BOYLE, *supra* note 5, at 39), surely Mr. Teal is still correct that "this may be true, but to have a concurrent remedy can do no harm." Teal, *The Practical Working of the Initiative and Referendum in Oregon*, in W. MUNRO, *supra* note 5, at 217, 231. See also Radin, *supra* note 83, at 584.

ity of government, thus limiting it to what we perceive as its proper sphere.¹⁹¹ The result may be a counterweight to the unrepresentative tendencies of the federal government that would enhance the possibilities of a closer congruence between the policy choices of government and the wishes of the populace. Moreover, the counterweight would not necessarily impinge substantially upon the lawmaking function of Congress; it would simply limit or preclude congressional discretion in certain areas.¹⁹² Working within the confines so provided, Congress would continue to provide its own solutions to perceived problems. The initiative, in short, is not designed to supplant the legislative process.¹⁹³ It would simply be

191. The contemporary desire to provide parameters for Congress is surely the sustaining force of the movement to amend the Constitution to mandate a balanced budget. To date, 27 of the required 34 states have petitioned Congress to call a constitutional convention to consider such an amendment. *TIME*, Feb. 19, 1979, at 18-21. The strength of the balanced-budget movement is a testament to the great distance between Congress and a large portion of the citizenry on matters of fiscal responsibility. Unfortunately, the balanced-budget-by-constitutional-amendment approach is probably ill-advised, due primarily to its rigidity and its failure to obviate potential congressional avoidance tactics.

A national initiative, by contrast, would not only permit the spending of Congress to be limited to what the electorate deems to be reasonable (which is the primary objective of the balanced-budget proponents), but also it would be free of the difficulties attending the balanced-budget amendment. With an initiative process, the citizenry could limit congressional spending by statute, and the statute could be amended as needed in light of subsequent developments.

192. See, e.g., Schwartz, *Initiative Held in Reserve*, 41 NAT. MUN. REV. 142, 145 (1952).

After years of observation we can look upon direct legislation as only an adjunct to the regular legislative process, resorted to as a means of carrying out the public will when an enlivened public opinion demands it as a method of accomplishing that purpose when such will has been thwarted by the legislative body.

Id. See also Jones, *The Initiative and Referendum Under the United States Constitution*, 56 CENT. L.J. 393 (1903). There have been other suggestions recently for institutional change designed to offset Congress' unrepresentativeness. For example, Prof. Miller has suggested that we consider using computerized national referenda. Miller, *A Program for Direct and Proxy Voting in the Legislative Process, in The Economic Approach to Public Policy*, *supra* note 110, at 369. Others have suggested random selection of representatives. Mueller, Tollison & Willett, *Representative Democracy Via Random Selection*, *id.* at 381. See also note 191 *supra*.

193. The "supplanting" of the legislative process was one of the earliest, and one of the silliest, arguments against initiatives generally. See, e.g., Campbell, *supra* note 128, at 428-31. See also Littleton, *Mob Rule and the Canonized Majority*, 7 CONST. REV. 86 (1923); Smith, *The Referendum and Its Uses*, 10 CONST. REV. 21-26 (1926).

The proper role of the initiative was also seen quite early, however. See, e.g., D. WILCOX, *supra* note 5, at 289; Carey, *Limitations on the Use of the Initiative and Referendum*, 23 CASE & COMMENT 353 (1916); Gardner, *supra*

another check in a system of checks and balances that commends itself as a means of inhibiting the undesirable aspects of congressional law-making without disturbing the desirable.¹⁹⁴

Another important potential benefit of an initiative process is that it may enhance representative government by defusing single-issue politics.¹⁹⁵ As noted earlier, single-issue politics seems to have had a greater and more destructive impact on our political process in recent years.¹⁹⁶ The detrimental effect of single-issue politics is twofold: first, small groups enjoy a near veto over certain policies of government; second, candidates who may be generally superior to their opponents lose on occasion because they alienate special interest groups.¹⁹⁷

An initiative process might go far toward alleviating both problems. If Congress feels it cannot risk antagonizing certain groups by adopting policies those groups oppose even though a significant majority favor governmental action, an initiative process would allow the nation to implement that policy if the citizenry so desires. Similarly, if we generally support a person's views and think him the superior candidate but disagree with him on a major issue, the availability of an alternative means of legislating should reduce our inhibition to vote for him because of that issue. We can have the better person as our congressman, in other words, without forfeiting the possibility of implementing our policy views in areas where we disagree with our elected representative.¹⁹⁸

note 186, at 500; Crouch, *Direct Legislation Laboratory*, 40 NAT. MUN. REV. 81, 99 (1951); Crouch, *The Constitutional Initiative in Operation*, 33 AM. POL. SCI. REV. 634, 637 (1939).

The modern advocates of the national initiative also realize that it is not designed to replace the legislative process but merely to supplement it. See, e.g., L. TALLIAN, *supra* note 9, at 28. For data on the frequency of use, see *Hearings*, *supra* note 1, at 47-53 (statement of Larry Berg).

194. That a national initiative would not be frequently used does not detract from its potential importance. The power to impeach the President has rarely been used, but I doubt that very many of us would think it a superfluous provision in the Constitution. The test of such procedures lies not in their use but in their effect. Like the power to impeach, "[t]he great value of direct legislation consists not so much in its use, as in its possession which, like the gun behind the door, renders its use unnecessary." L. TALLIAN, *supra* note 9, at 28 (quoting John Randolph Haynes).

195. See generally Hand, *Is the Initiative and Referendum Repugnant to the Constitution of the United States?*, 58 CENT. L.J. 244, 247-48 (1909).

196. See note 160 & accompanying text *supra*.

197. Evidence suggests this happened recently in the case of Dick Clark of Iowa. Farney, *Clark-Jepsen Race: Clear-Cut Test of Single-Interest Groups' Power*, Des Moines Register, Nov. 1, 1978, at 8A; Flansburg, *supra* note 161. See also Herbens, *Special Interests Gaining Power as Voter Disillusionment Grows*, N.Y. Times, Nov. 19, 1978, at 1, col. 1.

198. See, e.g., Diamond, diDonato, Marley & Tubert, *California's Political Reform Act: Greater Access to the Initiative Process*, 7 S.W.U. L. REV. 453, 461 n.34

There are other contributions a national initiative could make. It might stimulate a healthy public debate of issues and thus facilitate the examination of problems and their possible solutions.¹⁹⁹ A national initiative might also contribute to the growing political sophistication of the country²⁰⁰ by giving citizens a greater incentive to become involved as a result of their enhanced capacity to affect the outcome of political decisions.²⁰¹ Moreover, an initiative procedure might even further that second primary goal of our political theory—access of all interests to the process of decision-making.

With an initiative, any group, or any person for that matter, that feels abused or ignored by the legislature has a possible remedy—it can appeal directly to the people.²⁰² Although the chances of winning at the polls, or even qualifying may be small, the mere utilization of the initiative process may be valuable. Publicity given to the perceived grievance will allow others to gain a deeper understanding of the proponent's position. That, in turn, may facilitate a compromise that is more satisfactory than the status quo.²⁰³ And even when a group loses completely, it cannot say that its claims were denied because of the perverse nature of politics. It cannot say that powerful vested interests that dominate the legislature precluded a fair consideration of its grievance. Rather, it will have had its chance to make its case and to win or lose unrestrained by the arcane labyrinth of the legislative process; and that, although I cannot prove it, seems the superior state of af-

(1975). For a good example of this dynamic, see Hamilton, *supra* note 182, at 132. The defusing of special interests may also help arrest the decline of political parties. See note 120 *supra*.

199. An example is California's experience with pension initiatives, all of which lost but which probably helped lay the groundwork for the Social Security Act of 1935. See L. TALLIAN, *supra* note 9, at 48; note 210 *infra*.

200. See, e.g., N. NIE, S. VERBA & J. PETROCIK, *supra* note 183.

201. There is good reason to believe that initiatives may engender interest in the political process. See, e.g., Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience 1914-1973*, 28 W. POL. Q. 330, 339-40 (1975). Initiative America has compiled the voting statistics for the November, 1978, election and found that the voter turnout in states with an initiative on the ballot was 21.0% higher than in states that do not permit initiatives. The turnout was also significantly higher in states that permit initiatives but that did not have any on the ballot this election than in states without the procedure. The Florida ballot had that state's first-ever initiative and the turnout was more than double that of the comparable 1974 election. This data is contained in a December 1, 1978, press release, which I have on file and is obtainable on request.

202. This furthers one condition of Prof. Dahl's conception of polyarchal democracy that "[a]ny member who perceives a set of alternatives . . . can insert his preferred alternative(s) among those scheduled for voting." R. DAHL, *supra* note 17, at 70.

203. See, e.g., note 199 *supra*.

fairs.²⁰⁴ Finally, the proponents of an initiative measure may prevail. One of the most beneficial aspects of an initiative process is that it permits a *supposed* minority to test whether a proposal is indeed favored or opposed by a majority of the electorate.²⁰⁵

That is the theory, at any rate, but of course, there is another side to it. A number of potentially serious problems with the process have been articulated. It has been suggested that the voting populace is not competent to make intelligent judgments on legislative matters, and thus the results of initiatives are likely to be at best random and at worst arbitrary and capricious. Similarly, the fear is often expressed that citizens will lack the expertise to draft statutes and, worse, that they will use the process to deal with "emotional" issues. Consequently, the argument runs, there will be a stream of crude, simplistic measures dealing with complex, inflammatory issues put on the ballot that appeal largely to the biases and prejudices of the populace.

The critics of initiative also argue that these bills must be taken as given—there is no way to amend an initiative once the qualifying procedure has begun. Thus errors cannot be corrected and, more disturbing still, the deliberative aspects of the legislative process with its give and take, with all relevant interests heard and hopefully accommodated, are eliminated from the process. The risk of inept as well as abusive legislation unfairly impinging on minority rights is increased commensurately.

Finally, the view is often expressed that the initiative process would come under the influence of monied interests—the wealthy, it is feared, will buy their way onto the ballot and then buy the election by inundating the mass media with propaganda. The voter, according to this view, has little power of discrimination. Thus, when he hears or reads (assuming he is able to do so) 10 paid political advertisements favoring a proposition and only sees one opposing advertisement, two opposing editorials, and two opposing endorsements by people whose judgment he respects, he is going to tally it all up and conclude that the affirmative of the proposition outweighs the negative two to one²⁰⁶ and vote accordingly.²⁰⁷

204. See also J. POLLOCK, *supra* note 5, at 68.

205. Everett, *Federal Initiative and Referendum*, 11 S. ATL. Q. 350, 353 (1912).

206. Actually, the voter will conclude that the affirmative outweighs the negative 10 to 5 since he is probably unable to do fractions. That would be adequate, I think, since none of the critics, to my knowledge, are of the view that the typical voter does not know that 10 is a larger number than 5.

207. See generally D. WILCOX, *supra* note 5, at 53-54, 78; J. BOYLE, *supra* note 5; Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 767 (1968); Diamond,

That, at any rate, is the opposing theory.²⁰⁸ Thankfully, however, we need not rest having merely presented theoretical positions, although for some reason that typically is as far as the opponents of initiatives go. What Professor Max Radin said forty years ago is still accurate today. In the writings of those critical of the initiative "there is a paucity of reference to any extended practice in the many jurisdictions that have adopted direct legislation. The references to all actual experience are for the most part couched in very general terms and are often admittedly based on single incidents."²⁰⁹ Indeed, it does appear as though the subjunctive mood is much more dear to the critics of the initiative process than the indicative.²¹⁰ But, as John Randolph Haynes wrote more than a quarter of a century before the scholarship of Max Radin was published:

Why need we use the subjunctive mode in discussing these provisions of direct government, speculating as to what *might* happen, when the experience of . . . cities, states and nations enables us to use the indicative mode of expression, stating that under their operation such and such things *have* happened. Opponents of the initiative, referendum, and recall without specifying instances where these provisions *have* failed, contend that they *would*, if adopted, cause continual disturbance, hamper honest officials, injure business, prove expensive to operate, result in hasty and unwise legislation, mean a government by the minority instead of the majority, and, in short, be a government by the mob.²¹¹

Haynes and Radin were surely right on at least one score—we must invoke the facts where possible to resolve the tensions between opposing theories. We are now in a very propitious position to do just that. The "generation of detailed . . . experience in the United States" that so impressed Professor Radin²¹² has now been extended to three generations of an even more detailed experi-

di Donato, Marley & Tubert, *supra* note 198, at 454-57; Littleton, *supra* note 193. For more specific cites to critics, see notes accompanying § III of text *infra*.

208. The opposing arguments have not changed much over the years. See, e.g., Parsons, *Relative to Popular Government Through Initiative, Referendum and Recall*, S. Doc. No. 360, 63rd Cong., 2d Sess. (1914).

209. Radin, *supra* note 83, at 564-65. Obviously, the qualitative difference between a theoretical and a pragmatic analysis of an institution often will collapse into a quantitative difference. Thus, my discussion of congressional lawmaking could be viewed as "theoretical." Hopefully, however, enough examples were provided to demonstrate a reasonable likelihood that the theoretical positions reflected reality. By contrast, the typical work critical of initiatives relies on *no* actual experience or on an extraordinarily limited set of data—such as one issue in one election.

210. See, e.g., Boyle, *supra* note 5, at 43; Campbell, *supra* note 128; Scott & Nathan, *Public Referenda, A Critical Appraisal*, 5 URB. AFF. Q. 313, 319 (1970); Note, *The Appropriation Exception in Nebraska*, 54 NEB. L. REV. 393, 394 (1975).

211. Haynes, *The Actual Workings of the Initiative Referendum and Recall*, 1 NAT. MUN. REV. 586, 587 (1912).

212. Radin, *supra* note 83, at 564.

ence. A review of that history is crucial to beginning the process of resolving the theoretical contentions that have developed with respect to the initiative.

III. THE EXPERIENCE IN THE STATES

A. An Examination of the Results of Ballot Measures

The American experience with the initiative is rich and varied. Following South Dakota's lead,²¹³ twenty-three states and the District of Columbia have embraced the initiative and used it to handle an incredible array of issues.²¹⁴ The doubts raised about the initiative, as well as the aspirations for it, hopefully can be informed through an examination of that experience. If the initiative will lead to poorly drafted, perverse laws and to the undermining of what we hold dear, or if it will come under the domination of organized interests, there should be evidence of those consequences in the states which have an initiative procedure. Similarly, if the initiative will act as a healthy supplement to the legislative process, that, too, should be indicated by the experience in the states.²¹⁵

213. See note 8 *supra*.

214. I have a research memorandum, available on request, that examines and compares the various state procedures. In addition to the states now possessing the initiative, a number of states are presently in the process of considering the adoption of an initiative procedure. See, *Hearings, supra* note 1, at 16 (statement of James Abourezk).

Initiatives are also quite prevalent at the municipal level, regardless whether the city is in a state that has a statewide initiative. See generally Crouch, *The Initiative and Referendum in Cities*, 37 AM. POL. SCI. REV. 491 (1943); Fordham & Pendergast, *The Initiative and Referendum at the Municipal Level in Ohio*, 3 U. CIN. L. REV. 313 (1945). One interesting use to which local initiatives have been put is to provide citizens a means to express their views on national issues. See, e.g., Comment, *The Local Initiative—A Proper Sounding Board for National Issues?*, 1968 UTAH L. REV. 464; Note, *Vietnam Peace Petitions—Question of American Policy in Vietnam Permitted on Local Election Ballot*, 3 HARV. C.R.-C.L. L. REV. 183 (1967). For another interesting suggestion for the use of ballot measures that is tangential to the present discussion, see Weil, "Best Last Offer" Referendum—A Viable Alternative, 50 FLA. B.J. 483 (1976); Zasoria, *Solve Public Strikes by Referenda*, 18 CURRENT MUNICIPAL PROB. 276 (1977). For a discussion of law-making entities other than officially constituted government, see Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 20 (1937).

215. I will not examine the results of local initiatives. It seems to me that the aggregate experience with statewide initiatives should more closely approximate what would happen with a national initiative, whereas local initiatives are too likely to be influenced by parochial concerns that would not affect state or nationwide ballot measures. Moreover, an examination of the results of local initiatives would require a concomitant examination of the performance of local legislative bodies. That is a burden too great to be borne here. There are, however, numerous studies of local decisionmaking. See, e.g.,

Evaluating the states' experience with the initiative is not a simple task, however. It requires a clear recognition of the subjectivity of an analysis that rests, in part, upon whether the outcomes of ballot measures meet with our approval.²¹⁶ Limiting the subjectivity of analysis is always a problem, of course, but it is particularly troubling here because the task of evaluating the results of initiatives is inherently difficult apart from its subjectiveness. To evaluate the initiative process one must look to the results of ballot measures; but to grasp the significance of the result of any particular measure, one must appreciate the circumstances that precipitated it. Doing that for any significant number of issues would indeed be a task of "monumental proportions."²¹⁷ As one of the earliest students of the initiative process has said:

The more intensely one tries to study the interesting phenomenon of direct legislation the more humble does he become. To look closely, for example, at the two hundred and ninety-one constitutional and legislative measures which the people of thirty-two states voted upon in 1914 is to be impressed with the number and significance of the things about that remarkable election which one cannot possibly know. How superficial at best must be our insight into that complex of social, political, economic and human forces which lay back of the presentation of those measures and the popular decision upon them.²¹⁸

The difficulties have, in one sense, increased considerably since Professor Cushman wrote. More states have adopted the initiative, and it has been used extensively over the past sixty-five years. This considerable history, however, which makes a detailed analysis of all or any significant portion of its parts nearly impossible, also provides the means by which a helpful examination can be conducted. Not only has there been considerable use of the initiative, but there have also been a considerable number of studies of the process similar to Professor Cushman's. Some have attempted to study the initiative over time in a single jurisdiction,²¹⁹ others have looked at a single election in more than one jurisdiction,²²⁰ while others have traveled slightly different routes.²²¹ From all these studies remarkably consistent conclusions emerge,²²² and

Bruce, *Participation in Local Policy Making: The Case of Referenda*, 56 Soc. Sci. Q. 55 (1975).

216. See, e.g., Hamilton, *supra* note 182, at 131.

217. Crouch, *supra* note 193, at 638.

218. Cushman, *Recent Experience With the Initiative and Referendum*, 10 AM. POL. SCI. REV. 532 (1916).

219. See, e.g., J. POLLOCK, *supra* note 5.

220. See, e.g., Cushman, *supra* note 218.

221. See, e.g., Gamson, *The Fluoridation Dialogue: Is It an Ideological Conflict?*, 25 PUB. OP. Q. 526 (1961).

222. A number of objections to a national initiative process that are not related to the actual operation of initiatives can be quickly disposed of. The first is that there would be "no limit" to what could be done by a national initiative. That

though their mere consistency does not prove the truth of those conclusions, it certainly provides impressive evidence.

One of the most remarkable findings that emerges from an ex-

is wrong. The power to initiate law would be, at most, co-extensive with congressional power to legislate. See text accompanying note 397 *infra*. Furthermore, while the vote of the electorate surely "produces pause and generates restraint" in the courts, constitutional principles are nonetheless applicable. *Lucas v. 44th General Assembly*, 377 U.S. 713, 737 n.30 (1963) (quoting *Lisco v. Lowe*, 219 F. Supp. 922, at 944 (D. Colo. 1963)). See also *Hunter v. Erickson*, 393 U.S. 385 (1969); Hand, *supra* note 195, at 248 n.4.

Another objection that has been raised to the initiative and will surely be raised again is that the initiative is inconsistent with the views of the Founding Fathers. See, e.g., J. BOYLE, *supra* note 5, at 15-20; Smith, *supra* note 193, at 26. For a modern rendition, see Will, *Initiative, The Populists' Voguish Darling*, Wash. Post, July 28, 1977, at A23.

One is tempted to respond by saying, "Of course, that's why we need a constitutional amendment." A better course, I suspect, is to deal directly with what is implicit in such charges—that the Founders rejected the initiative. If the Founders rejected the idea of a national initiative, they certainly did so discretely. To my knowledge there is no record of any discussion at all of a national initiative procedure in the constitutional debates. That is not very surprising since general statewide statutory initiatives were also unknown, although constitutional referendum was practiced. Lobingier, *supra* note 9, at 358-59.

To be sure, one can find references to fears of untrammelled majority rule, see, e.g., THE FEDERALIST Nos. 10, 55, 63 (J. Madison) (J. Cooke ed. 1961), but a carefully structured initiative process would avoid the crucial problem of the Founders—mob rule. See § IV of text *infra*, & note 366 *infra*. More importantly, even if we assume that some of our forefathers would have rejected the idea of a national initiative, the somewhat skeptical view of the population at large held by certain of the gentry 200 years ago is hardly an impressive datum when measured by the experience we have had with the initiative and with the legislative branch of government.

Had the Founders seriously considered the issue, they probably would have rejected it because of the logistics involved. Today, however, the conditions that would have made a national initiative a practical impossibility have changed. See, e.g., Wilcox, *supra* note 5, at 5-7. For an excellent discussion of this and related issues, see Shafer, *A Teutonic Institution Reviewed*, 22 YALE L.J. 398 (1913). See also Radin, *supra* note 83, at 561. In fact, recent studies have concluded that "no single type or size of unit is optimal for achieving" the goals of democratic government, R. DAHL & E. TUFTE, *SIZE AND DEMOCRACY* 138 (1973).

One objection that often is raised to state initiatives is that the initiative procedure is inconsistent with the guarantee clause of art. IV, § 4 of the Constitution, an argument that has been used against many innovations. Radin, *supra* note 186, at 171 n.5. See, e.g., Sherwood, *The Initiative and Referendum Under the United States Constitution*, 56 CENT. L.J. 247 (1903). For a definitional treatment, see Note, *The Referendum as a "Republican Form of Government"*, 24 HARV. L. REV. 141 (1911).

That argument would not be relevant to a constitutional amendment providing for a national initiative process, obviously. For a thorough treatment of the guarantee clause, see Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desultude*, 46 MINN. L. REV. 513 (1962).

amination of the various studies of the initiative is that they consistently conclude that the initiative process has, on balance, performed in most respects at least as well as the legislative process.²²³ To be sure, there are studies critical of the process, but they are limited in scope. Typical are those that draw an inference from a few apparently irrational voters in a small number of elections that the process itself is irrational. Yet these works avoid, as a rule, a consideration of the crucial questions—did the measure win or lose, can the result be seriously questioned, and if so is the election aberrational? Furthermore, these studies are able to conclude that certain votes are irrational only by resolving all doubts in that direction. They do not even attempt to consider more favorable explanations.²²⁴

Other studies have been content to criticize the initiative process without any apparent concern for the outcome of any measures at all.²²⁵ In fact, the closest anyone has come to condemning the process on the basis of its results is Senator Neuberger who criticized the defeat of a few measures in California.²²⁶ What Senator Neuberger failed to ask, though, is why the electorate had to deal with those measures, and the answer is because the California Legislature failed to deal with them. Yet, the failure of the electorate to enact a bill is not a cogent criticism. The refusal to enact measures that the legislature did not pass provides no support at all for the argument that the initiative process is inferior to the legislative as a method of lawmaking;²²⁷ the most that it does is demonstrate an equivalency in certain areas over a short period of time.

By contrast, those studies of a more general nature consistently have concluded that the work-product of the initiative process overall is at least the equal of, and often superior to, that of the legislative process.²²⁸ There is no evidence from any extensive

223. The legislative process is the proper comparison, given the issue is whether we can improve upon it.

224. See, e.g., Mueller, *Voting on the Propositions: Ballot Patterns and Historical Trends in California*, 63 AM. POL. SCI. REV. 1197 n.16 (1969); Schumacher, *Thirty Years of the People's Rule in Oregon*, 47 POL. SCI. Q. 242, 250 (1932).

225. See, e.g. J. CORRY & H. ABRAHAM, *supra* note 12, at 412-13; Campbell, *supra* note 128, at 431.

226. Neuberger, *The People or Their Representatives?*, in THE CALIFORNIA GOVERNMENTAL PROCESS 85 (E. Lee ed. 1966).

227. For a work that suggests, without citation, that the initiative process has little effect on state governments, see Showal, *Attitudes Toward Conflicting Political Institutions*, 20 PUB. OP. Q. 604 (1957).

228. I will make no distinction in this discussion between initiated constitutional amendments and initiated statutes. There seems to be little difference in the way the two processes are used in the states, notwithstanding the fact that an initiated constitutional amendment is typically more difficult to amend or re-

study that legislation enacted by initiative is, as a whole, more "biased," more "ideological," more "emotional," more "ill-considered," more "poorly drafted," or less "deliberative" than the workproduct of the legislative branch. Quite to the contrary, in fact. But rather than rest upon my own characterizations of the work of others, I believe it better that they speak for themselves:

Professor James Pollock, upon examining the process in Michigan:

In any event, Michigan's thirty years' experience with the initiative . . . has shown that there is quite as likely to be a judicious and rational decision on popular votes as on legislative votes. Even on technical questions the popular judgment has been as good as the judgment of the legislature and certainly less open to suspicion. On larger reforms the people have been much more likely to arrive at an acceptable conclusion.²²⁹

Professor Edwin Cottrell, studying the initiative and referendum in California:

Neither fear of much radical legislation on the one hand, nor of an ultra-conservative attitude of the people on the other, has proved justified.

. . . .

The early charge that direct legislation would arouse passions between different elements of the population has failed to materialize.

. . . .

Students of government would probably agree after an examination of this experience that Theodore Roosevelt was prophetic in saying, "The majority of the plain people will day in and day out make fewer mistakes in governing themselves than any smaller body of men will make in trying to govern them."²³⁰

Professor Max Radin, on the basis of his first study of the California process:

Not only is it impossible to characterize the result reached in any case as clearly bad, but in the overwhelming majority of instances, the popular decision was precisely that which had been approved of by most civic organizations that had given independent and disinterested study to them.

. . . .

And this must be particularly emphasized because, of the twenty-nine proposals accepted, a certain number were quite patently of a kind that would be reckoned "unpopular," that is to say, they limited rather than increased popular action, and in some cases ran counter to our ancient and supposed inveterate popular prejudices. . . . Similarly proposals were rejected which had always been supposed to have a strong popular appeal. . . . Of some of these proposals accepted—all strongly advocated by competent political experts—it is not too much to say that no legisla-

peal. Because of this difference, however, one student of initiatives has concluded that the process of initiating constitutional amendments should be used quite sparingly. W. Harmon, Oklahoma's Constitutional Amendments: A Study of the Use of the Initiative and Referendum (1951) (unpublished Ph.D. Dissertation on file at Univ. of Okla. Library).

229. J. POLLOCK, *supra* note 5, at 65. Professor Pollock also studied referenda.

230. Cottrell, *Twenty-Five Years of Direct Legislation in California*, 3 PUB. OP. Q. 30, 38, 40, 45 (1939).

ture would have passed them, although they constituted highly desirable reforms. And of many of the jobbing and reckless proposals rejected by the people, it is only too likely that the legislature would have passed them; indeed in several cases, the legislature did pass them.²³¹

And Professor Radin, upon concluding his second study of the California experience:

The inferences which I felt justified in making in the former article seem amply confirmed by the four elections that have taken place since. Direct legislation can deal with complete competence—at any rate with a competence equal to that of representative legislatures—with the technical and routine problems which need legislative intervention. So far as large problems of public welfare are concerned, it is markedly more likely to reach a fair and socially valuable result.

One thing is clear. The vote of the people is eminently sane. The danger apprehended that quack-nostrums in public policy can be forced on the voters by demagogues is demonstrably nonexistent. The representative legislature is much more susceptible to such influences.²³²

The most thorough study of the results of an initiative procedure that I have been able to find is the dissertation of Dr. Paul Culbertson. His detailed evaluation of the Oregon experience is deserving of complete quotation:

Analysis of the type and content of direct legislative proposals since 1902 reveals the following important trends and facts:

1. Adequate financial support for education when a need for such assistance has been clearly demonstrated.
2. A tendency toward economy in appropriations for construction of institutions other than those relating to education and public health.
3. Generous financial provision for veterans of the World War.
4. An unsuccessful program of aid for agriculture.
5. A varied, but on the whole constructive, policy regarding revenue and expenditures.
6. A definite purpose to extend and preserve the 'people's power' in government.
7. Almost unanimous rejection of innovations in the basic machinery of government—other than changes included in the 'Oregon System.'
8. A policy of economy and a desire for greater purity in elections.
9. Extension of the governor's power in the interests of better government.
10. Modifications of the judicial system in the interests of cheaper, more rapid, and more exact justice.
11. Protection of public health.
12. A constructive attitude toward crime control.
13. An indecisive, hesitant attitude toward public power development.
14. Opposition to state entrance into direct competition with private business.

231. Radin, *supra* note 83, at 576-77. This study also included referenda.

232. Radin, *supra* note 186, at 190 (footnote omitted). He again included referenda.

15. Lack of interest in purely 'local' measures and a decided tendency to reject them.
16. On the whole, a friendly policy with reference to the aims of organized labor coupled with a requirement that labor keep its activity within limits prescribed by the general public welfare.
17. An enlightened, though conservative, attitude toward suffrage legislation.
18. With one or two exceptions, a policy of protection for the personal and civil rights of the individual citizen.
19. A varied policy toward highway construction, characterized at first by hesitation and uncertainty, then financial generosity, and finally by a determination to preserve the established system.
20. A reasonable degree of state control over corporations and utilities.²³³

What, in Dr. Culbertson's view, does all this add up to? "The marvel is that this system of popular government, so vulnerable to apathy, indifference and actual ignorance, has not only worked but has a considerable degree of constructive and progressive achievement to its credit."²³⁴

These quotations capture the essence of the scholarship which has examined the actual operation of the initiative. What emerges from these studies is a fairly attractive portrait of the performance of the initiative procedure. Those who have looked at the results of the process have consistently concluded that the initiative, on balance, is a healthy addition to the law-making machinery of a jurisdiction,²³⁵ as have many who have worked intimately with an

233. P. Culbertson, *A History of the Initiative and Referendum in Oregon* 493-95 (1941) (unpublished Ph.D. dissertation on file at the Univ. of Oregon). His work, obviously, also dealt with referenda.

234. *Id.* at 497.

235. In addition to those quoted in the text, see J. BARNETT, *THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON* (1915); D. BUTLER & A. RANNEY, *REFERENDUMS* 67-122 (1978); W. CROUCH, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA* (1950); J. LAPALOMBARA, *THE INITIATIVE AND REFERENDUM IN OREGON: 1938-1948* (1950); Bone & Benedict, *supra* note 201; Fordham & Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495, 501 (1950); Haynes, "People's Rule" in *Oregon*, 1910, 26 POL. SCI. Q. 32 (1911); Johnson, *The Initiative and Referendum in Washington*, 36 PAC. N.W. Q. 29 (1936); Norton, *Referenda Voting in a Metropolitan Area*, 16 W. POL. Q. 195 (1963); Potter, *The "Tools of Democracy,"* 24 CASE AND COMMENT 610 (1918); Schwartz, *supra* note 192, at 144; Thatcher, *The Initiative, Referendum and Popular Election of Senators in Oregon*, 2 AM. POL. SCI. REV. 601 (1908); Thomas, *The Initiative and Referendum in Arkansas Come of Age*, 27 AM. POL. SCI. REV. 66 (1933); Comment, *The Application of the Equal Protection Clause to Referendum-Made Law: James V. Valtierra*, 1972 U. ILL. L.F. 408; Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966).

For a thorough account of a recent well-publicized initiative campaign, see L. Olson, *Power, Public Policy and the Environment: The Defeat of the 1976 Winter Olympics in Colorado* (1975) (unpublished Ph.D. dissertation on file

initiative procedure.²³⁶ What may be referred to as "hate legislation"²³⁷ is not enacted by initiative,²³⁸ rather, the grist of that mill tends much more to be measures regulating government in one form or another or instituting some other type of reform for which there is a perceived need.²³⁹ Nor are frivolous or ill-considered measures enacted with regularity, at least when measured against the workproduct of the legislative process. Unquestionably measures have been enacted that are criticizable on technical as well as substantive grounds, and the initiative process has not proven to be an electrifying instrument of reform that has transformed political Sodoms and Gomorrahs into the Promised Land. But, what it has done is permit the citizenry to intervene directly into the governance of its own affairs when the need to do so has been perceived, and the disinterested students of that process have concluded that its benefits have exceeded its costs.

Conclusions concerning the initiative process must remain tentative, however. The material I have cited suffers from two deficiencies. The first is that it is dated; the second is that it is methodologically suspect. Little can be done about the first problem, except, of course, to update the studies,²⁴⁰ and there has been one recent effort to do so. Professors Bone and Benedict have reviewed the results of initiatives in Washington:

The theory of the initiative first states that it would give a large segment of the voters an opportunity to enact important policies when a legislature refuses to respond. This portion of the theory has passed the test reasonably well. Time and time again the sponsors have been ahead of the legislature. The initiative has been used to liberalize liquor laws, adopt daylight savings time, expand welfare benefits, authorize joint tenancies in property, protect game, advance and protect recreational opportunities, bring about reapportionment, and to institute a number of government reforms including the state civil service, open meetings, and regulation of lobbying and campaign practices. . . .

The second justification given for the direct legislation process is that it would lead to more egalitarian policy-making with less interest group ma-

at the Univ. of Iowa Law Library). See also Bass, *The Initiative and Referendum in Oklahoma*, 1 SW. POL. SCI. Q. 125 (1920).

Those political scientists who disapprove of initiatives do so on structural grounds. For a thorough discussion, see R. Anderson, *Adoption and Operation of Initiative and Referendum in North Dakota* (1962) (unpublished Ph.D. dissertation on file at the Univ. of Iowa Law Library). See also Schumacher, *supra* note 224.

236. See, e.g., *Hearings*, *supra* note 1, at 85, 102 (statements of Baxter Ward and Don Whiting).

237. *Hearings*, *supra* note 1, at 60 (testimony of Peter Bachrach).

238. See, e.g., W. CROUCH, *supra* note 235, at 17.

239. See D. BUTLER & A. RANNEY, *REFERENDUMS* 78 (1978).

240. My subjective review of successful initiatives corroborates the conclusions of the other students of the initiative process. See, e.g., text accompanying notes 268-301 *infra*.

nipulation than would occur in the legislature. Certainly the wide variety of interests that have availed themselves of the opportunity to initiate ballot measures is indicative of a large degree of pluralism.²⁴¹

As helpful as Bone and Benedict's work is, more appraisals of the results of the initiative process ought to be obtained before we allow our conclusions to become any less tentative. Hopefully, whatever subsequent work that is done will also address the methodological weaknesses of most of the existent studies. These studies proceed by asking whether, taken as a whole, the measures enacted by initiative are more or less consistent with "good government" than the output of the legislature. The trouble is, of course, that the definition of "good government" has a heavy element of subjectiveness. Such an approach is not surprising, in light of the fact that the strong emphasis on quantification is a relatively recent phenomenon in political science, as in the social sciences generally. Moreover, I am not at all sure that any other approach is preferable, since the issue is how an initiative process is likely to be used. Nonetheless, modern political scientists, after recoiling from my degeneracy, would likely point out that there are a number of empirical examinations of initiatives that could and should be done. In fact, one study has attempted to apply modern analytical techniques to the initiative process, and the results corroborate the more impressionistic conclusions of the earlier writers.

Professor Charles Price studied the "quality of life" in states with and without initiatives. He also studied the strength of state pressure group systems and political parties and the performance of the state legislatures. He tested the hypothesis that in states with initiatives, pressure groups would be stronger, parties would be weaker, and the legislatures would not be as effective or innovative.

Using the Midwest Research Institute's ranking of states on the basis of quality of life, he found "by a statistically significant score . . . 'Quality of Life' rankings in the high-use [of initiative] states were higher than 'Quality of Life' rankings in the low-use states."²⁴² Applying the Zeller categorization of state pressure group systems,²⁴³ he found no significant results when he compared high-use to low-use states and initiative and non-initiative states.²⁴⁴ When he applied the Jewell-Patterson compilation of

241. Bone & Benedict, *supra* note 201, at 347. See also D. BUTLER & A. RANNEY, *supra* note 239, at 67-122.

242. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 257-58 (1975).

243. B. ZELLER, *AMERICAN STATE LEGISLATURES* 90-91 (1943).

244. Price, *supra* note 242, at 253.

party voting in state legislatures²⁴⁵ and Ranney's Inter-Party Classification,²⁴⁶ he found no significant difference in political party strength between high-use and low-use states, but he did find some indication that initiative states may have less cohesive and disciplined parties than non-initiative states.²⁴⁷ However, he also found that "by a statistically significant margin high-use states had more functional (effective) legislatures than low-use states,"²⁴⁸ and that there was no significant difference in terms of innovative legislation between high-use states and low-use states or between initiative states and non-initiative states.²⁴⁹ On the basis of his study, Professor Price commented that:

The most important overall conclusion of this study is to question the prevailing negative assessment of initiatives held by politicians, not unexpectedly, and academics and journalists as well. The various conventional wisdom views of the initiative were all discarded and the familiar litany of other criticisms were found to be open to question.²⁵⁰

If we are seriously to consider implementing a national initiative, more work similar to the traditional studies as well as that of Professor Price will be essential. Indicia of "good government" need to be explicitly articulated and comparisons done on that basis between states with and without initiative procedures. Similar studies should also be done that address such issues as political stability and tolerance for minority interests. The need for further work notwithstanding, the cumulative impact of the existent studies is still quite impressive, I think, especially in light of their apparent consistency over time and in light of the similar conclusions reached through the use of different methodologies. This apparent consistency among the trained observers raises quite forcefully the question as to why the initiative has impressed its students beyond what might have been predicted. The primary reason, so far as I can tell, is that the typical voter is not a mindless, bigoted fool who is readily influenced by the claptrap that public relations firms employ as a substitute for reasoned discussion of ballot

245. M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES*, 445 (1973).

246. Ranney, *Parties in State Politics*, in *POLITICS IN THE AMERICAN SYSTEM* 87 (H. Jacob & K. Vines, ed., 2d ed. 1971).

247. Price, *supra* note 242, at 253-54.

248. *Id.* at 257. He relied on the ranking of the quality of state legislatures done by the Citizens Conference on State Legislatures. J. BURNS, *THE SOMETIMES GOVERNMENT: A CRITICAL STUDY OF THE 50 AMERICAN LEGISLATURES* 52-53 (1971).

249. Price, *supra* note 242, at 258. Here he applied Walker's Innovation Rank for States. See Walker, *The Diffusion of Innovation Among the American States*, 63 AM. POL. SCI. REV. 880 (1969); and Gray's Overall Average Innovation Rank, see Gray, *Innovations in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973).

250. Price, *supra* note 242, at 261-62.

measures. Moreover, perhaps partly in response to the claptrap, voters demonstrate a healthy tendency to vote no on initiated measures.

B. *The American Voter* Revisited

Political commentators have until quite recently consistently denigrated the abilities of the voting populace.²⁵¹ The source of this uncharitable view of those of us who vote, typically can be traced back to some of the "classic" works in the field of voting studies, such as *Voting*²⁵² or *The American Voter*.²⁵³ It is now clear, however, that these works are seriously deficient if used to support any sweeping generalizations about voters, especially about their powers of judgment and discrimination. The study involved in *Voting*, for example, although it was methodologically of the greatest importance, did not generate many insights into the process of voter discrimination. In fact, while it may be unkind it is also fair to say that "the authors of *Voting* confine their discussions to trivialities and present conclusions that might very well be wholly false."²⁵⁴

Although the results of *The American Voter* are of greater interest than those of *Voting*,²⁵⁵ interpretations often given those results—that the American voter is a political simpleton whose only redeeming feature is that he is also extraordinarily shallow—are simplistic.²⁵⁶ As one commentator has said, "frequent statements that the book suggested issues were not of great consequence [to the voter] say more about the loss of information when a complex phenomena is reduced to a dichotomous variable . . . than they do about the content of the book itself."²⁵⁷ Still, *The American*

251. See, e.g., B. BERELSON, P. LAZARSFELD & W. MCPHEE, *VOTING* (1954); J. PERRY, *THE NEW POLITICS* 213 (1968); Davis, *Community Attitudes Toward Fluoridation*, 23 PUB. OP. Q. 474 (1960).

252. B. BERELSON, P. LAZARSFELD & W. MCPHEE, *supra* note 251.

253. A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* (1960). For a review of the literature of voting studies prior to 1954, see Lipset, Berelson, Barton & Ling, *The Psychology of Voting: An Analysis of Political Behavior*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1124 (G. Lindzey ed. 1954).

254. Berns, *A Critique of Berelson, Lazarsfeld & McPhee's Voting*, in *PUBLIC OPINION AND PUBLIC POLICY: MODELS OF POLITICAL LINKAGE* 24 (N. Luttbegg ed. 1968). For a discussion of some of the difficulties voter studies entail, see Key, *The Politically Relevant in Surveys*, 24 PUB. OP. Q. 54 (1960).

255. See also P. LAZARSFELD, B. BERELSON & H. GAUDET, *THE PEOPLE'S CHOICE* (3d ed. 1968).

256. See, e.g., Pomper, *supra* note 59, at 415-16.

257. Kessel, *Comment: The Issues in Issue Voting*, 66 AM. POL. SCI. REV. 58 (1972).

Voter, and the comment that it generated,²⁵⁸ does contain data from which one may infer that the average voter is not greatly concerned with politics, does not possess deeply held ideological commitments, and that he gives very little thought to public issues. However, it is now becoming clear that those inferences are in great need of qualification.

The primary difficulty with drawing inferences of a general nature from the data presented in *The American Voter* is that the data is time-bound, as it is primarily based on a study of the 1956 election.²⁵⁹ It may be true that the average voter was uninterested in that election, but that probably is because it was a very uninteresting election. The Korean War was over, the Red Scare had largely abated, and the country was heading into a time of remarkable prosperity. The battles that were soon to be fought over the import of American ideals were not yet perceived. It was a time of quiescence, of stability, and most importantly of all, of contentment.²⁶⁰ It does not seem very surprising that, at a time of no burning issues, there was little evidence of a burning interest in politics.²⁶¹

If this explanation is accurate, there should be evidence from the decade of the sixties quite different from that of 1956, and indeed there is. Professor Pomper has updated the work of *The American Voter*, using essentially the same methodology. He found that after the great issues that would dominate the next decade began to be perceived, the views of the political parties began to diverge on those issues. As the parties diverged, the public perception of party differences on the issues increased dramatically.²⁶² Moreover, "this process of education" increased over the entire population—it "was not confined to the insightful young, or to the formally-trained college population, or to committed White segregationists and Black integrationists. This political education was general and apparently persistent."²⁶³ And, in Professor Pomper's words, since there is not a demographic explanation for the phenomenon, the "alternative . . . is a directly political one: the events and campaigns of the 1960's . . . made politics more relevant and more dramatic to the mass electorate. In the process,

258. See, e.g., A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *ELECTIONS AND THE POLITICAL ORDER* (1966).

259. Pomper, *supra* note 59, at 416. *The American Voter* does have some comparative data based on a similar study done of the 1952 election. A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *supra* note 253, at 17.

260. See N. NIE, S. VERBA & J. PETROCIK, *supra* note 183.

261. See Skeingold, *Social Networks and Voting: The Resurrection of a Research Agenda*, 38 AM. SOC. REV. 712, 716-17 (1973).

262. Pomper, *supra* note 59, at 417-19.

263. *Id.* at 423-24.

party differences were developed and perceived. Democrats divided from Republicans, Democrats became more liberal, and voters became more aware."²⁶⁴

Professor Pomper's basic premise—that the level of political knowledge in the electorate is apparently more a function of interest than of ability—has received recent corroboration from the most extensive inquiry into the dynamics of the voting public since *The American Voter*.²⁶⁵ In fact, the subsequent work of two of the authors of *The American Voter*—Miller and Stokes—makes this point dramatically. Miller and Stokes' appraisal of the electorate in the 1958 congressional election is similar to the view of the electorate that emerges from *The American Voter* based on the evidence from the 1956 election.²⁶⁶ Yet, as Miller and Stokes report, in the Arkansas Fifth Congressional District election enormous interest had been generated due to the perception of Congressman Brooks Hays as being too moderate on what the voters of that district then considered a burning issue—civil rights. The survey data of that election showed that every voter sampled had a clear perception of the candidates' positions on civil rights and that those perceptions were responsible for the victory of a write-in candidate.²⁶⁷

At any rate, I think it is a fair appraisal that since the publication of *The American Voter* we have witnessed the pendulum of political sophistication in the electorate swing back the other way, and with it has come a growing recognition of the voting populace's ability to intelligently distinguish available options.²⁶⁸ Moreover,

264. *Id.* at 421, 422; See also Converse, Miller, Rusk & Wolfe, *Continuity and Change in American Politics: Parties and Issues in the 1968 Election*, 63 AM. POL. SCI. REV. 1089 (1969).

265. N. NIE, S. VERBA & J. PETROCIK, *supra* note 183. In particular, see *id.* at 4-5, 7, 35, 43, 98-99, 110-22, 123, 166-73, 272-288, 290, 294, 348-49.

266. See A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *supra* note 258, at 366.

267. *Id.* at 369. One may not approve of what motivated the voters in the Arkansas Fifth Congressional District, but that is not the point, at least not here. See text accompanying notes 278-292 *infra*.

268. G. POMPER, VOTER'S CHOICES: VARIETIES OF AMERICAN ELECTORAL BEHAVIOR 210-26 (1975); R. SCAMMON & B. WATTENBERG, *supra* note 66, at 22, 60-61; V.O. KEY, THE RESPONSIBLE ELECTORATE (1966); H. HAHN, *supra* note 59, at 167; Brody & Page, *The Assessment of Policy Voting*, 66 AM. POL. SCI. REV. 450 (1972); Shapiro, *Rational Political Man: A Synthesis of Economic and Social-Psychological Perspectives*, 63 AM. POL. SCI. REV. 1106 (1969); Wilson & Banfield, *Public Regardness as a Value Premise in Voting Behavior*, 58 AM. POL. SCI. REV. 876 (1964).

For a critical appraisal of the Wilson and Banfield article, see Wolfinger & Field, *Political Ethos and the Structure of City Government*, 60 AM. POL. SCI. REV. 306 (1966). As we have become more "aware" it appears we also have become more cynical. Miller, *Trust in Government*, 68 AM. POL. SCI. REV. 951

the little evidence we have specifically focusing on the voters' relationship to ballot measures is quite consistent with the developing view of the voter's abilities.²⁶⁹

Even critics of the initiative procedure recognize the process of education that accompanies initiated measures,²⁷⁰ and the natural experiments that have occurred lend further support to the proposition that the voter comprehends his task. For example, in the 1964 California election, there were two incompatible measures on the ballot—one would have set up a state lottery and licensed a particular firm to run it; the other forbade any constitutional amendment decided by popular referendum, which the first would have been, to name a particular firm in it. The former lost and the latter won by sixty-nine percent of the vote.²⁷¹ Proposition 14 of constitutional law fame²⁷² is another example. It was a very complicated measure that required an affirmative vote to express a negative attitude on the Rumford Act, which was the primary stimulant to the proposition. The proposition won, a result consistent with what was apparently the public's views on the merits.²⁷³

In sum, then, although the data presented here does not irrefut-

(1974). Compare Critin, *Comment, The Political Relevancy of Trust in Government*, *id.* at 973, with Miller, *Rejoinder to "Comment" by Jack Critin: Political Discontent or Ritualism*, *id.* at 689. For evidence that voters may pay more heed to Presidential than to congressional elections, see Hinckley, *Issues, Information Costs, and Congressional Elections*, 41 AM. POL. Q. 131 (1976); Hinckley, Hofstetter & Kessel, *Information and the Vote: A Comparative Study*, 2 AM. POL. Q. 131 (1974). Again, though, I wonder how time-bound such data is. If Congress continues its independent ways, a resurgence in interest in congressional elections may likely occur.

269. Most of the work done has been demographic studies, which are not very enlightening for my purposes. For a representative sample, see Kaufman & Greer, *Voting in a Metropolitan Community: An Application of Social Area Analysis*, 38 SOC. FORCES 196 (1960); Kent & Harmon, *Class, Party, and Race in Four Types of Elections: The Case of Atlanta*, 28 J. POL. 391 (1966); Lustey, *The Relationships Between Demographic Characteristics and Pro-Integration Votes of the White Precincts in a Metropolitan Southern County*, 40 SOC. FORCES 205 (1962); Vyeki, *Patterns of Voting in a Metropolitan Area 1936-1962*, 1 URB. AFF. Q. 65 (1966).
270. See, e.g., Lutrin & Settle, *The Public and Ecology: The Role of Initiatives in California's Environmental Politics*, 28 W. POL. Q. 352, 359 (1975). See also W. CROUCH, *supra* note 235, at 121-23; J. POLLOCK, *supra* note 5, at 675; *Hearings*, *supra* note 1, at 68 (1977) (testimony of Henry Abraham); Cottrell, *supra* note 230, at 33; Haynes, *supra* note 235, at 62. But see A. MACDONALD, *supra* note 186, at 149.
271. Wolfinger & Greenstein, *supra* note 207, at 755. The winning proposition was a referendum. See also Cottrell, *supra* note 230, at 40. "Conflicting measures often appear on the same ballot. However, the voters have never adopted any which were in direct opposition." *Id.*
272. See *Reitman v. Mulkey*, 387 U.S. 369 (1967).
273. Wolfinger & Greenstein, *supra* note 207, at 755-57.

ably establish the competency of those who vote,²⁷⁴ it does nonetheless cast serious doubt on the once fashionable view of the voting populace as a collection of disinterested idiots.²⁷⁵ If that view turns out to be wrong, that would go a long way towards explaining the favorable view of the initiative possessed by those who have studied its results. It would also be helpful in disposing of a potential criticism of a national initiative procedure.²⁷⁶ But, what of the related fear that the electorate is so bigoted that the initiative will come to be dominated by emotional proposals reflecting the worst side of the American character? We can best approach that question by returning once more to the actual results of the process.²⁷⁷

The history of the initiative is remarkably free of the enactment of abusive legislation.²⁷⁸ One of the few examples of an initiated

274. Yet another point deserving of mention is that the belief that the position of a measure on a ballot has a substantial effect on its outcome does not appear to reflect reality. See J. POLLOCK, *supra* note 5, at 48. The alienated voter hypothesis has also been undermined considerably. Mueller, *supra* note 224, at 1209 n.32; Shepard, *Participation in Local Policy Making: The Loss of Referenda*, 56 Soc. Sci. Q. 55 (1975); Stone, *Local Referendums: An Alternative to the Alienated Voter Model*, 29 PUB. OP. Q. 213 (1965). But see Horton & Thompson, *Powerlessness and Political Negativism: A Study of Defeated Referendums*, 67 AM. J. Soc. 485 (1962). See also H. HAHN, *supra* note 59, at 166-67.

275. There are disbelievers, to be sure, but there is occasionally a strained quality to their disbelief. Consider, for example, one of the datum that is used to demonstrate the lack of competence of the typical voter in Hamilton, *supra* note 182. The author criticizes the electorate's knowledge on, among other things, the basis of its failure to know who the pro-fair housing candidates were in the election studied. *Id.* at 132-33. It is only in a footnote that he points out that the pro-fair housing candidates avoided the issue as though it were the kiss of death. *Id.* at 133 n.35.

He also does not realize the significance of the fact that the pro-fair housing mayor and councilmen who enacted the bill that was defeated in the referendum were all reelected. If one assumes that there was some knowledge of who voted for the bill, that sounds to me like a very discriminating electorate indeed. Compare McCall, *Representative as Against Direct Legislation*, in W. MUNRO, *supra* note 5, at 164, 173 with Bourne, *A Defense of Direct Legislation*, in W. MUNRO, *supra* note 5, at 194, 201.

276. An argument that is occasionally made in favor of the initiative is that if voters are competent to elect people, a fortiori they are competent to do the less difficult task of accepting or rejecting a particular bill. Not everyone agrees that "voting for the man" is more difficult, however. Compare *Hearings*, *supra* note 1, at 162 (testimony of Arthur S. Miller) and *id.* at 148 (testimony of Peoples' Lobby) with Scott & Nathan, *supra* note 210, at 315. I am not sure what portion of this argument is substance and what portion rhetoric. It seems to me that the range of difficulties faced by the voters in electing candidates is similar to the range of difficulties faced in voting on ballot measures.

277. See also text accompanying notes 164-74 *supra*.

278. The concern, obviously, is with measures that pass. See text accompanying notes 354-65 *infra*.

measure that singled out a small group for special, and worse, treatment is a 1920 measure that strengthened the California alien land laws.²⁷⁹ A complete history of the measure, however, defuses it considerably as an example of the failings of the initiative.

The bill was enacted at a time of intense racial tension, at a time when the people of California were using all the methods available to them to limit what was viewed as the encroachment of foreigners.²⁸⁰ The initiated alien land law was but one manifestation of this conflict and by no means the most significant.²⁸¹ I do not mean to downplay the abusiveness of this statute or to condone its passage, but the political structure that generated it can only be fairly evaluated by placing this incident in proper perspective. That perspective is one of explicit racial hatred, but the significant point is that the role of the initiative in that conflict was a quite limited one.²⁸² Moreover, the explicit racial prejudice of the California voting populace did not persist. In 1952 and 1954, the electorate modified the land laws through referenda,²⁸³ and in 1956 they repealed the laws entirely.²⁸⁴ Similarly, in 1952 the electorate repealed the hated "coolie law" that had been given constitutional status in California.²⁸⁵

279. CAL. GEN. LAWS ANN. act 261, §§ 1-14 (Deering 1921).

280. REPORT OF THE STATE BOARD OF CONTROL OF CALIFORNIA 9-10 (1920).

281. See, e.g., CAL. CONST. art. XIX (adopted in 1879 and repealed in 1952), which became known as the "coolie law."

282. In contrast to the one statute enacted by initiative, consider the following statutes enacted by the California legislature:

- a. After the 1920 initiative on the alien land laws, the legislature shifted the burden of proving citizenship to the defendant in an action under the law. CAL. GEN. LAWS ANN., act 261, §§ 9a-9b (Deering Cum. Supp. 1925-1927).
- b. Local school districts were authorized to create separate schools for Indians, Chinese, and Mongolians; and once created, no integration was allowed. CAL. POL. CODE § 1662(3) (Deering 1909).
- c. The state was forbidden to purchase *any* supplies of any kind (even if produced in California) if the product of Mongolian labor. *Id.* § 3235.
- d. "No native of China, no idiot, insane person, or person convicted of any infamous crime, and no person hereafter convicted of the embezzlement or misappropriation of public money, shall ever exercise the privilege of an elector." *Id.* § 1084.
- e. Cities and towns were authorized to remove Chinese to outside the municipal boundaries. CAL. GEN. LAWS ANN. act 1369 (Deering 1880).
- f. Statutes designed to restrict immigration of Chinese and Mongolians were enacted. CAL. GEN. LAWS ANN. act 1363 (Deering 1858); *Id.* act 1365 (Deering 1891).
- g. Chinese labor was taxed to protect free-white labor from competition. *Id.* act 1364 (Deering 1862).

283. 1953 Cal. Stats. ch. 1816 at 3600; 1951 Cal. Stats. ch. 1714 at 4035.

284. 1955 Cal. Stat. ch. 316 at 767 (as amended); 1955 Cal. Stat. ch. 1550 at 2831.

285. CAL. CONST. art. XIX (adopted in 1879 and repealed 1952). See also

The clearest case of abusive initiated legislation, then, appears not to provide much support for the view that the initiative process will more likely generate unfair statutes that will impinge on the rights of insular minorities than will the legislative process.²⁸⁶ Moreover, apart from this single statute, it is difficult to find abusive legislation enacted by initiative.²⁸⁷ There are no cases where the great mass of people penalized the wealthy by imposing excessively graduated taxation. Nor are there any other measures designed to effect massive transfers of wealth, such as inordinately high estate or gift taxes, although it seems likely that pension initiatives that lost did much to lay the groundwork for Social Security.²⁸⁸ In the field of morality, one finds few initiated measures placing restrictive conditions on abortions²⁸⁹ or enacting draconian obscenity statutes²⁹⁰ or, for that matter, modifying liberalized drug

Radabaugh, *Tendencies of California Direct Legislation*, 42 SW. SOC. SCI. Q. 66, 71-73 (1961).

286. A recent example to the contrary is the loss of California's Proposition 8, in the November, 1978, election, which was designed to restrict the rights of homosexuals. *Issues That Caught the Public Eye*, U.S. NEWS & WORLD REPORT, Nov. 20, 1978, at 35. In 1978, in Washington, *id.*, and Colorado in 1974, *Hearings*, *supra* note 1, at 435, it was mandated that children be assigned to local schools rather than bused to achieve racial balance. Although minorities appear to now favor busing to achieve racial balance in schools when faced with that single issue, it also seems clear that busing is the least-favored alternative. Compare G. GALLUP, *THE GALLUP POLL* 370 (1978), with *id.* at 566-67.
287. The only other initiated measure that perhaps should be included here is California's Proposition 14, which in essence repealed California's fair housing laws. There is evidence, however, that a significant motivating force of Proposition 14's proponents was the view that the government was intruding too far into the private lives of the citizenry. See Wolfinger & Greenstein, *supra* note 207, at 764-66. Even if that evidence is erroneous, Proposition 14 is, at the statewide level, a singular occurrence that has not been repeated. See also text accompanying note 304 *infra*. In a referendum in 1968 the voters of Maryland rejected a fair housing statute. The bill was passed in modified form in 1971, however, and it was not subjected to a referendum. 1971 Md. Laws, ch. 324, (codified as MD. ANN. CODE art. 49B, §§ 21-30).
288. See note 199 *supra*. Initiatives that won probably helped lay the groundwork for national conditions of employment statutes (Colorado, 1912), and the direct election of senators (Oregon, 1908).
289. In the November, 1978, election, Oregon voters endorsed continuing state funding of abortions for welfare recipients. U.S. NEWS & WORLD REPORT, *supra* note 286, at 36.
290. In the November, 1978, election, South Dakota rejected an obscenity bill outlawing the sale of obscene materials, whereas Montana voted to allow cities and counties to enact local obscenity statutes. *Id.* at 34.

Washington enacted an obscenity bill in 1977 (Initiated Measure No. 335, Nov. 1977), that did not adequately provide for a prompt judicial determination of obscenity and provided for much too liberal use of the summary contempt power. It was declared unconstitutional in *Spokane Arcades, Inc. v. Ray*, 449 F. Supp. 1145 (E.D. Wash. 1978). This statute is one of the few excep-

use or sexual misconduct laws. Nor does one find initiated measures placing restrictions, however disguised, on the free exercise of religious beliefs.²⁹¹ What Winston Crouch said close to thirty years ago is still true today: "Moral and religious reform groups of considerable variety have advocated measures by means of the initiative, but have encountered very slight success."²⁹²

In contrast with this lack of success, one finds a dazzling array of political reform acts, usually passed in the face of an obdurate legislature. California's Political Reform Act of 1974 was an initiated measure described by a critic of the process as "the most restrictive lobbyists disclosure law ever enacted in California."²⁹³ Once again a comparison to the legislative process may be instructive. When the California legislature was faced with a major scandal involving lobbyists, its sole response was to provide for a registration requirement.²⁹⁴ Another example is the California State Executive Budget Act of 1922, an initiated constitutional amendment that brought order to a chaotic budget process. A respected authority has described that measure as "one of the out-

tions to the general lack of success that has characterized attempts to regulate public morality through the initiative process.

291. By contrast, the Senate recently voted to deny the federal courts jurisdiction over state laws relating to voluntary prayers in schools. See, e.g., *Attacking the Constitution*, Des Moines Register, April 5, 1979, at C1, col. 1. Such single incidents must be kept in proper perspective, of course.

292. W. CROUCH, *supra* note 235, at 17. The Congressional Research Service has compiled a list of statewide initiatives appearing on the ballot through 1976. *Hearings, supra* note 1, at 355. I recommend this source to anyone wishing to evaluate the thoroughness of my search for abusive legislation. I have also written each of the states with a statewide referendum procedure requesting a summary of all the referenda that have appeared on their respective ballots and the election results. I have received replies from every state but Nevada. I have reviewed that data, looking closely at negative votes, in an attempt to determine whether the referendum procedure has been used in an abusive manner. I must say that the primary result of my efforts was a headache. The great majority of referenda involve legislative detail and the popular vote appears to be reasonably sound. Nonetheless, it borders on the impossible to give a sophisticated analysis of those votes; they involve too many factors of the day-to-day administration of the relevant states that are unknown to an outside observer like myself. Beyond the morass of legislative detail, I found very few startling votes, see, e.g., note 287 *supra*. The impression I was left with is that the referendum probably more closely corresponds to the legislative process than does the initiative, the most significant differences being that the use of a referendum does not permit a citizenry to force policy choices—e.g., sunshine laws—on a recalcitrant legislature. Let me emphasize the tentativeness of that conclusion, however. This difference between the referendum and the initiative probably militates in favor of the initiative. See text accompanying notes 294-302 *infra*.

293. Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 947 (1975).

294. *Id.* at 947 n.115.

standing pieces of legislation and one of the outstanding amendments produced in this state."²⁹⁵ In Oregon, a Corrupt Practices Act was enacted by initiative after having been defeated by the legislature.²⁹⁶ The Oregon voters also extended the provisions of the direct primary law to presidential elections,²⁹⁷ and provided a reasonable reapportionment plan when faced with a recalcitrant legislature.²⁹⁸ Further examples are the sunshine laws recently enacted in seven states in the face of legislative obstinence,²⁹⁹ and the budget limitations that are being imposed in many states to retard irresponsible state spending.³⁰⁰ Of all initiatives appearing on the ballot in the states, forty-five percent have dealt with government or the political process in one form or another, while another fifteen percent have dealt with education, health, welfare, or housing.³⁰¹

The list of beneficial statutes enacted by initiative could be lengthened considerably,³⁰² but that would be superfluous. Obviously, the mere listing of these accomplishments would not prove that the initiative, on balance, has made an important contribution to those states that employ it. A more in-depth analysis than that provided here must be attempted before we reach judgment on this issue—an analysis that attempts to put as many initiated measures as possible in their proper context and then evaluates them from that perspective.³⁰³ Nonetheless, the clear indications

295. W. CROUCH, *supra* note 235, at 18.

296. Haynes, *supra* note 235, at 47.

297. *Id.* at 59.

298. Baker, *Reapportionment by Initiative in Oregon*, 13 W. POL. Q. 508 (1960).

299. Nelson, *Citizens Take Initiative, Politics and Other Human Interests*, Oct. 25, 1977, *reprinted in, Hearings, supra* note 1, at 627, 628.

300. *See, e.g., Tax Revolt at the Polls*, U.S. NEWS & WORLD REPORT, Oct. 9, 1978, at 30.

301. D. BUTLER & A. RANNEY, *REFERENDUMS 78* (1978). I have included revenue issues in the category of issues related to the governmental process.

302. *See, e.g., L. TALLIAN, supra* note 9, at 43; *Hearings, supra* note 1, at 54-56 (testimony of Larry Berg); *id.* at 80-83 (testimony of Roger Telschow).

303. There are two areas where a number of commentators have expressed doubt about the wisdom of the often negative outcomes of city or countywide referenda: fluoridation, *see, e.g., Davis, supra* note 251; Plaut, *Analysis of Voting Behavior on a Fluoridation Referendum*, 23 PUB. OP. Q. 213 (1960); and metropolitanization, Merrando, *Voting in City-County Consolidation Referenda*, 26 W. POL. Q. 90 (1973); McDill & Ridley, *Status, Anomic, Political Alienation, and Political Participation*, 68 AM. J. SOC. 205 (1962). What the experts have overlooked in their evaluation was very nicely captured by Prof. Gamson. Although he was discussing fluoridation, his point is relevant to both areas: "It is as if fluoridation somehow symbolized the buffeting one takes in a society where not even the water one drinks is sacrosanct." Gamson, *supra* note 221, at 536. Nor, apparently, is the size of a city one lives in—at least, that is, if these measures are not defeated. *See also* D. MCNEIL, *THE FIGHT FOR FLUORIDATION* 198 (1957); Mueller, *The Politics of Fluoridation in 7 Californian Cit-*

are that such a study will demonstrate the positive contribution initiatives have made to state government.³⁰⁴

ies, 19 W. POL. Q. 62 (1966). At any rate, an examination of local initiatives is beyond the scope of this paper. See note 215 *supra*. But see note 304 *infra*. See also note 287 *supra*.

304. In a recent article, Prof. Derrick A. Bell has cast aspersions on the initiative and referendum processes. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978). He asserts that direct democracy may be generally pernicious to individual rights, and, more particularly, that initiatives and referenda pose a serious threat to the rights of blacks and other minorities. According to Prof. Bell, "because [direct democracy] enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day." *Id.* at 14-15 (footnote omitted). Similarly, "the experience of blacks with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is "and" [t]he threat is growing," as voters turn more and more to the processes of direct democracy to implement their will. *Id.* at 1.

Unfortunately, the strength of Prof. Bell's statements are not matched by the strength of the evidence he has adduced. Apart from open housing and low-income housing referenda, all he cites in support of his position are two pre-Civil War referenda, *id.* at 16-17, the 1977 Washington anti-pornography bill, *id.* at 18-19, California's Prop. 13, *id.* at 19 n.72, three Massachusetts initiatives that all lost at the polls, *id.* at n.73, and a Maine referendum nullifying a court order drastically revising the traditional method of school funding in Maine. This list, it seems to me, is rather unimpressive. For obvious reasons, one can put aside pre-Civil War referenda. Moreover, ballot measures that lose are not much of an argument against initiatives. See text accompanying notes 263-70 *infra*. Thus, the only statewide measures worthy of attention that Prof. Bell cites (apart from housing measures) to demonstrate the seriousness of the "growing threat" that direct democracy poses for individual rights are Washington's attempt to control obscenity, Maine's desire to perpetuate its traditional method of financing schools, and California's tax reduction proposition. Those measures collectively do not mount much of an assault on individual rights. Moreover, Prof. Bell made no apparent attempt to broadly survey the results of ballot measures, nor does he attempt to compare the workproduct of direct democracy with that of the legislature, which is, of course, the essence of any analysis of the value of the initiative or the referendum.

What, then, of Prof. Bell's reliance on the defeat of various low-income housing and fair-housing measures? Unfortunately, again there are serious problems. In the first place, almost all such measures are local, not statewide. See *id.* at 15 n.54. Thus, to determine whether the methods of direct democracy have generally been beneficial, notwithstanding these measures, one would have to examine and compare generally the workproduct of local initiatives and legislative bodies, a task Prof. Bell did not attempt. Furthermore, while Prof. Bell makes much of the fact that a number of fair-housing referenda have lost, he fails to mention that as early as 1968, "more than 120 million people—62% of the total population of the United States—were living in the 23 States and 120 localities with fair housing laws." Holmgren, *NCDH and the Fair Housing Law*, HUD CHALLENGE, April, 1978, at 17. Moreover, in 1977, the federal government recognized 22 states and the District of Columbia "as providing rights and remedies for alleged discriminatory housing

Before concluding the present examination of the states' expe-

practices substantially equivalent to those in the "Federal Fair Housing Act" 24 C.F.R. § 115.11 (1978). Of those states, eight permit both initiatives and referenda (Alaska, Colorado, Maine, Massachusetts, Michigan, Nebraska, Nevada, and Oregon), *see Hearings, supra* note 1, at 285, that could be used, but have not been, to repeal the fair housing legislation in those states.

Thus, one begins to wonder if the fair-housing elections Prof. Bell relies on may be aberrational or anachronistic, and there is reason to believe they are. In 1978, the New York Times reported a significant drop from 10 years before in the antipathy of whites to integrated neighborhoods. In 1968, only 46% of the white respondents "would not mind at all" if a black family of similar social class moved in next door. In 1978, the figure was 66%. More importantly, in 1968, 60% of the white respondents felt blacks should be able to live wherever they can afford to, but in 1978 the figure had risen to 90%. Similarly, in 1968 close to one-third of the white respondents felt they had a right to keep blacks out of their neighborhood but only 5% felt that way in 1978. Reinhold, *Poll Indicates More Tolerance, Less Hope*, N.Y. Times, Feb. 29, 1978, at 28, col. 3.

These apparent changes in racial attitudes have been corroborated by the major study done by Louis Harris and Associates, Inc., for The National Conference of Christians and Jews, Inc., which I have on file and which may be obtained on request from the NCCJ. The results of the Harris study were so remarkable that they prompted Harry A. Robinson, Vice-President of the NCCJ, to say that: "[d]espite the widespread belief of leadership groups that the country is in a regressive period in race relations, . . . [the Harris survey] . . . reveals major shifts in white thinking about the black quest for equality, indicating a period of real progress is now imminent." *Id.* *See also* Wilkins, *The Kerner Report of 1968*, N.Y. Times, Feb. 27, 1978, at A14, (*see also* accompanying chart: Two Societies: How the Races View One Another); Wilkens, *Blacks and Politics: Steady Gain in a Decade of Disappointment*, N.Y. Times, Mar. 3, 1978, at 12, col. 3; *The Black Middle Class: Making It*, N.Y. Times, Dec. 3, 1978, at 34 (Magazine).

Prof. Bell's attempt to support his use of the fair housing ballot measures by reference to the results of low-income housing referenda is equally unpersuasive. The primary difficulty is his facile equation of resistance to low-income housing with racism. As he says, referenda "upsetting city council or zoning commission approval to build low-income housing have become a standard means of barring minorities from suburban, residential communities." Bell, *supra* at 8 (footnotes deleted). Unfortunately, there are many reasons having no relationship to racism to resist the construction of low-income housing in middle class neighborhoods, not the least of which is, as the Supreme Court pointed out, that construction of low-income housing "may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." *James v. Valtierra*, 402 U.S. 137, 143 (1971). To be sure, there also are cogent considerations to the contrary, but that simply demonstrates the complexity of the issue, a complexity Prof. Bell seems to ignore.

Prof. Bell also ignores the fact that blacks have *not* been "bar[red] from suburban residential communities." In fact, just the opposite has occurred—the black population in the suburbs has increased dramatically and at a much faster rate than the white population. *34% Increase in Suburban Blacks Tied to Incomes and New Laws*, N.Y. Times, Dec. 3, 1978, at 82, col. 3.

I do not mean to suggest that racism has died in the United States, *see, e.g.*, Hecht, *Apartment-Hunting, in Black and White*, The N.Y. Times, May 11,

rience with the initiative, however, an important issue remains to be considered. Even if, as a rule, we seem to collectively demonstrate reasonable judgment, and even if we generally do not rush to legislate our biases, is it possible that there might be an exception to the rule when organized monied interests lend their support to a proposition? Might not, in short, our judgment be swayed and our biases inflamed by the paid political propaganda that accompanies some initiative campaigns?³⁰⁵ Unmistakably, this is a concern that cuts to the heart of the wisdom of the national initiative proposal.

C. The Effect of Campaign Expenditures on Initiative Elections

The concern, in essence, is that monied interests will be able to buy their way onto the ballot³⁰⁶ and then buy the election³⁰⁷ by dominating the media with the help of clever public relations firms,³⁰⁸ regardless of the nature of the initiated measure or whether it is in "the public interest."³⁰⁹ The evidence we have, though, suggests that this fear may not reflect reality. It is difficult to find an initiated measure where a monied interest has induced the public into giving it a special advantage or privilege.³¹⁰ A significant part of the initiative's history is to the contrary; the electorate has used the process to limit the influence that monied interests have occasionally exercised over legislatures.³¹¹ Thus, it is not surprising that those who have studied the matter have con-

1978, at 23, col. 1, nor, more particularly, that racism no longer infects the housing market. See Stanfield, *Fair Housing—Still Doors to Open After 11 Years*, 11 NAT. J. 734 (1979). However, the issue here is not racism but whether initiatives facilitate the expression of racial bias. In my judgment, the evidence does not support Prof. Bell's position on that issue.

305. See, e.g., *Hearings*, *supra* note 1, at 59 (testimony of Peter Bachrach).

306. This is probably true, see Diamond, diDonato, Marley & Tubert, *supra* note 198, at 463 n.36, but of no great concern, as the following discussion elaborates.

307. A related difficulty is whether a deserving measure may be defeated by monied interests that oppose it. That problem, however, is of lesser concern. See text accompanying notes 354-65 *infra*.

308. See, e.g., Lutrin & Settle, *supra* note 270, at 361; Scott & Nathan, *supra* note 210, at 317; Note, *supra* note 293, at 949.

309. I put "public interest" in quotes because it is a very misleading term. There is no such thing as the "public interest" apart from the aggregate of "private interests." See, e.g., Dahl, *supra* note 17, at 14 n.13, 69 n.5. But see R. FLATHMAN, *THE PUBLIC INTEREST* 32-52 (1966). It is in that sense that I use the phrase.

310. See Warren & Best, *The 1968 Election in Washington*, 22 W. POL. Q. 545, 547 (1969).

311. See, e.g., The California Political Reform Act of 1974, CAL. GOV'T CODE §§ 81000-81004 (West 1976). This Act has been declared unconstitutional in part in light of *Buckley v. Valeo*, 424 U.S. 1 (1976). *Hardie v. Fong Eu*, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201, *cert. denied*, 430 U.S. 969 (1976).

cluded that monied interests do not dominate the process.³¹²

There are numerous explanations for this lack of success with the initiative process. The fear of such entities rests on a misimpression of the role of money and the effect of the mass media on the electoral arena. It is also based on a misconception of the process of public opinion formation in the United States.

Our knowledge of the role of money in elections comes primarily from research into campaign expenditures of candidates, particularly of congressional and presidential candidates. What emerges from those studies is that "no neat correlation is found between campaign expenditures and campaign results."³¹³ For example, the Democratic candidates for President in this century have generally been at a financial disadvantage, yet according to a preeminent authority, "it cannot be argued convincingly that the Democratic party has lost a single presidential election in the twentieth century for want of funds."³¹⁴

Moreover, what we know of expenditures in congressional campaigns is consistent with the data from presidential elections. As Herbert Alexander, one of our foremost authorities on election finance, has noted:

During the 20th century, at the national level, Republicans consistently have had more money at their disposal than the Democrats, even when independent labor funds are added to Democratic spending. Yet from the 1930s through the mid-1970s, the Democrats have been able to command a majority of voters more often than have Republicans. In his eight years in office, Dwight Eisenhower had a Republican-controlled Congress for only two years; Nixon and Ford from 1969 through 1976 faced large Democratic majorities in Congress.³¹⁵

In the 1952 and 1956 elections, for example, Republican expenditures on candidates averaged between sixty to seventy percent higher than Democratic expenditures, and in four out of five states direct Republican expenditures exceeded those of the Democrats,³¹⁶ yet in neither year was there a Republican landslide.³¹⁷ Similarly, in one of the few years that total spending on congressional candidates probably favored the Democrats—1966—they suffered serious losses in Congress.³¹⁸

312. See, e.g., Bone & Benedict, *supra* note 201, at 332-35; D. BUTLER & A. RANNEY, *supra* note 235, at 106.

313. A. HEARD, *THE COSTS OF DEMOCRACY* 16 (1960). Much of the data is suspect, however, because it is based on self-reporting.

314. *Id.* at 34.

315. H. ALEXANDER, *FINANCING POLITICS* 40 (1976).

316. A. HEARD, *supra* note 313, at 20-24.

317. In 1952, Republicans picked-up 22 seats, but they lost three in 1956. 2 U.S. DEP'T OF COMM., *HISTORICAL STATISTICS OF THE UNITED STATES* 1083 (1975).

318. L. BERG, H. HAHN & J. SCHMIDHAUSER, *CORRUPTION IN THE AMERICAN POLITICAL SYSTEM* 101 (1976). Democrats lost 49 seats in 1966. 2 U.S. DEP'T OF

This is not to say that money is of no consequence in a campaign, for obviously it is;³¹⁹ but it is to say that the importance of money may be overrated. Although money is important, it is only one of many factors that influence the outcomes of elections. There is little evidence to suggest that it is the dominant one,³²⁰ and even less to suggest that the primary use of money in initiative campaigns—to obtain public relations assistance—is of much value. As Professor Heard has said:

In recent years much has been said about the increasing ability of experts in advertising and public relations to influence popular tastes and opinions. It has even been contended that through what is called motivational research and the techniques of hidden persuasion the outcome of elections can be decisively influenced through skillful use of the mass media, especially television. Since the skill and the media cost money, a possibility is seen that a party or candidate could translate a financial advantage more or less directly into an electoral advantage—as once could be done in many places through election-day expenditures. No evidence is yet at

COMM., HISTORICAL STATISTICS OF THE UNITED STATES 1083. By contrast, the Democrats probably also spent more in 1964 and were fairly successful. K. McKEOUGH, FINANCING CAMPAIGNS FOR CONGRESS 9 (1964). See also H. ALEXANDER, MONEY IN POLITICS 116, 127 (1972).

Recent research has attempted to go beyond the aggregate data used by Heard and Alexander, and the findings are quite remarkable. There has been found to be no positive correlation between an incumbent's spending and his chances of winning at the polls. In fact, the more an incumbent spends the greater is his chance of losing. Glantz, Abramovitz & Burkart, *Election Outcomes: Whose Money Matters?*, 38 J. POL. 1033, 1036 (1976); Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469, 489 (1978). The more a challenger spends, by contrast, the greater are his chances. *Id.* The relationship between challengers' expenditures and success is probably in part a function of name recognition. *Id.* at 485-89. However, it is also possible that challengers who demonstrate a better chance of winning attract greater campaign contributions. *Id.* at 469-70; Palda, *The Effect of Expenditure on Political Success*, 18 J. L. & ECON. 743 (1975). See also Welch, *The Effectiveness of Expenditures in State Legislative Races*, 4 AM. POL. SCI. Q. 333 (1976). Moreover, in those campaigns without an incumbent, there does not appear to be a close correlation between high spending and winning. CONG. Q., DOLLAR POLITICS 21-22 (1971). All of these authorities concur on one point—that campaign spending is only one of many factors that influence the outcomes of elections and that it is not the dominant one. Glantz, Abramovitz & Burkart, *supra* at 1036-37; Jacobson, *supra*, at 470; Palda, *supra* at 771; Welch, *supra* at 340-56; See also CONG. Q., *supra*, at 19; Lott & Warner, *The Relative Importance of Campaign Expenditures: An Application of Production Theory*, 8 QUALITY & QUANTITY 99 (1974); Palda, *The Effect of Expenditures on Political Success*, 18 J. L. & ECON. 748 (1975). It is also becoming clear that whatever effect expenditures have, it decreases rapidly as more money is spent—the Law of Diminishing Returns apparently is fully applicable to campaign finance. Welch, *supra* at 353; Welch, *The Economics of Campaign Finance*, 2 PUB. CHOICE 83 (1975).

319. See note 318 *supra*.

320. A. HEARD, *supra* note 313, at 31; H. ALEXANDER, *supra* note 315, at 39-59; H. ALEXANDER, *supra* note 318, at 37-50.

hand, however, to confirm the fear that men so well understand themselves that in the context of a political campaign they can predictably control the opinions and actions of other men.³²¹

Not only is there still no such evidence at hand, but much evidence has accumulated to the contrary.

One of the more remarkable findings of the last two decades is that the mass media appears to have a limited impact on the formation of public opinion, or at least on how the public votes. For example, Professor Mueller found no difference between the votes of absentee voters and those who voted on election day in an election with intense media activity towards the end of the campaign.³²² Similarly, the evidence we have suggests that the relationship between editorial content and voter preference is slight, and the perceived relationship may be as much a function of public opinion influencing editorial content as the other way around.³²³

Again, this is not to suggest that the mass media has no effect at all on public opinion. In certain limited situations—as, for instance, in a very confusing election—the potential role of the media is considerably heightened.³²⁴ But in the typical case, the view that the media has a significant impact on the outcomes of elections is largely unsubstantiated.³²⁵ If the reasonably disinterested components of the mass media, such as editorial content, have little observable impact on the outcomes of elections, it should come as no surprise that the effectiveness of expansive, and obviously biased, media campaigns is also highly questionable:

A look at the record of 1970 outcomes of gubernatorial and senatorial contests should make this clear. In the 32 senatorial contests (excluding those won by independents) the candidate who spent the most money on radio and television advertising won in only 56 percent of the cases. The victory rate of the 34 gubernatorial high spenders was only slightly greater—59 percent. The record of the nine best-known media advisors in 1970 is also unimpressive. Excluding the several elections where their clients competed against each other, their record in statewide contests was

321. A. HEARD, *supra* note 313, at 32.

322. Mueller, *supra* note 224, at 1204-06.

323. R. ERICKSON & N. LUTTBEG, *AMERICAN PUBLIC OPINION: ITS ORIGINS, CONTENT, AND IMPACT* 143-45 (1973). Another example of the limited effect of editorial content is that in most recent presidential elections (the Goldwater-Johnson election being a notable exception) newspapers have overwhelmingly endorsed the Republican candidate. *Id.* at 143-44.

324. See, e.g., Mueller, *Choosing Among 133 Candidates*, 34 PUB. OP. Q. 395 (1970).

325. See, e.g., J. CORRY & H. ABRAHAM, *supra* note 12, at 385-86; J. KLAPPER, *THE EFFECTS OF MASS COMMUNICATION* (1960); Boyd, *Popular Control of Public Policy: A Normal Vote Analysis of the 1968 Election*, 66 AM. POL. SCI. REV. 429, 444-45 (1972); Hamilton, *supra* note 182, at 185. See also Horland, *Effects of the Mass Media of Communication*, 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1062 (G. Lindzey ed. 1954).

an undistinguished eight wins and 12 losses.³²⁶

The limited ability of media campaigns to influence elections is a readily explainable phenomenon. In the first place, when a campaign effort inundates the media with propaganda, it does not necessarily inundate the voter. "[T]he flow of messages of the mass media is rather like dropping a handful of confetti from the rim of the Grand Canyon with the object of striking a man astride a burro on the canyon floor. In some measure chance determines which messages reach what targets."³²⁷ Moreover, once the target is hit, the typical impact is small. People tend not to take political propaganda very seriously.³²⁸ We filter out most of it, and tend to hear only that campaign propaganda that is consistent with our previously formulated views.³²⁹ To the extent that is true, the power of media campaigns to influence attitudes is obviously severely circumscribed.³³⁰

The most important factor limiting the influence of media campaigns, however, is that the messages of the mass media are but a small part of the forces acting on individuals that together influence individual opinion. As Professor Key has said: "[t]he messages of the media do not strike the isolated and atomistic individual; they strike . . . an individual living in a network of personal relationships that affect his outlook toward the objects of the external world. . . ."³³¹ A person's background, family, job and social relationships set the matrix within which decisions are made. When information is received, it is evaluated from the perspective of that personal matrix and its concomitant well-determined, reasonably stable, set of values and views³³² rather than from the perspective of an isolated, valueless, easily manipulable automaton.³³³

The importance of interpersonal relationships to opinion forma-

326. R. ERICKSON & N. LUTTBEG, *supra* note 323, at 152.

327. V.O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* 357 (1961).

328. To some extent, this is an elaborate elucidation of the obvious. Of course we do not take the mindless babbling that is often the essence of media campaigning very seriously. The Dec. 5, 1978, edition of the cartoon P.T. Bimbo captured the general view of public relations activities quite well. A public relations man, carrying a shovel, is walking toward a circus workman who is shoveling a pile of bovine droppings. He says to the workman, "Bimbo wants me to work with you guys awhile to learn more about the circus. Imagine, an advertising man like me shoveling this stuff around." "Why not," responds the workman, "You got more experience than I got."

329. V.O. KEY, JR., *supra* note 327, at 354-56.

330. *See id.* at 397.

331. *Id.* at 366-67.

332. *See id.* at 234-62, 293-343; R. ERICKSON & N. LUTTBEG, *supra* note 323, at 122-212.

333. *But see* J. PERRY, *THE NEW POLITICS* 213 (1968): "These new managers . . . can play upon the voters like virtuosos. They can push a pedal here, strike a chord there, and presumably, they can get precisely the response they seek." *Id.*

tion is demonstrated by the fact that, although media campaigns do not greatly influence people,³³⁴ other people do, especially other people of personal importance. The influence of the views of the members of primary groups is well known,³³⁵ as is the influence of neighbors³³⁶ and friends.³³⁷ In the context of elections, an issue or candidate that can generate personal commitments and grass-roots support will have a much greater chance of winning than an issue or a candidate with a small but well-financed constituency that lacks general appeal.³³⁸ It is thus readily understandable why monied interests have been unsuccessful in their attempts to use the initiative. As Professor Heard said:

Activities that shape the climate of opinion customarily lie outside the usual concept of political campaigning and the monies involved are beyond the customary definition of campaign finance. However, all the energies that seek to mold this climate affect the outcome of campaigns as certainly—which is not to say how certainly—as campaign activities themselves, and the sums of money engaged are infinitely larger.³³⁹

There is, in short, little evidence from the studies of election campaigns to substantiate the fear that monied interests will be able to use the initiative to their advantage by hoodwinking the public. Moreover, the sketchy information that is available on expenditures in initiative campaigns is consistent with that view.

Although a number of states have campaign finance disclosure requirements applicable to the contestants of ballot measures,³⁴⁰ most of the data are not in a readily usable condition.³⁴¹ The lim-

334. See Hamilton, *supra* note 182, at 129.

335. Key, *supra* note 254, at 55.

336. Hamilton, *supra* note 182, at 135.

337. *Id.* at 133. See also P. LAZARSFELD, B. BERELSON & H. GAUDET, *supra* note 255, at 150-58.

338. Eldersveld, *Experimental Propaganda Techniques and Voting Behavior*, 50 AM. POL. SCI. REV. 154 (1956); McPhail & Tucker, *Interest Group Activities and the Public Opinion Process: A Case Study of a Liquor Referendum*, 20 S. CAR. L. REV. 749 (1968); Wolfinger & Greenstein, *supra* note 207, at 762-63. See generally E. KATZ & P. LAZARSFELD, *PERSONAL INFLUENCE* (1955); Coleman, Katz & Menzel, *The Diffusion of an Innovation Among Physicians*, 20 SOCIOLOGY 253 (1957); Crain, *Fluoridation: The Diffusion of an Innovation Among Cities*, 44 SOC. FORCES 467 (1966); Freidson, *A Prerequisite for Participation in the Public Opinion Process*, 19 PUB. OP. Q. 105 (1955); Woelfel, *Political Radicalization as a Communication Process*, 1 COM. RESEARCH 243 (1974). See also L. GERLACH & V. HINE, *PEOPLE, POWER, CHANGE: MOVEMENTS OF SOCIAL TRANSFORMATION* (1970); H. HAHN, *supra* note 59, at 93.

339. A. HEARD, *supra* note 313, at 31.

340. Because of the limited data available, I have included the figures on initiatives and referenda, except where specifically noted to the contrary.

341. Alaska, for example, keeps excellent records of who spent what, but one cannot tell from the records whether money was spent in favor of or in opposition to a measure. Ohio and Oregon keep superb records but do not compile them, although I have been informed by their respective Secretaries of State that I, and presumably any other interested party, would be quite welcome to

ited data that are available, however—primarily from California and Montana—are quite remarkable, especially in light of the general absence of party labels and partisanship that surely tempers the effect of money in elections of candidates. From 1954 to 1976, there were campaign disclosure statements filed in fifty-seven statewide ballot campaigns in California and two in Montana.³⁴² Money was on the winning side in thirty-four of those campaigns. If money was the dominant force in the outcomes of ballot measures, one would think that it would have a higher winning percentage than fifty-eight per cent. To some extent that figure is misleading, though, because in many elections very little money was spent and the money differential was small. However, the figures become *even more* striking if one looks to those elections where one side is outspent by more than \$500,000.³⁴³ There were twenty-one such elections³⁴⁴ and money was on the winning side in ten for an average of only forty-eight percent. More importantly, in those instances where the proponents outspent the opponents, the proponents had a success rate of only twenty-two percent,³⁴⁵ which is consistent with the view that the initiative does not provide monied interests with an easy to use method of obtaining their statutory goals.³⁴⁶ When money opposed an issue, the meas-

inspect and attempt to utilize their records. A similar situation prevails in Massachusetts, according to the Office of Political Campaign and Political Finance. Michigan's campaign disclosure law did not become effective until June 1, 1977, and South Dakota has required disclosure for the first time this year. Colorado has recently required disclosure, but I have not yet obtained its records. Finally, no committees for the support or defeat of a measure have ever formed in Wyoming, and thus no financial statements have ever been filed. All of this information is contained in letters to me from the relevant state officials and may be obtained on request. Obviously, the files in Ohio, Oregon, Massachusetts, and Colorado should be examined before any definitive conclusions are reached.

342. I obtained this information from the California Fair Political Practices Commission, and from the Montana Commissioner of Campaign Finance and Practices. Montana began keeping records of this sort in 1975. This data, too, is available on request.
343. A figure picked for convenience—California organizes its data on that basis.
344. I have included Proposition 12 from the 1976 California Primary, where \$467,760 was spent in favor of the measure and \$268 was spent against it. It lost.
345. Two out of nine. Two of the measures that lost were referenda—Proposition 5 in the 1976 California General Election and Proposition 12 in the 1976 California Primary. If those two measures are excluded, the rate of passage is 29%, which is less than the overall rate. *See* text accompanying note 354 *infra*.
346. The two measures that passed are hard to characterize as examples of special interests obtaining an advantage at the expense of the population at large. One forbade pay television (1964 General Election Proposition 15) and the other eliminated featherbedding on railroads (1964 General Election Proposition 17).

ure passed two out of eight times,³⁴⁷ a figure reasonably close to the overall passage rate of initiatives.³⁴⁸

The limited data we have, then, tends to confirm the suspicion that money, and the public relations experts it can buy, is not a dominant factor in determining the outcomes of initiated measures,³⁴⁹ although there is reason to believe that well-financed cam-

347. Prof. John Shockley of the Western Illinois University Department of Political Science is in the process of collecting data that may demonstrate a high correlation between heavy spending in opposition to a measure and its loss. Some of his preliminary data was presented at the hearings on S.J. Res. 67, *Hearings, supra* note 1, at 172 (testimony of John Shockley), and in his testimony to the Subcommittee on Commerce, Committee on Government Operations of United States House of Representatives on May 23, 1978. See Shockley, *The Political Impact of Grass-Roots Lobbying By Corporations in Initiative Campaigns* (prepared testimony for the United States House of Representatives Committee on Government Operations, Subcommittee on Commerce, Consumer, and Monetary Affairs, May, 23, 1978) (on file NEB. L. REV.). His work shows a uniform pattern of nuclear energy limitations being opposed by well-financed opposition and consistently losing. He infers that money was one of the primary causes, but I wonder how much of this is explainable on the basis of a widely shared view that we must encourage the development of nuclear energy to replace our dwindling fossil fuels, a point Prof. Shockley notes. He also discusses mandatory deposit bills and his data shows that in the four cases studied the opponents greatly outspent the proponents, but the measure won two out of the four times.

I should also point out that in the November, 1978, election, the nuclear power limitation measure in Montana was approved, presumably again in the face of heavy spending by the opposition. Prof. Shockley also presents data from the 1976 elections in Colorado that show a high correlation between money spent in opposition to measures and measures losing. Losing measures are not much of an argument against an initiative procedure, however. The concern rather is with those measures that win, and Prof. Shockley's work provides no support for the proposition that monied interests can buy a favorable vote on a measure. Moreover, there is some difficulty with making too much of a single time period. In 1972, for example, environmental issues won quite consistently at the polls. See, e.g., *Major Tax Revisions Fail: Environmental Issues Win*, 15 St. Gov't News No. 11, at 2 (1972).

An interesting natural experiment on the effect of corporate spending on a measure occurred recently in Massachusetts. Massachusetts voters have considered a constitutional amendment to provide for a graduated income tax three times—in 1962, 1972, and 1976. Corporations have generally opposed the measure. In 1962 and 1972, they contributed heavily to its opponents, but in 1976 they were precluded from doing so by a state statute. In 1962 the measure was favored by 16.5% of the electorate, in 1972 by 33%, and in 1976, when corporations could not finance the opposition, the measure was favored by only 26.5% of the electorate. The voting data was obtained from the Massachusetts Office of the Secretary of State and is obtainable on request. The background to this measure can be found in *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407 (1978), where the Court struck down the statute limiting corporate expenditures on state ballot measures.

348. See text accompanying note 354, *infra*.

349. A. HEARD, *supra* note 313, at 583.

paings against a measure may increase its chances of losing.³⁵⁰ Organized, monied interests clearly have an advantage in qualifying measures for the ballot,³⁵¹ but it does not appear that they can buy the election.³⁵²

Not only does it seem unlikely that elections can be bought by monied interests, but it seems clear that their efforts in favor of a proposition occasionally backfire. Too much spending by a small group for a proposition, or a last minute media blitz, may actually lose rather than gain votes and thus enhance a measure's chances of losing.³⁵³ Voters seem to be quite skeptical of a measure when a group lacking a history of disinterested involvement in civic affairs shows too great an affection for it. But then, voters are generally skeptical of initiated measures, and wisely so, given the nature of the process.

Close to two-thirds of the statewide measures that have appeared on the ballot have lost, a figure that has remained remarkably stable over time.³⁵⁴ There appear to be a number of reasons for the low passage rate, the primary one being that usually the voter seems, quite sensibly, to resolve any doubts he has on a particular measure against it.³⁵⁵ While this trait may, on occasion, permit opponents of a measure to bring its defeat by raising baseless fears,³⁵⁶ that is practically its only regrettable consequence. A "no" vote does not preclude reconsideration of the issue by either the populace or the legislature.³⁵⁷ Thus, if a problem needs to be addressed, but a voter is unsure of the effects of the measure

350. This would not be optimal but would not be all that troubling. See note 359 & accompanying text *infra*. Hopefully studies of the marginal effect of expenditures in initiative campaigns will be done using the data the states are collecting. See note 341 *supra*. That should provide much more information than the limited aggregate data discussed in the text.

351. W. CROUCH, *supra* note 235, at 17.

352. Bone & Benedict, *supra* note 201, at 347; Scharrenberg, *Big Business Attempts to Use the "Initiative,"* 46 AM. FEDERATIONIST 38, 44 (1939); *Hearings, supra* note 1, at 90 (testimony of Baxter Ward). Special interest activity may not be significantly less in those states with initiatives, however. See, e.g., A. MACDONALD, *supra* note 186, at 149.

353. See, e.g., *Hearings, supra* note 1, at 54 (testimony of Larry Berg); Comment, *Corporate Contributions to Ballot-Measure Campaigns*, 6 U.M. J. L. REF. 781, 795 n.90 (1973); Note, *supra* note 293, at 935 n.72.

354. Thirty-seven percent, to be exact. I used the Congressional Research Service Study, which goes through 1976, for my data base. See *Hearings, supra* note 1, at 355. Prior to 1970, the figure is 36.9%; from 1970 to 1976, the figure is 37.2%.

355. A. MACDONALD, *supra* note 186, at 149; L. TALLIAN, *supra* note 9, at 122; Schumacher, *supra* note 224, at 251; Smith, *Can We Afford the Initiative?*, 38 NAT. MUN. REV. 437 (1949).

356. Scott & Nathan, *supra* note 210, at 321.

357. See, e.g., Carter, *Nuclear Initiatives: Californians Vote "No," But Legislature Acts*, 192 SCIENCE 1317 (1976).

before him, a "no" vote merely provides the opportunity for further consideration and exploration of the problem and its potential solutions. Furthermore, the entire process will have stimulated public debate on the issue and hopefully facilitated the formation of informed opinion on the various alternatives.³⁵⁸

The low passage rate also tends to compensate for potential problems in the drafting and qualifying of measures for the ballot. There is often an initial burst of enthusiasm sufficient to qualify a measure if it appears on first blush to fill an important need. Occasionally, however, further reflection suggests that the proposal is ill-considered or poorly drafted,³⁵⁹ and there is no way to amend such a bill.³⁶⁰ But, signing a petition and voting for a proposition are two very different things.³⁶¹ As such a proposal is probed and its drawbacks become more evident, its support usually dissipates, which typically results in a loss at the polls.³⁶² The cost, then, of allowing citizens to draft and offer measures for approval free from the political structure is a low passage rate.³⁶³ But that does not appear to be a great expense to bear. Initiatives that lose wreak no havoc,³⁶⁴ and quite frankly I can think of no serious argument

358. See note 288 *supra*. See also Cottrell, *supra* note 230, at 45; J. POLLACK, *supra* note 5, at 67.

359. A good example is discussed in Lutrin & Settle, *supra* note 270, at 359 (Proposition 9).

360. This difficulty is noted in J. BOYLE, *supra* note 5, at 21; Crouch, *John Randolph Haynes and His Work for Direct Government*, 27 NAT. MUN. REV. 434, 439 (1938) (quoting L.A. Times editorial, Oct. 11, 1917); J. CORRY & H. ABRAHAM, *supra* note 12, at 413. The oft-stated fear that any crackpot can come up with a ballot measure is theoretically true but not very realistic. If a measure is to have any chance of success, it must receive broad support. A radical or poorly drafted proposal is not likely to receive such support. It is thus not surprising that typically a great deal of consultation and compromise go into the drafting of proposed ballot measures. See, e.g., J. BOURNE, *supra* note 275, at 210; W. CROUCH, *supra* note 235, at 20. Moreover, amending procedures could be implemented, even though generally the states do not have them. *Hearings*, *supra* note 1, at 144.

Of course, if the measure passes it can later be amended by initiative or by the legislature in most instances.

361. See Note, *supra* note 293, at 630 n.62.

362. See Lutrin & Settle, *supra* note 270, at 359. Not all "imperfect" bills lose. Sometimes the imperfections are outweighed by the benefits, as occurred with the famous Proposition 13. See note 368 *infra*.

363. This is indicated by the significantly higher passage rate of referenda as compared to initiatives. D. BUTLER & A. RANNEY, *supra* note 235, at 80-82.

364. The only troublesome aspect of the fact that most initiatives lose is that each initiative, win or lose, does entail certain expenses—validating signatures on petitions, the cost of printing the measure, preparation of the materials for petition drives, and setting up the election machinery are examples. The greatest of these costs appears to be that required for validating signatures, which is normally close to 21 cents per signature. On the assumption that four million signatures would be required in order to get a measure on a na-

against an initiative process predicated upon the fact that a few proposals manage to qualify for the ballot before they are sufficiently understood and then lose at the election once their deficiencies have been exposed. Yet, on the other hand, such proposals may be beneficial in that they facilitate public consideration of troublesome issues notwithstanding that the proffered solution is unacceptable.³⁶⁵ Moreover, the only way to inhibit "unacceptable" proposals prior to a vote is to inhibit the entire process.

The low passage rate, in short, reflects a cautious electorate that votes "no" when faced with too much ambiguity or doubt. This caution, one would think, should increase the difficulty of enacting undesirable legislation by the initiative, restrict even further the potential role of organized, monied interests in the process, and compensate in part for the lack of a means to amend initiatives after the process has begun. If so, and in conjunction with what we know of the judgment of the electorate and the difficulty of manipulating its views, it becomes quite understandable why the results of the initiative process have consistently been viewed as beneficial.

D. From the State to the Federal Level—A Note of Caution

The evidence we have, then, suggests that we voters are not, at least collectively, mindless automatons who can be manipulated with ease by clever media specialists. Nor do we seem inclined to translate our well-known prejudices and bigotry into law when given the slightest opportunity to do so.³⁶⁶ To the contrary, the disinterested observers who have examined the results of initiated measures consistently have been impressed by the product of the initiative process and by the social and political dynamic that appears to underlie it.³⁶⁷ To be sure, a statute is occasionally en-

tional ballot, it would cost \$840,000 to certify a measure for the ballot. *See, Hearings, supra* note 1, at 4, 5 (Congressional Budget Office, Cost Estimate). That expense is another factor that must go into the balance, of course, as are the other costs involved. The remaining costs should be relatively low, depending primarily on the effort made to provide voter information to the electorate. *Id.*

365. An example is California Proposition 9 in the June, 1972, election. It was an extreme measure that lost handily but that may have helped lay the groundwork for the success of Proposition 20, a much less extreme measure, in the November, 1972, election. Lutrin & Settle, *supra* note 270.

366. Moreover, the time element in the initiative process normally is considerable, which is why rash measures usually are unsuccessful. Tempers calm down before it is time to vote, even if they had not when the petitions were being circulated.

367. A recent development lends support to the view that the typical man on the street is not a cretin. Most of us are apparently coming to realize the impor-

acted, the wisdom of which is questionable, and the initiative process clearly has not proven to be a panacea for all the political ills in those states that have embraced it. Nevertheless, on balance the fears of the critics do not appear to have been substantiated to any significant degree by the extensive experience we have had with the initiative, while the expectations of the proponents seem to have been at least partially fulfilled.³⁶⁸ In fact, the most impressive testament of all to the favorable operation of the initiative in

tance of reporter's shield laws. See Gallup, *Growing Majority Backs News-men's Privilege*, Des Moines Register, Oct. 5, 1978, at 6A, col. 1.

368. The most recent election appears to be quite consistent with what has come before. The dominant theme of the measures on the ballot was government reform, and a number of measures were passed over the opposition of what surely were much better financed opponents. Oregon passed a measure permitting dental technicians to sell false teeth, and Montana enacted a measure restricting the construction of nuclear plants, as did Hawaii in a constitutional referendum. See U.S. NEWS & WORLD REPORT, *supra* note 286, at 34. In two recent California elections (Proposition 5 and 7 in November 1978) well financed groups apparently won.

Perhaps the most well-known initiated measure of recent times is California's Proposition 13, which was enacted in the June, 1978, election. Proposition 13 suffers from some infirmities and thus will probably be used as an example of the unfortunate consequences of initiatives. One example, however, is not much of an argument against a generally beneficial practice. Moreover, I am not sure which way Proposition 13 cuts, notwithstanding its difficulties.

Admittedly, Proposition 13 is not a perfect bill and it is certainly not a model of clear draftsmanship. See Adams, *Coping With Proposition 13*, Wall St. J., Oct. 10, 1978, at 22; *The Jarvis-Gann Proposition*, Wall St. J., Apr. 25, 1978, at 24. These problems could have been avoided had Proposition 13 been handled by the legislature, the argument may run. Unfortunately, however, the California legislature showed absolutely no inclination to engage in tax cutting until after it was clear that Proposition 13 had a reasonable chance of winning. And that is true notwithstanding California's history of tax initiatives, all of which failed but which together should have sent a message to the legislature. Yet that message was ignored. Moreover, it is instructive that the California electorate was willing to embrace a relatively poorly drafted measure by close to a two-to-one margin rather than permit the status quo to continue. That seems to demonstrate how far out of line the California State Government had gotten, and without the initiative it would probably have been more difficult to begin to put things into proper order.

Finally, that Proposition 8—the California Legislature's hasty response to the possibility of Proposition 13 passing—was defeated is not surprising. To a large extent Proposition 13 was a referendum on the state government, which the government lost. Given the view the electorate had of its elected officials, a vote for a measure proposed by them would have been very surprising indeed. See, *California Tax Slash Proof of Voter Ire*, Buffalo Courier Express, June 11, 1978, at c-1, Col. 6.

Let me be clear that I do not mean to condone the more unfortunate aspects of Proposition 13, but I do not think that, on balance, Proposition 13 makes much of a case against the initiative. Rather, I think it is a better example of the difficulties of representative government.

the states is not the laudatory views of the experts that I have quoted at length. Rather, the most impressive testament is that there has never been a serious effort to eliminate the initiative in any state that has ever embraced it.³⁶⁹

Still, before we can decide to embrace a national initiative proposal, much more work remains to be done. In a matter of this import, we should not act until all possible questions have been answered as best they can be.³⁷⁰ The information I have presented here paints a fairly attractive picture of the initiative process as it has operated in the states, but that picture needs to be updated, fleshed-out, and checked for accuracy.

Another reason to proceed cautiously, of course, is that the concern is not simply over the operation of the initiative in the states. The experience in the states is relevant only to the extent one can draw inferences from that experience about the likely operation of a national initiative. It may be that the results of a national initiative process would not be much different from what we find in the states. After all, voters who demonstrate powers of discrimination and judgment at the state level should not lose them in a federal election—especially if the issues dealt with by a national initiative process prove not to be of greater complexity.³⁷¹

369. Fordham & Leach, *supra* note 235, at 497. But see Dow, *Portland Limits the Initiative*, 40 NAT. MUN. REV. 347 (1951). Moreover, a number of states that do not possess the initiative are now in the process of amending their constitutions to provide for it. See, *Hearings, supra* note 1, at 16 (opening statement of James Abourezk).

370. One argument often raised against initiatives is that laws are typically enacted by a minority of the people since rarely does a proposition receive the votes of over 50% of the eligible voters. See, e.g., Gardner, *supra* note 186, at 507; Johnson, *supra* note 235, at 46; Schumacher, *supra* note 224, at 244-45. See also J. POLLOCK, *supra* note 5, at 28. There are a number of responses to this. One is to point out that as many vote for state legislators as vote on initiatives. Radin, *supra* note 83, at 571; Bone & Benedict, *supra* note 201, at 339. Another is that "those who through ignorance, indifference, or carelessness fail to vote on propositions that are put in their hands at the polls make out a prima facie case of unfitness against themselves," and we are perhaps better off without their votes. D. WILCOX, *supra* note 5, at 31. See also R. DAHL, *supra* note 17, at 38; L. TALLIAN, *supra* note 9, at 30 (quoting John Randolph Haynes); D. WILCOX, *supra* note 5, at 237.

371. Certainly, federal statutes may on the average be more complex than state statutes, but that does not mean that the issues underlying the statutes are more difficult to comprehend. Moreover, much of the complexity in federal statutes results from pandering to special interests. See, e.g., D. MAYHEW, *supra* note 97, at 138. At any rate, the issue is not the complexity of present statutes; instead, it is the likely form national initiatives will take. If an exceedingly complex measure is qualified for the ballot, or one whose effects are not clear, it will probably lose, given the tendency to vote no that our fellow citizens exhibit when faced with ambiguity. Thus, complex, technical matters, or measures of doubtful effect, will almost of necessity have to be left to Congress, which is where they belong.

Similarly, if public relations firms cannot hoodwink the public in statewide elections, it would seem unlikely that they will be able to do so on the national level. National initiatives will undoubtedly be subjected to much greater scrutiny than state initiatives. Who is backing a bill and why, is more likely to be exposed, and the actual strengths and weaknesses of any particular measure surely will receive even greater attention than is now the case in the states. Reason suggests, then, that the results on national initiatives will be at least as commendable as the results we have gotten in the states.³⁷²

Nonetheless, reality is not always reasonable. To the extent possible, we should attempt to narrow our gaps in knowledge by further study. We should try to determine if the dynamics of group decision-making may vary from the state to the national level—whether the larger group is likely to become less rather than more tolerant. For example, we should attempt to compare the acceptance of progressive state legislation to the national consensus on similar federal legislation. We also need to conduct further studies of the effect of money and media campaigns on elections. The states with campaign finance disclosure requirements applicable to ballot measures³⁷³ have created a splendid opportunity to study the marginal effect of money on initiative balloting. We should also examine more carefully the effect of money in elections without incumbents, especially primaries where partisanship should also be lacking. Moreover, more careful, in-depth analysis of the results of initiatives should also be conducted. Only when these and related questions have been examined to the extent feasible should we extrapolate from the data and estimate the likely performance of a national initiative procedure.

Yet, even after such extrapolation, one important question will remain: is the federal law-making machinery seriously so deficient as to justify taking whatever risk a national initiative amendment would entail?³⁷⁴ The federal lawmaking process has generally op-

372. Special interests, due to greater organizational and financial resources, may have an even greater advantage at the national level in qualifying national measures. To the extent there is a concern about special interests abusing the qualifying process, it can be handled by appropriate statutory provisions. My own view, however, is that the qualifying procedure is essentially immune from abuse. I see nothing wrong with anyone or any group utilizing their resources in an attempt to qualify a measure or to ensure its passage. If a ridiculous bill is qualified, I have confidence we will vote it down. But the process should still prove interesting, probably educational, and the resultant debate will contribute to the quality of life in the United States.

373. See note 341 *supra*.

374. One argument against the initiative deserving of brief mention is the occasionally expressed fear that direct democracy will adversely affect the legislative branch by dulling its sense of responsibility. See, e.g., J. BOYLE, *supra*

erated at a higher level than that of most states, yet it is clear that Congress is subjected to a myriad of forces that are capable of influencing it in an undesirable fashion.³⁷⁵ Even if we conclude that those forces are often successful and that an initiative process would prove helpful in counteracting them, we still must decide whether whatever risk a national initiative entails is worth it. That will be, I think, a question requiring individual judgment, although to some extent the answer will depend on the form the national initiative amendment would take. Accordingly, I will conclude this article with a brief consideration of Senate Joint Resolution 67.

IV. SENATE JOINT RESOLUTION 67—SOME SUGGESTIONS

Senate Joint Resolution 67 is, for the most part, well drafted and suited to its purpose.³⁷⁶ It does contain a few questionable provisions, however.³⁷⁷ Of these, the most important is the criterion

note 5, at 25; Smith, *supra* note 193, at 26. The referendum may have this effect, and thus it may make sense not to provide for a national referendum, but it is difficult to see how a legislator could rationally abdicate his responsibilities because a jurisdiction employs the initiative. Moreover, no such consequence appears to have occurred. What Prof. Cushman observed long ago still seems true today:

Critics of the system have long declared that direct legislation would rob the state legislator of his dignity and destroy his sense of responsibility to the people. He would become a mere automaton and the important work of legislation would be carried on at the polls. Needless to say no such complete emasculation of state law-making bodies has anywhere occurred. The legislators in Oregon, Washington and California still grind out laws with as great rapidity and steadiness as though they were paid for their statesmenlike labors by the piece instead of by the day.

Cushman, *supra* note 218, at 533.

For empirical support for Cushman's views, see text accompanying notes 242-49 *supra*.

There are other objections that have been raised to the initiative process, but they are not deserving of extended discussion. One is that the initiative does not allow intensity of feeling to influence the outcome of policy choices. Again, though, I know of no examples where a mildly favorable majority have imposed their will on a stridently opposed minority. If there are not a number of people seriously interested in a measure, it will not likely qualify for the ballot. Moreover, the same reasons that motivate legislators to accommodate intensity of feeling should also motivate voters. See R. DAHL, *supra* note 17, at 50. But see Wolfinger & Greenstein, *supra* note 207, at 769. Another concern is that initiatives may be hard to interpret, given the lack of legislative history. 1972 U. ILL. L.F. 408, *supra* note 235, at 420-21. The answer, I suppose, is that the courts will have to expand their conception of "legislative history." See, e.g., *Fields v. Fung Eu*, 18 Cal. 3d 322, 556 P.2d 729, 134 Cal. Rptr. 367 (1976).

375. See § III of text *supra*.

376. It is reproduced in the appendix to this article.

377. I have limited myself to relatively significant aspects of S.J. Res. 67.

provided for the enactment of a bill. A law would be enacted if, after qualifying, it received "approval by a majority of the people casting votes with respect to such proposed law."³⁷⁸ I think, though, that the late Alexander Bickel was correct when he observed that "no measures of pervasive application can or should rest on narrow majorities."³⁷⁹

Professor Bickel's primary concern was that a law that commanded barely more support than it generated opposition would be difficult to enforce, and efforts to do so could result in more harm than good. Resistance to the enforcement of such laws undoubtedly would develop; in many places the statute would be openly and brazenly flouted; and any serious intervention by the authorities would be viewed as repressive by a large segment of the populace. The result would be to bring the process of law and its enforcement into disrepute and, consequently, to undermine the conditions of the rule of law.³⁸⁰ Accordingly, the process of lawmaking should try to avoid dichotomizing the population and, so far as possible, should rest upon a consensus more complete than that required by a majority vote.

There are other reasons for requiring something other than a simple majority to enact a federal statute by initiative. Our present structure deliberately contains impediments to law-making that are designed to make it generally difficult to enact legislation. These exist partially in response to concerns similar to Bickel's, partially as an awkward attempt to provide institutional protection for minority interests, and partially as a result of a general bias against governmental intervention into private affairs.³⁸¹ A simple majority vote on a national initiative would amount to a potentially serious reordering of our law-making process through its implicit rejection of many of these concerns, and I, for one, am still sufficiently impressed by the tyrannizing tendency of any form of government to think that a poor choice.³⁸²

378. S.J. Res. 67, 95th Cong., 1st Sess. § 3 (1977).

379. A. BICKEL, *THE MORALITY OF CONSENT* 103 (1975).

380. Our experience with sumptuary criminal legislation provides much support for Prof. Bickel's view. See, e.g., Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968).

381. See text accompanying notes 19-25 *supra*.

382. Since the status quo will undoubtedly contain some statutes that deserve to be repealed, any modification of a simple majority rule does allow for some rule by minorities by making the status quo more difficult to change. Thus, a modification of the majority rule means not simply that private action will be preferred to governmental intervention, but also that present statutes will be preferred to proposed ones. Were I convinced that the need to repeal statutes was of great enough magnitude, I might favor a majority vote, but I am not convinced of that. Thus, the loss resulting from the enhanced difficulty of repeal appears to be outweighed by the value of inhibiting new legislation.

Allowing for enactment by a simple majority also may give too much power to a few heavily populated states.³⁸³ It is very likely that regional concerns would on occasion be the subject matter of national initiatives, and a simple majority vote would give a decided advantage to the densely populated portions of the country.³⁸⁴ Concern for the disruptive effects of regionalism was one of the justifications for the creation of the Senate, in fact, and a simple majority vote foregoes this advantageous aspect of state representation without providing any alternative. Similar concerns also stimulated the only provision of the Constitution that purports to be unamendable, absent consent of the affected parties.³⁸⁵ Article V provides that "no state, without its Consent, shall be deprived of its equal Suffrage in the Senate."³⁸⁶ Although the scope of this provision surely "is confined to protecting the equality of the states in the Senate" and "says nothing about the . . . freedom of the state from a whole or partial loss of its powers through amendment,"³⁸⁷ still Article V rests on the desire to guarantee the states equal power to influence legislation at one necessary step in the legislative process, a guarantee that a majority vote provision nullifies.

For all these reasons, something other than a simple majority vote for the enactment of a national initiative should be required,³⁸⁸ but precisely what should be substituted for it is not altogether clear. There appear to be two alternatives. One is simply to raise the percentage of affirmative votes required for passage to something greater than a majority, but that course presents problems. If, for example, one is concerned that the heavily populated states may tend to vote uniformly on a particular measure, nationwide support for the measure can be guaranteed only by raising the percentage to virtually unattainable levels.³⁸⁹ Further-

Moreover, most statutes are written with present conditions in mind. Accordingly, most statutes supported presently by only a minority will probably tend to lose support as time passes and conditions change until eventually there is a sufficiently large consensus to repeal them.

383. According to the 1970 census, half the population is in nine states. U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, 1970 U.S. CENSUS OF POPULATION.

384. The problem was recognized quite long ago. See Everett, *supra* note 5, at 360.

385. L. ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 6 (1948).

386. U.S. CONST. art. 5.

387. L. ORFIELD, *supra* note 385, at 97. The seventeenth amendment (direct election of senators) strongly supports this conclusion.

388. The lack of a Presidential veto power, which perhaps should be made explicit, see *Hearings, supra* note 1, at 123, is yet another reason for requiring more than a simple majority. See S.J. Res. 67, 95th Cong., 1st Sess. (1977). Governors also do not possess veto powers over initiatives. See, e.g., Fordham & Leach, *supra* note 235, at 523.

389. The 25 least-populated states have only approximately 15% of the population. Thus, to guarantee support for a bill in at least half of the states, we would

more, what plurality would satisfy concerns such as Bickel's is not self-evident, nor for that matter is it clear how high the required percentage can be made without again making the process virtually impossible to use.³⁹⁰ Accordingly, the second alternative may be preferable to requiring a super-majority vote.

The alternative to a super-majority vote is a structural solution that parallels the federal arrangement. What should be considered is a requirement that a proposed statute receive not only an overall majority but also a majority in a majority of states.³⁹¹ Such an arrangement would ensure that no bill would be enacted without widespread support, and thus it would go far towards solving the problem of regionalism as well as serving the laudatory, although somewhat random, screening function of the Senate.³⁹² Moreover, this arrangement should also satisfy the concerns raised by Article V of the Constitution, since each state would maintain its ability to influence the outcome of a proposed statute.

Obviously, this suggestion does not guarantee that a statute would not be enacted by a very close vote, and I have considered suggesting a super-majority vote in addition to requiring that a measure receive a majority in a majority of states.³⁹³ I have decided against it for a number of reasons, however. In the first place, I doubt that proposed statutes will very often be approved by a majority in over half the states and still only barely receive a majority overall.³⁹⁴ Moreover, the electorate's tendency to be

have to require that a measure receive approval from 85% of the electorate (assuming population and voting population are roughly proportional), although it obviously is unlikely that a proposed statute would uniformly be voted for in the 25 largest states and uniformly voted against in the 25 smallest.

390. An examination of the votes in presidential races and public opinion polls on various issues does not lead one, or at least did not lead me, to form any conclusion concerning what percentage might be optimal for a national initiative process. On the basis of the experience in the states, it seems as though a requirement that a bill receive from 55% to 60% of the vote for enactment would not emasculate the process, although some bills are passed with less than a 55% affirmative vote.

391. See generally L. TALLIAN, *supra* note 9, at 13; Everett, *supra* note 5, at 354-55. S.J. Res. 67 provides that for purposes of that amendment Washington, D.C., shall be treated as a state.

392. See text accompanying notes 21-35 *supra*. And, like the electoral college, it would encourage the contestants to argue the merits of their positions throughout the entire country.

393. I would have suggested 55%, which would ensure a sizeable winning margin but probably would not eviscerate the process. On supermajority requirements generally, see Gordon v. Lance, 403 U.S. 1 (1971); Comment, *The Constitutionality of Supermajority Voting Requirements*: Gordon v. Lance, 1971 U. ILL. L.F. 703.

394. If so, one might argue, why not impose a supermajority requirement? I must say, I am almost convinced. My only response is that I do not know how high

skeptical about initiatives is a built-in check upon the process, which, in conjunction with the requirement that a measure carry half the states, should be a more than adequate surrogate for the impediments to legislating contained in our extant political structure.³⁹⁵

The remaining suggestions I have to offer do not deal with matters as significant as the criteria for enacting a measure, and can be discussed in short order. First, the scope of legislative power under the proposed amendment should be clarified. The amendment provides for the enactment of "laws" but does not define the scope of the term, which creates the possibility that certain quagmires that can and should be avoided may not be.³⁹⁶ Accordingly, the first sentence of Section 1 should be amended to read: "*The people of the United States shall have the power to propose and*

a requirement to impose. See note 393 *supra*. Given that uncertainty, and that it is probably not necessary anyway, prudence dictates not imposing a higher standard. See also text accompanying note 395 *infra*.

395. One consequence of requiring half the states to approve a measure may be to encourage a greater number of challenges to the vote count, but that has not been a serious problem in presidential elections. *Hearings on the Electoral College and Direct Election of the President Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 340 (1977).

A number of states require that in addition to a ballot measure receiving a majority of the votes cast on it, it also receive a minimum number of votes or that a minimum number of votes be cast one way or the other on it. See, e.g., Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 N. ENG. L. REV. 455, 486 (1977); Troutman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 57 (1973). Such provisions generally are designed to reduce the chance that bills without serious popular support are enacted. Whatever the wisdom of these provisions at the state level, I see no reason to incorporate them into a national initiative process. The difficulties of qualifying bills should preclude most bills without significant support. But see note 372 *supra*. Moreover, it may be that a relatively small group, but one sufficiently large to qualify a bill, has been mistreated by Congress to the advantage of only a few, and it is hard to see why that should be within the power of Congress but excluded from the scope of the initiative. Similarly, if two or more groups are contesting an issue that is within the reach of federal lawmaking but that does not affect most of the nation, and if one of these groups manages to qualify a measure, it is hard to see why those who are interested in it should not decide its fate themselves, simply because none of the rest of us care enough to vote on the measure. See also note 370 *supra*.

396. The principal quagmire is the distinction between "legislative" and "administrative" acts that has developed in the state courts, particularly with respect to local initiatives where local governing bodies possess both legislative and administrative functions. The scope of the power under the initiative has been held not to extend to administrative acts, but the cases are, to say the least, difficult to reconcile. See Fordham & Leach, *supra* note 235, at 501; Troutman, *supra* note 395, at 84-87. Note, *The Legislative/Administrative Dichotomy and the Use of the Initiative and Referendum in a North Dakota Home Rule City*, 51 N.D. L. REV. 855 (1975); Note, *Limitations on Initiative and Referendum*, 3 STAN. L. REV. 497, 503 (1951).

enact laws in accordance with this article. This article shall not be construed to exclude from the lawmaking power of the people any subject matter that is within the legislative competence of Congress including, but not limited to, taxation and appropriations."³⁹⁷ The exceptions now contained in the first sentence of Section 1 serve no real purpose and should be removed.³⁹⁸

Second, the amendment should be made explicitly self-executing, since its very existence would postulate a potentially unresponsive legislature. Thus, the next to last sentence of Section 2 should be amended to read: "*The Congress shall provide by law reasonable procedures for the preparation and transmittal of such petitions, and for the certification of signatures on such petitions, but the chief law enforcement officer of the United States shall provide for the preparation and transmittal of such petitions and for the certification of the signatures on them, in the absence of congressional action.*" Similarly, Section 4 should be amended to read: "*This article is self-executing upon being ratified by the legislatures of three-fourths of the several States. However, the Congress and the people shall have the power to enforce this article by appropriate legislation.*"³⁹⁹

Finally, provision should be made for inconsistent measures. Given the diversity of this country it is not at all unlikely that two measures will qualify for the ballot that are inconsistent with one another in at least a minor way, and Senate Joint Resolution 67 provides no method of resolving any such tension. Thus, Section 3 should be amended to add a concluding sentence: "*In the event that two laws are enacted at the same election that are in whole or in part inconsistent, the inconsistent laws or parts thereof shall be deemed to repeal one another.*"⁴⁰⁰

397. The specific reference to fiscal affairs should remove any doubts about the scope of the initiative based upon the fact that the House of Representatives has exclusive jurisdiction to originate bills raising revenues. U.S. CONST. art. I, § 7. A number of states limit the scope of the initiative with respect to fiscal affairs. See, e.g., Stewart, *supra* note 395, at 462; Note, *supra* note 210; 3 STAN. L. REV. 497, *supra* note 396. See also Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966).

398. See U.S. CONST. art. I, § 8, cl.11. It provides for the declaring of war and related matters. Clause 15 provides for the calling out of the militia. Neither of these powers can effectively be exercised through an initiative, and the President's position as Commander-in-Chief further immunizes these areas from popular influence.

399. See generally Fordham & Leach, *supra* note 235, at 501-02; Note, *The Initiative Cannot Be Limited by Legislative Act*, 25 ROCKY MTN. L. REV. 106 (1952-53). Perhaps citizens should be given standing to sue to enforce the provisions of the amendment. That might provide some leverage to be used against a recalcitrant Executive.

400. See Fordham & Leach, *supra* note 235, at 522. The alternative to mutual repeal is that the bill receiving the highest number of affirmative votes (or pos-

The issues discussed here are, I believe, the most significant of the problems raised by Senate Joint Resolution 67, but by no means the only ones. A number of its other aspects may generate controversy and certainly will require discussion if we decide to give serious consideration to the wisdom of the national initiative proposal.⁴⁰¹ Moreover, there are myriad issues of lesser significance that will have to be handled by statute that also are in need of elaboration, but I will leave that task for another time.⁴⁰² On the

sibly the highest winning percentage) would supercede the other. See Stewart, *supra* note 395, at 491. That view rests on the assumption that inconsistent parts of the measures caused the different outcomes, but with relatively complex bills, or with bills that deal with largely different issues, that may not be the case. Thus, resolving the difficulty by reference to the number of affirmative votes runs the risk of being an arbitrary method of resolution. Providing for mutual repeal, by contrast, merely preserves the status quo. If the provisions repealed are crucial to the statutory scheme, Congress can provide the missing link through its power to amend initiatives. See S.J. Res. 67, 95th Cong., 1st Sess., § 3 (1977).

For bills passed at different elections, the normal rules of statutory construction would apply, of course.

401. Principal among the issues that may be discussed is whether we should adopt an indirect initiative process rather than a direct one as contained in S.J. Res. 67. See, e.g., *Hearings, supra* note 1, at 193 (testimony of B. Barber); Note, *Effect of Pending Initiative Petition on Legislature's Power to Enact Inconsistent Law*, 49 COLUM. L. REV. 705 (1949).

Should S.J. Res. 67 be enacted, Congress would still be able to enact any bill it likes prior to the election on a measure. Thus, a lot of trouble could be saved by Congress enacting a proposal that appears likely to qualify; or Congress could attempt to defuse the situation by enacting a substitute. Accordingly, the primary purpose of an indirect method may be met by the present proposal, as may the primary purpose of those schemes that allow the legislature to place substitute measures on the ballot. Moreover, Congress can also amend any initiated measure, although during the first two years after enactment only by a two thirds rollcall vote. Nonetheless, I think it would make good sense to allow Congress to place alternative measures on the ballot, once a measure has qualified, and let the electorate choose among them (or reject or accept them all). That, I think, might provide a mixture of the best of both worlds.

The power to amend contained in S.J. Res. 67 serves the purposes of state "emergency clauses." See generally Troutman, *supra* note 395, at 57 n.10, 68; 3 STAN. L. REV. 479, *supra* note 396, at 498-502; Note, *Court Interpretation of the Power to Amend the Initiative*, 34 WASH. L. REV. 150 (1958). Another issue that may be raised is whether state legislatures should be permitted an explicit role in the process. It seems to me their implicit role is quite enough.

402. The issues that should be dealt with by statute are too numerous for extended discussion here. See generally Diamond, diDonato, Marley & Tubert, *supra* note 198. Among the most important are the method of obtaining, transmitting, and certifying signatures on petitions; statutory determinations of the point at which the qualifying and certifying processes begin; the governmental aid that should be provided to proponents and opponents of measures; the limitations on paid signature gatherers and on the campaigns over measures; the process of amending proposals to correct technical or stylistic flaws; and the role of the judiciary prior to an election.

whole, Senate Joint Resolution 67 is a very solid proposal that should serve very well to facilitate consideration of the wisdom of a national initiative procedure—which, of course, is its primary task.

V. A CONCLUDING THOUGHT

And so we have come to the end of a long but hopefully not unduly tedious journey. It is with some regret that I echo what was anticipated at our departure to the effect that what we have seen along the way has not disposed of every possible criticism of, nor substantiated all the hopes and expectations for, the initiative process. To some extent that could never be accomplished, for a considerable portion of the argument over the worth of the initiative rests upon fundamental disagreement on often implicit value judgments. To the extent disagreement rests on issues more susceptible of reasoned discussion, there is more work to be done before final judgment is reached. And it may be that some may find questions unexamined here to be of crucial importance.⁴⁰³ Nevertheless, the journey has not been entirely for naught. It has yielded, hopefully, a useful analytical scheme; it has provided a preliminary analysis of many of the issues central to the wisdom of a national initiative process, and perhaps it has been helpful in making explicit what may underlie much of the dispute over the wisdom of initiatives generally.

There remains just one point to be made.⁴⁰⁴ The question whether or not to take the next and most dramatic step in the democratization of the Republic⁴⁰⁵ is, in essence, to ask to what extent we take our ideals, and ourselves, seriously. The history of the United States is to a considerable degree a history of an ever-expanding enjoyment of an ever-increasing portion of our ideals. The issue posed by the national initiative amendment is whether we sufficiently trust ourselves to make real yet another ideal and

403. For instance, whether a national initiative would enhance the power of the presidency, due to the Executive's national stature, and thus enhance the chances of creating a tyrannical demagogue. I must say that in this regard the potential effect of a national initiative procedure pales beside the President's power as Commander-in-Chief of the Armed Forces.

404. I feel compelled to point out that the present size of the various political parties should not influence one's view of the wisdom of a national initiative process, unless the minority is convinced it will never be able to demonstrate to a sufficient number, the wisdom of its views and thus become the majority. R. DAHL, *supra* note 17, at 52.

405. Six of the last 12 constitutional amendments have extended the franchise or attempted to protect its exercise. For a discussion of the American progress towards democracy, see A. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* (1978).

the consequences of our inability to do so. I cannot improve on the words of Professor Benjamin Barber:

In the end, in fact, the real issue at stake in S.J. Res. 67 is whether or not America believes in democracy, and believes it can afford the risks that go with democratic life. All of the objections to it are so many different ways of saying "the people are not to be trusted"—a skepticism which, it is perfectly true, can be traced back to the "realism" and cynical elitism of a significant group of constitutional fathers. But there really is no democratic alternative to such trust: if the American people are not capable of self-government, our democracy will perish—whether or not elites keep them from initiating legislation.⁴⁰⁶

I do not mean to suggest that the gravity of the question makes the answer any easier. It may be that upon further study and reflection enough of us will have sufficient reservations about enough of our fellow citizens to force the conclusion that a national initiative would not be a wise addition to our political structure. I agree with Professor Barber, however, that such a conclusion does not bode well for the health of the Republic. Say what you will about the importance of institutional structures and relationships, in the final analysis the perpetuation of any free society rests primarily on the character of its citizens, not in the form of its institutions.⁴⁰⁷ And it is difficult for me to imagine how a citizenry that lacks the competence to intercede directly into matters of its own governance when it feels the need has arisen can long survive as the pillar of a free society. Still, those are the issues the national initiative proposal generates, and I, for one, hope that we will begin the process of examining them.

406. *Hearings*, *supra* note 1, at 195 (testimony of B. Barber). *See also* L. TALLIAN, *supra* note 9, at 40 (quoting John Randolph Haynes); D. WILCOX, *supra* note 5, at 311.

407. *See* R. DAHL, *supra* note 17, at 22, 134-35, 143. *See also* D. WILCOX, *supra* note 5, at 67.

APPENDIX

95TH CONGRESS
1ST SESSION

S.J. Res. 67

IN THE SENATE OF THE UNITED STATES

JULY 11 (legislative day, MAY 18), 1977

Mr. ABOUREZK (for himself and Mr. HATFIELD) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

Joint Resolution

Proposing an amendment to the Constitution of the United States with respect to the proposal and the enactment of laws by popular vote of the people of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States:

“ARTICLE—

“SECTION 1. The people of the United States shall have the power to propose and enact laws in accordance with this article, except with respect to carrying out the powers granted to Congress in clauses 11 and 15 of article 1, section 8, of this Constitution. This article does not grant the people of the United States the power to propose amendments to this Constitution.

“SEC. 2. A law is proposed by presenting to the chief law enforcement officer of the United States a petition that sets forth the text of the proposed law and contains signatures, collected within the eighteen months prior to such presentation, of registered voters equal in number to three per centum of the ballots cast in the last general election for President and which includes the signatures of registered voters in each of ten States equal in number to three per centum of the ballots cast in the last general election for President in each of the ten States. Within ninety days of such presentation, the chief law enforcement officer of the United States shall determine the validity of the signatures contained in such pe-

tition through consultation with the appropriate States. Upon a determination that such petition contains the required number of valid signatures, he shall certify such petition. He shall then direct that the proposed law be placed on the ballot at the next general election held for choosing Members of the House of Representatives occurring at least one hundred and twenty days after such certification. The Congress shall provide by law reasonable procedures for the preparation and transmittal of such petitions, and for the certification of signatures on such petitions. For the purposes of this section, the term 'State' shall include the District of Columbia.

"SEC. 3. A proposed law shall be enacted upon approval by a majority of the people casting votes with respect to such proposed law and shall take effect thirty days after such approval except as otherwise provided in the proposed law. Any law enacted pursuant to this article shall be a law the same as any other law of the United States, except that any law to repeal or amend a law enacted pursuant to this article during the two years immediately following its effective date must receive an affirmative rollcall vote of two-thirds of the Members of each House duly elected and sworn. No law, the enactment of which is forbidden the Congress by this Constitution or any amendment thereof, may be enacted by the people under this article.

"SEC. 4. The Congress and the people shall have the power to enforce this article by appropriate legislation."