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INITIATIVE AND REFERENDUM—DO THEY ENCOURAGE OR IMPAIR BETTER STATE GOVERNMENT?

I. INTRODUCTION

Lawmaking solely through the efforts of individual voters differs greatly from American democracy's traditional form of representative government. Lawmaking by the people accomplished through the initiative and referendum has been widely accepted in this country as a method for checking abuses by representatives and giving the people a more direct voice in their government. Twenty-one states permit their citizens, by petition, to propose new laws and seek the rejection of legislation passed by traditional methods.¹ Nearly all of these initiative and referendum provisions were adopted shortly after the beginning of the twentieth century in reaction to the corruption and unresponsiveness of state legislatures.² Yet the question of whether the people should be accorded a more active role in their government persists today.³

Lively debate and empirical study of initiative and referendum subsided in the 1940's and largely ended in the 1950's, yet many of the

1. The initiative and referendum provisions considered in this note include: ALAS. CONST. art. XI, §§ 1-8; ARIZ. CONST. art. 4, pt. 1; ARK. CONST. amend. 7, § 1; CAL. CONST. art. 2, §§ 8-10; COLO. CONST. art. V, § 1; IDAHO CONST. art. III, § 1; ME. CONST. art. IV, pt. 3, §§ 17-20; MASS. CONST. amend. 48; MICH. CONST. art. 2, § 9; MO. CONST. art. 3, §§ 49-53; MONT. CONST. art. V, § 1; NEB. CONST. art. III, §§ 1-4; NEV. CONST. art. XIX; N.D. CONST. art. II, § 25; OHIO CONST. art. II, §§1-1 (g); OKLA. CONST. art. 5, §§ 1-8; ORE. CONST. art. IV, § 1; S.D. CONST. art. II, § 1; UTAH CONST. art. VI, § 1; WASH. CONST. amends. 7, 30; WYO. CONST. art. 3, § 52. This paper deals only with the states that provide general legislative initiative and referendum at the state level. Several states offer only referendum. See, e.g., MD. CONST. art. XVI; N.M. CONST. art. IV, § 1. Other states may provide initiative and referendum at the local level, either generally or in specific instances. Still other states authorize their legislature voluntarily to submit laws to the electorate for their approval and some states require certain questions, such as debt authorization, to be approved by the electorate. See THE COUNCIL OF THE STATES, THE BOOK OF THE STATES 218 (1976-77).

2. R. LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 572 (1930) [hereinafter cited as R. LUCE]; Wilson, *The Issues of Reform*, in THE INITIATIVE, REFERENDUM, AND RECALL 69, 69-70 (W. Munro, ed. 1920). See also J. BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON 4 (1915).

3. The District of Columbia City Council on May 17, 1977, approved initiative, referendum, and recall measures, which must be approved by the electorate and by Congress before becoming law. The proposed measures would amend the District of Columbia Charter, which is roughly equivalent to a state's constitution. Washington Star, May 18, 1977, § B, at 1, col. 1.

Senator James Abourezk of South Dakota and Mark Hatfield of Oregon are currently sponsoring a federal constitutional amendment allowing for initiative at the national level. International Herald Tribune, August 1, 1977, at 6, col. 1.

arguments for and against direct legislation by the people remain viable.⁴ To facilitate consideration of initiative and referendum, this note reviews, in a condensed manner, initiative and referendum law and theory. In Part II, the terms initiative and referendum are defined and the more common procedures described. Part III presents the arguments for and against "direct legislation" concepts.⁵ Part III also considers the wisdom of adopting a system of direct legislation in a state such as Florida,⁶ which currently employs only the constitutional initiative. If the Constitution Revision Commission were to create an initiative mechanism for statutory change—and encourage the use of the statutory initiative by requiring less signatures than for a constitutional initiative—this might contribute substantially toward keeping inappropriate matter out of the Florida Constitution. Part IV, the experience of states permitting direct legislation is reviewed. In conclusion, the authors present their observations on the utility of direct legislation.⁷

II. PROCEDURES AND PROVISIONS

Initiative and referendum provisions reserve direct lawmaking power to the voters of the state. Initiative empowers a portion of the voters to propose new legislation and thereafter the general electorate to adopt or reject it at the polls.⁸ The initiative extends positive legis-

4. See sources cited in notes 74-75 *infra*. Several arguments discussed in this note focus on the ability of the public to communicate their preferences to their legislators and to obtain adequate information about measures before voting on them. The reader should therefore consider the arguments in light of the great advances in mass communication in the past several decades. The authors doubt, however, that the public is significantly better informed today on most issues; more information is available, but public interest in digesting it is difficult to quantify.

5. The term "direct legislation" will be used synonymously with "initiative and referendum." Except as indicated, direct legislation is not intended to imply the distinction that exists between the direct and indirect initiative. See text accompanying notes 25-33 *infra*.

6. Section III-D was prepared at the suggestion of the editors of the *Florida State University Law Review* in light of the Florida Constitutional Revision Commission's study of the feasibility of the statutory initiative. The authors wish to express their appreciation for the research assistance for Section III-D provided by the *Florida State University Law Review*.

7. This note addresses the use of initiative and referendum to alter statewide statutory law. State constitutions frequently provide for the application of the initiative and referendum principles to constitutional amendment and local government legislation. See, e.g., FLA. CONST. art. XI, § 3. See generally Sturm, *The Procedure of State Constitutional Change with Special Emphasis on the South and Florida*, 5 FLA. ST. U.L. REV. 569 (1977).

8. The initiative is used to amend laws and repeal laws no longer subject to the referendum. See, e.g., CAL. CONST. art. II, § 8. The initiative may be subject to some restrictions. See note 43 and accompanying text *infra*.

lating power and is used to correct legislative "sins of omission."⁹ Referendum, as described in this note, empowers voters to adopt or reject statutes enacted by the legislature in the current or most recent session.¹⁰ It is in effect a voter's veto over the action of the legislature, and is used to correct the legislature's "sins of commission."¹¹

Although defined as powers, initiative and referendum are best described as procedures instituted and controlled by the voters to make new laws and to approve the laws previously made by the legislature.¹² Voters circulate a petition to put the initiative or referendum measure on the ballot. Although the specific components of the states' provisions vary somewhat, certain patterns emerge which, along with significant deviations, are set out in Table I, *infra*.

A. Precirculation Requirements

Only a few states' constitutional provisions require a proponent to take specific action prior to the circulation of an initiative or referendum petition;¹³ a larger number of states have statutes to that effect.¹⁴

9. As discussed in Parts III and IV of this note, the initiative is an alternative to the traditional mode of legislation. Initiative is, however, a comparatively cumbersome procedure which can take many months from its institution to final approval or rejection at the polls. Additionally, the initiative is not a "pure" manifestation of democracy: although the final decision is made by the majority of voters, both organization and resources are required to place a proposal on the ballot.

10. See, e.g., CAL. CONST. art. II, § 9. The referendum often is restricted in scope. See note 58 and accompanying text *infra*.

11. The referendum, discussed in Parts III and IV of this note, enables the voters to oversee the actions of the legislature. Like the veto, the referendum must be instituted shortly after enactment or not at all. See notes 48-49 and accompanying text *infra*. The referendum differs from the veto in that some legislative actions are immune from referendum, while most legislative actions are subject to the veto. See notes 55-61 and accompanying text *infra*.

12. The three regular branches of government are continually in existence and capable of protecting their institutional integrity. The initiative and referendum have no institutional existence and take on life only when exercised by the voters, but popularly enacted legislation has a legal effect remarkably similar to that of legislatively enacted legislation. See notes 71-73 and accompanying text *infra*.

13. ALAS. CONST. art. XI, § 2 (an application containing the bill must be signed by 100 voters and filed with the lieutenant governor); CAL. CONST. art. II, § 10(d) (prior to circulation of an initiative or referendum petition, a copy must be submitted to the Attorney General who then prepares a title and summary); ME. CONST. art. IV, § 20 (petition forms shall be furnished or approved by the Secretary of State upon written application signed in the office of the Secretary); MASS. CONST. amend. art. 48 Init., pt. 2, § 3 & Ref. pt. 3, § 3 (the petition, signed by ten voters, shall be filed by the first Wednesday in August with the Attorney General who then certifies the title, form, and content; the Secretary of the Commonwealth provides additional blanks); WYO. CONST. art. III, § 52 (b) (an application containing the bill is to be signed by 100 voters and submitted to the Secretary of State).

14. See, e.g., COLO. REV. STAT. § 1-40-101.

TABLE I
SUMMARY OF CURRENT INITIATIVE AND REFERENDUM PROCEDURES

	Alas.	Ariz.	Ark.	Cal.	Colo.	Idaho ^o	Maine	Mass.	Mich.	Miss.
Statutory Initiative Signatures Required	10%	10%	8%	5%	8%	10%	10%	8%	8%	5%
Const. Initiative: Signature Required ^a	—	15%	10%	8%	8%	—	—	8%	—	8%
Geographic Distribution of petition signatures required	yes	—	yes	—	—	—	—	—	—	yes
Direct or Indirect Initiative	Ind.	Dir.	Dir.	Dir.	Dir.	—	Ind.	Ind.	Ind.	Dir.
Initiatives: filing deadline ^b	^e	4 mo.	4 mo.	13 days	4 mo.	4 mo.	†	8	u	4 mo.
Legislature may refer measures	—	yes	—	—	yes	—	—	—	—	yes
Referendum: Signatures required	10%	5%	6%	5%	5%	10%	10%	2%	5%	5%
Referenda: filing deadline ^c	90 days	90 days	90 days	90 days	90 days	60 days	90 days	90 days	90 days	90 days
Measures suspended pending referral	no	yes	yes	yes	yes	yes	yes	yes	yes	yes
Initiative and Referendum extended to localities ^d	—	yes	yes	yes	yes	—	yes	—	—	—

^a Included for comparison only. Constitutional initiative or referendum may nonetheless be provided.
^b Where the initiative is direct, the deadline is a stated length of time prior to the election at which the measure is to be submitted. Where the method is indirect, the deadline is a stated length of time prior to the convening of the next legislative session. See notes 47-48 and accompanying text *supra*.
^c The deadline is within the stated period of time from the final adjournment of the legislative session in which the challenged measure was passed. Some states measure the period from enactment of the challenged measure, or from a recess or interim adjournment that is to be longer than ninety days.
^d States extending initiative and referendum to the localities may utilize provisions different from those used at the state level. This table merely indicates where those powers are explicitly extended. Initiative and referendum may be exercised at the local level in states not in the table and when not specifically granted.
^e No filing deadline is stated, although the provision requires that one complete legislative session falls between the filing and the submission to the voters.
^f The petition must be filed by the fifteenth day after the convening

of the legislature. *Me. CONST. art. IV, pt. 3, § 18.*
^g The Massachusetts initiative procedure begins with an application by ten voters made prior to the first Wednesday in August. The additional signatures must be filed between the first Wednesday in September and the first Wednesday in the following December. Legislative initiative requires the signatures of three percent of the voters. If the legislature fails to enact the measure before the first Wednesday in May, the measure shall be submitted to the voters in an additional one and one-half percent signatures are submitted between the first Wednesday in June and the first Wednesday in July. *MASS. CONST. amend. art. 48, pt. 2, § 3, and pt. 5, § 1.*
^h Although no deadline appears in the constitutional provision, the indirect initiative procedure requires that the measure be before the legislature for forty session days. *MICH. CONST. art. 2, § 9.*
ⁱ A measure is submitted to the legislature if proposed by a petition signed by three percent of the voters and filed ten days prior to the convening of the legislature. If the legislature rejects the measure or if it fails to act within four months, the measure shall be submitted to the voters if a supplementary petition containing the signatures of an additional three percent of the voters is filed within ninety days of the rejection or the expiration of the four months. *OHIO CONST. art. II, § 1b.*

TABLE 1 (Continued)

	Mont.	Neb.	Nev.	N.D.	Ohio	Okla.	Ore.	S.D.	Utah	Wash.	Wyo.
Statutory Initiative	5%	7%	10%	10,000	^h 10%	8%	6%	5%	k	8%	15%
Signatures Required											
Const. Initiative:											
Signature Required ^a	10%	10%	10%	—	10%	15%	8%	—	—	—	—
Geographic Distribution of petition signatures required	yes	yes	—	—	yes	—	—	—	—	—	yes
Direct or Indirect Initiative	Dir.	Dir.	Ind.	Dir.	Ind. ^l	Dir.	Dir.	Dir.	Ind.	Both	Ind.
Initiatives: filing deadline ^b	3 mo.	4 mo.	30 days	90 days	10 days	none	4 mo. 10 days	j	10 days	10 days	e
Legislature may refer measures	—	—	—	—	—	—	—	—	—	yes	—
Referendum:											
Signatures required	5%	5%	10%	7,000	6%	5%	4%	5%	10%	4%	15%
Referenda: filing deadline ^c	6 mo.	90 days	none	90 days	90 days	90 days	90 days	90 days	60 days	90 days	90 days
Measures suspended											
pending referral	1	1	no	yes	yes	yes	yes	yes ^p	yes	yes	no
Initiative and											
Referendum extended	—	—	yes	—	yes	yes	yes	—	—	—	—
to localities ^g											

^j The Secretary of State shall transmit to the legislature all measures filed prior to convening or whenever received during a session. The legislature shall enact all measures and submit them to the voters at the next general election; the measures shall take effect when the tally is completed. S. D. COMPILED LAWS ANN. § 2-1-2.

^k Initiative petitions shall be filed ten days prior to the convening of the legislature and shall contain the signatures of five percent of the voters. If the legislature fails to enact the measure it shall be submitted to the voters at the next general election upon submission of the signatures of an additional five percent of the voters. UTAH CODE ANN. § 20-11-2.

^l See note 53 and accompanying text.

^m Procedure begun by submission of petition signed by three percent of voters. See MASS. CONST. amend. art. 48, pts. II and IV.

ⁿ Signatures of three percent of the electorate authorize submission of the measure to the legislature and signatures of an additional three percent place the measure on the ballot. OHIO CONST. art. II, § 1b.

^o Idaho specifies its requirements by statute. IDAHO CODE §§ 34-1802-07.

^p South Dakota's procedures for filing referenda and voting thereon are regulated by statute. S.D. COMPILED LAWS ANN. § 2-1-4.

^q Washington's constitution outlines procedures for both direct and indirect initiative. WASH. CONST. amend. 7.

If required, a precirculation application usually must contain the text of the proposed measure and the signatures of a relatively small number of voters.¹⁵ A state officer determines whether the form of the proposed measure is proper and insures that the petition is correctly drawn.¹⁶ In most states, statutes regulate drafting and circulation of petitions¹⁷ although the constitutional provision may establish some basic requirements.¹⁸

B. Petition Requirement

To qualify a measure for submission to the voters, the proponents must collect a required number of signatures, expressed as a percentage¹⁹ of the number of voters participating in a prior general election.²⁰ The percentage is usually higher for constitutional initiatives, where they are permitted,²¹ than for legislative initiatives, which is in turn higher than the percentage required for legislative referendum.²² In addition, some states require that the signatures be distributed geographically, typically providing that a designated proportion of the qualified electors signing the petition must reside in a proportion of the subdivisions of the state.²³

15. Alaska and Wyoming require 100 signatures. ALAS. CONST. art. XI, § 2; WYO. CONST. art. 3, § 52 (b). Maine requires one signature. ME. CONST. art. IV, § 20. Most other states are within this range.

16. Review of measures before circulation may also permit the state to determine that the initiative measure or one substantially similar to it has not been submitted recently to the voters, MASS. CONST. amend. art. 47, Init., pt. 3, § 3; and to prepare a title and summary, CAL. CONST. art. II, § 10(d). Denial of certification sometimes is made subject specifically to judicial review. *See, e.g.*, WYO. CONST. art. XI, § 2. Arkansas also requires that the measure be published in a newspaper of general circulation 30 days before filing. ARK. CONST. amend. 7, § 1. An additional reason to require precirculation filing is to limit the amount of time during which signatures may be collected. The requirement of a certain number of signatures within a limited time insures active support for the proposed measure among the qualified electors. This requirement is built into the Massachusetts Constitution. *See* note g to Table I. For material relating to ballot pamphlets, see notes 100 & 148 and accompanying text *infra*.

17. *See, e.g.*, ARIZ. REV. STAT. §§ 19-101-116.

18. *See, e.g.*, ARK. CONST. amend. 7, § 1 (the initiative petition shall contain a full text of the measure proposed).

19. North Dakota differs by setting its signature requirements in terms of whole numbers. N.D. CONST. art. II, § 25. *See* Table I.

20. Most states use the total vote for the office of governor at the prior regular gubernatorial election. *See, e.g.*, CAL. CONST. art. II, §§ 8(b), 9(b). A few other states use similar criteria. *See, e.g.*, COLO. CONST. art. V, § 2 (total vote for office receiving the highest number of votes); ALAS. CONST. art. XI, §) (number of voters participating in prior election).

21. Not all states having an initiative provision permit its use for constitutional amendment. *See, e.g.*, ME. CONST. art. IV, pt. 3, §§ 17-20.

22. For a comparison within each state and among the states, see Table I.

23. The geographical distribution requirement is in addition to the required

C. Initiative Procedure

The provisions generally set no absolute deadline for filing a legislative or constitutional initiative petition,²⁴ so failure to meet a deadline is not disqualifying as it would be for a referendum petition.²⁵ For an initiative, the deadline is relative, and failure to meet it merely delays the ultimate acceptance or rejection of the measure.²⁶ Under a direct initiative procedure the legislature has no opportunity to act on the measure prior to submission to the electors.²⁷ The "direct initiative" petition usually must be filed four months before the election at which it will be considered,²⁸ so that failure to meet the deadline delays the vote until the next regular election.²⁹ This delay can be ameliorated in those states with procedures permitting a special election to consider the measure, but such elections can be called only at the discretion of the governor or the legislature, or by a voters' petition.³⁰ Under an "indirect initiative" procedure the legislature has

number of signatures. ALAS. CONST. art. XI, § 3 (residents in at least two-thirds of the election districts); ARK. CONST. amend. 7, § 1 (at least one-half the designated percentage from each of fifteen counties); NEB. CONST. art. III, §§ 2-3 (5% of the voters in each of two-fifths of the counties for an initiative); NEV. CONST. art. XIX, § 2 (10% in at least 75% of the counties, initiative only); OHIO CONST. art. II, § 1(g) (at least one-half the designated percentage from each of one-half of the counties); WYO. CONST. art. III, § 52(c) (resident in at least two-thirds the counties). Missouri requires the designated percentages in each of two-thirds of the congressional districts. MO. CONST. art. III, §§ 50 and 52(a).

24. See, e.g., ALAS. CONST. art. XI, § 4 (file at any time).

25. See notes 47-48 and accompanying text *infra*. This is the general interpretation of the different provisions, but in some instances, an absolute deadline for filing after a precirculation filing may be imposed.

26. Initiative petitions are generally valid regardless of when filed. If they are filed too close to the time of election, they may be placed on a subsequent ballot. The logic of the requirement in the Alaska Constitution, which dictates that it is irrelevant when the petition is filed, requires as much. ALAS. CONST. art. XI, § 4. But courts have held that a petition can lapse, at least where the required number of signatures is barely collected or barely not collected. See, e.g., *Gage v. Jordan*, 147 P.2d 387 (Cal. 1944). On the other hand, if the opportunity to exercise the referendum is unused, it is lost forever, much like the executive veto.

27. The relative merits of direct and indirect initiative are discussed briefly in Parts III and IV of this note. In summary, indirect initiative contemplates the initiation of legislation by the legislature; direct initiative, on the other hand, deals with the initiation of legislation by the electorate. Indirect initiative appears to have three advantages over the direct version. First, legislative debate of the strengths and weaknesses can increase voter awareness; second, allowing the legislature to propose alternative measures can save poorly drafted proposals containing good ideas, see note 100 and accompanying text *infra*; and third, the expense of the complete initiative procedure can be avoided if the legislature enacts the measure.

28. Some states use different periods. See Table I.

29. See note 26 *supra*.

30. See, e.g., ARK. CONST. amend. 7, § 1 (petition by 15% of voters); CAL. CONST. art. II, § 9(c) (governor may call); MONT. CONST. art. III, § 6 (legislature may call).

an opportunity to consider the measure before it is placed on the ballot.³¹ The typical provision states that the petition must be filed a specified length of time prior to the convening of the legislature.³² If the legislature enacts the measure without amendment,³³ or enacts "substantially the same" measure,³⁴ the initiative petition is declared void and the procedure is ended.³⁵ Some state constitutional provisions make the enacted measure subject to the referendum procedure,³⁶ but this would seem to make initiated measures no different from any other measure enacted into law by the legislature.³⁷ If the legislature rejects the initiated measure, some states permit the legislature to propose alternative measures to be placed on the ballot with the original measure.³⁸ The voters are then permitted to choose between the measures or reject both.³⁹ In any event, if the legislature rejects the

31. Seven state constitutions have the indirect initiative procedure. ALAS. CONST. art. XI, § 4 (the procedure is timed so that one legislative session occurs between the filing and the balloting; enactment of "substantially the same" measure terminates the initiative procedure); ME. CONST. art. IV, pt. 3, § 18 (legislature can enact the measure as proposed or can propose an alternative to present to the voters); MASS. CONST. amend. art. 48 Init., pt. 5, § 1 (a voter petition signed by 3% submits the measure to the legislature; if the legislature fails to act within the allotted time, and if the signatures of an additional 1½% are submitted, the measure and any alternatives proposed by the legislature are put before the voters); MICH. CONST. art. II, § 9 (if the legislature does not enact or reject the proposed measure within 40 session days, it and a proposed alternative measure shall be submitted to the voters); NEV. CONST. art. XIX, § 2 (petition must be filed within 30 days prior to legislative session; if legislature fails to act within 40 days it shall be submitted to the voters); OHIO CONST. art. II, § 1b (a petition signed by 3% presents the matter to the legislature; if the legislature fails to act within four months, and if additional signatures amounting to 3% are submitted, either the original measure or the measure as amended by the legislature shall be put before the voters); WASH. CONST. amend. 7, § 1(a) (submitted to legislature if filed at least 10 days before convening of legislature; legislature may enact measure or propose alternative; otherwise, it is submitted directly to voters); WYO. CONST. art. III, § 52 (the procedure is timed so that one legislative session falls between the filing and the balloting; enactment of "substantially the same" measure terminates the procedure). Utah's statute provides for submission to the legislature upon the filing of petitions containing the signatures of 5% of the voters, 10 days prior to convening. If rejected, an additional 5%, totalling signatures constituting 10% of the votes cast for governor in the preceding election, must be collected to submit the proposal to the voters. UTAH CODE ANN. § 20-11-2. Filing a petition initially containing the signatures of 10% of the voters submits the measure directly to the voters. *Id.*, § 20-11-3. See note 127 *infra*.

32. See Table I.

33. See, e.g., MICH. CONST. art. II, § 9.

34. See, e.g., ALAS. CONST. art. XI, § 4.

35. See note 27 *supra*.

36. See, e.g., NEV. CONST. art. XIX, § 3.

37. The referendum procedure applies to legislated matters except certain restricted items. See notes 51-56 and accompanying text *infra*. Some states limit the ability of the legislature to amend or repeal initiative statutes. See notes 66-69 and accompanying text *infra*.

38. See note 31 *supra*.

39. The typical scheme requires the submission of all proposed measures to the

measure or declines to act upon it within the time allotted by the provision,⁴⁰ the measure will be put on the ballot at the next regular or special election.⁴¹

The most common restrictions on the use of the initiative prohibit proposals concerning appropriations or reconsidering measures initiated and rejected by the voters within the previous three years.⁴² Unlike the referendum, the initiative is restricted as to subject in only a few states.⁴³

D. Referendum Procedures

Some states provide that either the voters or the legislature can refer recent legislative acts to the electors; other states allow only the voters to begin the process of referendum.⁴⁴ The proposal of a referendum by petition requires a specified percentage of signatures⁴⁵ and may require a geographic distribution of the signers.⁴⁶ Referendum provisions almost universally require that the petitions be filed either (1) within ninety days of the enactment of the measure⁴⁷ or (2) before the adjournment of the legislative session in which the measure was passed.⁴⁸ A sizeable number of states provide that a legislative measure

voters for their vote on each. In the event that two or more conflicting measures are approved, the measure receiving the highest number of votes becomes law. *See, e.g.*, NEB. CONST. art. III, § 2. Several states, however follow different rules. *See, e.g.*, ME. CONST. art. IV, pt. 3, § 18 (voters can choose between competing measures or reject both; if neither receives a majority, the one receiving the most votes, if more than one-third of the votes cast, shall be submitted at the next general election).

40. *See, e.g.*, MICH. CONST. art. II, § 9 (40 days); OHIO CONST. art. II, § 16 (four months).

41. *See* note and accompanying text 26 *supra*.

42. ALAS. CONST. art. XI, § 7 (cannot dedicate revenues, make or repeal appropriations, create courts, define jurisdiction of courts, prescribe court rules, enact local or special legislation); MASS. CONST. amend. art. 48, Init., pt. 2, § 2 (prohibits matters relating to religion, appointment of judges, reversal of judicial decisions, powers and creation of courts, local matters, specific appropriations); MO. CONST. art. III, § 51 (cannot make appropriations where new revenues are not also created); NEB. CONST. art. III, § 2 (void if submitted within three years); NEV. CONST. art. XIX, § 6 (cannot make appropriations where new revenues are not also created); OHIO CONST. art. II, § 1e (cannot vary the scheme of property taxation); OKLA. CONST. art. V, § 6 (measure rejected by voters through initiative and referendum within three years cannot be proposed by less than 25% of voters); WYO. CONST. art. III, § 52(a) (cannot dedicate revenues, make or repeal appropriations, create courts, enact local or special legislation).

43. *Compare* note 42 *supra* with note 61 *infra*. At the very least, the initiative may not be used to enact statutes which are beyond the power of the legislature to enact. *See* text accompanying notes 65-69 *infra*.

44. *See* Table I.

45. *See* note 19 *supra* and Table I.

46. *See* note 23 *supra*.

47. *See, e.g.*, CAL. CONST. art. II, § 9(b).

48. *See, e.g.*, WYO. CONST. art. V, § 52(e). *See* Table I.

referred to the voters shall be suspended pending the election,⁴⁹ although some states permit emergency statutes⁵⁰ to go into effect immediately and remain in effect until rejected by the voters.⁵¹ Other states provide that no act of the legislature shall become effective until ninety days after the adjournment of that session of the legislature.⁵² In these states a referred measure remains in abeyance until approved by the voters. A third group of states provides that the acts of the legislature shall remain in effect until specifically rejected by the voters.⁵³ A few states provide that the referred measure shall be suspended only upon the submission of additional signatures.⁵⁴

By far the most frequent restriction upon the operation of the referendum is the emergency statute.⁵⁵ These statutes, defined as those measures immediately necessary for the preservation of the public peace, health and safety,⁵⁶ either may be wholly exempt from the referendum procedure,⁵⁷ or suspension of the measure's effect may be postponed until its final rejection at the polls.⁵⁸ Some states require a separate proviso in an emergency statute stating why immediate effectiveness is necessary.⁵⁹ Other states require passage by a greater-than-majority vote.⁶⁰

49. ARK. CONST. amend. 7, § 1; CAL. CONST. art. II, § 10(a); COLO. CONST. art. V, § 1; IDAHO CODE § 34-1803; MICH. CONST. art. II, § 9; MO. CONST. art. III, § 52(a); N.D. CONST. art. II, § 25; OKLA. CONST. art. V, § 3; S.D. COMPILED LAWS ANN. § 2-1-2. Some states provide that the measure is suspended, *see, e.g.*, MICH. CONST. art. II, § 9, although others say that the measure becomes effective only upon approval by the voters, *see, e.g.*, OKLA. CONST. art. V, § 3. *See* Table I.

50. *See* note 56 and accompanying text *infra*.

51. Arkansas, Massachusetts and North Dakota use this procedure. *See* note 49 *supra*.

52. ARIZ. CONST. art. IV, pt. I, §§ 1(3), (4)-(5); ME. CONST. art. IV, pt. 3, §§ 16-17; MASS. CONST. amend. art. 48, Ref., pt. 1; OHIO CONST. art. II, § 1c; ORE. CONST. art. IV, § 1(3)(a); UTAH CODE ANN. § 20-11-5 (no law effective for 60 days unless passed by two-thirds votes); WASH. CONST. amend. 7, §§ 1(c)-1(d). Florida's constitution presently provides that "[e]ach law shall take effect on the sixtieth day after adjournment sine die of the session of the legislature." FLA. CONST. art. 3, § 9.

53. *See, e.g.*, ALAS. CONST. art. XI, § 6; NEV. CONST. art. XIX, § 1(2); WYO. CONST. art. III, § 52(f).

54. *E.g.*, MONT. CONST. art. III, § 5(2) (the measure is referred by 5%, suspended if petition is signed by 15%); NEB. CONST. art. III, § 3 (measure referred by 5% suspended if the petition is signed by 10%).

55. Most initiative and referendum provisions refer to emergency statutes, usually by definition. California refers simply to "urgency statutes." CAL. CONST. art. II, § 9(a).

56. *E.g.*, WYO. CONST. art. 3, § 52(g). The wording may vary slightly, but the three omnipresent concepts are necessity, immediacy, and preservation of the public peace, health or safety.

57. *E.g.*, CAL. CONST. art. II, § 9(a); COLO. CONST. art. V, § 1; ME. CONST. art. IV, pt. 3, § 17; OHIO CONST. art. II, § 1; OKLA. CONST. art. V, § 2; ORE. CONST. art. IV, § 1(3)(a).

58. *See* note 51 *supra*.

59. *E.g.*, ARIZ. CONST. art. IV, pt. 1, § 1(3).

60. *Id.* (two-thirds vote of all elected members in both houses). *Contra*, ALAS. CONST.

Next to emergency statute limitations the most common restriction on the power of referendum is the exemption of appropriations for the support and maintenance of state government and state institutions.⁶¹ The referred measures are then submitted at the next regular or special election.⁶²

E. Approval, Veto, Amendment, and Repeal

The petitioning feature makes the initiative and referendum procedures distinctive in lawmaking. Of course, neither procedure ends with the submission and administrative approval of petitions. At the very least the measure must be put before the voters, and some states have particular requirements as to what constitutes passage. Most states determine voter approval of measures placed before the electorate by a simple majority,⁶³ although a few states require not only a majority but a certain proportion of the total vote cast at that election or a previous election.⁶⁴

The executive's veto power usually does not apply to statutes submitted to and approved by the voters.⁶⁵ The states are divided, however, upon the ability of the legislature to amend and repeal initiative and

art. XI, § 7 (no mention of how a measure becomes an emergency statute).

61. ALAS. CONST. art. XI, § 7 (dedication of revenue, appropriations, local or special legislation, emergency statutes); ARIZ. CONST. art. IV, pt. 1, § 1(3) (emergency statutes, support of state government and institutions); ARK. CONST. amend. 7, § 1 (no restrictions); CAL. CONST. art. II, § 9(a) ("urgency" statutes, statutes calling elections, tax levies, appropriations for the usual current expenses of the state); COLO. CONST. art. V, § 1 (emergency statutes, support of state government and institutions); IDAHO CONST. (no restrictions); ME. CONST. art. IV, pt. 3, § 17 (emergency statutes); MASS. CONST. amend. art. 48, Ref., pt. 3, § 2 (matters relating to religion, to appointment of judges, creation of courts, local matters, appropriations for usual current expenses of state and its institutions); MICH. CONST. art. II, § 9 (appropriations for state institutions or to meet deficiencies in state funds); MO. CONST. art. III, § 52(a) (emergency statutes, appropriations for the usual current expenses of state government, support of public schools); MONT. CONST. art. III, § 5 (appropriations); NEB. CONST. art. III, § 3 (support of state government or institutions); NEV. CONST. art. XIX, § 6 (no restriction); OHIO CONST. art. II, § 1d (tax levies, appropriations, for support of state government and institutions, emergency statutes); OKLA. CONST. art. V, § 2 (emergency statutes); ORE. CONST. art. IV, § 28 (emergency statutes); S.D. COMPILED LAWS ANN. § 2-1-3 (emergency statutes, support of state government and institutions); UTAH CODE ANN. § 20-11-4 (statutes passed by two-thirds vote in each house); WASH. CONST. amend. 7, § 1(b) (emergency statutes, support of state government and institutions); WYO. CONST. art. III, § 52(g) (dedications of revenue, appropriations, local and special legislation, emergency statutes).

62. See notes 40-41 and accompanying text *supra*. See also Table I.

63. *E.g.*, ORE. CONST. art. IV, § 1(4)(d).

64. *E.g.*, MASS. CONST. amend. art. 48, init., pt. 5, § 1 (passage of initiative measure by majority of votes case on the measure that is at least 30% of the vote cast at that election); WYO. CONST. art. III, § 52(f) (adoption or rejection by vote in excess of 50% of the vote cast in the preceding general election).

65. *E.g.*, ARIZ. CONST. art. 4, pt. 1, § 1(6).

referendum statutes. A sizeable proportion make no mention of any restriction upon the power of the legislature.⁶⁶ Some states differentiate between initiative statutes and referendum statutes: they permit the legislature to amend or repeal the latter at will, but forbid the legislature to amend or repeal the former, either absolutely or in the absence of a greater-than-majority vote.⁶⁷ A few states restrict the power of the legislature to amend or repeal both initiative and referendum statutes.⁶⁸ Although only a few states so provide,⁶⁹ it would seem that an initiated or referred statute could be amended or repealed by use of the initiative process. A substantial minority of states extend the powers of initiative and referendum to the voters of localities, and leave the details and the administration of these procedures to the affected jurisdictions.⁷⁰

In State *ex rel.* Dahl v. Dewing, 131 N.W.2d 434 (N.D. 1964), the court took this exception one step further and held an executive veto of an appropriation for a post created by initiative to be unconstitutional. That case, however, involved an express constitutional prohibition on the executive's veto over statutes created by initiative. The opposite result is conceivable if the initiative section of the constitution is silent as to whether the veto pertains and the veto power encompasses all legislation.

66. The constitutions of Colorado, Idaho, Maine, Massachusetts, Missouri, Nebraska, Ohio, Oklahoma, Oregon, South Dakota, and Utah provide that initiative and referendum laws may be amended by any subsequent legislature. *See, e.g.*, UTAH CODE ANN. § 20-11-6. For citations to the constitutional provisions of these states, see note 1 *supra*. But a statute amended by the legislature does not lose its identity as an initiative statute. State *ex rel.* Dahl v. Dewing, 131 N.W.2d 434 (N.D. 1964). This can be of great importance since the governor's veto will not apply. *Id.*

67. ALAS. CONST. art. XI, § 6 (initiative law cannot be repealed within two years of enactment; amendable at any time); CAL. CONST. art. II, § 10(c) (legislature may amend or repeal initiative statute by another statute effective only when approved by voters); MICH. CONST. art. II, § 9 (amendment or repeal only by three-quarters vote of all members elected to and serving in both houses); MONT. CONST. art. II, § 9 (amendment and repeal only by three-quarters vote); WYO. CONST. art. III, § 52(f) (no repeal of initiative law within two years of effective date; amendable at any time).

68. ARIZ. CONST. art. IV, pt. 1, § 1(6) (no power to amend or repeal); ARK. CONST. amend. 7, § 1 (only on two-thirds vote of legislature); NEV. CONST. art. XIX, §§ 1 and 2(3) (no power to amend, repeal or suspend referendum laws at any time, initiative laws within three years); N.D. CONST. art II, § 25 (only on two-thirds vote of elected members); WASH. CONST. amend. 26 (no law approved by a majority of the electors shall be amended or repealed within two years of enactment).

69. *E.g.*, MICH. CONST. art. 2, § 9. *Cf.* ARIZ. CONST. art. 4, pt. 1, § 1(6) (legislature may not amend or repeal a statute derived by initiative or referendum); CAL. CONST. art. 2, § 10(c) (legislature may amend or repeal referendum statutes, but only a referendum statute can repeal an initiative unless the initiative provides otherwise).

70. *See* Table I. The procedures may vary from those used at the state level and may be established either by the legislature or the relevant locality. The initiative used by the voters of the locality cannot be used to legislate in areas not authorized by the state's constitution or delegation statutes. It should be noted the initiative and referendum are extended to localities where those powers are not reserved to the voters at the state level.

In addition to those states covered in Table I, the following states have an initiative process available only to local governmental units: Georgia, Kentucky, Louisiana, Minne-

The statutory law resulting from the initiative procedure differs, if at all, from the laws made by the legislature primarily in the ways initiative statutes may be amended and repealed, as previously discussed.⁷¹ The courts tend not to recognize distinctions owing to the origin of a given statute, and have held that initiative statutes are "of equal dignity with those passed by the Legislative Assembly"⁷² and that "rules of construction apply equally to direct legislation by the people as to legislative enactment."⁷³

III. BACKGROUND AND ARGUMENTS

A. *An Historical Perspective*

Initiative and referendum are relatively new terms for very old procedures. Ancient democracies, such as the Greek city-states, utilized direct democracy by plebiscite.⁷⁴ To some degree, the Saxons governed themselves through a popular assembly.⁷⁵ From colonial times in America the electorate in some states has been required to review legislation of certain types before it could become law.⁷⁶ The initiative gained acceptance slowly, in part because it was thought to undermine the guarantee of a "republican form of government" found in the United States Constitution.⁷⁷

Not until 1898 did a state adopt statewide initiative and referendum measures that the electorate could invoke to consider almost any issue.⁷⁸ South Dakota, like the states which followed its lead, adopted a variation of the Swiss initiative and referendum procedures, which had become popular after the adoption of the referendum by a lone Swiss canton in 1831.⁷⁹ Reformists urging the enactment of direct

sota, New Jersey, Pennsylvania, South Carolina, Texas, Vermont, Virginia and West Virginia. THE COUNCIL OF THE STATES, THE BOOK OF THE STATES (1976-77) 218 (Table 7 & n.c). All states have referendum available to local governmental units except Alabama, Connecticut, Delaware, Hawaii, New Hampshire, Iowa, Louisiana, Mississippi, New Mexico, New York, North Carolina, and Tennessee. *Id.* at 216-17 (Table 6 & n.c).

71. See text accompanying notes 63-69 *supra*.

72. State *ex rel.* Jones v. Erickson, 244 P. 287, 290 (1926).

73. Washington State Dept. of Revenue v. Hoppe, 512 P.2d 1094, 1096 (1973) (*en banc*).

74. Munro, *Introduction*, in THE INITIATIVE, REFERENDUM, AND RECALL 4 (W. Munro ed. 1920) [hereinafter cited as Munro].

75. R. LUCE, *supra* note 2, at 563; Munro, *supra* note 74, at 4.

76. In 1638 Plymouth Colony adopted a form of referendum. For an excellent discussion of the history of direct legislation, see R. LUCE, *supra* note 2, at 563-73.

77. U.S. CONST. art. IV, § 4. The argument that initiative and referendum denied the people of a state a republican form of government eventually reached the Supreme Court. The Court declined to rule on the constitutionality of the matter, labelling the issue a political question. Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912).

78. S.D. CONST. art. III, § 1.

79. The original referendum adopted in the German-speaking canton of Saint Gallen

legislation provided the impetus for adoption of initiative and referendum in twelve more states by 1911.⁸⁰ By 1924 eighteen states had adopted the initiative or referendum.⁸¹

B. *The Arguments for Initiative and Referendum*

The first of several categories of argument in favor of initiative and referendum is that direct legislation as a governing technique is purer than, and therefore preferable to, representative government. Believing that the individual is sovereign, students of Rousseau⁸² have argued that direct legislation should be a vital part, if not the moving force, of government.⁸³ Because initiatives and referenda theoretically address issues rather than personalities, proponents long have argued that voters act more objectively in considering direct legislation and that greater objectivity means greater accuracy in expressing the public will.⁸⁴ Intent upon dispelling the charge that direct legislation opens the door to "mob rule," supporters of direct legislation have countered that nominating conventions and even town meetings are far more

provided that laws took effect 45 days after enactment unless a petition signed by 50 voters was submitted demanding that the law be referred to the communal assembly. A majority of *all* registered voters had to reject a measure to prevent its becoming law. R. LUCE, *supra* note 2, at 565.

The first initiative provision was adopted by the Swiss canton of Vaud in 1845. By 1930 the statutory initiative existed in all but three cantons, the constitutional initiative in all but one. *Id.* at 566.

80. Utah, 1900; Oregon, 1902; Nevada, 1904 (which adopted only the referendum at that time); Montana, 1906; Oklahoma, 1907, Maine and Missouri, 1908; Arkansas and Colorado, 1910; and Arizona, California and New Mexico, 1911 (New Mexico adopted only the referendum). All but three of these states have retained their original provisions. See citations in note 1 *supra*. Arkansas, California, and Missouri have modified or moved their provisions. Compare ARK. CONST. amend. 10 (1910) with ARK. CONST. amend. 7, § 1; CAL. CONST. art. IV, § 1 (1911) with CAL. CONST. art. II, §§ 8-10; MO. CONST. art. 4, § 57 (1908) with MO. CONST. art. 3, § 57.

81. R. LUCE, *supra* note 2, at 573.

82. The most prominent advocate of the theory of direct democracy was Jean Jacques Rousseau, who believed that political liberty could be preserved only through constant participation in government by all members of society. See J. ROUSSEAU, *CONTRAT SOCIAL* (Paris 1762).

83. J. LAPALOMBA, *THE INITIATIVE AND REFERENDUM IN OREGON: 1938-1948* (1950) [hereinafter cited as J. LAPALOMBA]; Bourne, *A Defence of Direct Legislation*, in *THE INITIATIVE, REFERENDUM, AND RECALL* 194 (W. Munro ed. 1913) [hereinafter cited as Bourne]. The authors found no one who insisted that representative government should be abolished, although at least one commentator suggested it take a "subordinate place." Radin, *Popular Legislation in California: 1936-1946*, 35 CAL. L. REV. 171, 188 (1947) [hereinafter cited as Radin], quoting Shafer, *A Teutonic Institution Revived*, 22 YALE L.J. 398, 406 (1913).

84. Munro, *supra* note 74, at 22; Rappard, *The Initiative and Referendum in Switzerland*, 6 AM. POL. SCI. REV. 345, 365 (1912) [hereinafter cited as Rappard]. *Contra*, R. LUCE, *supra* note 2, at 625.

susceptible to spontaneous ignition by radical elements.⁸⁵ Furthermore, if the large number of bills considered by each legislator each session is compared to the relatively small number of initiated and referred measures considered by the individual voter, the voter appears to have a better opportunity to become knowledgeable of the issues.⁸⁶

A second line of argument favors direct legislation as a tool for eliminating flaws in the representative system. The exercise of the powers of initiative and referendum effectively checks the corruption of legislatures by powerful special interest groups.⁸⁷ Proponents have claimed that direct legislation also serves an important function if representatives are sincere but mistaken in their beliefs as to what the people want or what is in their best interests. By exercising the initiative or referendum process the people can effectuate their will on a specific issue without the necessity of voting good representatives out of office.⁸⁸ Even if the powers of initiative and referendum are rarely exercised, proponents urge, they operate as the "gun behind the door,"⁸⁹ a sobering reminder to legislators that a miscast vote or failure to act on an important issue may spark adverse publicity and action by the electorate.⁹⁰ Proponents also have asserted that the availability of the direct legislation process increases participation in government by public-minded citizens who are unable to become involved on a full-time basis.⁹¹

A third line of argument focuses on resulting improvements in the electorate. Increased voter involvement in the affairs of government suggests a better educated electorate. Proponents have predicted that contested issues would become the subject of exhaustive public debate

85. Johnson, *Direct Legislation as an Ally of Representative Government*, in *THE INITIATIVE, REFERENDUM, AND RECALL* 139, 152 (W Munro ed. 1913) [hereinafter cited as Johnson].

86. J. LAPALOMBA, *supra* note 83, at 111-12; Bourne, *supra* note 83, at 207-08. See text accompanying notes 100-01 *infra*.

For example, during the 1977 Florida legislative session, 2,336 bills were introduced in the House and 1,492 in the Senate. History of Legislation, 1977 Regular Session, Prepared by Legislative Information Division, Joint Management Committee.

87. Bourne, *supra* note 83, at 199; Munro, *supra* note 74, at 20. Unpopular or corrupt judges also can be checked by the initiative process. For example, in August, 1977, voters in Madison, Wisconsin removed a judge because of his remarks following a rape trial. N.Y. Times, Oct. 30, 1977, at 1, col. 3.

88. Johnson, *supra* note 85, at 147; Diamond, *California's Political Reform Act: Greater Access to the Initiative Process*, 7 Sw. U.L. REV. 453, 462 n.34 (1975) [hereinafter cited as Diamond], quoting State of California, Proposed Amendments to the Constitution of the State of California, with Legislative Reasons For and Against Adoption Thereof (Oct. 10, 1911).

89. R. LUCE, *supra* note 2, at 632.

90. See generally Wilson, *The Issues of Reform*, in *THE INITIATIVE, REFERENDUM, AND RECALL* 69, 87-88 (W. Munro ed. 1913).

91. Johnson, *supra* note 85, at 151.

once the public possessed the power of final disposition.⁹² Backers of direct legislation also have anticipated a diminution in the electorate's feeling of impotence—the “there's-nothing-I-can-do-about-it,” syndrome. By reducing the average citizen's feeling of helplessness in asserting her will, initiative and referendum might increase voter enterprise and concern.⁹³

C. *The Arguments Against Initiative and Referendum*

The proponents of representative government argue that the whole of society, as distinct from the majority that controls under a program of direct legislation, is not served best by the expressions of an amorphous popular will, but that the general social good is advanced by reliance upon the corporate wisdom of elected representatives.⁹⁴ Legislative lawmaking, when compared to lawmaking by a plebescite such as initiative and referendum, is relatively efficient. The members of a legislative body can gain a measure of expertise which enables them corporately to promulgate laws that serve the community as a whole. As a discrete body, the legislature is more easily petitioned and educated by those who do not have the resources to convey their message to the general electorate. Assuming that the availability of direct legislation will result in its widescale substitution for representative legislation, some detractors have forecast socialism and even anarchy.⁹⁵ One of these critics has asserted that democracy, especially in its purer forms such as direct legislation, is not a prerequisite of individual liberty.⁹⁶ The failure of ancient direct democracy, suggest some commentators, may be one reason that the framers of the United States Constitution were strong proponents of representative government.⁹⁷

Critics of direct legislation have forecast a decrease in the quality of legislators commensurate with the decline in responsibility borne by the legislature. They assert this decline will occur because direct

92. Munro, *supra* note 74, at 2, 21; Johnson, *supra* note 85, at 153. *Contra*, R. LUCE, *supra* note 2, at 627.

93. Munro, *supra* note 74, at 2.

94. *See generally* E. BURKE, REFLECTIONS ON THE FRENCH REVOLUTION (London 1790); J. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1875). For excerpts from selected works, see REPRESENTATION (H. Pitkin ed. 1969).

95. Littleton, *Mob Rule and the Canonized Minority*, in 7 THE CONSTITUTIONAL REVIEW 86, 90 (1932) [hereinafter cited as Littleton]; *see* Campbell, *The Initiative and Referendum*, 10 MICH. L. REV. 427, 428 (1912) [hereinafter cited as Campbell]; McCall, *Representative as Against Direct Legislation*, in THE INITIATIVE, REFERENDUM, AND RECALL 164, 166-67 (W. Munro ed. 1913) [hereinafter cited as McCall].

96. Littleton, *supra* note 95, at 90. *Contra*, J. LAPALOMBRA, *supra* note 83, at 102.

97. Campbell, *supra* note 95, at 428; McCall, *supra* note 95, at 166.

legislative power vested in the people reduces the power of elected legislators.⁹⁸ A related argument suggests that once legislators realize that the people can and will initiate measures not as carefully refined as legislatively enacted laws, the incentive to "fine tune" statutes through legislative debate and compromise will disappear.⁹⁹ This fear of poorly drafted initiatives often is reflected in another opposing argument, namely, that initiative and referendum, even if they are not detrimental to representative government, are inherently defective methods of legislating.¹⁰⁰

Opposers of initiative and referendum have argued that special interests will "oil" the direct legislation machinery to get the desired results just as they buy and barter under the representative system.¹⁰¹ The critics conclude that a major purpose of direct legislation—to assure the average citizen a voice in government—will be achieved rarely. These critics argue that a well-organized and heavily funded minority can block any initiative at the polls, and they conclude that problems of the average citizen can be solved through direct legislation only if the measure is not opposed by a powerful special interest group.¹⁰²

A host of other alleged weaknesses in direct legislation would tend to compound its vulnerability to special interests. The electorate has always voted in smaller numbers for measures than for candidates.¹⁰³ Naturally, critics have emphasized that light participation permits a relatively small percentage of the electorate to pass a law.¹⁰⁴ Opponents have also claimed that complex issues and numerous measures on each ballot render intelligent decisionmaking by the voters an impossibility;¹⁰⁵ this is contrasted with the careful deliberations of a

98. E. OBERHOLTZER, *THE REFERENDUM IN AMERICA* 512 (1912) [hereinafter cited as E. OBERHOLTZER]; McCall, *supra* note 95, at 178; Munro, *supra* note 74, at 25.

99. See generally Campbell, *supra* note 95, at 428. In some states that utilize the direct initiative, the initiated matter is not subject to amendment prior to election.

100. *Id.* at 428, 430-31; Holman, *The Unfavorable Results of Direct Legislation in Oregon*, in *THE INITIATIVE, REFERENDUM, AND RECALL* 279, 282-83 (W. Munro ed. 1913) [hereinafter cited as Holman]; Munro, *supra* note 74, at 25.

101. R. LUCE, *supra* note 2, at 623-24 (suggesting that money spent lobbying the legislature could be diverted to initiative or referendum publicity; but bribery is impractical at the public level although effective in legislatures); E. OBERHOLTZER, *supra* note 98, at 502-03; Munro, *supra* note 74, at 30-31.

102. Munro, *supra* note 74, at 31. *But see* notes 145-47 and accompanying text *infra*.

103. See note 148 *infra*.

104. Holman, *supra* note 100, at 283-85.

105. Campbell, *supra* note 95, at 431 (discussing extraordinary length of two Oregon ballot pamphlets—1908, 126 pages; 1910, 210 pages); Holman, *supra* note 100, at 282; McCall, *supra* note 95, at 170-73; Munro, *supra* note 74, at 34-35. See text accompanying note 86 *supra*.

legislature.¹⁰⁶ One critic has observed that the public cannot vote as intelligently as its representatives, who by profession are better qualified to make policy decisions.¹⁰⁷ A final factor that may assist special interests in influencing direct legislation is the inherent prejudice of the voters. Review of an early initiative and referendum elections, for example, revealed distinct prejudices against corporations and in favor of labor, so long as the workers were not part of a powerful labor organization.¹⁰⁸

Some opponents of direct legislation have urged that minority interests without the resources to act as a bloc at the polls can be stifled by the majority if direct legislation is available.¹⁰⁹ Aggravation of this problem occurs when their needs conflict with those of powerful special interests. Others believe direct legislation to be a misdirected effort. The real problem, they contend, is careless selection of public officials by the voters.¹¹⁰ Opponents reason that if the people cannot choose representatives wisely, they cannot be expected to do better in considering numerous and complex proposals.¹¹¹

D. Considerations Peculiar to States Permitting Only Constitutional Initiatives¹¹²

If a state permits amendment by initiative of its constitution and does not permit statutory initiative, several considerations suggest that the latter procedure also should be made available. First, when constitutional amendment is the only way the voters can exercise direct law-making power, the state's constitution may accumulate numerous provisions that are statutory rather than constitutional in nature. This phenomenon may have occurred already in Florida.¹¹³ Inclusion in the

106. Campbell, *supra* note 95, at 430-31; Munro, *supra* note 74, at 39. See generally S. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND 48 (1955).

107. E. OBERHOLTZER, *supra* note 98, at 500.

108. Munro, *supra* note 74, at 37. Since inherent voter prejudices can be dispelled only by educating the voter, the debate of issues prompted by a popular legislation system may tend to reduce voter prejudice. See note 137 and accompanying text *infra*.

109. Schumacher, *Thirty Years of the People's Rule in Oregon: An Analysis*, 47 *POL. Sci. Q.* 242, 243 (1932) [hereinafter cited as Schumacher].

110. Munro, *supra* note 74, at 25.

111. R. LUCE, *supra* note 2, at 633.

112. Substantive suggestions and research assistance for Section III-D were provided by the *Florida State University Law Review*.

113. Florida's Sunshine Amendment is the only measure enacted under Florida's constitutional initiative provision. FLA. CONST. art. II, § 8. It was proposed by Governor Reubin Askew after repeated unsuccessful efforts to secure a strong financial disclosure state. See Address by Governor Askew, *Florida Bicentennial Democratic Convention*

state constitution of measures the legislature or Governor have stopped from legislative enactment is not necessarily an evil in itself,¹¹⁴ although it runs counter to an historic desire to limit the state's primary governing document to simple and essential provisions.¹¹⁵ Second, amendment of a constitutional provision is typically more difficult than amendment of a statute,¹¹⁶ so an initiated amendment to the state constitution may be difficult to change. Third, and perhaps most important, the adopted measure is constitutional as opposed to statutory law. As a part of the supreme law of the state, such a measure overrules all statutes with which it is in conflict, and would be on the same level as the historic constraints on governmental action—due process and equal protection, for example—instead of being subject to their limitations. Indeed, it is possible that the courts might view an initiated amendment with provisions for easy alteration¹¹⁷ as more than a statute but less than a part of the constitution. Although recognition of such a body of subconstitutional law might avoid some of the perils of making a measure that is statutory in nature a part of the constitution, it would increase the uncertainty in navigating the relationships among the different types of laws by adding yet another level to the proliferating hierarchy of laws.

Theoretically, it makes good sense to accord the voters a direct voice in the resolution of fundamental issues normally addressed in a state constitution while leaving to the legislature the more "technical" issues such as those associated with statutory enactments. But as a practical matter, it is rather difficult to describe categorically those matters that are appropriate or inappropriate for expression in the state's constitution.¹¹⁸ Experiences in Florida with the constitutional initiative concerning topics ranging from restructuring the legisla-

(Orlando, Fla., Nov. 15, 1975). It is unclear whether the Amendment should have been included in the constitution in its entirety. On the one hand, Governor Askew obviously felt the measure was appropriate for statutory treatment. On the other hand, a financial disclosure law is the sort of provision that may be strongly opposed by the legislators it regulates and should be included in the Constitution in toto to assure its preservation. The Florida Sunshine Amendment, however, allows for modification by the legislature—surely an unusual constitutional provision. FLA. CONST. art. II, § 8(h).

114. Some items statutory in form, either by reason of their content or because of their detail or specificity, probably belong in the constitution where they are less vulnerable to legislative tampering. For example, items such as disclosure laws or initiative and referendum provisions, which might be viewed as contrary to the personal interests of the legislators, may belong in the constitution in relatively full detail.

115. See generally Sturm, *supra* note 7.

116. See Table I.

117. E.g., Florida's Sunshine Amendment. FLA. CONST. art. II, § 8.

118. See generally Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968).

ture¹¹⁹ to financial disclosure¹²⁰ to insurance¹²¹ illustrate the difficulty in deciding whether an initiated measure merits inclusion in the constitution. Unfortunately, it appears there is no workable constraint to prevent proposal of a constitutional initiative so long as its validity depends on some constitutional precept. Because proponents of measures that are the proper subject of statutes should not be induced to convert their measures into constitutional initiatives,¹²² the statutory initiative should exist whenever constitutional initiative is available.

The preceding discussion suggests that the statutory initiative should be available to prevent the abuse of the constitutional initiative, but it does not follow that when constitutional initiative is available, legislative initiative must be relatively easier. Making the two procedures equally difficult might avoid the repeated use of the easier procedure simply to improve the chances of success at the expense of properly categorizing measures as statutory or constitutional. Whether an initiated proposal belongs in the state's constitution or statutory law is a question for the citizens alone to decide; no branch of government, even the courts, should be permitted to intervene.

IV. EXPERIENCE OF THOSE STATES PERMITTING DIRECT LEGISLATION

More than a half century of experience affords some concrete data that can be applied to the arguments for and against direct legislation. Commentators have observed that initiative and referendum

119. In 1970, petitions were circulated proposing a unicameral legislature for Florida. That effort was thwarted by a Florida Supreme Court declaration that a separate petition and separate amendment would be necessary to eradicate each reference in the constitution to the bicameral scheme. *Adams v. Gunter*, 238 So. 2d 824, 831 (Fla. 1970). Although art. XI, § 3 later was amended to permit "revision or amendment of any portion or portions" of the constitution, thus overruling *Adams*, the petition drive for a unicameral legislature was not revived.

120. See note 113 *supra*.

121. Dissatisfied with the 1977 state legislature's rejection of his proposed insurance program, see *The Florida Times-Union*, Aug. 10, 1977, § B, at 2, col. 1; *id.* May 19, 1977, § A, at 1, col. 2, and unsuccessful in his efforts to persuade Governor Askew to veto the insurance program enacted by the 1977 Legislature, see *id.*, June 5, 1977, § B, at 3, col. 1, Florida Insurance Commissioner William Gunter announced he would utilize the constitutional initiative to secure the approval of his proposed package. See, e.g., *Miami Herald*, April 22, 1977, § A, at 20, col. 1; *Florida Times-Union*, Aug. 10, 1977, § B, at 2, col. 1. Commissioner Gunter's apparent preference for statutory enactment and the relatively narrow scope of his proposal suggest that the proposed insurance program may not be suitable for the state's constitution. On the other hand, the insurance plan proposes elimination of a right to recover damages for pain and suffering in automobile accidents. Because the Florida Supreme Court has invalidated similar statutes in the past under the access-to-courts theory, *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9 (Fla. 1974), a constitutional amendment would obviate another invalidation. See generally Note, *Access to Courts*, 5 FLA. ST. U.L. REV. 871 (1977).

122. E.g., Florida's Sunshine Amendment. FLA. CONST. art. II, § 8(h).

generally prompted lawmakers to be more attuned to the will of the electorate¹²³ and to abstain from the passage of radical legislation.¹²⁴ Greater participation in government by public-minded citizens has not occurred to the extent envisioned by supporters, apparently because initiative and referendum have been used less often than at first expected.¹²⁵ Direct legislation has promoted voter education, but probably not to the extent claimed by early advocates.¹²⁶ For example, the only commentator who considered whether direct legislation stimulated public interest decided that it has not: voter ignorance was reflected in statistics indicating inconsistent votes cast on related measures, votes cast "no" more often than "yes," and frequent abstentions on direct legislation while votes were cast for candidates for public office.¹²⁷

Studies tend to reveal far more about the validity of critics' predicted effects of initiative and referendum. Direct legislation has not damaged representative government as feared,¹²⁸ although some legislatures were more hesitant to enact controversial measures in the years shortly after direct legislation was adopted.¹²⁹ Anarchy, the most feared result of direct legislation, has never resulted, and social welfare legislation has been created by the legislatures, not via the initiative.¹³⁰

Criticism directed at the operation of the direct legislation process itself has been substantiated in large part. A number of abuses have occurred that were not foreseen by the friends or foes of direct legislation. For example, a number of "giveaway" bills that had little likelihood of being enacted were placed on the ballot by political minority groups in California in the 1940's.¹³¹ These outlandish proposals prompted one commentator to propose that there be only an "indirect"

123. R. LUCE, *supra* note 2, at 632; Key & Crouch, *The Initiative and Referendum In California*, 6 PUBLICATION OF U.C.L.A. IN THE SOC. SCIENCES 423, 574-75 (1939) [hereinafter cited as Key & Crouch]. Key and Crouch indicated that legislatures acted in a more restrained manner in states offering direct legislation, but not to the extent forecast by some proponents of direct legislation. *Id.* at 570.

124. Key & Crouch, *supra* note 123, at 574.

125. *Id.* at 623.

126. J. LAPALOMBA, *supra* note 83, at 120; Munro, *supra* note 74, at 22.

127. Schumacher, *supra* note 109, at 258.

128. R. LUCE, *supra* note 2, at 621-22.

129. J. BARNETT, *THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON* 169 (1915) [hereinafter cited as J. BARNETT]; cf. Rappard, *supra* note 84, at 364-65 (recognizing Swiss legislators' timidity and suggesting it would be corrected by use of the initiative process).

130. See, e.g., Diamond, *supra* note 88, at 553-61 (a list by title of all initiative petitions passed in California between 1912 and 1975 reflecting only two successful initiatives suggestive of social welfare).

131. Some of these bills bore appropriate nicknames such as "Thirty on Thursday" and "Ham and Eggs." Smith, *Can We Afford the Initiative?*, 38 NAT'L MUN. REV. 437 (1949).

initiative, whereby all proposed measures would have to be considered by the legislature before being placed on a ballot.¹³² Under the indirect method, the legislature could propose an alternative measure, which would also appear on the ballot. Because the indirect process takes longer and stimulates more legislative debate, it also gives the voters an opportunity to consider the proposal more fully.¹³³ Other unexpected subjects have been placed on the ballot simply for polltaking purposes, a practice used most frequently during the social unrest of the 1960's.¹³⁴ Less obvious abuses, such as public misrepresentation,¹³⁵ "backscratching" between urban centers in a state,¹³⁶ and needless circumvention of the legislature¹³⁷ also have occurred sporadically.¹³⁸

The quality, in terms of both draftmanship and content, of laws adopted through the initiative process generally has equalled that of laws passed by the state legislature.¹³⁹ The fear that poorly conceived and prepared measures would reach the ballot, was however, not totally unfounded,¹⁴⁰ so the electorate probably should be credited with being able to recognize and reject unintelligent proposals consistently.

The claim that the direct legislation process would be just another medium for special interest politics has proved to be one of the most accurate. Initiative and referendum, however, do serve as a check on special interest groups.¹⁴¹ The power of special interests to affect the direct legislation process coupled with the ability of the public to recognize and reject self-serving proposals made by special interest groups has produced a standoff: generally, neither the average voters

132. *Id.* at 442.

133. *Id.* See note 31 and accompanying text *supra*.

134. See 5 CAL. W.L. REV. 148 (1968); 3 HARV. C.R.-C.L.L. REV. 183 (1967); 1968 UTAH L. REV. 464.

135. Diamond, *supra* note 88, at 463. This problem and others prompted passage of the California Political Reform Act of 1974. *Id.*; see notes 146-47 and accompanying text *infra*.

136. J. BARNETT, *supra* note 129, at 23-24. This author indicates that on at least several occasions the electorate of one Oregon city, expecting reciprocity in the future, would support a measure favoring another city.

137. Munro, *supra* note 74, at 19. Many measures that the author believed would have been enacted by the Oregon legislature were never placed before it.

138. For a compilation of subjects considered by one state's electorate, see Diamond, *supra* note 88, at 553-61.

139. J. LAPALOMBRA, *supra* note 83, at 111-12 (suggesting that legislative bill drafters for the special interests will be equally careful in drafting initiatives); cf. R. LUCE, *supra* note 2, at 628, citing J. BASS, THE GOVERNMENT OF OKLAHOMA 30 (n.d.) (early direct legislation in Oklahoma was neither radical nor hastily done.); Key & Crouch, *supra* note 123, at 565 (suggesting that the measures adopted in California reflect careful consideration by the voters).

140. See notes 102-04 and accompanying text *supra*.

141. J. LAPALOMBRA, *supra* note 83, at 117-19.

nor the powerful special interests have allowed enactment of measures injurious to them.¹⁴² On the other hand, measures which are opposed primarily by the inertial attitudes of government bureaucrats and those which only incidentally favor special interests find success at the polls.¹⁴³ In spite of the power wielded by special interests, the use of the initiative process has forced public debate and brought new problems and issues to public attention.¹⁴⁴ The ability of special interests to block legislation by propaganda campaigns may be offset considerably by the appearance of citizens' action groups.¹⁴⁵ Recently California voters broke through the special interest barrier in passing the Political Reform Act of 1974.¹⁴⁶ This Act, which received nearly seventy percent of the vote, has been described as the most comprehensive reform in California politics since adoption of initiative and referendum in 1911.¹⁴⁷

The alleged shortcomings of direct legislation that would facilitate control by special interests also have been substantiated to a considerable degree. In the two studies considered, more than twenty-five percent of those who voted at general elections did not vote on initiative or referendum measures on the ballot.¹⁴⁸ Commentators have concluded from these figures that more voters feel competent to vote for political candidates than for measures,¹⁴⁹ and that well-organized special interests have too much power, whether or not that power is exercised.¹⁵⁰ Proponents have countered that a minority of all qualified voters usually select representatives anyway,¹⁵¹ and it is a sign of voter intelligence to abstain when a measure is not understood. A study indicating that simpler measures receive more votes suggests that

142. Key & Crouch, *supra* note 123, at 567, 569.

143. *Id.* at 567, 573.

144. J. LAPALOMBRA, *supra* note 83, at 110.

145. For example, the following groups banded together to draft and promote the Political Reform Act, discussed in note 135 *supra* and text accompanying notes 146-47 *infra*: People's Lobby, Office of the California Secretary of State, California Common Cause, NAACP, Ripon Society, Sierra Club, Women for the Political Reform Act, National Women's Political Caucus, Stamp Out Smog, Forum on Open Government, American Friend's Service Committee on Legislation, and Ralph Nader's California Citizen Action Group. Diamond, *supra* note 88, at 463 n.41.

146. CAL. GOV'T CODE §§ 81000-91014 (West 1976); see Diamond, *supra* note 88.

147. Diamond, *supra* note 88, at 454; see Steck, *California Legislation: Sources Unlimited*, 6 PAC. L.J. 536, 545 (1975).

148. Schumacher, *supra* note 109, at 245 (based on 30 years' experience in Oregon); Address by Arthur Schwartz, director of Ohio Legislative Reference Bureau (40 years' Ohio experience), to National Conference on Government (Nov. 28, 1951), *printed in* 41 NAT'L MUN. REV. 142, 145 (1952) [hereinafter cited as Schwartz Address].

149. Schumacher, *supra* note 109, at 245-46.

150. Key & Crouch, *supra* note 123, at 572; Schumacher, *supra* note 109, at 257. To illustrate, it was found that over a period of 30 years two-thirds of all measures were adopted or rejected by a minority of Oregon voters. *Id.* at 252.

151. J. LAPALOMBRA, *supra* note 83, at 112-14.

proposal complexity, as well as voter apathy, reduces voter participation.¹⁵²

In the past, many voters who have not understood a measure have guessed, voted "no," or voted to perpetuate the status quo.¹⁵³ During the early years of direct legislation, both the complexity and the large number of ballot proposals rendered proper voter consideration an impossibility.¹⁵⁴ The smaller number of direct legislation measures on recent ballots¹⁵⁵ plus the distribution of voter pamphlets,¹⁵⁶ however, probably has resulted in better voter understanding.

The majority generally has not vented its prejudices through the direct legislation process (as some had feared), and the courts have not hesitated to invalidate objectionable laws adopted through use of the initiative.¹⁵⁷ Indeed, direct legislation can function effectively as a medium for agitation by minorities that lack the political clout to prevail at the polls. While these minorities may not succeed immediately, their needs become widely known and no longer can be ignored by state legislators.¹⁵⁸

V. OBSERVATIONS AND CONCLUSIONS

The strongest practical¹⁵⁹ criticism of direct legislation is that it does not alleviate the distortion of the political process caused by special interest groups. Experience has shown, however, that the voters can distinguish self-serving special interest legislation and almost uniformly reject it.¹⁶⁰ Perhaps a more serious problem is posed by the measure that is not intended to meet the selfish needs of a special interest, but simply may be unwise legislation. Fortunately, many such measures never appear on the ballot because inadequate voter interest exists to obtain the required petition signatures. Because of the cumbersome process that must be hurdled before a measure is placed on the ballot, no measure without considerable voter appeal or

152. Schumacher, *supra* note 109, at 247.

153. *Id.* at 251.

154. BARNETT, *supra* note 129, at 91.

155. See Diamond, *supra* note 88, at 553-61; Schwartz Address *supra* note 148, at 145.

156. Voter ballot pamphlets typically are distributed to voters shortly before election day. The pamphlet explains the measure in detail and includes arguments for each side. See e.g., CAL. ELEC. CODE § 3567.5.

157. For an example of recent state supreme court activity, see Diamond, *supra* note 88, at 460 & n.33. The initiated statute has a presumption of validity equal only to a legislative statute. See text accompanying notes 65-69 *supra*.

158. Key & Crouch, *supra* note 123, at 569.

159. The theoretical positions set forth in text accompanying notes 82-122 *supra* cannot be resolved in an empirical review such as this. Because the concepts are not mutually exclusive, it seems unnecessary to take a position on the question.

160. See notes 141-42 and accompanying text *supra*.

the support of special interests is likely to succeed. Voter education is another key to the effectiveness of direct legislation. Some of the electorate has voted unintelligently in the past, but not in sufficient numbers to enact any of the more undesirable measures considered. The indirect initiative¹⁶¹ clearly would ameliorate the voter education problem by giving the legislature a chance to propose an alternative to the voters.¹⁶² Although the corruption of legislatures at the beginning of this century prompted the adoption of direct legislation, the honesty and intelligence of the legislature at any given time should not be the primary measure in considering whether to adopt a direct legislation procedure. Rather, the enduring issues that focus on the workability of direct legislation should be decisive.

Unanswered questions remain regarding the wisdom of providing for statewide initiative and referendum. Although experience suggests that the people have not acted brashly through direct legislation, the continuance of that record is hardly guaranteed. Furthermore, the legislator, even if subject to intense pressure from special interests, may legislate in a consistently superior fashion because of experience and insight.

Direct legislation procedures encourage greater responsiveness by legislatures to the desires of the electorate. If the voters have the power to act when the legislature does not act, legislators would feel that their actions were under closer scrutiny and would pay closer attention to the concerns of their constituents. Even if a legislator felt he must vote his conscience rather than the desires of his constituents, the threat of action through direct legislation would prompt the legislator to explain his reasons to the electorate more fully.

An additional argument in favor of the statutory initiative applicable to states such as Florida that already permit constitutional initiatives, is premised on the views that the state constitution should contain only fundamental measures¹⁶³ and that all but a small proportion of a state's laws should take the form of statutes or regulations. The absence of a statutory initiative channels the impetus for direct legislation into the constitution.¹⁶⁴

The initiative and referendum power is by no means a panacea for the ills of government. Certainly the success of direct legislation pro-

161. See notes 31-35 and accompanying text *supra*.

162. For a discussion of the merits of indirect initiative, see Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922 (1975).

163. See generally Grad, *supra* note 119; Sturm, *supra* note 7.

164. For example, this diversion of statutory measures may have occurred in Florida. Commissioner Gunter's insurance proposal is the best example. See note 122 *supra*. Florida's Sunshine Amendment, because it can be amended by the legislature, possibly should have been a statute also.

cedures depends upon the degree of public dedication to better government, and the procedures can never be invoked without considerable resources and assertive civic leaders. The inherent shortcomings of direct legislation, however, are no greater than those encountered in the legislative mode. The potential benefits achievable through affording a direct popular voice in the government and encouraging increased responsiveness on the part of the legislature are worth the possible costs.

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