

## Expanding Direct Democracy in the US: How Far is Too Far?<sup>1</sup>

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The United States stands as one of the few well-established democracies to have never held a national vote on a major question of public policy. This reflects the fact that the US continues to operate under Constitutional arrangements that are shaped, largely, by structures that pre-date the contemporary expansion of democratic practices. Although various amendments to the US Constitution have transformed American politics in ways that have expanded popular democracy, little has been added to the Constitution that increases the scope of what citizens may decide upon in federal elections.<sup>2</sup>

This constrained use of popular democracy in America at the national level stands in contrast to expanded use of direct democracy in many other advanced democracies. Governments in nearly all European nations have referred major policy issues to voters in the past decade.<sup>3</sup> Even Britain, from where America inherited its tradition of constrained

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<sup>1</sup> Paper prepared for The Democracy Symposium. Williamsburg, VA. February 16 - 18.

<sup>2</sup> Expansion of popular democracy beyond the original "Madisonian model" may be found in the 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup> (senate election methods), 19<sup>th</sup> (suffrage), 23<sup>rd</sup> (electors for DC), 24<sup>th</sup> (poll tax), and 26<sup>th</sup> (voting age) amendments. These amendments generally 1) expand rights of franchise directly or via creating national standards of citizenship. Only the 17<sup>th</sup> and 23<sup>rd</sup> amendments explicitly expanded the scope of what voters could decide upon.

<sup>3</sup> See Matthew Mendelsohn and Andrew Parkin (eds.) 2001. *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns*. London: Palgrave, and David Butler and Austin Ranney (eds.) 1994. *Referendums Around the World: The Growing Use of Direct Democracy*. Washington, DC: AEI Press. Recent examples include votes on various treaties associated with European integration. See for example Andres Todal Jenssen and Ola Listaug. 2001. "Voters Decisions in the Nordic EU Referendums of 1994" in Mendelsohn and Parkin (eds.); and Simon Hug. 2000. "Referendums on European Integration: Do Institutions Matter in the Voter's Decision?" *Comparative Political Studies*. 33:3-36. Other examples include votes on divorce in Ireland and Italy, abortion in Ireland, on Spain joining NATO, nuclear power in Sweden in 1980, and Senate reform in France in 1969. See Shaun Bowler and Todd Donovan. 2001. "Popular Control of Referendum Agendas" in Mendelsohn and Parkin (eds.)

popular democracy, has used regional referendums to decide issues of political devolution. Governments in other British-influenced democracies, including America's northern neighbor, Canada, and Australia, referred major constitutional questions to a national vote in the past decade.<sup>4</sup> Use direct democracy has also expanded in New Zealand, where since 1993, citizen petitions may be used to qualify advisory initiative measures for a national vote. A majority of Canadians and New Zealanders support national referendums and initiatives.<sup>5</sup>

Constraints on popular democracy in the US also stand in conflict with popular opinion in the US and other nations. Majorities of survey respondents in 14 European nations support the Swiss model of direct democracy<sup>6</sup> and various polls show majorities of Americans also support the use of direct democracy at the national-level. As the American publics' perceptions of Congress have soured,<sup>7</sup> public regard for the initiative process remains firm. Unlike most other advanced democracies, however, the American

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<sup>4</sup> Australians have voted on dozens of national matters, and most recently rejected a constitutional proposal to switch from a monarchy to a republic in 1999 (see Brian Galligan "Amending Constitutions through the Referendum Device" in M. Mendelsohn and A. Parkin (eds.) *On the 1992 Canadian referendum*, see Richard Johnston, et al. 1996. *The Challenge of Direct Democracy*. Montreal: McGill-Queens University Press.

<sup>5</sup>The 1999 New Zealand Election study found 65% agreed that referendums were "good things." Fifty-five percent gave this response in a 2000 Canadian poll. Only 1% in New Zealand, and only 8% in Canada, agreed that referendums were "bad things." The NZ data is available at <http://www.nzes.org>. The author thanks Matthew Mendelshon of Queens University for placing this question on his Canadian poll. Use of direct democracy in each nation is discussed in S. Bowler, T. Donovan and J. Karp. 2000. "When Might Institutions Change? Elite Support for Direct Democracy in Three Nations." Paper presented at the International Political Science Association Congress. Quebec City. Aug 2-6.

<sup>6</sup> On Europe, see Russell Dalton, Wilhelm Burkin and Andrew Drummond. 2001. "Public Opinion and Direct Democracy." *Journal of Democracy*. 12(4): 141-153. Of those who were familiar with the Swiss system, over 66% of respondents in most nations agreed it should be considered for their own nation.

<sup>7</sup> John Hibbing and Elizabeth Theiss-Mores. 1995. *Congress as Public Enemy*. New York: Cambridge University Press. They find that only 24% of Americans approved of Congress as "the collection of members" but that 88% supported Congress "the permanent institution." (p. 106). Approval (of members of Congress) has increased dramatically since September 11, 2001.

public's desire for expanded democratic practices have not been satisfied with any use of direct democracy at the national level.<sup>8</sup>

In many western American states, however, initiatives play a major role in governing. As initiative use has exploded in many states citizens have remained supportive of the initiative process.<sup>9</sup> A body of recent scholarship suggests initiatives can produce a modest increase in voter turnout, as well as increase the public's engagement with democracy.<sup>10</sup> Surveys reveal that familiarity with direct democracy does not breed contempt for its expanded use. A recent poll (spring 2000) of voters in Washington state found 78% thought that initiatives were a "good thing." Sixty-nine percent of California respondents offered the same evaluation in 1996, as did 62% of Arkansas voters in 2000. Sixty-three percent of Washington voters also supported expanding initiative use to the national level.<sup>11</sup> Another recent poll found 68% of Americans supported having initiatives at the state level, with 57% supporting a national initiative. In 1987, a Gallup conducted a poll for Thomas Cronin found that 58% of respondents supported a national

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<sup>8</sup> On the mass public's desire for greater participation in government in many democratic nations, see recent books by Ian Budge, Pippa Norris, and Ronald Inglehart.

<sup>9</sup> On trends in use of initiatives in the US, see David Magleby. 1994. "Direct Legislation in the American States." In Butler and Ranney (eds.). See also S. Bowler, T. Donovan and C. Tolbert (eds.). 1998. *Citizens as Legislators: Direct Democracy in the American States*. Columbus, OH: Ohio State University Press.

<sup>10</sup> On turnout see C. Tolbert, J. Grummel and D. Smith. 2001. "The Effects of Ballot Initiatives on Voter Turnout in the American States." *American Politics Review*. 29(6)625-48; On engagement, S. Bowler and T. Donovan. 2002. "Democracy, Institutions and Attitudes about Citizen Influence on Government." *British Journal of Political Science*. 31:000-000. (in press).

<sup>11</sup> Washington data are from the author's statewide polls, conducted by Applied Research Northwest in 1999. California data from a 1996 Field/California Poll (F9604). The author thanks Janine Parry for placing initiative questions on the 2000 Arkansas Poll. In these polls, respondents were asked if they thought referendums "were good things, bad things, or neither good nor bad?" Only 3% in Washington, 7% in California, and 2% in Arkansas agreed that they were "bad things."

*advisory* initiative process, with 48% supporting a national "referendum." Another recent poll found more support for a binding national initiative than for advisory votes.<sup>12</sup>

This array of public opinion data - usually showing strong support for general principles of direct democracy - should not detract from the fact that widespread approval of the initiative process coexists with worries, among voters and elected officials in west coast states, about the health of the initiative process as it is now used. In these states where initiatives are widely used, voters and legislators agree that the process needs reform - however they do not agree much about how the process should be improved. They agree that initiatives often make bad laws, and that campaigns are misleading. They agree that some public official or public office should take a more active role, *before the election*, to review the constitutionality of measures prior to a public vote. Beyond that, voters and representatives disagree. Legislators desire greater ability to affect or amend initiative decisions after voters approve them - voters, not surprisingly, are opposed to this. In 1997, a majority of California voters expressed support for requiring super-majorities to pass initiatives, and a near majority supported having legislators cast votes on measures before the public.<sup>13</sup>

Any proposal to expand the citizen's initiative to the national level should take seriously the west coast experience with direct democracy. We must ask ourselves what the west coast experience says about how a national initiative process should be designed. The Democracy Act proposed by Philadelphia II does attempt to address some of the

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<sup>12</sup> Recent national data on attitudes about initiatives were obtained from Dane Waters of the Initiative and Referendum Institute, who commissioned Rasumssen Research to conduct a poll in 2000. Other national polls about national initiatives and referendum or on the IRI we site (<http://www.iandrinstute.org>).

<sup>13</sup> These statements are based on the author's survey of legislators from California, Washington and Oregon, and voter opinion polls from California and Washington. See S. Bowler, T. Donovan, M. Neiman and J. Peel. 2001. "Institutional Threat and Partisan Outcomes: Legislative Candidates Attitudes toward Direct Democracy." *State Politics and Policy Quarterly*. 1(4): 364-379.

concerns about initiative use found on the west coast.<sup>14</sup> Provisions of the Act regulate PAC and corporate spending on initiative measures, and require clear identification of those who spend money on initiative campaigns. If this produces solid information about initiative sponsors while not choking off funding needed for vigorous campaigns, it may create a national electoral context that provides for informed voter choice. This could, in theory, even be an improvement on the initiative electoral context that exists in initiative states at present.<sup>15</sup>

Many other provisions in the Act may be problematic, however, given experience with direct democracy in western states. In the section below, I consider some key provisions of the Act. I must stress that I am trained as a social scientist, not a lawyer. I approach the Act with a perspective shaped by the empirical literature on contemporary use of direct democracy in the American states. My perspective is also informed, generally, by my reading of public opinion. In general, I fear the Act would place too many measures before voters - overwhelming their ability to make reasonable decisions. Statutory and Constitutional changes may also be approved by bare majorities, regardless of turnout. This threatens the political legitimacy of decisions made by initiative. The low barriers for qualification and enactment may also make it difficult for

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<sup>14</sup> For broad overviews of problems with California's initiative process, see California Commission on Campaign Financing. 1992. *Democracy by Initiative: Shaping California's Fourth Branch of Government*. Los Angeles: Center for Responsive Government; E. Gerber. 1995. "Reforming the California Initiative Process: A Proposal to Increase Flexibility and Legislative Accountability" in B. Cain and R. Noll (eds.) *Constitutional Reform in California*. Berkeley: IGS Press. Peter Schrag. 1998. *Paradise Lost: California's Experience, America's Future*. New York: New Press.

<sup>15</sup> On the importance of voter knowledge of initiative sponsors, see Arthur Lupia. 1994. "Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections." *American Political Science Review*. 88:63-76; On effects of information and campaign spending, see S. Bowler and T. Donovan. 1998. *Demanding Choices: Opinion, Voting and Direct Democracy*. Ann Arbor, MI: University of Michigan Press, and Elisabeth Gerber and A. Lupia. 1995. "Campaign Competition and Policy Responsiveness in Direct Legislation Elections." *Political Behavior*. 17:287-306.

citizens and their representatives to govern effectively. Some changes to the Act, suggested in my conclusion, might provide a remedy for the issues I identify below.

**Section 2.** The Act states that its provisions regulating direct democracy would apply to every governmental jurisdiction in the US. This suggests that it would supercede state and local provisions for initiative and referendum in places that currently use them. This would eliminate existing local/state discretion in setting provisions for use. It also stands as a radical departure from federal principles in the US Constitution. As the 2000 Presidential election demonstrated, the US does not have federal standards for conducting elections. This provision would seem to establish sweeping national standards for direct democracy elections, while retaining the federal nature of other elections. Given that public support for initiative use at the state level exceeds support for its use nationally, this provision may actually generate hostility from areas that have their own, existing standards for direct democracy.

**Section 3A.** "Matters of public policy." Does this mean administrative matters are to be made subject to citizen initiatives and referendum? An expansive definition such as this, if applied as a national standard, could provide for a dramatic expansion of initiative use in states and communities with active direct democracy at present. Consider that the popularly elected state Supreme Court of Washington state, for example, interprets the state's Constitution to limit the use of local initiatives to matters that are deemed "legislative" as opposed to "administrative" actions. One major impact of this is limiting the type of land use questions that voters may place on their local ballot. In Washington, amendments to existing zoning plans and rezone decisions are considered administrative, and are not subject to initiative and referendum. Oregon, Utah, and other

states also limit initiatives to general ordinance matters, not decisions on specific pieces of property.<sup>16</sup> The Act, it would seem, expands direct democracy to every micro-level decision about local land use and zoning. (see also Section 4. E. 1). Over-zealous use of local land-use initiatives have the potential to create greater segregation by race and class.<sup>17</sup>

**Section 3.** The Act does not include specific limitations on subject matter, other than a single-subject clause. Several American states may suffer from fiscal crises brought about by initiatives that limit the legislatures ability to set long-term budget goals.<sup>18</sup> Although initiatives may bring some state policies to more closely match the state's voters' preferences,<sup>19</sup> the initiative process is not well-equipped for matching public preferences over revenue sources (taxation, debt) with public preferences for spending on specific programs. Individual tax initiatives and spending initiatives can serve as an effective ways for the public to send signals to legislators about their preferences, but these discrete ballot measures cannot substitute for the legislative budget process.

If legislators are given the ability to amend initiatives, particularly fiscal measures, initiatives may complement the legislative budget process. However, if multiple, discrete fiscal issues can be decided by initiative and enshrined permanently

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<sup>16</sup> The relevant case in Washington is *Leonard v. City of Bothel* (1976). Roger Caves. 1992. *Land Use Planning - The Ballot Box Revolution*. Newbury Park: Sage.

<sup>17</sup> On the racial effects of such local initiatives, see T. Donovan and Max Neiman. 1995. "Local Growth Control Policies and Changes In Community Characteristics." *Social Science Quarterly*. 76:780-793; Derrick Bell Jr. 1978. "The Referendum: Democracy's Barrier to Racial Equality." *Washington Law Review*. 54:1-29.

<sup>18</sup> Schrag 1998. T. Donovan and S. Bowler. 1998. "Responsive or Responsible Government?" in Bowler, Donovan and Tolbert (eds.).

<sup>19</sup> E. Gerber. 1996. "Legislative Response to the Threat of the Popular Initiative." *American Journal of Political Science*. 40:99-128. See also the dialogue between John Matsusaka and Hagen et al in *Journal of Politics*, November 2001.

into the Constitution, Congress would be left with no way to reconcile the inevitable contradictions that will arise from such initiatives. If California is any model, voters may happily approve indebtedness, tax cuts, and greater spending, but approve few new taxes. Research suggests that the long-run effect of initiative-influenced state fiscal policy may be greater indebtedness, more regressive taxation, and deterioration of credit ratings.<sup>20</sup> Voters will limit certain revenue streams while approving spending on some popular programs. Discrete initiative choices do not reconcile such contradictions - Congress must remain engaged in such activity.

**Section 3B.** Qualification is far too easy. These provisions allow for qualification in ways that are more permissive than what exists in any state today, and may be more permissive than what exists in any nation currently using direct democracy.<sup>21</sup> Most worrisome is the public opinion poll method. Survey research on public support for ballot proposals finds a rather consistent effect where respondents are prone to offer positive opinions about measures prior to campaigns and media discussion of the measures. These same surveys show that most voters have not even heard about proposals prior to being surveyed. Having little or no information about a measure, or a "non-attitude," they may nevertheless offer a yes or no response in a survey. When voters do become more informed about a measure over time (during the campaign phase), they

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<sup>20</sup> On regressive taxation see Donovan and Bowler. 1998. p. 260; D. Dwyer et al 1994. "Disorganized Politics and the Have Nots: Politics and Taxes in New York and California." *Polity*. 27:25-45. On indebtedness and credit, see Donovan and Bowler 1998 p. 262 - 4; James Clingermayer and B. Dan Wood. 1995. "Disentangling Patterns of State Indebtedness." *American Political Science Review*. 89:108-20.

<sup>21</sup> Only North Dakota is this permissive. Most initiative states require at least 5% to qualify statutory measures, and at least 8% for constitutional initiatives. In addition, several states add geographic distribution requirements to this. David Magleby. 1984. *Direct Legislation: Voting on Ballot Propositions in the United States*. Johns Hopkins University Press. P. 38.



form (or discover) preferences, and support for nearly all ballot measures erodes.<sup>22</sup> It seems there is a bias toward positive replies when proposals have not yet been vetted in any campaign.<sup>23</sup>

Moreover, research on those who sign initiative petitions finds that a substantial number of people (perhaps one-third) sign because they are persuaded that "the fair thing" to do is let the measure on the ballot - regardless of its content.<sup>24</sup> The difficult logistic context of petitioning requires that proponents round up vast numbers of signatures if they are to take advantage of this response effect. Even then, those signing may discuss the measure with petitioners, and read the text of the proposal. In random sample opinion surveys, these logistical difficulties are eliminated. Combine this with the response bias in early polls that tends to over-state actual support for measures, and this qualification method is a recipe for an avalanche of qualified initiatives.

**Section 3B.** Constitutional initiatives are far too easy. A body of political theory, and experience with democratic government, argue that constitutions should be relatively difficult to change. The Act allows for Constitutional amendments, on what seems to be any subject, and there are no clear provisions for legislative alteration of Constitutional initiatives. Experience with initiatives in the American states illustrates the difficulties involved with allowing initiatives that amend constitutions in ways that only voters may

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<sup>22</sup> Bowler and Donovan. 1994. D. Magleby. 1989. "Opinion Formation and Opinion Change on Ballot Proposition Campaigns." In Margolis and Mauser (eds.) *Manipulating Public Opinion*. Pacific Grove, CA: Brooks/Cole. Research on polling indicates that surveys will elicit replies, often positive, even if respondents have no clear preferences over the policy at issue. John Zaller and S. Feldman. 1992. "A Simple Theory of the Survey Response: Answering Questions vs. Revealing Preferences." *American Journal of Political Science*. 36:579-616; Herbert Asher. 1995. *Polling and the Public: What Every Citizen Should Know*. Washington, DC: CQ Press.

<sup>23</sup> S. Bowler and T. Donovan. 1994. "Opinion Change on Ballot Propositions." *Political Behavior*. 16:411-35.

<sup>24</sup> Thomas Cronin. 1989. *Direct Democracy*. Cambridge: Harvard University Press.

alter via a subsequent initiative.<sup>25</sup> The Act would establish a relatively easy way for groups to amend the US Constitution. The 5% qualification for Constitutional initiative amendments is a lower bar than exists in most American states that allow constitutional amendments. With this vehicle, at some point our parsimonious map of republican government could swell to match the ridiculous size of state constitutions. The concurrent majorities requirement in the Act does not restrict the number of measures that will qualify.

**Section 3F. Enactment and legitimacy.** Given that the bar for qualification is set so low, the bar for enactment of statutory initiatives would also seem too low if outcomes are to be seen as legitimate.

Outcomes of representative processes may be politically legitimate (to the mass public) regardless of whether any sort of popular majority approved the outcome. Rather, legitimacy of representative outcomes depends upon a public process that accommodates many interested parties and groups (i.e. pluralism). When the public suspects the legislative process is corrupted, legitimacy suffers. However, legitimacy in Congress does not depend upon bills being approved by a coalition of legislators who claim to have been elected by an actual national majority of voters. Rather, it is reasonable to assume that the public sees Congressional outcomes as legitimate when it deems the legislative process to be acceptable. The public probably does not think that one group of legislators is not legitimate because fewer people voted for them than voted for another group of legislators of equal size.

In contrast, the legitimacy of direct democratic outcomes rests not as much on process, but on the fact that the outcome was endorsed by a popular majority. Initiative

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<sup>25</sup> E. Gerber. 1995.

outcomes are only legitimate if this condition holds. But what sort of enactment rules provide for legitimate majority approval of an initiative? The legitimacy of a "majority" is contingent upon how many citizens participate in the decision. As noted above, provisions of the Act may lead to a large number of issues placed before the voters. Although initiatives may increase turnout, particularly in low-turnout elections, there comes a point when voters will be overwhelmed by too many initiatives. Many voters skip the less salient measures placed on state ballots. With turnout in the US low to begin with, this means that many initiative measures are enacted with far less support than what elected officials receive.<sup>26</sup>

**Section 3 G. Judicial Review.** This is, perhaps, the single most troubling element of the Act. With this clause, and with the Act's provision for relatively easy Constitutional amendments, this proposal is essentially a wholesale revision of the US Constitution. The lack of judicial review, in particular, would seem to over-ride the Guarantee Clause of Article 4, Section 5 of the US Constitution. This combination could spell the end of republican government and of the separation of powers.<sup>27</sup> Does it not wholly end the Madisonian system of democracy that served us for so long? Without judicial review, what protections are left from the Bill of Rights? What is to stop a citizen initiative from disbanding the legislature, or radically increasing the powers of the executive branch? As noted above, voters in American initiative states that actively use initiatives desire greater independent legal review of initiatives than exists at present.

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<sup>26</sup> S. Bowler, T. Donovan. T. Happ. 1992. "Information, Voter Fatigue and Ballot Proposition Voting." *Western Political Quarterly*.

The concerns detailed above should not be read as a condemnation of the general principles of the Democracy Act. Rather, I hope they shed light on some points of criticism that will be raised by those who are sympathetic to the idea of a national initiative process for the US. The Act might be less vulnerable to critics if some of the following changes were considered.

1) Re-design provisions for Constitutional initiatives. Direct public influence over amendments to the federal Constitution might be better served with the Canadian or Australian models, where direct national votes are held to approve amendments referred by the legislature.

2) Do not abandon federalism. Consider some method of providing local discretion for setting standards for use of local direct democracy - or focus the Act on establishing a national initiative and referendum process exclusively.

3) Consider revising provisions regulating qualification. Eliminate the opinion poll method for qualification. Initiative petitioning over the Internet might reduce qualification costs sufficiently and make this provision moot.

4). Provide for judicial review. Even after the Supreme Court's selection of the President in *Bush v. Gore*, voters still have great regard for the judiciary, and for separation of powers.

5) Consider a turnout threshold, as used in Italy, as an additional requirement for approving national initiatives.

6) Prevent national initiatives on fiscal matters.

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<sup>27</sup> On concerns about the relationship between initiatives and protections of republican governments, see Hans Linde. 1989. "When is Lawmaking not Republican Government." *Hastings Constitutional Law Review*. 17: 159-73.

7) Keep Congress into the mix. Legislative hearings may be held prior to advisory votes. Congress should be authorized to amend initiatives after some fixed period of time.