Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition

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ARTICLES

REPRESENTATIVE GOVERNMENT AND POPULAR DISTRUST: THE OBSTRUCTION/FACILITATION CONUNDRUM REGARDING STATE CONSTITUTIONAL AMENDMENT BY INITIATIVE PETITION

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The Guardians must have both [savage and tame] natures . . .

— Plato

Vox populi, vox dei.

— Alcuin

Because, if the essential rights of sovereignty . . . be taken away, the commonwealth is thereby dissolved . . . , it is the office of the sovereign to maintain those rights entire, and consequently against his duty . . . to transfer to another or to lay from himself any of them.

— Thomas Hobbes

There can be but one supreme power which is the legislative . . ., yet, the legislative being only a fiduciary power to act for certain ends, there remains still in the people a su-

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3. T. Hobbes, Leviathan 262 (H. Schneider ed. 1958) (1st ed. 1651). Cf. Plato, supra note 1, at 145 ("Since [the people] are free from faction among themselves, there won't ever be any danger that the rest of the city will split into factions against [the Guardians. . . "]

preme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them.

— John Locke

A republic . . . refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

— James Madison

On the other hand, . . . men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, corruption, or other means, first obtain the suffrages, and then betray the interests of the people.

— James Madison

INTRODUCTION

Representative government in America is under both active and passive attack. Unlike the recent historical period during which frustration with legislative outputs was reflected

5. The Federalist No. 10, at 82 (J. Madison) (C. Rossiter ed. 1961) [hereinafter Federalist 10].
6. Id.
7. Within the category of “active” attack, I include not only to the “recent explosion in the use of the devices of direct democracy, including the . . . initiative, referendum, and the recall,” May, State Constitutions and Constitutional Revision: 1988-89 and the 1980s, in Council of State Governments, The Book of the States 20, 20 (1990-91 ed.), but also to more structural attempts at reform, such as California’s, Colorado’s and Oklahoma’s decisions, pursuant to constitutional initiatives, to limit the terms of their state legislators, see Calif. Const. art. 4, §§ 1.5, 2; Colo. Const. art. V, § 3; Okla. Const. art. 5, § 17A, and Colorado’s decision, again pursuant to a constitutional initiative, to limit the terms of its United States senators and representatives as well. Colo. Const. art. XVIII, § 9a. See generally Cortez & Macauley, The Constitutionality of Term Limitation, 19 Colo. Law. 2193 (1990). In 1990, California also imposed term limitations on its governor, lieutenant-governor, attorney general, controller, secretary of state, treasurer, and superintendent of public instruction. Calif. Const. art. V, §§ 2, 11; id. art. IX, § 2. Oklahoma has gone still further in the area of structural reform, and has recently adopted a constitutional initiative depriving its legislature of the power to raise taxes absent popular ratification, unless three-fourths supermajorities in both houses concur. Initiative Petition No. 348, State Question 640 (Mar. 10, 1992) (to be codified at Okla. Const. art. V, § 33).
primarily in appeals to federal courts (in cases involving asserted violations of constitutional individual rights), the current attack stems from a perception by the general populace that in a less particularized manner, it is in many respects unrepresented by its representatives, and that its only recourse is not only ultimately but immediately to itself.

The present era is not the first in which such a perception has surfaced: at the turn of this century, the progressive reform movement, concerned, inter alia, with rampant corruption in the political system, directed popular frustration at politicians, political institutions, and interest groups. At the federal level, its influence was reflected by the enactment of substantive provisions such as the antitrust acts, and procedural reforms such as the popular election of senators and women's suffrage.

At the state level, the progressive movement was successful in effectuating portions of its substantive agenda as well. Most notable for present purposes, however, were the reforms sought (and in many cases obtained) in state political systems, including direct primary elections; cross-filing therein; preclusions of party endorsements at the primary level; secret

By "passive" attack, I refer to voter apathy, electoral nonparticipation, and the increasing degree of general alienation from (any cynicism concerning) the political process as a whole. See, e.g., Loth, Voting Their Anger: U.S. Election Results are Bad News for Bush, Boston Globe, Nov. 10, 1991, at A29:

Knitting together the disparate results [of the 1991 general elections] was a white-hot thread of public distrust with government, evidenced not just in the anti-incumbent trend but in the burgeoning number of initiative petitions and in radio airwaves fairly crackling with callers intent on bashing their leaders.

See generally infra notes 183-202 and accompanying text (assessing impact of my proposal on the quality and quantity of citizen participation in self-government).


11. U.S. Const. amend. XVII.

12. U.S. Const. amend. XIX.

13. Typical in this respect was the state maximum-hour legislation held unconstitutional in Lochner v. New York, 198 U.S. 45 (1905).
ballots; and the recall, referendum, and initiative. The statutory initiative, first enacted by South Dakota in 1898, became prevalent (largely in the western states) as a mode of enacting legislation by popular vote without legislative participation, and is now available in twenty-six states. In addition, seventeen states, now recognize the constitutional initiative, by virtue of which a specified number of voters may propose an amendment to the state constitution, which becomes effective (in most cases) upon a popular majority vote.

The modern era of popular distrust in representative government may be traced, more or less, to California’s enactment (pursuant to constitutional initiative) of Proposition

14. See, e.g., Briffault, Distrust of Democracy (Book Review), 63 Tex. L. Rev. 1347, 1348 (1985); Price, supra note 9, at 243-44.


16. Ariz. Const. art. XXI, § 1; Ark. Const. amend. 7; Calif. Const. art. XVIII, § 3; Colo. Const. art. V, § 1; Fla. Const. art. XI, § 3; Ill. Const. art. XIV, § 3 (authorizing constitutional initiative with respect to legislative article only); Mass. Const. art. XLVIII (with various subject-matter restrictions); Mich. Const. art. XII, § 2; Mo. Const. art. III, § 50; Mont. Const. art. XIV, § 9; Neb. Const. art. III, § 2; Nev. Rev. Const. art. 19, § 2; N.D. Cent. Const. art. III, § 1; Ohio Rev. Const. art. II, § 1a; Okla. Const. art. V, § 2; Or. Const. art. XVII, § 1; S.D. Const. art. XXIII, § 1. Concerning the historical evolution of state constitutional amendment processes, see generally Williams, State Constitutional Law Processes, 24 Wm. & Mary L. Rev. 169, 224 n.258 (1983) (citing sources).

17. The requisite number of signatures on constitutional initiative petitions ranges from 3%, see Mass. Const. art. XLVIII, to 15%, see Okla. Const. art. V, § 2, of some measuring election (typically, the last gubernatorial election). See generally May, supra note 7, at 44 (describing measuring elections in states possessing the constitutional initiative device).

18. But cf. Ill. Const. art. XIV, § 3 (either a majority voting in election, or 3/5 voting on amendment); Mass. Const. art. XLVIII (majority voting on amendment, provided that number is at least 30% of total voting in election); Neb. Const. art. XVI, § 1 (majority voting on amendment, provided that number is at least 35% of total voting in election); Nev. Rev. Const. art. 19, § 2 (majority voting on amendment in two consecutive general elections).

19. Unlike far too many commentators in virtually all disciplines, I will, in the interest of linguistic purity and clarity, see generally 1 Oxford English Dictionary 1828 (compact ed. 1971) (defining “modern”), resist the temptation to label the most recent period of relevance to my topic “postmodern.” Cf. Posner, What Has Pragmatism to Offer Law?, 63 S. Cal. L. Rev. 1653, 1654, 1660 (1990) (expressly recognizing the nonutility of overly general descriptive terms).
on June 6, 1978. On that day—by a two-to-one margin—the voters solved a fiscal problem that the California legislature had proved incapable of so doing: while the state government accumulated a large fiscal surplus, California homeowners were reaping an increasingly intolerable property tax burden. Moreover, the growth rate in local government expenditures was exceeding the consumer price index, and showed no sign of abating. Given rapidly increasing home values, even with a ceiling on tax rates, "[i]n order to alleviate rapid increases in homeowner property taxes, a more sturdy belt-tightening effort would have been required." But the legislature did not respond, and many urban homeowners were hit with tax bills that had doubled in a three to four year period. Two-thirds of the voters, sensing exploitation, did, however, respond, and the tax revolt was on.

While that revolt quickly spread (and its fires, in fact, still burn), the active attack on representative institutions was not confined to that issue. During the decade of the 1980s, while legislatively-generated state constitutional
amendments substantially declined, the number of constitutional initiative proposals rose to new heights: a record number of eleven such amendments—55% of those proposed—were enacted in 1988 and 1989 alone. Such modifications included a broad range of substantive and procedural reforms.

Nonetheless, the initiative process (as well as other political trends) continued to reflect pervasive popular distrust in republican institutions themselves. In 1984, for example, Cali-

27. May, supra note 7, at 20.
28. Id. at 20-21.
29. Noteworthy in this respect was the wholesale removal by the California electorate in 1986 of Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice Joseph R. Grodin from the California Supreme Court. The removals, in no small part, were due to the public perception that those justices were largely responsible for frustrating the execution of the death penalty, which the people had, by constitutional initiative, re-enacted some years before (reversing an antecedent California Supreme Court holding of unconstitutionality). See CALIF. CONST. art. I, § 27 (West 1983); People v. Ramos, 37 Cal. 3d 136, 153 n.6, 689 P.2d 430, 439 n.6, 207 Cal. Rptr. 800, 809 n.6 (1984) (historical context of constitutional initiative). See generally Egelko, Duke's Court, CAL. LAW., June 1987, at 28 (aftermath of judicial replacements). In 1990, the California electorate approved Proposition 115, see generally CAL. CONST. art. I, § 24 (portion of Proposition 115's text), captioned the "Crime Victims Justice Reform Act," which, in part, precluded California courts from interpreting state constitutional provisions protective of criminal defendants' rights more broadly than the equivalent rights in the United States Constitution are interpreted by the United States Supreme Court. This portion of the constitutional initiative was held to violate the California constitution in Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

Ironically, federal and state candidate campaigns have also reflected popular distrust of representative government in the modern era. Those with long memories will recall that not since 1972 has a President with substantial congressional experience been elected, and will recall also the "Washington outsider" theme of all successful presidential candidates—both Democrat and Republican—since that date.

In the area of non-presidential politics, Pennsylvanians will recall their 1991 senatorial election, in which Richard Thornburgh's campaign thrust, based upon his alleged knowledge of the "corridors of power," caused his lead in that race to evaporate, and his opponent to prevail by a wide margin. See, e.g., Loth, supra note 7, at A29 (victorious candidate Harris Wofford "pilloried Thornburgh as an elite symbol of all things profligate and arrogant in the Washington establishment"). Oregons will recall the recent gubernatorial defeat of then-Attorney General David Frohnmayer, whose lead also dissipated following a well-publicized (by his opponent) flight with the President on Air Force One. And in Oklahoma, the state with which I am most familiar, the most recent gubernatorial campaign witnessed a Republican primary in which none of the four candidates had ever held elective office; on the Democratic side, the two candidates with legislative experience (one state, one federal), were eliminated at the primary stage; the ultimate victor had no governmental experience at all.
California voters adopted Proposition 24, a statutory initiative measure which repealed eighteen sections of the California Government Code, added thirty-five new ones, and cut funding for the legislature by thirty percent.30 Based on a number of findings31 accompanying the structural reform, Proposition 24, inter alia,

Congress, possessed of the franking privilege, see Archibald, Frankly Speaking, Washington Times, Sept. 21, 1990, at A3 ("A Library of Congress report estimates House postage will top $136 million for 1989 and 1990—an average of $310,000 per congressional office."). and spectacular patronage potential, see, e.g., infra note 37, seems immune to all of the above: the re-election rate in the United States House of Representatives has hovered around 98% in recent years, see Cortez and Macauley, supra note 7, at 2193, a rate higher than the re-election rate in the then-Soviet Politburo. The only incumbent congressman to be ousted at the primary stage in 1988 was a convicted sex offender. See Jackley, The Incumbent Protection Plan, N.Y. Times, Oct. 29, 1990, at A21, col. 2. This rate should not be surprising, since the average incumbent spends more through the use of the franking privilege alone than the average challenger spends on his or her entire election campaign. See Archibald, supra, at A3.

The increasing reference to the other devices of direct democracy further corroborates the existence of the groundswell of resistance to (and distrust of) representative institutions. In 1988 alone, voters proposed more than fifty popular-initiated measures in eighteen of the twenty-six states so permitting. See T. CRONIN, supra note 15, at 2-3. Moreover, the recent popular trend has leaned in the direction of extending the devices of popular democracy into the twenty-four states not enjoying them, rather than restricting them in the majority of states where they now exist. See id. at 3-4. A recent nationwide Gallup poll found that two-thirds of the citizens polled supported a popular right to vote on some state and local laws. Id. at 4.

The recall device has also become more widely employed: several state and local officials have recently been recalled for raising taxes, failing to curb government spending, or both, see id. at 3, and the 1988 recall-triggered impeachment of Arizona's then-Governor Evan Meacham received broad national attention. Cf. T. CRONIN, supra note 15, at 5 (circumstances of Meacham's recall and impeachment). The removal from office of the three California Supreme Court justices described in the first paragraph of this footnote, while not a recall in form, CALIF. CONST. art. 6, § 3 (West 1983) (election of Supreme Court justices), was much to the same effect.

Cf. supra note 7 (imposition of term limitations and limitations on legislatures' taxing authority; voter apathy).


31. These included the conclusions that

the "concentration of power in the office of Speaker of the Assembly and, to a lesser extent, in the office of President pro Tempore of the Senate," the "system of patronage and punishment" which that power has fostered, the "growth in abusive voting practices," and the "distribution of funding, staff, and informational resources . . . according to predominantly partisan criteria,"

id. at 498 (footnotes omitted) (citing statutes), constituted threats to equal representation. Id.
set forth the powers, membership-selection process, and voting requirements of the Senate and Assembly Rules Committees and of the Joint Rules Committee; the method of selection of all other committee chairpersons, vice-chairpersons, and members (including requirements for partisan balance); . . . voting requirements for adoption of standing rules in each chamber (as well as for their suspension); and rules for allocating members' and committees' staffs and funding in proportion to party membership.\textsuperscript{32}

Despite the unprecedented scope of Proposition 24's intrusions into the internal workings of the legislature itself, its popular success was not surprising: in a Field poll conducted only three months before the election, eighty-five percent of the respondents felt that "there is too much party politics in the legislature," nearly three quarters believed that the legislature 'spends too much money on itself,' and two thirds thought that that body '[did] not inspire public trust and confidence.'\textsuperscript{33}

1990 saw the success of movements in several states to impose term limitations on various elective officers; those successes were seen by many as imposing a "sunset law" on the political power of perceived career politicians. Oklahoma, in September of that year, led the way in this reform effort, limiting future legislators to no more than twelve years in state

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\textsuperscript{32} Id. at 497-98 (footnotes omitted) (citing statutes). \textit{See also} People's Advocate, Inc., v. Superior Court, 226 Cal. Rptr. 640, 651-58 (Cal. App. 1986) (reproducing complete text of Proposition 24).

\textsuperscript{33} Note, supra note 30, at 500-01. Cf. id. at 501-02 (legislature's response to enactment of Proposition 24). In the face of the California Assembly's refusal to fully comply with Proposition 24, a private organization chaired by Paul Gann, the initiative's nominal sponsor, see id. at 498-99, brought suit to enforce full compliance. \textit{Id.} at 502. In the ensuing litigation, Proposition 24 was invalidated almost in its entirety as beyond the statutory initiative power of the people. People's Advocate, Inc., 226 Cal. Rptr. 640 (Cal. App. 1986). As the court's ratio decidendi focused on the limits of the \textit{statutory} initiative power, however, it is possible that the results sought by Proposition 24 could be achieved through California's \textit{constitutional} initiative process. \textit{See} \textit{CALIF. CONST.} art. XVIII, § 3 (West 1954 & Supp. 1992). But cf. Raven v. Deukmejian, 52 Cal. 3d 336, 349-55, 801 P.2d 1077, 1085-89, 276 Cal. Rptr. 326, 334-38 (1990) (en banc) (constitutional \textit{revision}, as opposed to \textit{amendment}, can be accomplished only through constitutional convention; categorization of the former as opposed to the latter determined by both qualitative and quantitative effects of proposed measure on constitutional scheme). But cf. infra note 35 (citing caselaw upholding subsequent constitutional initiative-imposed limitation on legislature's appropriations to itself).
\end{flushright}
California and Colorado joined the movement in the November, 1990 elections, with California’s term limitations applying not only to legislators but to a host of executive-branch elective offices as well. Colorado’s constitutional term-limitations, also pathbreaking, applied to its federal and state legislators alike.

In November of 1991, a fourth constitutional initiative reached the voters in Washington state; this proposal was the most draconian of all, imposing term limitations on both state and federal legislators, and making those limitations retroactive as to time already served. Such an approach, if enacted, would have automatically “retired” Speaker of the House Thomas Foley, the state’s most powerful political figure, in 1994; most analysts credit Foley’s intensive lobbying for the measure’s narrow defeat. Despite that setback, various types of term limitation initiatives were enacted in fourteen additional states — including Washington — in 1992.

Legislators’ ethics were also a subject for suspicion. In 1990, Oklahoma again took the lead in the reform effort when its voters, pursuant to constitutional initiative, created a constitutionalized ethics commission which, having legislative,

34. Okla. Const. art. V, § 17A.
36. Colo. Const. art. V, § 3; id., art. XVIII, § 9a.
37. Loth, supra note 7, at A29. The incumbent Washington congressional delegation spared no effort in attempting to preserve their jobs: voters were reminded of the political power of the state delegation, and warned that without congressional muscle the state would lose subsidies for hydroelectric projects, with a consequent tripling of power rates. A Wake-Up Call on Term Limits, Chicago Tribune, Nov. 10, 1991, at C3 [hereinafter A Wake-Up Call]. See generally infra note 54 (incentives to perpetual incumbency.)
39. Okla. Const. art. XXIX.
40. Id., § 3. A vital safeguard regarding the Commission’s rules-promulgation function is the constitutional requirement that newly-promulgated rules be accepted or rejected as a package by the legislature, id. (emphasis added) (“If these rules are not disapproved . . . .”), avoiding the understandable legislative temptation to em-
executive, and judicial powers, is widely seen as embodying an innovative "fourth branch of government" approach to checks and balances.\textsuperscript{14}

Of course, to say that the general populace has become increasingly skeptical concerning the values of representative government is not to say that its perceptions concerning the workings of those governments are correct. Even more tenuous is the conclusion that the popular democratic remedies—in the present context, the remedy of the constitutional initiative—is not more problematic than representative government's defects.

In Part I of this Article, I will attempt first to objectify the popular dissatisfaction with the processes and outcomes of state representative government as it is practiced here and now,\textsuperscript{41} and will maintain that, in two respects, representative government suffers from inherent and structural defects which the popular democratic devices ameliorate in varying degrees. In Part II, I will present additional comparative ad-

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\textsuperscript{14} of a "pick and choose" approach. See generally Daily Oklahoman, Feb. 24, 1992, at 6, col. 2 (describing bill introduced in Oklahoma Senate, less than eighteen months after voters constitutionalize state ethics commission, to \textit{repeal} portion of state law denying retirement benefits to public officials convicted of felonies which violate their oaths of office); \textit{Lawmakers Scrap Ethics Proposals, Adopt Their Own}, Daily Oklahoman, May 30, 1992, at 1, col. 6 (legislative rejection of Ethics Commission's proposed rules).

\textsuperscript{41} Id., §§ 4, 5.

\textsuperscript{42} The constitutional ethics commission was established to replace an earlier statutorily created body, see \textit{OKLA. STAT. ANN.} tit. 74, § 4203 (West 1987), which was widely perceived to be both underfunded and structurally ineffective. See generally, \textit{Oklahoma Constitution Revision Study Commission, The Constitution of The State of Oklahoma: Recommendations for Revision}, 16 \textit{OKLA. CITY U.L. REV.} 515, 657-68 (1991) (drafting history and intent of new Article XXIX) [hereinafter \textit{1991 Oklahoma Constitution Report}].

Justice Alma Wilson of the Oklahoma Supreme Court, in the case which rejected a pre-election citizen challenge to the constitutional initiative in question, recognized the "fourth branch" implications of the then-potential Ethics Commission, but suggested that such a branch might run afoul of the Oklahoma Constitution's separation of powers provision. \textit{In re Initiative Petition No. 341, State Question No. 627, 796 P.2d 267, 275 (Okla. 1990)} (Wilson, J., concurring in the result) (citing \textit{OKLA. CONST. art. IV, § 1}). Believing, as I do, that both the purpose and result of constitutional amendments are to \textit{amend} prior inconsistent constitutional provisions, I do not view the issue through the same lens as does Justice Wilson. \textit{See, e.g.}, \textit{Johnston v. Hicks, 225 Ga. 576, 170 S.E.2d 410 (1969)}.

\textsuperscript{43} See generally \textit{infra} notes 86-87, 131; text accompanying notes 273-74 (impact of federal bill of rights on state governmental options).
vantages of employing those devices, and will, in addition, respond to various objections which have been made concerning their desirability. I will maintain (most particularly, but not exclusively, with regard to the state constitutional initiative) that those devices are not, in fact, more problematic than the state representative system unmodified. This, in turn, will lead me to the conclusion that constitutional initiative processes should be facilitated, not obstructed.

In Part III, as an illustration of the comparative disadvantages of obstruction, I will turn to a recent experience in Oklahoma which involved judicial intervention preclusive of a popular vote on two proposed measures of structural governmental reform, and will conclude that that intervention was unwarranted and counterproductive.

Finally, based upon an examination of the constitutional initiative schemes of the seventeen states possessed of that device (and their relative merits and demerits), I will, in Part IV, construct a proposed model for judicial review of proposed initiative measures.

I. THE STRUCTURAL LIMITATIONS OF PURELY REPRESENTATIVE GOVERNMENT

The literature on representative government abounds past the point of redundancy. From Plato to the modern public choice and civic republican theorists, commentators have examined the theoretical merits and demerits of the system, and have differed profoundly as to how, as an empirical matter, various manifestations of the representative model actually operate.44

44. See generally infra note 45 (citing authority defending the proposition that Plato's view, though not widely understood as such, was broadly democratic). But cf. C. FARRAR, THE ORIGINS OF DEMOCRATIC THINKING 1 (1988) (classifying Plato and Aristotle as "undemocratic and politically alienated thinkers"); 1 K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 103, 136 (4th ed. 1963) (same). Cynthia Farrar has persuasively argued that the exploration and critique of democratic and republican thinking traces back still further, to Protagoras, Thucydides, and Democritus in the fifth century B.C. See C. FARRAR, supra, passim.

45. Apart from the modern theories themselves, many recent commentators have taken up the task of offering new and sometimes startling interpretations of ancient texts. E.g., L. STRAUSS, THE CITY AND MAN 81, 129-30 (1964) (questioning the sincer-
In this Article, I will make no attempt to be encyclopedic in my treatment of the literature, as either a descriptive or an analytic matter. Nevertheless, coherent exploration of the practical deficiencies in our representative governmental systems cannot be undertaken without reference to a number of themes developed in both historic and modern literature. Preeminent among these themes are the ends which good government should seek; the dangers of (and remedies for) faction; the physical size of the polity; the degree to which laws, let alone constitutional structures, should necessarily involve modification and compromise of views; the degree of reflection necessary to coherent decision-making; stability, for its own sake; and finally, the degree to which legislatures are better able than citizens to fulfill a "disinterested observer" function (assuming, of course, that that posture is deemed desirable in the decisionmaker).

Since the first two of these themes involve contexts in which I maintain that representative government has structural (though democratically remediable) limitations, I will examine those issues at this point. The third issue, as we shall see, is inextricably intertwined with the problems and remedies for faction, so it, too, will be considered in this section. I will address the final four themes, relating to commonly posed objections to the popular democratic devices, in Part II-C of this Article.

A. The Ends of Good Government

At a high level of generality, all may presumably agree that good government should operate for the "common good" (as opposed to the good of the rulers); that the "common

ity of Plato's quasi-articulated preference, see supra note 1, for monarchy or aristocracy).

46. I am, after all, defending the proposition that state constitutional initiatives should be facilitated.

47. See generally I. KANT, CRITIQUE OF PRACTICAL REASON 30 (L. Beck trans. 1956) ("He judges . . . that he can do something because he knows that he ought, and he recognizes that he is free . . .").


It is clear . . . that those constitutions which aim at the common good are right, as being in accord with absolute justice; while those which aim only
good" should take cognizance of the "permanent and aggregate interest of the community;" and that government, as an overriding matter, should be conducted in such a way as to protect the "rights" of citizens.

Even at this level of generality, an argument might be made that in an era of million-dollar congressional campaign contributions by targets of federal investigations; the fixing of traffic tickets by a congressman for his roommate (a convicted felon who allegedly operated a male prostitution ring from the congressman's apartment); the use of "royalties" from a privately-published collection of speeches by the Speaker of the House of Representatives in order to evade a statutorily-imposed cap on honoraria; self-granted congressional pay raises (to a rate almost quadrupling the average wage-earner's annual income); self-granted exemptions from

at the good of the rulers are wrong. They are all deviations from the right constitutions. They are like the rule of master over slave, whereas the state is an association of free men.

49. FEDERALIST 10, supra note 5, at 78.
50. See id.
53. See, e.g., Schneider, From an Icon to a Sleaze, L.A. Times, Dec. 17, 1989 (opinion section), at M3, col. 2.
54. See Kranish, In Switch, Senate OK's 10% Pay Hike, Boston Globe, Nov. 18, 1989 (national/foreign section), at 1; UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991 at 446 [hereinafter STATISTICAL ABSTRACT].

Direct financial compensation is, of course, supplemented by indirect benefits. Supporting the United States Congress cost taxpayers nearly $2 billion in 1990, an average of over $3.5 million for each congressman and senator. L.A. Times, Oct. 23, 1991, at A3, col. 4. Abuses of congressional perks, Representative Frank Riggs of California has recently argued, has turned the House into a House of Lords rather than a House of Commons. Id.

Former congressional staffer John Jackley has described the relationship between compensation and perks, on the one hand, and the desire for re-election, on the other:

If you were asked to help run the nation with a staff of 20 to cater to your every personal and professional whim; handed free phones, offices, mobile offices, and gifts; offered private gyms, swimming pools, saunas and a host of other perks; given the ability to put your relatives on the Government payroll, and paid a salary of $125,000 (a third of which is specifically to compensate you for not taking bribes), wouldn't you do everything in your power to hang on at all costs?

Jackley, supra note 29, at A21, col. 2. See generally infra notes 72-75 and accompanying text (impetus to continued re-election functions as perverse disincentive to leg-
laws generally applicable to the citizenry-at-large;\textsuperscript{55} a "leni-

islative resistance to minority faction, and consequentially, to pursuit of permanent
and aggregate community interests); \textit{infra} text following note 69 (describing "Arrow's
non-paradox"); \textit{infra} note 96 (Aristotle's view of inequality of honor as a cause of
faction).

\textsuperscript{55} \textit{E.g.}, 5 U.S.C. §§ 51(1)(A), 552 (1988) (exempting Congress from Freedom of
Information Act); 42 U.S.C. § 2000e-16 (1988) (exempting Congress from Title VII of
Civil Rights Act of 1964 with respect to non-civil service positions). Other laws from
which Congress has exempted itself include portions of the National Labor Relations
Act of 1935, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the
Age Discrimination Act of 1967, the 1975 amendments to the Age Discrimination Act,
the Occupational Safety and Health Act of 1970, the Equal Employment Opportunity
Act of 1972, the Rehabilitation Act of 1973, the Americans with Disabilities Act of
1990, the Privacy Act of 1974, and Title VI of the Ethics in Governmental Act of
\textit{But cf.} \textit{The Federalist} No. 57, at 352-53 (J. Madison) (C. Rossiter ed. 1961) (empha-
sis added):

\begin{quote}
I will add, as a fifth circumstance in the situation of the House of Repre-
sentatives, restraining them from oppressive measures, that \textit{they can make
no law which will not have its full operation on themselves and their
friends}, as well as on the great mass of the society. This has always been
deemed one of the strongest bonds by which human policy can connect the
rulers and the people together. It creates between them that communion of
interests and sympathy of sentiments, of which few governments have fur-
nished examples; but \textit{without which every government degenerates into
tyranny . . . If this spirit shall ever be so far debased as to tolerate a law
not obligatory on the legislature, as well as on the people, the people will
be prepared to tolerate anything but liberty.}
\end{quote}

Evidencing the fact that Madison's concerns in this regard have not as yet van-
ished completely—even in Congress—Senator Don Nickles of Oklahoma recently in-
troduced an amendment to the Civil Rights Act of 1991 entitled the "Congressional
Accountability Act of 1991," which would have repealed the exemptions described
earlier in this footnote (except with regard to the Freedom of Information Act). \textit{See}
Senate Majority Leader George Mitchell responded, "This is the most blatantly, flag-
grantly, obviously unconstitutional proposal I've seen since I've been in the Senate,"
id. at S15358 (Statement of Sen. Mitchell), and added that the premise of the amend-
ment was "contrary to the whole history of Anglo-Saxon law . . . ." Id. at S15358.
Senator Pete Domenici commented: "There is no doubt about it, the Constitution
intended . . . [the Congress] to be a very special place." Id. at S15358 (daily ed. Oct.
29, 1991) (statement of Sen. Domenici). The Senate voted to reject Senator Nickles'
amendment, 61-38. Id. at S15361.

On the constitutional question (which centers on separation-of-powers analysis,
and the speech and debate clause of Article I), Senator Mitchell's description of the
amendment as "the most blatantly, flagrantly, obviously unconstitutional proposal
I've seen" is one of the most blatantly, flagrantly, obviously hyperbolic statements
I've seen. While some lower court authority does support Senator Mitchell's assertion
with respect to some aspects of Senator Nickles' amendment, \textit{see, e.g.}, Browning v.
Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir. 1986), the weight of
Supreme Court authority, with respect to the overwhelming majority (if not the en-
tirety) of that amendment, does not. \textit{See, e.g.}, Hutchinson v. Proxmire, 443 U.S. 111
ent” rubber-check policy at the congressional bank;\textsuperscript{56} House members “neglecting” to pay over $360,000 in restaurant bills at the House of Representatives’ restaurant;\textsuperscript{57} self-granted congressional permission to keep prior campaign contributions as personal funds;\textsuperscript{58} and the installation of $250 per square foot marble flooring in Capitol elevators during a time of national recession,\textsuperscript{59} our federal representative body operates quite nicely for the benefit of our rulers. But the focus of this Article is the facilitation of \textit{state} constitutional initiatives, and, in most states, the opportunity for profligacy is, by comparison, de minimis. Nevertheless, while endorsing the presumed tongue-in-cheek sentiment (though not the text) of the late Senator Everett Dickersen’s most famous one-liner (“A billion here, a billion there, and pretty soon you’re talking about real money . . .”),\textsuperscript{60} I will maintain that the structural weakness of legislative self-interest—which is not limited to

\footnotesize{(1979); Davis v. Passman, 442 U.S. 228 (1979); United States v. Brewster, 408 U.S. 501 (1972). Moreover, assuming that Senator Mitchell’s concerns about constitutional legitimacy are genuine (and are not merely a mask for an unarticulated preference for special treatment \textit{per se}), it is difficult to imagine what harm would be done by simply repealing the \textit{congressionally self-delegated} exemptions, and permitting federal courts — which are not self-interested in the matter — to engratify congressional exemptions onto the otherwise-apposite statutes as required by judicially-declared separation-of-powers (and other) constitutional requirements.

\textsuperscript{56} See 45 House Members Admit to Bad Checks, L.A. Times, Oct. 5, 1991, at A19, col. 4 (noting further that General Accounting Office had identified a total of 134 members who had bounced checks totaling at least $1,000 within a six-month period). \textit{See generally supra} note 55 (quoting James Madison).


\textsuperscript{58} See 2 U.S.C. § 439a (1988) (applying to persons who were members of Congress on or before January 8, 1980). In 1989, Congress eliminated the “grandfather” provision, but permitted members who resigned or were defeated prior to the commencement of the 103rd Congress (which first meets in 1993), to continue to avail themselves of the “grandfather” provision, if applicable. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 504, 103 Stat. 1716, 1755 (codified at 2 U.S.C.S. §§ 439a, 439a note (Law. Co-op. Supp. 1991)).

\textsuperscript{59} See, \textit{e.g.}, Sierra, \textit{Underfoot at the Capitol}, Chicago Tribune, Jan. 24, 1992 (news section), at 18.

financial self-aggrandizement— is not confined to our federal legislature alone.\textsuperscript{61}

The second tentatively agreed-upon goal of good government requires such government to pursue the "permanent and aggregate interests of the community."\textsuperscript{63} To be sure, the "permanent and aggregate interest" concept is an amorphous one,\textsuperscript{64} and our history, though not of brief duration, is still too short to permit definitive evaluation of how effectively our representative bodies have pursued such interests. Moreover, our experience with the popular democratic devices traces back less than a century,\textsuperscript{65} and that period of time is also too brief to draw conclusive comparisons between those states possessing the devices and those which do not. A final evaluative problem is more theoretical: the pursuit of "aggregate" interests, in the broadest utilitarian sense, may run afoul of our third tentatively agreed-upon goal of rights-protection. How should the efficacy of unmodified representative systems be evaluated \textit{vis-a-vis} the democratically modified ones from the "good government" standpoint, when one more effectively pursues the utilitarian aggregate, and the other the desired "rights" (even assuming that such a comparative conclusion could be drawn)?


Perhaps no area of legislation is more susceptible to conflicts of interest than election law. For reasons which may be apparent, groups holding political power have often tended to resist both extensions of the franchise and efforts to facilitate candidate qualification and access. Justice Miller, writing for the Court a century ago . . . , recognized that "[i]n a republican government, like ours, where political power is reposed in representatives of the entire body of the people, . . . the temptations to control these elections . . . is a constant source of danger. Such has been the history of all republics."

\textsuperscript{62} The extent to which the popular democratic devices (again, most particularly, the state constitutional initiative) are capable of ameliorating this deficiency will be explored in substantial detail in Part II-A of this Article. See \textit{infra} notes 136-52 and accompanying text.

\textsuperscript{63} See \textit{supra} note 49 and accompanying text (quoting James Madison).

\textsuperscript{64} See, e.g., D. Epstein, \textit{The Political Theory of The Federalist} 65 (1984) ("An interest group may watch out for the prosperity of the part it is concerned with and thereby even contribute to the 'aggregate' prosperity.").

\textsuperscript{65} \textit{Supra} text accompanying note 15.
To say that the argument is elusive is not, however, to say that it should not be pursued. Apart from the democracy-facilitation issue, both "public choice" and "civic republican" theorists (of all stripes) have debated the "permanent and aggregate interest" issue exhaustively (and inconclusively). But on my chosen field of battle—examining representative institutions vis-a-vis such institutions democratically enhanced—my task is more limited than theirs. While in Part II of this Article, I will necessarily confront the comparative-advantages question, at this (structural weakness) stage, I need only establish that unmodified representative government does not necessarily pursue the good-government, "permanent and aggregate interest" goal.

My argument makes initial reference to a paradox developed by Kenneth Arrow in 1951, which asserts the incoherence of majority voting schemes. Arrow's paradox was cogently contextualized by William Eskridge, Jr. and Philip Frickey:

In some circumstances, majority rule may not resolve the choice among three or more mutually exclusive alternatives that are voted on pairwise. For a simple example, assume that three children—Alice, Bobby, and Cindy—have been pestering their parents for a pet. The parents agree that the children may vote on having a dog, a parrot, or a cat. If each child's order of pet preferences is as follows:

Alice: dog, parrot, cat
Bobby: parrot, cat, dog
Cindy: cat, dog, parrot

and pairwise voting is required, then majority voting cannot pick a pet. A majority (Alice and Cindy) will vote for a dog rather than a parrot; a majority (Alice and Bobby) will vote for a parrot rather than a cat; and a majority (Bobby and Cindy) will vote for a cat rather than a dog. This, of course, is a prescription for gridlock.

67. See infra notes 133-287 and accompanying text.
68. K. Arrow, Social Choice and Individual Values 2-3 (1951). But cf. id. at 3 n.3 (antecedent development of the paradox).
69. W. Eskridge & P. Frickey, supra note 66, at 50 (emphasis added).
It may be objected that the gridlock is equally real whether the democratic decisionmaker is a representative or popular democratic institution. But a representative institution, I submit, is more likely than the populace to award the children a dog, a parrot, and a cat, since in the legislative arena, the options are never mutually exclusive, and pairwise voting is not required. (I leave to the reader's imagination the dynamic possibilities of the pet menagerie just described.) In support of this proposition, I offer the following model, which, as its expositor (in this context), I feel free to designate "Arrow's non-paradox."

Suppose that there are three equally-powerful groups representing, say, an entitlement constituency (including an array of providers and administrators), a defense constituency (including an array of suppliers and employees), and a taxpayer constituency (including an array of fiscally conservative political interest groups). Let us further suppose that the preferences of the entitlement constituency, in order, are

1) Additional financial support for entitlement programs;
2) No additional tax burdens to support other programs; and
3) Additional financial support for defense programs.

The defense constituency's preferences are:

1) Additional financial support for defense programs;
2) No additional tax burdens to support other programs; and
3) Additional financial support for entitlement programs.

The taxpayer constituency's preferences are:

1) No additional tax burdens to support any new programs;
2) Additional financial support for either entitlement or defense programs, but indifference as between the two.

The resulting matrix looks like this:

Entitlement constituency: entitlements, no tax, defense
Defense constituency: defense, no tax, entitlements
Taxpayer constituency: no tax, entitlements/defense (tie)
While any two of the three groups would favor the no-tax option to the additional support desired by the first two groups, the legislature, if it elects that option, will have alienated two of three equally powerful constituencies (the results multiply geometrically, of course, when the panoply of groups seeking financial support for other agendas is added in). In short, the representative model, untethered by mutual exclusivity or the popular democratic checks (where binary voting is required) is likely to increase financial support to both the entitlement and defense constituencies, despite the absence of majority support for either; thus does the legislative "ice cream truck" roll on. This time-honored legislative practice is known to political scientists as "logrolling."

"Representative government, if it is to be worthy of the name, must be responsive to the governed." Yet James Madison, as we shall see, correctly recognized that even frequent elections may not insure that result. Richard Briffault has carried the argument still further:

[T]he imperative of re-election . . . may function as a perverse incentive inducing incumbent representatives to erect barriers to entry to the political process while also causing them to embrace the programs of those groups whose wealth and organizational support they will need to win the next election.

70. Briffault, supra note 14, at 1367. See also C. Montesquieu, The Spirit of the Laws 309 (A. Cohler, B. Miller, & H. Stone trans. 1989) (Oeuvres completes ed. 1758) ("There are two sorts of tyranny: a real one, which consists in the violence of the government, and one of opinion, which is felt when those who govern establish things that run counter to a nation's way of thinking."); H. Pitkin, The Concept of Representation 232 (1967):

Every government's actions are attributed to its subjects formally, legally. But in a representative government this attribution has substantive content: the people really do act through their government, and are not merely passive recipients of its actions. A representative government must not merely be in control, not merely promote the public interest, but also must be responsive to the people. The notion is closely related to the view of representing as a substantive activity.

71. Infra note 131.

72. Briffault, supra note 14, at 1367. See generally supra note 54 (inducements to permanent political "career").
That support is anything but insignificant; the difference between receipt and nonreceipt of special-interest funds (and the votes of single-interest constituents) may mean the difference between a candidate's ability and inability to pursue his or her chosen (political) "profession." More specifically, legislators' interest in continued re-election adversely influences potential structural reforms in the campaign finance, ethics-in-government, reapportionment, and third-party (and independent candidate) ballot-access contexts, in addition to affecting the more substantive and obvious redistributive and regulatory outcomes. In the modern special-interest state, the achievement of the "permanent and aggregate interest of the community" occurs accidentally, if at all.


74. See Briffault, supra note 14, at 1367. See also supra note 61 (relating specifically to ballot-access issues); supra note 40 (relating specifically to ethics issues).

75. See Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371, 371 (1983) ("The basic assumption is that taxes, subsidies, and other political instruments are used to raise the welfare of more influential pressure groups."); Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 NW. U.L. Rev. 226, 248-49 (1958) ("[N]ot infrequently economic pressure groups are able to procure the enactment of regulatory legislation which furthers their own rather than the public interest."); Note, Counterrevolution in State Constitutional Law, 15 Stan. L. Rev. 309, 329 (1963):

[T]he legislative process is far too complex to be an accurate reflection of the popular will. There is no sound basis for concluding that legislators who acceded to the interests of barbers or photographers... were adopting a coherent program which enjoyed the support of a majority of the constituents. On the contrary, if such measures were submitted to a plebiscite they would probably be defeated.

Cf. M. Olson, The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities (1982) (maintaining that pursuant to prescriptive public-choice theories, economic decline inevitably results from the inefficiency produced by special-interest legislative victories); Posner, supra note 19, at 1665 ("[T]he interest-group theory of politics in the version revived by economists has taught us that the legislative process often caters to the redistributive desires of narrow coalitions and, in so doing, diserves the public interest, plausibly construed.").

Of course, there is no inherent reason why judicial review could not provide relief from the excesses of minority-faction, special-interest legislative politics:

Both courts and commentators have largely ignored the possibility that [state-court] judicial review might play a radically different role—that of safeguarding the interests of majorities. State constitutional law could be dramatically divorced from its federal counterpart if state courts were to
The third general goal of good government is the protection of citizens' rights and liberties. While a liberty-context argument could be constructed which roughly parallels the reconceive their purpose in terms of elaborating and employing a theory of majoritarian, rather than antimajoritarian, review.


But state courts have thus far failed to articulate and apply any consistent theory of majoritarian review. See Developments, supra, at 1499. And the fact that such checks have only been applied infrequently should not be surprising, since state courts cannot invalidate such special-interest legislation "without violating the tenets of a [judicial self-restraint in economic matters] philosophy which bears the endorsement of Holmes, Thayer, Corwin, Hand, and Frankfurter, which has been accepted by the United States Supreme Court, and which is probably regarded as sacred by most of the academic commentators." Note, supra, at 314. But cf. infra notes 77-78 (citing works by Richard Epstein and Bernard Siegan which reject the economic interest-judicial self-restraint approach as applied to United States Constitution); Hetherington, supra at 249-51 (rejecting the approach as applied to state constitutions). Moreover,

[M]ajoritarian logic . . . would raise troubling questions of judicial competence; it is far from self evident that courts . . . can devise a majoritarian calculus that would distinguish "good" laws from "bad" ones. Majoritarian review presents equally troubling questions about the source of a judicial mandate to second-guess the legislative process on behalf of displaced majorities. Few state constitutions contain more than an opaque invitation for courts unilaterally to police legislation for antimajoritarian outcomes. State due process, equal protection, and inalienable rights clauses may accommodate majoritarian review; they hardly compel it.

Developments, supra, at 1499-1500. See also Department of Ins., 492 So.2d at 1035-43 (Boyd, C.J., dissenting).

Thus, as a practical matter, majoritarian state constitutional review has not emerged as a powerful palliative for minority-faction logrolling in the legislative process. And as a theoretical one, the problems of legitimacy which may inhibit its future effect do not obtain with respect to the popular democratic devices, in governmental systems such as ours where at least formally shared notions of sovereignty acknowledge that its ultimate repository is the people.

76. Supra text accompanying note 50.
special-interest argument presented immediately above, apart
from the economic-liberty argument (which, for now, I leave
to Richard Epstein\textsuperscript{77} and Bernard Siegan),\textsuperscript{78} I am too per-
suaded by Madison's arguments\textsuperscript{79} (and de Tocqueville's)\textsuperscript{80}
concerning the dangers of \textit{majority} faction to see a structural
weakness in representative government ameliorable with addi-
tional democratic checks. Since liberty-based arguments are
frequently tendered \textit{against} the popular democratic devices I
support, I will, however, return to this issue in Part II-C of
this Article, wherein I confront the commonly posed objec-
tions to those devices.\textsuperscript{81} For the moment, it suffices to say that
should my facilitation proposal have the effect of undermining
liberty's foundations, I am prepared to concede that it would
have a strong presumption to overcome.

Apart from substantive outcomes, examination of the
\textit{procedural} goals of good government reveals two limitations
inherent in our representative institutions which such institu-
tions are structurally incapable of remedying.

Both relate to the educative function of the state. We are
most aware, of course, of that function's most obvious mani-
ifestation in the public educational system. At the adult level,
we may include as functional equivalents the various publica-
tions offered by governmental entities, adult literacy pro-
grams, vocational training, and the like. (These will be re-
ferred to herein as "active" state educational enterprises.) But
Aristotle long ago correctly recognized that such education
was intrinsically incomplete:

\begin{quote}
It is obvious however that those Greeks who have today a
reputation for running up the best constitutions, \ldots did
not in fact construct their constitutional plans with the best
possible aim, and did not direct their laws and education to-
wards producing all the virtues; but instead, following the
\end{quote}

\textsuperscript{77} See R. \textsc{Epstein}, \textit{Takings} (1985) (defending expansive interpretation of the
takings clause). \textit{See generally infra} note 250 (commenting on property/liberty
distinction).

\textsuperscript{78} See B. \textsc{Siegan}, \textit{Economic Liberties and the Constitution} (1980) (defending
expansive interpretation of the due process clauses). \textit{See generally infra} note 250
(commenting on property/liberty distinction).

\textsuperscript{79} \textit{E.g.}, \textit{Federalist} 10, \textit{supra} note 5, at 80-84.
\textsuperscript{80} See A. de \textsc{Tocqueville}, \textit{Democracy in America} 301-14 (R. Heffner ed. 1956).
\textsuperscript{81} See \textit{infra} notes 203-87 and accompanying text.
vulgar way of thinking, they turned aside to pursue virtues that appeared to be useful and more lucrative.\textsuperscript{82}

Despite Aristotle's skepticism regarding democracy,\textsuperscript{83} he conceded at least hypothetically that the education-for-virtue described above should be made available to common men as well as to the elites:

[S]ince . . . in the best state it is bound to be the case that the virtue of a man and of a citizen are identical, then it follows clearly that the . . . education and morals that make a man sound, and those that will make him fit to play the part of a statesman or of a king, are also more or less identical.\textsuperscript{84}

Aristotle's reasoning is compelling on its own terms, even absent democratic participation by the populace; it is all the more compelling when that factor is added in.\textsuperscript{85} But given the federal limitations rightly imposed on governmental actors by the speech clause,\textsuperscript{86} establishment clause,\textsuperscript{87} and other consti-

\textsuperscript{82} Aristotele, supra note 48, at 434 (Book VII, ch. xiv). I do not mean to suggest either that education in English, foreign languages, history, mathematics, science, geography, economics, or most of the other curricular components of our "active" state educational enterprises are vulgar or useless. To the contrary, their utility to the commercial and wealth-creating enterprise—which I value quite highly—is manifest. More importantly for present purposes, however, I applaud the contribution which such studies make to the."education for citizenship" goal which both Aristotele, see id. at 430-36 (Book VII, ch. xiv), and I deem vital to continued political evolution. My point, rather, is more narrow: that such studies cannot provide enough of the intellectual and moral tools which our future citizens will need to achieve the constructive political evolution goal described above, and that, given extrinsic constraints, see infra notes 59-60 and accompanying text, our system is structurally incapable of remedying the deficiency. In Part II of this Article, I will defend the proposition that our representative system, augmented by the popular constitutional initiative device, more effectively achieves the requisite educational goals by providing a "passive" educational component capable of filling in the identified educational gaps. See infra notes 153-69 and accompanying text.

\textsuperscript{83} See, e.g., Aristotele, supra note 48, at 310-13 (Book V, ch. v).

\textsuperscript{84} Id. at 232 (Book III, ch. xviii). See generally infra text accompanying note 90 (related Confucian view).

\textsuperscript{85} E.g., Aristotele, supra note 48, at 304 (Book V, ch. iii) (citing example of consequences of "lack of vigilance"). Aristotle's example, of course, would not be our own.

\textsuperscript{86} U.S. Const. amend. I. See generally, e.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977) (first amendment freedom of thought "includes both the right to speak freely and the right to refrain from speaking at all"); Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270 (10th Cir. 1984), aff'd, 470 U.S. 903 (1985) (equally divided court) (holding statute precluding public school teachers from "advocating, . . . en-
tutional guarantees (let alone the recent and perhaps irrevers-
ible trend\textsuperscript{88} in our pluralistic society to multiculturalism and 
relativism\textsuperscript{89} in the curricula of the “active” state educational 
enterprises), such enterprises are structurally disabled from 
performing the education-for-virtue function seen by Aristotle 
(and myself) as essential to just government.

Enlightened government, however, is not the only casu-
ality of the educational deficiency just described; perhaps 
equally important are its consequences in daily life. More 
than two millennia ago, Confucius, in discussing the relative 
merits of \textit{li} (the proper mode of behavior) and \textit{wang fa} (the 
emperor’s strict law), recognized:

If the people be led by laws, and uniformity sought to be 
given them by punishments, they will try to avoid the punish-
ment, but have no sense of shame.
If they be led by virtue, and uniformity sought to be given 
them by the rules of propriety, they will have the sense of 
shame, and moreover will become good.\textsuperscript{90}

I believe that this observation is as relevant (and as well 
corroborated) in modern America as it was in ancient China. 
Given the structural inability of our representative institu-
tions to resolve the education-for-virtue deficiency which con-
tributes to the problem described by Confucius, this, too, 
must be seen as an inherent (though consequential) limitation 
of our republican system.

\textit{B. Faction}

Though we now most commonly associate the political ju-
risprudence of faction with Madison’s exegesis of the problem 
in \textit{Federalist 10}, recognition of the potential problems

\begin{itemize}
\item courting or promoting public or private homosexual activity” void on first amend-

\textit{ment grounds}).

\item \textsuperscript{87} U.S. \textsc{const. amend.} I. \textit{See generally}, e.g., Bd. of Educ. v. Barnette, 319 U.S. 

624, 642 (1943) (“[I]f there is any fixed star in our constitutional constellation, it is 

that no official, high or petty, can prescribe what shall be orthodox in politics, nation-

alism, religion, or other matters of opinion . . . .”).

\item \textsuperscript{88} Admittedly, however, \textit{this} subcomponent of the problem—assuming it be 

so—is not a structural one.

\item \textsuperscript{89} \textit{See}, e.g., Hughes, \textit{The Fraying of America}, Time, Feb. 3, 1992, at 44.

\item \textsuperscript{90} Confucius, \textit{Analects}, in \textsc{The Four Books} 13 (J. Legge trans. 1966) (emphasis 
in original).
\end{itemize}
presented by it to democratic systems (broadly defined) traces back to the ancient Greeks.91 Although Plato’s concerns were sui generis to the type of state he posited,92 Aristotle’s were more broadly based, and were applied by him to a number of theoretical governmental schemes.

For Aristotle, “[i]nequality is everywhere at the bottom of faction”;93 “inequality,” however, partakes of a multitude of evils, from the desire for equal rights of participation,94 to the unwarranted and dangerous95 demand for equality of economic result. Other reflections of inequality-caused faction include inequality of honor;96 ill-treatment of disfavored groups by office-holders;97 disproportionate power wielded by interest groups or cliques;98 and disproportionate increase in one economic segment of the population.99 Taken together or separately, these causes are strikingly modern.

91. E.g., PLUTO, supra note 1, at 141-51; ARISTOTLE, supra note 48, at 104-09; 296-309; 319-22.

92. See PLATO, supra note 1, at 141-51 (rebutting concerns of faction as applied to his eugenic and sexual regime); contra, ARISTOTLE, supra note 48, at 104-12 (Book II, chs. iv, v).

93. ARISTOTLE, supra note 48, at 298 (Book V, ch. i).

94. Id. at 296 (Book V, ch. i) (“Democracy arose from the idea that those who are equal in any respect are equal absolutely. All are alike free, therefore they claim that all are equal absolutely . . . . The next step is when the democrats, on the ground that they are equal, claim equal participation in everything. . . .”).

95. See id. at 310-11 (Book V, ch. v) (common cause for overthrow of democracies to be found in “unprincipled . . . popular leaders” unjustly “split[ting] up [the] possessions or income” of the “notables,” causing them to unite). See also infra note 96.

96. ARISTOTLE, supra note 48, at 302 (Book V, ch. iii) (“[T]he situation is certainly unjust whenever either the honor or the lack of it is contrary to deserts, but it is just whenever it is in accordance with them.”). See generally supra note 54 (discussing congressional compensation and benefits).

97. ARISTOTLE, supra note 48, at 301 (Book V, ch. iii) (“When those in office ill-treat others and get larger shares for themselves, men form factions both against each other and against the constitution to which [the officials] owe their power to act; and these greater shares are won sometimes at the expense of individuals, sometimes at the expense of the common interest.”). See generally supra note 54 (discussing congressional compensation); supra notes 69-75 and accompanying text (discussing consequences of modern minority-faction politics).

98. ARISTOTLE, supra note 48, at 302 (Book V, ch. iii) (“[P]reponderance . . . is to be seen in any case where one or more men exercise power out of all proportion to the state or to the power of the citizen-body.”).

99. Id. at 302-03 (Book V, ch. iii).
By 1787, the constitutional Framers had benefited from two millennia of scholarly commentary and governmental observation not experienced by Aristotle. In defending the proposed Constitution, James Madison, in Federalist 10, faced the task of rebutting a popular evaluation of that intervening history which concluded that only small countries could enjoy popular government, the large ones reverting inexorably to despotism. Pursuant to the common interpretation (let alone portions of Madison's text), Federalist 10 saw in representative government a major portion of the necessary remedy for faction.

But more careful textual examination reveals not only that Madison himself recognized the existence of other remedies for faction, but must have also recognized that representative government (as contrasted with more directly democratic forms) was the most speculative and least effective remedy he put forth.

100. Diamond, *The Federalist*, in *History of Political Philosophy* 663 (L. Strauss & J. Cropsey 3d ed. 1987). The reasoning behind this conclusion included the observations that political authority in remote parts breaks down absent the vigor which only despotic government can provide; that to preserve their control, the people in a democratic or republican society must be patriotic, vigilant and informed, but those characteristics necessarily break down as the governmental scale increases; and that those who actually manage the affairs of a large country, even if their selection is representative in form, inevitably succumb to corruption and despotic tendencies due to their remoteness from the citizens. See id. at 663-64.

101. See, e.g., D. Epstein, supra note 64, at 59 ("Federalist 10's conclusion is familiar: Contrary to the conventional wisdom that popular governments suit only small and homogeneous cities, only an extended republic with a wide variety of groups and a 'scheme of representation' can cure the effects of popular government's moral defect, 'faction'."); Diamond, supra note 100, at 666 (emphasis in original) ("[T]he peculiar property of a republic, that it is a representative democracy, is the foundation of The Federalist's teaching . . .").

102. *Federalist* 10, supra note 5, at 81 ("A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking."). See generally *The Federalist* No. 39, at 240-46 (J. Madison) (C. Rossiter ed. 1961) (further considering the nature of representative government).

103. Madison defined "faction" as follows:

> By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

*Id.* at 78.
Following his assertion that a "republic," involving representative government, "promises the cure," Madison immediately contrasted his proffered system with that of "pure democracy":

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

Even at this stage of the discourse, Madison introduced considerations of the citizenry's size and distribution into the debate. From Madison's choice of words ("may be extended"), however, an argument might be made that his second distinction is proffered as a potential advantage only, which—while it enabled him to later maintain the suitability of representative government to a geographically large and populous state—was independent of the remedy-for-faction issue. Should this prove correct, then Madison could reasonably be understood to contend that it is the representative nature of the republic he defended which inherently supplied the remedy for faction. But even without departing from Madison's other writings in The Federalist, it becomes clear that this is not the case—and that Madison himself likely recognized that fact. Three arguments will demonstrate this point.

First, the size-of-the-polity issue, it turns out, is not independent of the other Madisonian distinction (representative nature) between "republics" and "pure democracies"; size, in fact, turns out to be by far the more important of the two. Having seemed to suggest in Federalist 10 that the collapse of the ancient democracies resulted from faction (which the pure democratic form, devoid of representative safeguards, proved

104. Supra note 102.
105. Federalist 10, supra note 5, at 81.
106. Id. at 82 (emphasis added).
107. E.g., The Federalist No. 14, at 101 (J. Madison) (C. Rossiter ed. 1961) ("[T]he natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand . . . .")
108. Madison, of course, correctly recognized that while faction might be remedied, its causes could not be eliminated except through draconian and undesirable means. Federalist 10, supra note 5, at 78-79.
structurally unable to control),\textsuperscript{109} in \textit{Federalist 63}, conceding that Athens, Sparta, Crete, Carthage, and Rome employed representative institutions,\textsuperscript{110} Madison candidly observed:

The difference most relied on between the American and other republics consists in the principle of representation, which is the pivot on which the former move, and which is supposed to have been unknown to the latter, or at least to the ancient part of them. The use which has been made of this difference, in reasonings contained in former papers, will have shown that I am disposed neither to deny its existence nor to undervalue its importance. I feel the less restraint, therefore, in observing that the position concerning the ignorance of the ancient governments on the subject of representation is by no means precisely true in the latitude commonly given to it . . . .

\ldots

From these facts . . . it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions . . . . \textsuperscript{[T]}o insure [the United States' republican] advantage its full effect, we must be careful not to separate it from the . . . advantage, of an extensive territory. For \textit{it cannot be believed that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece.}\textsuperscript{111}

To the same effect, Madison conceded in \textit{Federalist 10} that "the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large

\textsuperscript{109.} See \textit{id.} at 81 (emphasis added):

\[\text{[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will in almost every case, be felt by a majority of the whole; a communication and concert results from the form of the government itself . . . . Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.}\]

\textit{Cf.} \textit{The Federalist No. 9, at 71-72 (A. Hamilton) (C. Rossiter ed. 1961) (analogous view expressed by Alexander Hamilton) [hereinafter Federalist 9].}

\textsuperscript{110.} \textit{The Federalist No. 63, at 386-87 (J. Madison) (C. Rossiter ed. 1961) [hereinafter Federalist 63].}

\textsuperscript{111.} \textit{Id.} (emphasis added).
over a small republic.”

But for the necessity, in a pure democracy, of the citizens to physically “assemble . . . [to] administer the government in person,” by the reasoning presented above, a corresponding conclusion can be reached: the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large democracy over a small democracy.

Second, Madison himself was not naive concerning the potential for representative abuse. Aside from occasional Kierkegaardian leaps of faith regarding the representatives’ likely good character, he reveals himself as, at bottom, a realist: “It is in vain to say,” Madison recognized, “that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.”

Third, excessive focus on the representative/democratic distinction tends to obscure what is, without question, the most effective structural remedy for faction. Checks and balances, broadly construed, incorporate tripartite separation of powers, more minute fine-tuning devices, and federalism; all these (in addition to appropriate polity size) comprise parts of

112. Federalist 10, supra note 5, at 83.
113. See supra note 109.
114. Cf. Federalist 63, supra note 110, at 385:

It may be suggested that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a former paper to show that it is one of the principal recommendations of a confederated republic.

See generally Federalist 9, supra note 109, at 72-73 (Hamilton’s reflections on “new discoveries” in the “science of politics,” in which the efficacy of an enlarged political orbit to suppress faction figures prominently).

115. E.g., Federalist 57, supra note 55, at 351-52 (“There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interests, is some pledge for grateful and benevolent returns.”); supra text accompanying note 5. Cf. The Federalist No. 28, at 180 (A. Hamilton) (C. Rossiter ed. 1961) (Hamilton’s view that the placing of “the whole power of the proposed government . . . [into] the hands of the representatives of the people . . . [is] the only efficacious security for the rights and privileges of the people which is attainable in civil society.”).

116. Federalist 10, supra note 5, at 80. See also supra text accompanying note 6.

117. E.g., U.S. Const. art I, § 7, para. 1 (“All Bills for raising Revenue shall originate in the House of Representatives . . . .”).
the "new political science" not known to the ancients, but known to the constitutional Framers. In his discussion of bicameralism, Madison makes clear the extent of his relative reliance, for faction-amelioration, on checks and balances as opposed to representative institutions:

The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men than where the concurrence of separate and dissimilar bodies is required in every public act. Nor, for that matter, was Madison comfortable with the advantages created by polity size, apart from structural check-and-balance safeguards. Since the nature of those devices—and the methods by which they ameliorate the dangers of faction—consume virtually the remainder of The Federalist (and since their operation is not yet relevant to my argument), I need not rehearse those arguments here.

To this point, I have maintained that Madison correctly viewed both polity size and checks and balances (broadly defined) as more effective remedies for faction than representative government as such. At this juncture, I wish to press the argument further, and will contend that, when an unmodified representational system is contrasted with such a system onto which the popular democratic devices have been engrafted, the former is structurally less capable of combating the evils of faction. In pursuing my point, I will exclude majority faction from present consideration. (The reader is assured, however, that I will consider the dangers posed by such fac-

119. *Federalist* 63, *supra* note 110, at 386. *See also infra* text accompanying notes 274-75.
120. *Federalist* 63, *supra* note 110, at 385 ("[T]his advantage ought not to be considered as superseding the use of auxiliary precautions.").
121. *But cf. infra* notes 237-44, 250-77 and accompanying text (discussing impact of my facilitation proposal on liberty).
122. For a general discussion of how checks and balances (broadly defined) relate to the dangers of faction, *see, e.g.*, Diamond, *supra* note 100, at 669-78.
123. Madison's definition of "faction," as has been noted, *see supra* note 103, expressly includes groups, with the requisite motivation, "whether amounting to majority or a minority of the whole . . . ."
tion when I explore the "liberty" issue, deferred from this Article's last subsection, below).

At the outset, it is important to note that I agree not only with Madison's definition of "pure democracy," but also with his judgment that that system is inherently unsuited to all but the smallest political units. Both the need for a physical assemblage of the citizenry and the directness of the resultant administration preclude its applicability to either extremely populous or geographically large entities. Thus, Madison's conclusions about democracy are correct on his own terms. The distinction between his "democracy" and mine, however, is different not only in degree, but in nature: the modern popular democratic devices require neither the physical assemblage of the citizenry nor direct administration by it. As to the former, the only "assemblage" is at the polling place; as to the latter, I wish to facilitate the devices' use as a check upon, not a substitute for, representative institutions. My democracy, in short, is supplemental, not pure.

Despite his quasi-hortative declarations, we have seen that Madison was not completely sanguine regarding the character and interest of our chosen representatives. (Admittedly, we ourselves are less sanguine still, but much like Madison, who had the benefit of two millennia of experience not possessed by Aristotle, we now possess the benefit of two centuries' experience not possessed by Madison.) Madison, indeed, recognized that while removal from elective office is a potent potential check, such a remedy may be inadequate

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124. See supra text accompanying notes 76-81.
125. See infra text accompanying notes 237-44, 250-77.
126. Supra note 109.
128. E.g., supra note 115.
129. See supra note 116 and accompanying text.
130. See generally supra notes 7-42 and accompanying text (describing the manifestations of the modern popular attack on representative governmental institutions); text accompanying notes 51-59 (congressional outrages of the past twenty-four months); Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.) ("The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.").
without more. Expressly, Madison also concluded, representatives might betray the people though the people would not likely betray themselves.

Though Madisonianism is now commonly associated with a belief in representative institutions and a corresponding distrust of broad popular democracy (and there is much in the thrust of his writings in The Federalist to support that view), other portions of those writings make it clear that what may, indeed, be Madison's argumentative thrust is undercut by extrinsic arguments and concessions which he makes elsewhere therein. Such extrinsic arguments and concessions take on special force when applied to the modern popular democratic devices rather than hypothetical direct democracy.

II. FACILITATION OF STATE CONSTITUTIONAL INITIATIVES: À COMPARATIVE-ADVANTAGES CASE

In the context of both the ends of good government and faction, I have maintained that representative government suffers from structural weaknesses which that system is inherently incapable of remedying. In this section, I will first establish that those structural deficiencies are, in fact, ameliorable by the remedy I propose. Next, I will maintain that in other, non-structural contexts, my proposal generates substantial advantages when contrasted with our representative system(s), unmodified. Finally, I will turn to common criticisms which

131. See The Federalist No. 53, at 332 (J. Madison) (C. Rossiter ed. 1961) ("What necessity can there be of applying . . . [annual congressional elections] to a government limited, as the federal government will be, by the authority of a paramount Constitution?").
132. E.g., supra note 101.
133. See, e.g., supra note 102; supra text accompanying notes 5, 109.
134. While my primary focus herein is not Madison but rather the constitutional initiative, it must be noted that the tension relating to the efficacy of representative institutions which I highlight is not the only internal conflict in Madison's work. See, e.g., II W. Crosskey, Politics and the Constitution 1011 (1953). Nor is such an observation solely a product of our historical hindsight, enhanced by the benefit of time. See, e.g., Letter from James Madison to N.P. Trist (Dec. 1831), reprinted in III The Records of the Federal Convention of 1787 516 (M. Farrand ed., Rev. ed. 1966) ("But I find that by a sweeping charge, my inconsistency is extended to 'my opinions on almost every important question which has divided the public into parties'.")
have been leveled at the democratic devices, and will conclude that those criticisms—to the extent of their validity—are outweighed by the benefits of those devices.

A. Ameliorating the Structural Defects

1. The Substantive Ends of Good Government

At our appropriate level of generality, I have identified governance for the benefit of the people (not the rulers), governance for permanent and aggregate ends, and rights-protection as good government’s substantive goals. With respect to the first, I identified legislative self-aggrandizement as a structural weakness; with regard to the second, the predominance of minority factions (special-interest groups) which lack, as a goal, the permanent interests of the whole. A number of illustrations will demonstrate how these deficiencies are ameliorable pursuant to the remedy I propose.

Legislative self-aggrandizement partakes of a multitude of forms: most notable are excessive direct and indirect financial self-compensation; the view of political office as a permanent career rather than an opportunity for temporary community service; a corresponding tendency to restrict the political marketplace, both by restricting potential personal challenges and by skewing the internal legislative machinery; self-granted exemptions from laws of general applicability; and corruption.

That the citizenry has employed the constitutional initiative as an effective remedy against such abuses is proof that such devices can provide amelioration when the representative devices cannot; actuality, in short, proves possibility. Examples of such checks have already been provided, and in-

135. Supra note 54; supra text accompanying notes 53-54, 56-57.
136. Supra note 54. See generally supra notes 34-38 and accompanying text (describing term-limitation constitutional initiatives).
137. Supra note 61.
138. See supra note 31; text accompanying notes 32-33.
139. See supra note 55 and accompanying text.
140. E.g., supra text accompanying notes 51-52. See generally, e.g., Weeks, Bribes, Gratuities, and the Congress: The Institutionalized Corruption of the Political Process, The Impotence of Criminal Law to Reach It, and a Proposal for Change, 13 J. Legis. 123 (1986).
clude term limitations (to provide a check on career politicians),\textsuperscript{141} popular legislative restructuring (to provide a check on majority-party abuses),\textsuperscript{142} and constitutionalized ethics commissions (to provide a check on corruption),\textsuperscript{143} to identify but a few. Moreover, empirical data reveal that these types of issues, given the availability of the popular democratic devices, are among those most likely to be of remedial interest to the citizenry. David Magleby's recent study found that the subject areas most likely to result in initiatives are governmental processes, and revenue,\textsuperscript{144} and Austin Ranney's examination of the years 1898 to 1976 found that fully one-third of all constitutional initiatives during that period were concerned with governmental and political processes.\textsuperscript{145}

\begin{itemize}
\item Voting malfeasors out of office may also, of course, ameliorate the described abuses. In 1988, for example, one congressman, convicted of statutory rape, was rejected by voters at the polls,\textsuperscript{supra note 29, and five of the other 408 congressmen seeking re-election were rejected for other reasons. E.g., Jackley, supra note 29, at A21, col. 2. But at the federal level, incumbency has sufficient inertia—for very quantifiable reasons, see supra notes 37, 54—to make replacement improbable.

At the state level, different dynamics operate. "For many citizens, interest in politics and regularly scheduled elections is quite low." D. Magleby, supra note 15, at 88. Such interest as may exist is effectively dispersed by consequential lack of knowledge about a particular candidate's record, and the diffusion of responsibility for any given consequence which is (perhaps) an unintended consequence of representative institutions per se. In candidate elections, therefore, voters often take "cues" from party affiliations, apart from a candidate's record (even if known). See id. at 122. Such "cues"—which may be misleading, or irrelevant to the bulk of the voter's actual concerns—are unavailable in popular initiatives or referendums, where the voter is put to a direct and binary choice.

Empirical data confirm this hypothesis in practice. The Field poll cited above in connection with California's Proposition 24 revealed both deep dissatisfaction with, and pervasive distrust in, the California legislature as an institution. See supra text accompanying note 33; see also supra note 31. Six months later, they returned incumbent legislators to office by an overwhelming margin.

Ironically, voters' support for term limitations further confirms my hypothesis. While some critics of term limitations have suggested that that approach reflects a
I have specifically identified logrolling, the natural consequence of interest-group politics, as a structural impediment to governance in the permanent and aggregate interest of the whole, and have argued further that the initiative's binary nature renders it structurally capable of remedying that problem in egregious cases. Admittedly, the model I propose does not wholly abate the abuse, since the proposal I am making views the democratic devices as checks upon, not substitutes for, the legislative process. As Richard Briffault has noted,

to proceed by contrasting direct and representative democracy may miss the point. We do not have to choose between the initiative and the legislature: in [many] states we have both . . . . The real issue is how well they work together, or, given that even in initiative states government remains largely representative, whether the initiative corrects some of the defects of the legislative process.

Given the costs of qualifying initiative petitions for the ballot, there is no basis for assuming that such petitions will correct any but the most egregious legislative excesses. They will, however, correct some.

“stop us before we kill again” mentality among the voters, I assert that the voters’ reasoning is undoubtedly not that shallow. To be sure, voters may at some level recognize that when term limitations are imposed, special-interest influences on their legislator—including their own special-interest influences on their legislator—will no longer be of utility. In that sense, the “stop us before we kill again” analogy may be apt, but reflects a positive, self-righting, “permanent and aggregate interest” instinct. Apart from that, however, the term-limitation impetus may stem from voters’ awareness, at whatever level, of their own inability (given the time and energy which most gainfully-employed voters have to devote to the political enterprise, see D. Magleby, supra note 15, at 88, and the difficulty of imposing personal responsibility for the work-product of a collective body) to adequately assess their representatives’ performance over time. Term limitations, at least, limit the perpetuity of any voter misassessment.

146. Supra notes 66-75 and accompanying text.
147. See infra notes 356-404 and accompanying text.
149. See generally supra note 17 (describing requisite number of signatures for constitutional initiative petitions).
2. The Procedural Ends of Good Government

Having maintained that the active educational enterprises of our representative governments are incapable of adequately fulfilling good government's education-for-virtue role,150 I concluded that that structural151 deficiency diminished the prospects for both constructive governmental evolution152 and present interpersonal relations.153 At this juncture, I will argue that, when available, the employment of the constitutional initiative process intrinsically (though passively) facilitates the achievement of the broader educational goals defended by both Aristotle and myself.

When constitutional initiatives are proposed, lively debate (usually focused on the role or structure of government)154 may reasonably be expected to ensue. Whether from widely disseminated155 ballot pamphlets,156 formally-required

150. Supra notes 82-87 and accompanying text. See also infra note 151.
151. Structural, at least, as such government is practiced here and now (including its Bill of Rights tethers). See supra notes 86-87 and accompanying text.
152. Supra notes 82-89 and accompanying text.
153. Supra text accompanying note 90.
154. See generally supra text accompanying notes 147-48 (describing most common subjects of constitutional initiatives).
155. E.g., CAL. ELEC. CODE § 3578 (West 1977 & Supp. 1992) ("The Secretary of State shall mail one copy of the ballot pamphlet to each registered voter at the postal address stated on the voter's affidavit of registration . . . .").

The ballot pamphlet shall contain all of the following:

(a) A complete copy of each state measure.
(b) A copy of the specific constitutional or statutory provision, if any, which would be repealed or revised by each state measure.
(c) A copy of the arguments and rebuttals for and against each state measure.
(d) A copy of the analysis of each state measure.
(e) Tables of contents, indexes, art work, graphics and other materials which the Secretary of State determines will make the ballot pamphlet easier to understand or more useful for the average voter . . . .

newspaper publication, media editorials and advertisements, conversations with friends, family members, work associates, or fellow members of groups or organizations, or combinations of the above, voters have ample opportunities to learn about and discuss the subjects of the proposals. Not all of them, of course, avail themselves of such opportunities, and it is certainly reasonable to conclude that the most salient proposals will generate the liveliest debate. But to quibble about the amount of such debate (and its consequential civic education) is to miss the point that some educational advantage accrues; as a longtime resident of a state with a lively initiative process, I can attest to the fact, from personal experience, that the amount is not insubstantial. Constitutional initiatives, in short, invite the citizenry to involve themselves in a "living constitutional jurisprudence;" representative government, unmodified, does not.

To this point, I have not assumed that any constitutional initiative has been enacted. When adopted, however, a different but equally valuable educational experience occurs.

A quarter-millennium ago, Montesquieu expounded at length on the now self-evident proposition that different laws may be better suited to different citizenries in different areas. In the American context, Madison's claim to the title "federalist" (as that term was originally understood) rested in no small measure on Federalist 45, in which he asserted that state powers "will extend to all the objects which, in the ordi-

159. See id. at 128-29.
160. Fischer, supra note 73, at 87.
161. Evidence abounds that American voters need all the civic education they can get. Less than half of the adult population can identify their congressman, and in 1978, in the midst of an oil embargo, less than 40% realized that the United States imported any oil. See D. Magleby, supra note 15, at 127-28. See generally Hearings, supra note 145, at 190 (statement of Prof. Harlan Hahn) ("[T]he present operation of the American system of government does not provide an adequate basis for continuing involvement in the political process among large segments of the population."); id. at 189 (statement of Prof. Hugh A. Bone) (concluding, based on study of the Washington state experience, that the initiative "has led to public dialogue and an informed electorate").
162. See C. Montesquieu, supra note 70, at 231-518.
nary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."163 More recently, Justice Louis Brandeis argued:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.164

By virtue of the citizenry's direct participation in the experiments which our "laboratories of federalism" permit, it may well be anticipated that popular levels of sophistication regarding governmental structures and constructive substantive outcomes will increase. While it is true, of course, that some educational benefit obtains both from experiments on the federal level165 and legislatively-initiated ones in the states, the directness and extent of popular participation generated by initiative processes will inevitably increase that result. Perhaps, as an ancillary benefit, an enhanced sense of


Term limitations furnish but one example of the "laboratories of federalism" concept in action. When California's term-limitation approach, see supra note 35 and accompanying text, was unsuccessfully challenged in the California Supreme Court, that court noted:

Petitioners assume, for example, that the eventual loss of experienced legislators, and the arrival of their relatively unseasoned replacements, will irreparably hinder and damage the legislative process. Yet respondents argue with equal conviction that Proposition 140's term limitations will free the entire process from the control of assertedly entrenched, apathetic, veteran incumbents, thereby allowing fresh creative energies to flourish free of vested, self-serving legislative interests.


165. E.g., U.S. Const. amends. XVIII, XXI (enactment and repeal of prohibition).
personal responsibility will result from the more intimate sense of self-government which a facilitated initiative process fosters, and that sense, coupled with a greater awareness of government's limits and the necessity for self-generated social constraints, would in turn result in a greater reliance on the Confucian notion of li. But that, I concede, is a Kierkegaardian leap of my own.

3. Faction

We are here concerned with the problem of minority faction, whose causes cannot be eliminated, but whose effects must be brought under control.

I have argued that our representative institutions are structurally incapable of so doing, and may supply a perverse, though unintended inducement to logrolling by combinations of such factions.

Madison's remedy for minority faction relied in large measure on political force: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." The same observation made by Madison about "the republican principle" can also be made about the democratic one. In the latter case, however, the counter-factional effect is even stronger, due to mutual exclusivity, the absence of logrolling, and the binary nature of the popular democratic devices I defend.

Madison also relied, in part, on a "safety-in-numbers" rationale. What is true, from faction's purview, of a more numerous citizenry when compared to a less numerous citi-

166. See generally supra text accompanying note 90 (describing Confucian notions of li and \textit{wang fa}, and the consequences of excessive reliance on the latter).
167. While Madison's definition includes both majority and minority varieties, supra note 103, the problem of majority faction has most commonly been invoked with regard to the danger such faction poses to liberty. As such, I have deferred consideration of majority faction to Part II-C of this Article, which deals, in part, with the impact of my proposal on liberty as a general matter.
168. Supra note 108.
170. \textit{Federalist} 10, supra note 5, at 80.
zenry,\textsuperscript{171} is also true of a more numerous citizenry when compared to a less numerous legislature. In the modern interest-group state, I feel confident in asserting that politically powerful single-interest minority factions may more easily prevail in legislatures than in a binary popular vote.\textsuperscript{172} I am equally confident in concluding that \textit{combinations} of minority factions can (and do) prevail more in the representative arena than under the more democratic model I propose.\textsuperscript{173}

\textbf{B. Non-Structural Comparative Advantages}

Apart from the areas in which representative government, \textit{due to} its representative nature, is saddled with structural deficiencies, in two other contexts the popular democratic devices provide potential advantages beyond what unmodified representative institutions have achieved.

1. Innovation

The first such advantage involves governmental creativity in the resolution of evolving policy problems: legislators primarily \textit{adapt} to the "way things are done" to further what political effectiveness they possess.\textsuperscript{174} This adaptability is not confined to procedures (evidenced by a necessary willingness to logroll),\textsuperscript{175} but extends to substantive contexts as well (evidenced by a common and understandable reticence to con-

\textsuperscript{171} See supra notes 106-14 and accompanying text.
\textsuperscript{172} See generally T. Lowi, \textit{The End of Liberalism} (1969) (describing process of "capture" by special-interest groups of legislative and executive institutions); \textit{supra} text following note 69 (describing operation and consequences of legislative logrolling process).
\textsuperscript{173} See \textit{infra} text accompanying notes 381-97 (describing single-subject component of the model I propose).
\textsuperscript{174} But cf. \textit{supra} note 29 (describing voter reaction to such adaptive capability in context of recent Pennsylvania senatorial election).
\textsuperscript{175} Perhaps Oklahoma's former United States Senator, Henry Bellmon, supplies the exception which proves the rule. When AMTRAK was hemorrhaging cash a number of years ago, route consolidations provided an obvious remedy. Acting in a quasi-Kantian manner, \textit{see supra} note 47 and accompanying text, and pursing the "permanent and aggregate interests of the whole," Senator Bellmon correctly insisted that, should logrolling occur, and business-as-usual prevail, no such cuts could be made. Oklahoma is today the most populous of the three states (in the contiguous forty-eight) which do not enjoy AMTRAK service. (The reader may take notice that the cause is not likely either the state's geographical isolation or small physical size.)
front perceivedly invincible special-interest groups).\textsuperscript{176} There may be no inherent reason why courageous legislators cannot resist such temptations,\textsuperscript{177} but our experience indicates that they too infrequently demur.

Incremental losses in potential governmental innovation thereby result. The consequential policy ossification is not only often detrimental to the "permanent and aggregate interest" per se (due to logrolling successes of combined minority factions whose energies are not directed to that goal),\textsuperscript{178} but creative solutions to policy problems which legislators may not believe are achievable (due to realpolitik) or, for that matter, which legislators may not perceive, are lost, as options, to the polity.

It is true, of course, that many "innovative" solutions may be neither practicable or wise. But initiatives of all stripes are difficult to enact,\textsuperscript{179} and this inherent "brake" will almost certainly check the most unworkable or extreme.\textsuperscript{180} Some voter-initiated measures have, however, achieved goals which the application of traditional wisdom, in traditional representative systems, had not.\textsuperscript{181} Moreover, ventilation of a

176. See generally supra text following note 69 ("Arrow's non-paradox").
177. But cf. supra text accompanying note 72 (describing re-election incentives); supra text accompanying note 136 (describing temptation to view political office as a career, not as temporary community service); supra note 175 (describing Oklahoma's AMTRAK experience).
178. See supra note 75 and accompanying text.
179. Given petition-signature prerequisites, constitutional initiatives are difficult to qualify. See supra note 17. As an empirical matter, they have proved difficult to enact. Infra note 246. The intrinsic "brake" is exacerbated by the impact of campaign spending: while David Magleby's study of the California initiative experience demonstrated that even when proponents of voter-initiated measures outspent opponents by a two-to-one ratio or more, they still encountered defeat more than half (52\%) of the time. Conversely, in those cases where opponents' spending was equal to only two-thirds (or more) of proponents', the initiative measure met defeat almost 90\% of the time. D. Magleby, supra note 15, at 147.
180. T. Cronin, supra note 15, at 229 ("Unwise legislation does get onto ballots, but the record indicates that the voters reject most really unsound ideas."); Briffault, supra note 15, at 1366 ("The 'negative bias,' although a barrier to 'good' legislation, functions equally as a shield against 'bad' legislation: a defect of direct democracy may also prevent its abuse.").

[T]he main difficulty with petitioners' argument ... [that Proposition 140 effected a revision, not an amendment] is that its acceptance could, as a
range of political choices contributes to the education-for-citizenship goal described above,\textsuperscript{182} enhancing the range of future policy options.

2. Participation

Citizen participation in the process of self-governance may be evaluated either quantitatively or qualitatively. While I later eschew any definitive claim that the popular democratic devices enhance quantitative voter participation (although that may, in fact, be the case), some preliminary statistical data establish a context for further inquiry.

David Schmidt reported in 1983 that voter turnout is consistently higher in states with initiatives on the ballot than in states without;\textsuperscript{183} a study of the North and West (the South, for historical reasons, has had low voter-turnout rates) by David Everson in the same year, however, did not confirm Schmidt’s conclusion.\textsuperscript{184} But an examination of overall voting patterns in the 1988 federal general election (without regard to whether ballot propositions—often voted on in special or primary elections—were on the ballot) reveals that eleven of the seventeen states with constitutional initiative procedures exceeded the national turnout rate for congressional elections, with five below (and one tie).\textsuperscript{185} The southern constitutional-initiative states again lagged behind.\textsuperscript{186}
While I take some comfort from such statistics, I draw no conclusive inference from them. Most of the constitutional-initiative states are clustered in the Midwest and West, areas which have historically enjoyed high voter-turnout rates. Moreover, the seventeen constitutional-initiative states have generally better educated populations than the others, and education levels have been found to be positively related to voter turnout. In this context, the chicken-and-egg question resurfaces.

Although fewer votes are cast on most ballot propositions than in most candidate elections, some voters are probably drawn to the polls by such propositions who would otherwise not participate. Thomas Cronin has observed that public opinion polls "regularly report that nonvoters and unregistered voters say they would be more likely to vote if they could vote on issues as well as candidates," and a 1978 Los Angeles Times exit poll reported that 7% of those polled responded that they would not have voted in that general election had Proposition 13 not been on the ballot. Such samplings, of course, suffer from their own intrinsic limitations, and are probably skewed, both on the negative side (due to the understandable reluctance of some voters to admit that their participation in self-governance may have been motivated by a single issue), and on the positive one (in the case of the latter survey, due to the highly controversial and well-

187. Further examination of the 1988 congressional elections will illustrate my point. For example, the United States Bureau of the Census classifies Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota as its "West North Central" division; of these states, only the last four employ the constitutional-initiative device. For the 1988 congressional election, the average of their voter-turnout rates was 57.9%, substantially above the 44.7% national average. But the average of Iowa's, Kansas', and Minnesota's rates was 56%, too close for a conclusive intra-regional comparison.

188. The average percentage of high school graduates in those states is 79.1, compared to a national average of 76.9. Their college graduation rates, however, are slightly lower. See Statistical Abstract, supra note 54, at 139, 141.

189. E.g., D. Magleby, supra note 15, at 80.
190. See id. at 77-99.
192. See supra notes 19-25 and accompanying text.
publicized nature of Proposition 13). My skepticism concerning drawing causational inferences from such polls induces me to refrain from advancing any definitive claim that voter participation rates are enhanced by the availability of initiative choices. (I suspect that the reader's intuition is as sound, on that question, as my own, and, for that matter, as sound as the pollsters' as well.) My claim, rather, relates to the quality of citizen participation in self-government, and any increase in voter turnout is but an ancillary benefit to my proposal.

In the Introduction to this Article, I described some of the manifestations of citizens' alienation from their governments; in Part I, I described some of the likely causes. In addition to the causes therein enumerated, three of the causes of faction posited by Aristotle (inequality of honor, ill-treatment of disfavored groups by office-holders, and the wielding of disproportionate power by interest groups or cliques) are broadly descriptive of at least one further impetus to citizen alienation.

Americans, by a large majority, support the availability of initiatives. While "[i]t would be difficult to prove that Minnesotans or Virginians [who reside in non-constitutional-initiative states] are less proud or less trusting of their state governments than Coloradans or Californians," it would seem idle to claim that in states wherein voters have adopted term limitations, ethics commissions, and tax limitations (both pro-

194. An independent issue relates to the ability of artful pollsters to formulate their questions to achieve a given outcome; this skill is too well understood to require documentation. In the cited Los Angeles Times exit poll, for example, Magleby reports that the question which elicited the 7% affirmative response was: "Would you have come here today if Proposition 13 were not on the ballot?" Id. I must confess to curiosity about the level of affirmative response were the question posed as: "Do you generally vote only if a particular special-interest proposition is on the ballot?" or, conversely, "Does the absence of controversial ballot propositions deter you from generally exercising your right to participate in our process of governance by casting your historically long-struggled-for vote?" To be sure, these questions are caricatures, but rather than negating my point, all that proves is my unsuitability for a career as an artful pollster.

195. Supra notes 7-42 and accompanying text.
196. Supra notes 48-81 and accompanying text.
197. Supra notes 96-98 and accompanying text.
198. T. Cronin, supra note 15, at 4-5.
199. Id. at 228.
cedural and substantive),\textsuperscript{200} such voters have not, ipso facto, achieved a heightened sense of self-government. While noting that better education, media coverage, and inter-party competition have also contributed to this end, Thomas Cronin has observed that in states once dominated by special interests and party bosses, the popular democratic devices have contributed to political responsiveness,\textsuperscript{201} and thereby, to the perception of political self-control.

Moreover, the initiative process contributes to alienation amelioration: the very act of signature-solicitation conveys a message to the citizenry (whether sympathetic or unsympathetic to the particular petition in question) that individuals can directly affect the operation of their governments. At the campaign stage, large numbers of individuals (many of whom doubtless have never been similarly involved) participate in various ways. Even apart from the ancillary education-for-citizenship benefit, such involvement cannot but enhance the quality of citizen participation in self-government, both as perceived and as a matter of fact.\textsuperscript{202}

C. The Commonly-Posed Objections

1. Deliberation

Several permutations of the argument that representative government is intrinsically more deliberative than the popular democratic processes have been suggested. One emphasizes legislative expertise,\textsuperscript{203} and related legislative reflection.\textsuperscript{204} A

\textsuperscript{200} See supra note 7; supra notes 19-42 and accompanying text.

\textsuperscript{201} T. CRONIN, supra note 15, at 228.

\textsuperscript{202} Cf. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1585 (1990) ("[P]lebiscites . . . are not quite the same as the New England town meeting, but citizens are likely to feel substantially more connected and personally involved with them than with the remote action of their elected representatives.").

\textsuperscript{203} E.g., Campbell, The Initiative and Referendum, 10 Mich. L. Rev. 427, 434 (1912): It is also true, as every fair-minded man must admit, that the people, acting as a whole, cannot make satisfactory laws. The drafting of a law requires expert knowledge and experience . . . . How absurd it would be to submit to popular vote the question how diphtheria should be treated or what remedy should be used in cases of scarlet fever or pneumonia.

\textsuperscript{204} E.g., id. at 428 ("All opportunity for mutual discussion or deliberation is lost.").
second highlights the inevitable benefits of compromise, with a third expressing concern regarding the passion of popular temperament. I will consider each in turn.

Certainly, legislatures are structured so as to be able to avail themselves of the expertise of others, in addition to whatever expertise individual legislators may possess. The committee system (and its attendant hearing processes), research services, and staffs all have the capacity to—and do, in fact—generate voluminous data on a multitude of subjects. But such instruments and the press of multidimensional legislative business create their own intrinsic limitations. The diversity and quantity of the issues which legislatures must resolve as a practical matter preclude any individual legislator from becoming expert on (or perhaps even conversant with) most of the issues on which he or she must vote. Consequently, that legislator is compelled to rely upon the judgment of committees (or, even more narrowly, members of that legislator's party on the relevant committee) (or, worse yet, special-interest groups) to inform his or her judgment. Thus, the effective decision-making group on any given issue constrains still further, undermining, as an incidental matter, the "safety in numbers" approach which Madison invoked as a palliative for interest-group (minority) faction.

Apart from that, both legislative procedures and non-structural but apparently endemic legislative practices diminish any potential advantage which legislatures as such may enjoy. As to the former, Richard Briffault provides an example:

205. See id. at 428 (emphasis added):

Each individual expresses by his ballot his own personal opinion, and selection must be made from the mass of opinions thus submitted. The necessary result is that in the end, some one's individual views, unmodified by the opinion of others, must prevail, rather than the composite judgment of the majority.

206. E.g., id. at 436 ("I have an abiding faith in the judgment of the people, but it is in the mature and sober judgment which comes with knowledge and reflection upon which our institutions must rest. A government controlled by hysteria and hasty impulse must inevitably fall."). Madison, too, considered this possibility when he defined "faction" as motivated by "some common impulse of passion, or of interest . . . ." FEDERALIST 10, supra note 5, at 78 (emphasis added). See generally D. EPSTEIN, supra note 64, at 68-81 (discussing Madisonian conception of passions and interests).
The New York Senate's "fast roll call" procedure provides an interesting commentary on legislative "deliberation." When a fast roll call is in effect, a vote on the final passage of a bill is taken by calling the names of only five senators in the 61-member body—the Temporary President, the Minority leader, and the first and last two senators on the alphabetically arranged senate roll-call list. Every other senator is recorded as voting in the affirmative—even if silent or out of the chamber when the vote is taken—unless the senator is present and expressly records himself or herself in the negative. In one recent case, a highly controversial tax increase was passed on a predawn fast roll call with 31 affirmative votes, the minimum number required for passage. Included in the majority was a senator opposed to the bill who was in the hospital when the vote was taken.\textsuperscript{207}

The "nonstructural but apparently endemic legislative practices" to which I referred above include the well-known custom of packing hundreds if not thousands of legislative measures into a single omnibus bill for end-of-the-legislative-session approval (usually, but not always, to avoid an executive veto). "The crush of end-of-session business buries state legislators in the closing weeks. In many states it becomes impossible to even find bills."\textsuperscript{208} Even when an omnibus bill is not employed, the practical effect—from the standpoint of deliberative advantage—is the same. In one session of the New York legislature, for example, 508 bills were passed in the session's last three days.\textsuperscript{209} One effect of this practice is that the governor, house speaker, and senate president pro tempore determine what enactments become law.\textsuperscript{210}

Briffault also argues that lack of deliberation is not confined to the end of the session, quoting the memoirs of a Cali-
Legislators consistently vote on legislation without understanding what is in it, especially when the final vote is taken. Every legislator has his own system for judging how he will vote, but reading the bill usually isn't part of the procedure, and listening to debate on the bill's merits certainly isn't either.211

The second deliberation-related objection relates to the necessity for compromise: such necessity is invoked, almost as an article of faith, by some of direct democracy's opponents.212 But this argument proceeds from untenable premises, and even given those premises' viability, proceeds in a misguided direction.

Zeno's second paradox illustrates the untenability of the premise, in principle: supposing an undesirable starting point (in whatever particular legal context), the compromise rationale, carried to its conclusion, disenables government from totally excising the residual disadvantages of the legal point of origin.213

At a more pragmatic level, as I have illustrated above, "compromise" is no talisman, and may often be a shibboleth

212. See, e.g., supra note 205.
213. Frederick Copleston recounts Zeno's second motion paradox as follows:

Let us suppose that Achilles and a tortoise are going to have a race. Since Achilles is a sportsman, he gives the tortoise a start. Now, by the time that Achilles has reached the place from which the tortoise started, the latter has advanced to another point; and when Achilles reaches that point, the tortoise will have advanced still another distance, even if very short. Thus Achilles is always coming nearer to the tortoise, but never actually overtakes it . . . .

1 F. COPLESTON, A HISTORY OF PHILOSOPHY 74 (1962) (emphasis in original). A variant on the paradox, more directly relevant to my point about motion toward problem amelioration, is:

Suppose that you wish to walk to the other side of a room. First you must walk halfway. At that point, you must again walk halfway. And so on, so that while you will always be getting closer, by proceeding in halfway measures, you will never reach the other side.

And so it is with compromise, when seen as a necessary and inherent component of good legislation in all cases. By such reasoning, to cite but one example, state-sponsored racism could not be legislatively abolished, since to do so would violate the principle requiring compromise.
for logrollers. And in such cases, as I have argued, what is posited as a weakness of the popular democratic devices turns out to be a strength.

But even assuming the viability of the premises, the "compromise" argument discounts the effect of compromises antecedent to submission of an initiative to the people. Constitutional initiatives are difficult both to qualify and to enact; they fail more than half the time even when opponents are substantially outspent. As a matter of practicality and efficiency, proponents of such initiatives must engage in sophisticated pre-submission compromises to envelop as many citizens as feasible into the fold of ultimate supporters of the measure.

The third "deliberation" argument focuses on the passion of popular temperament. My response to this objection is threefold. First, as I have noted earlier, constitutional initiatives are difficult to enact: this fact, as a practical matter, imposes a brake on popular passions. My second and third responses relate to Madison's safety-in-numbers approach to faction-amelioration, and the availability of broad channels for ventilation of initiative-generated issues. Since I will explore these issues at some length in considering the possibility that direct-democracy facilitation will result in a modification of the substantive outcomes of the status quo, I will defer the development of those arguments to that point.

Finally, I reemphasize that the model I propose views the constitutional initiative as a supplement to, not a substitute for, the legislative process. Even with its failings, the legislative process does generate some expertise, involve some bona

214. See supra text accompanying notes 68-70 (describing "Arrow's non-paradox," and the inevitability of legislative logrolling); supra notes 146-49 and accompanying text (comparative disadvantages of logrolling, unchecked by popular democratic devices); supra note 75 (same); supra notes 207-11 and accompanying text (infrequency of principled legislative deliberation).

215. Supra text following note 69 (illustrating ability of popular democratic devices to ameliorate logrolling excesses because of their binary nature, and the unavailability of compromise).

216. Supra note 179.

217. See supra note 206 and accompanying text.

218. Supra note 179 and accompanying text. See also infra note 246.

219. See supra notes 106-14 and accompanying text.

220. See infra notes 230-77 and accompanying text.
fide deliberation, effectuate some genuine and necessary compromise, and check some popular excesses. My point, rather, is that the popular deliberation engendered by the constitutional initiative process does not necessarily suffer by comparison with real-world, non-hypothetical, legislative “deliberation.”

2. Access

The criticism is often tendered that the representative system provides meaningful access to the political process for groups which would otherwise go without. But the access issue, from the standpoint of the nonaffluent and unorganized, is not confined to the direct democratic devices alone:

Private wealth and special interests dominate the financing of candidate elections as well as initiative petition drives and ballot proposition campaigns. Inequalities of wealth and organization influence both the outcome of elections and the postelection behavior of legislators. Indeed, heavy affirmative spending seems to be even more effective in candidate elections than in initiative balloting.

The last point is enhanced by recent studies indicating that financial contributions are substantially more effective at defeating initiatives than enacting them.

While the single citizen, unwilling to work in concert with others, is doomed to frustration in the context of generating voter-initiated change (as he or she would most likely be in the legislative arena as well), some groups, such as environmentalists, who are generally not well-represented at the state legislative level, have succeeded through the initiative process not only substantively, but by forcing legislatures to give

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221. E.g., D. MAGLEBY, supra note 15, at 182. As the reader is undoubtedly well aware, “access,” in modern political discourse, has often become a codeword for preferred substantive outcomes. I employ the term in its orginary signification herein.


224. See T. CRONIN, supra note 15 at 199 (citing, as examples, bottle bills and nuclear power restrictions).
greater consideration to their agendas;\textsuperscript{226} the experience of the Progressives indicates that this is not solely a modern phenomenon.\textsuperscript{226} As a practical matter, since relatively few constitutional initiatives succeed, an important function of such devices is to advance the standing of particular issues on the legislative agenda,\textsuperscript{227} in the hope that legislative responsiveness to those issues may increase. It does not always, of course, turn out that way, which is why approximately one-third of the constitutional initiatives qualified for the ballot in the 1980s did succeed.\textsuperscript{228} The proponents of those initiatives benefited from the additional access provided by the device,\textsuperscript{229} and no one else's "access" was diminished.

3. Outcome Modification

It may be objected that in light of the analysis presented above, different outcomes may obtain when the popular devices are added in, or facilitated. A number of responses may be made.

First, a portion of the benefits which, I argue, flow from my proposal relies precisely on the assumption that some outcomes will, in fact, be different. I have maintained that position earlier in my examination of the substantive goals of good

\begin{itemize}
\item \textsuperscript{225} See id. at 225. See also Hearings, supra note 145, at 109 (statement of Professor Hugh A. Bone).
\item \textsuperscript{226} See id. at 199 ("Women's suffrage was approved in several western states because of the initiative process . . . . Other initiative-forced reforms include . . . establishment of the eight hour work day for women and underground miners . . . ."); supra note 13 (describing Progressive-inspired, legislatively-enacted regulation).
\item \textsuperscript{227} Briffault, supra note 14, at 1372.
\item \textsuperscript{228} See May, supra note 7, at 21.
\item \textsuperscript{229} In addition to the structural reform proponents and tax-limitation advocates described in the Introduction to this Article, and the environmentalists and Progressives whose effective employment of the popular devices is described supra at notes 224 and 226, other groups which achieved access to the political system through those mechanisms include advocates of the abolition of poll taxes, voter-registration reform, a presidential primary system, real-property joint tenancies, merit-based civil service, sunshine laws, liquor-by-the-drink, campaign-finance reform, the repeal of blue laws, the protection of recreation facilities, implied consent intoxication laws, reapportionment reform, and the repeal of laws prohibiting the sale of colored oleomargarine, to list but a few. See, e.g., T. Cronin, supra note 15, at 199; Hearings, supra note 145, at 109 (statement of Professor Hugh A. Bone). The list of those whose access was enhanced is a list whose membership is both lengthy and diverse.
\end{itemize}
government, and make no apology for my hopeful suspicion that popular wisdom may impose limitations on legislatures' ability to unduly restrict the political marketplace, from self-interest; impose higher standards of legislative ethics than legislators impose on themselves; and reject the repugnant legislative temptation to impose standards on the citizenry from which legislatures exempt themselves, to list but a few. (As to the last, I enjoy express support from Madison.)

But I take no comfort from dismembering straw men, and I am aware that the real challenge to my position emanates from the contention that facilitation of the popular democratic devices will result in different substantive outcomes in the economic or liberty arenas.

As a general matter (and with reference to both contexts), empirical data suggest that this is not the case. In Oklahoma, the same citizenry which adopted a constitutional initiative establishing a right of voter approval of all tax-increase measures had specifically rejected a statutory initiative to roll back a tax-increase package for educational purposes less than five months before. In California, an electorate which adopted a constitutional initiative to restrict certain state constitutional rights had earlier enacted a broad and sweeping state constitutional right to privacy.

Interstate comparisons reveal similar results. "Voters in Colorado in 1984 passed the first statewide antiabortion initiative in the nation, while on the same day Washington State voters rejected a similar proposal."

230. See supra notes 133-49.
231. See supra notes 31-33 and accompanying text; text accompanying notes 137-38.
232. See supra notes 39-42 and accompanying text; text accompanying notes 51-52.
233. See supra note 55.
234. Supra note 55 (quoting James Madison).
237. Supra note 29 (discussing Proposition 115).
238. See CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy.").
The most recent comprehensive study of the use of the popular devices not only in the United States but internationally concluded that the weight of the evidence confirmed the political neutrality of such devices, and a 1976 Massachusetts study indicated that both Republicans and liberals were likely to vote on ballot propositions. Considering the statistical outcomes, a study by David Schmidt of constitutional and statutory initiatives from 1977 to 1984 found that initiatives classifiable as "liberal" appeared on state ballots seventy-nine times, with "conservative" initiatives appearing seventy-four. The "liberal" initiatives were adopted 44% of the time, the "conservative" ones, 45%. The reason for this phenomenon, David Butler and Austin Ranney concluded, is that the democratic devices generally produce "outcomes favored by the current state of public opinion[, and p]ublic opinion is seldom left or right on all questions at any given moment, nor is it consistently left or right on any question through all time."

The above comments relate to both economic policy and liberty; I have further observations, however, to make about each sphere individually.

In the economic context, the hypothetical which I tendered under the banner of "Arrow's non-paradox" does not, save in the broadest of senses, produce either a "liberal" or "conservative" result as those terms are used in common political discourse. Economic logrolling, in short, has been employed by every group with an economic interest in government largesse or fiscal policy. (That set, manifestly, includes

240. See Referendums, supra note 15. The study examined the use and effects of popular democratic devices in seventy-six countries, focusing most intensively on Australia, Denmark, France, Ireland, Norway, Sweden, Switzerland, the United Kingdom, and the United States.

241. Id. at 224. See also T. Cronin, supra note 15, at 200-01.

242. See D. Magleby, supra note 15, at 103 (citing study). But cf. id. (low-income voters less likely to vote than middle or upper-income ones, and women less likely to vote on such propositions than men). But cf. id. at 82 (low-income voters less likely than middle or upper-income ones to vote in all elections).


us all.) Recalling that I have conceded that the popular devices (due to transactional costs)\textsuperscript{245} will likely ameliorate only the most flagrant and unpopular\textsuperscript{246} logrolling abuses,\textsuperscript{247} I anticipate no sea change in legislative "business as usual."

But in any case, believing that the substantive concept underlying representative government is \textit{representation},\textsuperscript{248} I make no apology to any self-appointed Platonic Guardian, whether plutocrat or social engineer, for any economic outcome which my facilitation proposal may modify. The claim by any avowed adherent of popular government (broadly defined) that either its democratic or representative form should be preferred because its outcome is more likely to favor either laissez faire or interventionist economic views entails a greater degree of naked instrumentalism (if not cynicism) than I will be able to counter with argumentation relating to governmental structure. In short, such views can only be countered (if at all) with political discourse or political force. At the rational level, however, it may be recalled that Holmes' admonition that the federal Constitution enshrined neither laissez faire nor economic paternalism\textsuperscript{249} consists of two propositions, not one.

Although a similar view could be taken with regard to the liberty side of the equation, I find it less persuasive in the latter application.\textsuperscript{250} The United States, after all, is a nation whose founding is grounded deeply in the bedrock of liberty.

\textsuperscript{245} E.g., May, \textit{supra} note 7, at 44 (describing signature requirements for constitutional initiative petitions).

\textsuperscript{246} In the decade of the 1980s, approximately two-thirds of state constitutional initiatives were rejected at the polls. \textit{See id.} at 21. \textit{ Cf. D. Magleby, supra} note 15, at 148 (examining California initiatives); \textit{supra} note 179 (examining effects of campaign spending). \textit{But cf. text} accompanying note 28 (describing upswing in rate of constitutional-initiative adoption in the late 1980s).

\textsuperscript{247} \textit{Supra} text accompanying notes 147-49.

\textsuperscript{248} \textit{Supra} note 70 and accompanying text.

\textsuperscript{249} Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

\textsuperscript{250} This is not to disparage the importance of the economic liberties defended by Richard Epstein, Bernard Siegan, and others, see \textit{supra} notes 77-78, but the rehearsal of the arguments for and against the property/liberty distinction, which traces back to the \textit{Carolene Products} footnote, United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), and beyond, see, \textit{e.g.}, U.S. Const. art. I, § 10 (contract clause), is manifestly beyond the scope of the present work. \textit{See generally} Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972):
To be sure, the definition of liberty was no less imprecise at the time of the founding of the republic than it is today. Forrest McDonald has observed:

[I]t is no great exaggeration to say that for two decades prior to the meeting of the Constitutional Convention, American political discourse was an ongoing public forum on the meaning of liberty. And there was a wide range of opinion: almost the only thing generally agreed upon was that everybody wanted it. Everything else—what liberty was, who deserved it, how much of it was desirable, how it was obtained, how it was secured—was subject to debate.\(^{251}\)

The spectrum of thought ranged from Thomas Jefferson's "radical libertarian"\(^{252}\) views\(^{253}\) to more narrow, English his-

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property;

McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46:

Judges and professors are talkers both by profession and avocation. It is not surprising that they would view freedom of expression as primary to the free play of their personalities. But most men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds. Mark Twain would surely have felt constrained in the most fundamental sense, if his youthful aspiration to be a river-boat pilot had been frustrated by a State-ordained system of nepotism. Needless to say, no disparagement of freedom of expression is here intended. But its inarguable importance to the human spirit, on the one hand, does not furnish an adequate ground for downgrading all economic rights, on the other.


Thus, while conceding that property, as well as liberty, has helped to define "Americanness" in recent centuries, infra text accompanying note 255, I assume, for the sake of this argument, the viability of the constitutional distinction which is our modern legacy. See generally McCloskey, supra, at 62 (discussing stare decisis).


252. Id. at 158.


Of liberty . . . I would say that, in the whole plentitude of its extent, it is unobstructed action according to our will, but rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add "within the limits of the law," because
tory-based formulations. Nonetheless, liberty, however defined, has provided a touchstone for "Americanness" throughout recent centuries, and should my facilitation proposal have the effect of undermining its foundations, I have earlier conceded that it would have a strong presumption to overcome. I maintain, however, that it has no such effect.

The problem of liberty-abridgement is the problem of majority tyranny. Pursuant to my interpretation of Madison's writings in The Federalist, he correctly placed substantial reliance on the numerical size of the polity in formulating his remedies for such faction. In light of that reliance, comparative population data will provide an appropriate beginning place for analysis.

In 1787, Madison expressed confidence that a polity the size of the then-United States would provide (in tandem with broadly-construed checks and balances) an adequate faction-check. Madison’s polity, in 1787, comprised something less than four million people.

In terms of the size of the decisionmaking citizenry, however, the four-million figure is substantially misleading: in law is often but the tyrant's will, and always so when it violates the right of an individual.

See also Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), reprinted in id. at 55:

Our legislators are not sufficiently apprised of the rightful limits of their power: that their true office is to declare and enforce only our natural rights and duties and to take none of them from us. No man has a natural right to commit aggression on the equal rights of another, and this is all from which the laws ought to restrain him . . . .


255. E.g., Federalist 10, supra note 5, at 78 ("Liberty . . . is essential to political life . . . "). Cf. Aristotle, supra note 48, at 209 (Book III, ch. xii) ([W]ithout free population . . . there cannot be a state at all . . .").

256. See supra notes 106-35 and accompanying text.

257. See supra text accompanying notes 117-22.

258. The 1790 census, conducted three years after Madison wrote Federalist 10, found the population of the United States to consist of 3,929,214 individuals. Statistical Abstract, supra note 54, at 7.
Madison's day, property-based, race-based, and gender-based restrictions on the franchise were prevalent. By the most conservative measuring device (halving the population due to gender-based restrictions, employing the 1790 census, and making no other adjustment whatsoever), an effective potential polity of less than two million persons (including male children) emerges. If the 1787 United States were a 1990 state, its "effective" population would rank thirty-fourth among the fifty-one hypothetical states. By Madison's own analysis, at least thirty-three states have populations of a size sufficient to provide adequate majority-faction dilution.

While that computation may be persuasive, it is not, without more, sufficient to establish my point. For Madison argued that the population's geographic dispersal was an important factor, as well:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests . . . .

But geographic diversity must be evaluated from Madison's political and historical perspective. That perspective provides a radically different role for geographical space in combating majority faction (and its threats not only to lib-

259. In 1838, Kentucky became the first state to grant women a partial franchise, limited to school elections; a number of states followed suit. It was not until 1869, when Wyoming Territory granted women the right to vote on an equal basis with men, that this result obtained anywhere within the territorial limits of the United States. CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1571 (1973).

260. The Constitution, of course, initially left franchise qualifications to the states. U.S. CONST. art. I, § 4, para. 1; U.S. CONST. art. II, § 1, para. 2. Nine of the fifteen amendments to the federal constitution since 1800, however, have related to either election procedures or expansions of the franchise.

261. But cf. STATISTICAL ABSTRACT, supra note 54, at 17 (African-American population in 1790 comprising 25% of total population).

262. See STATISTICAL ABSTRACT, supra note 54, at 23.

263. FEDERALIST 10, supra note 5, at 83 (emphasis added).
Daniel Boorstin has observed:

Although Americans lacked the feudal past which plagued European nation-makers in their efforts to unify their countries, there was an American counterpart. Here space played the role of time. If American history had been brief, American geography somehow made up the difference. In the great American emptiness, varied local governments, economies and traditions were separated from one another by wilderness and rivers and mountains, which speedily created differences elsewhere created by centuries . . . . In Europe the powerful local diversities were, for the most part, the institutional detritus of time. In America they were largely the effects of topography, climate, and physical distance. While European politics was primarily the by-product of history, American politics was primarily a by-product of geography.  

Madison thus confronted the task of unifying a people who, although they had ceased to be Englishmen, had not yet become Americans: “their primary and continuing loyalty remained to their own colony, now become a state.” The resulting pursuit of separate interests, even after separation from Great Britain, was perhaps the greatest single source of structural inadequacy in the Articles of Confederation. Thus, while it might appear that certain objective factors (such as the recency of the struggle for independence against a common enemy, and the overwhelmingly rural character of the population in 1787) would evidence a commonality of interests among citizens of the various states at that time, such factors are misleading in light of other circumstances.

264. See supra text accompanying note 49 (Madisonian good government goals include pursuit of permanent and aggregate interest of the community).


266. Id. at 401. Despite Madison's best efforts, this perception lasted until well after the adoption of the Constitution. Boorstin quotes Federalist Fisher James in 1792: “Instead of feeling as a Nation, a State is our country. We look with indifference, often with hatred, fear, and aversion to the other States.” Id. at 403.

267. According to the 1790 census, about 3,700,000 of the 3,900,000 residents dwelled in rural areas. STATISTICAL ABSTRACT, supra note 54, at 17.
Even within the limits of any given state, the populace is now more diverse, and liberty issues more complex, than was the case when Madison wrote in *The Federalist*. The citizenry has diversified racially, religiously, culturally, occupationally, economically, and politically, and liberty issues not contemplated by the Framers have emerged.\(^2\)\(^6\) Given the increased diversity in both citizenry and issues, and recalling recent rights-initiative experience,\(^2\)\(^6\)\(^8\) the unlikelihood of an emerging and permanent anti-liberty coalition,\(^2\)\(^7\)\(^0\) and the difficulty of both qualifying\(^2\)\(^7\)\(^1\) and enacting\(^2\)\(^7\)\(^2\) constitutional initiatives, it is difficult to imagine the emergence of a permanent and effective anti-liberty popular force.\(^2\)\(^7\)\(^3\)

Apart from the size and geographic distribution of the population, it must be recalled that "[t]he electorate-as-legislature can no more infringe upon constitutionally protected rights than can the representative legislature."\(^2\)\(^7\)\(^4\) Since Madison's day, the addition of the Bill of Rights has furnished additional liberty-protection, and the liberty-protecting enterprise, during the last century, has found its expression almost exclusively in those rights and the fourteenth amendment. State action, whether statutory or constitutional, can have no impact on such guarantees.\(^2\)\(^7\)\(^5\)


\(269.\) See *supra* note 246.

\(270.\) *Supra* notes 242-44, 256-68 and accompanying text; *infra* note 273.

\(271.\) See *supra* note 17.

\(272.\) *Supra* note 246.

\(273.\) Liberty issues, as has been noted, come in many shades and types. *See supra* note 268. It is even more difficult to imagine a permanent and effective anti-liberty popular force whose internal cohesion carried through to all of the conceivable contexts in which such issues present themselves.

\(274.\) Briffault, *supra* note 14, at 1364.

Finally, since it is a comparative enterprise in which I am engaged, I note for the record that the liberty-protecting records of our state representative institutions are anything but unblemished: a quick perusal of any standard constitutional law treatise will reveal hundreds of pages examining thousands of cases of legislatively-imposed liberty abridgements. Nor are such abridgements confined to cases which reach the courts.

4. Stability

Given the variability in public viewpoints over time (which I invoked, in part, to illustrate the ultimate political neutrality of the popular devices I defend), it may be objected that an unintended consequence of my facilitation proposal will be the introduction of a destabilizing factor into the state governmental equation. I will defend my proposal along various lines.

First, the overall attitude of voters is conservative, with a small "c": "[a] lack of information about an initiative proposal or uncertainty about its effects leads voters to vote in the negative." This factor, often referred to as the "negative bias" of the initiative process, contributes in no small measure to the difficulty of enacting initiatives into law.

Second, in those cases in which initiatives have succeeded, success has often come after significant and extended

277. E.g., Brant, Introduction, in F. Harper, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION vii, x (1965) (describing chilling effect on University of Iowa faculty due to "fear of financial reprisals in the Iowa legislature").
278. E.g., Campbell, supra note 203, at 429-30.
279. Briffault, supra note 14, at 1356; see also T. Cronin, supra note 15, at 198: Just as in candidate campaigns, when [American voters] give the benefit of the doubt to the incumbent and the burden of proof is on the challenger to give reasons why he or she should be voted into office, so in issue elections the voter needs to be persuaded that change is needed. In the absence of a convincing case that change is better, the electorate traditionally sticks with the status quo.

Contra D. Magleby, supra note 15, at 198 ("Those who have not learned about the measure before entering the booth will play a form of electoral roulette, casting affirmative and negative votes at random.").

280. See generally supra note 246 (statistical likelihood of passage of initiative measures).
periods of legislative nonresponsiveness.\textsuperscript{281} Substantial voter intensity must be generated before popular remedial measures have significant chances for success.\textsuperscript{282}

Third, successful constitutional initiatives, although engrafted onto state constitutions, are still subject to construction and interpretation by state courts. Such courts, which often pay glowing verbal tribute (almost always in dictum) to popular democratic devices,\textsuperscript{283} are quite capable of honing off residual doctrinal rough edges,\textsuperscript{284} and sometimes, as we have seen, the entire doctrinal plank.\textsuperscript{285}

Apart from judicial “interpretations,” what the voters do, the voters can undo. If and when experiments go awry in the laboratories of federalism, the missteps can be retraced.\textsuperscript{286} But even when an unwise or unworkable innovation needs to be recalled, the “education for citizenship” goal—so necessary to governmental and societal evolution—is passively enhanced.\textsuperscript{287}

\section{III. An Example of the Comparative Disadvantages of Obstruction}

To this point, I have demonstrated that comparative disadvantages, both theoretical and actual, generally\textsuperscript{288} accrue from the imposition of obstructions to the popular democratic

\textsuperscript{281} Cf., e.g., Briffault, \textit{supra} note 14, at 1371 (discussing tax-cut and spending-limit proposals).
\textsuperscript{282} Fischer, \textit{supra} note 73, at 78.
\textsuperscript{283} See generally Briffault, \textit{supra} note 14, at 1364 n.90 (quoting examples).
\textsuperscript{284} See Fischer, \textit{supra} note 73, at 80-82.
\textsuperscript{285} See, e.g., \textit{supra} note 29 (describing California voters’ odyssey in attempting to enact death penalty); \textit{supra} note 33 (judicial disembowelment of California’s Proposition 24). See generally, e.g., Briffault, \textit{supra} note 14, at 1365 (citing further examples); Fischer, \textit{supra} note 73, at 82-83 (same).
\textsuperscript{286} See generally \textit{supra} notes 164-66 and accompanying text (describing, and applying to the instant context, Justice Brandeis’ “laboratories of federalism” metaphor); \textit{Hearings, supra} note 145, at 100 (testimony of Ralph Nader) (“The process is also revocable. That’s what’s good about it. In a few years if the consequence of the first initiative is untoward it can be repealed. It’s not like something cast in bronze.”).
\textsuperscript{287} See generally \textit{supra} notes 82-90, 150-66 and accompanying text (discussing educational function of the state, and comparative limitations of the “active” state educational enterprises in pursuing that goal).
\textsuperscript{288} The qualification I attach to the potentially more categorical assertion takes cognizance of the necessity for some form of single-subject component, even with respect to the democracy-facilitation proposal which I hereinafter make. See \textit{infra} notes 381-97 and accompanying text.
devices. Such obstructions manifest themselves in a wide variety of forms, from burdensome ballot-qualification impediments,289 to state court-imposed substantive limitations,290 to denial of the availability of the popular devices at all.291

In this section, I will focus on procedural impediments to ballot qualification, which may find their sources in state constitutions or statutes, but which are ultimately applied, either more or less restrictively, by state courts. In so doing, I will employ as an example a recent experience in Oklahoma, both to provide an illustration of the disadvantages of obstruction in a specific factual setting, and to demonstrate the methods by which state courts, choosing so to do, can procedurally impede popular constitutional reform.

A. Structural Defects in the Oklahoma Constitution

Subsequent to its discussion of state constitutional conventions, the Oklahoma Constitution includes a proviso: "Provided, That the question of such proposed convention shall be submitted to the people at least once in every twenty years."292 This proviso resulted from the common perception of the constitution's 1906 framers that the constitution, given its nature and rapidly evolving social conditions, would need periodic revision.293

The proviso, however, is not self-executing, and the question has not been put to the voters in accord with the constitutional requirement.294 Over the years, however, various studies of the Oklahoma Constitution's inadequacies were conducted,295 which resulted, unfortunately, in no substantial

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289. See supra note 17 (describing number of requisite qualifying signatures for ballot qualification with respect to constitutional initiatives); May, supra note 7, at 44 (describing measuring election, and distribution-of-signatures requirement); supra note 18 (describing requirements for adoption once a constitutional initiative has qualified for the ballot).
290. See Briffault, supra note 14, at 1365 (citing examples).
291. See supra note 16 and accompanying text (unavailability of constitutional initiative procedure in thirty-three states).
292. OKLA. CONST. art. XXIV, § 2.
294. But cf. 1991 Oklahoma Constitution Report, supra note 42, at 522-23 (identifying 1970 as the last year in which such a vote was conducted).
improvements. Against this backdrop, then-Governor Henry Bellmon, United States Senator David Boren, and then-Attorney General Robert Henry announced the formation of the Oklahoma Constitution Revision Study Commission [OCRSC]. I had the privilege of serving on that Commission.

The OCRSC comprised thirty-two individuals, under the chairmanship of Robert Henry; those individuals included persons with widely divergent political viewpoints, expertise, and backgrounds. After three years of investigations, the Commission concluded—unanimously—that the Oklahoma Constitution was a very badly flawed device, and generated a number of proposals for its improvement.

While I make no claim to having exhaustively researched each of the other forty-nine state constitutions, I feel confident in asserting that Oklahoma’s must be among the worst. It is the third-longest state constitution, more than ten times as lengthy as Vermont’s (and the United States’). Article IX of the Oklahoma Constitution (creating the Corporation Commission) is almost twice as long as the Constitution of the United States (excluding the amendments); section 13 of Article IX, which creates fifty-one exceptions to the rule prohibiting railroads from offering free passes, is more lengthy than Article III of the United States Constitution, which creates and distributes the federal judicial power.

But size alone does not badness make. The constitution’s weight, to be sure, would contribute to a reasonable suspicion of surplusage. That suspicion, in turn, would be confirmed by the discovery of provisions specifically authorizing the legislature to pass laws which the legislature is already generally authorized to pass, specifically authorizing the citizenry,

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296. The Commission’s honorary chairmen were then-Governor Bellman (a Republican) and Senator Boren (a Democrat). The Chairman—Robert Henry—is a Democrat. Commission members included Republicans, Democrats, and even a Libertarian, with widely differing political and economic views.

297. See generally May, supra note 7, at 23 (describing OCRSC’s membership and procedures).

298. May, supra note 7, at 40.

299. Compare Okla. Const. art. V, § 36 (“The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution . . . shall not work a restriction . . . of such authority upon the same . . . .”) with id., art. V, § 37 (“The Legislature shall have the power to establish a state printing plant . . . .”).
through initiative petition, to enact laws which the citizenry is already generally authorized to enact, and exhorting—in non-self-executing provisions—the legislature to pass certain laws. The constitution also demonstrates little reluctance to confront the bizarre: noteworthy in this respect are provisions declaring railroads to be public highways and constitution-alizing both the flash point and specific gravity of kerosene. Much material normally left to statute is constitutional-ized under Oklahoma’s scheme, and much of that is manifestly outdated. Much more has been statutorily pre-empted by federal law. Nor is the Oklahoma Constitution reticent about engaging in procedurally bizarre machinations. Many of its provi-sions are amendable by statute, a result surely different

300. Compare id., art. V, § 1 (“[T]he people reserve to themselves the power to propose laws . . . and to enact or reject the same at the polls independent of the Legislature . . . ”) with id., art. XXV, § 1 (“[T]he people by initiative petition are hereby authorized to provide . . . for the relief and care of needy, aged persons who are unable to provide for themselves . . . ”).

301. E.g., id., art. XXIII, § 5 (“The Legislature shall pass laws to protect the health and safety of employees in factories, in mines, and on railroads.”).

302. Id., art. IX, § 6.

303. Id., art. XX, § 2. For the curious, the flash point is set at 115° Fahrenheit, and the specific gravity at 40° Baumé.

304. E.g.; id., art. IX, § 26 (requiring railroad depots to be “kept well lighted and warmed”).

305. E.g., id., art. IX, § 17 (requiring corporation commissioners to swear, inter alia, that they have no interest in traction lines, street railways, canals, or steam boats); id. art. XIII, § 7 (exhorting legislature to provide for teaching of stock feeding and “domestic science” in state’s common schools); id., art. IX, § 14 (requiring that railroads pass no closer than four miles to a county seat without passing through the county seat, “unless prevented by natural obstacles such as streams, hills, or mountains”); id., art. VI, § 31a (requiring that a majority of the Board of Regents of Oklahoma State University be farmers).


307. E.g., OKLA. CONST. art. XIII, § 4 (requiring compulsory school attendance for children “who are sound in mind and body”).

308. E.g., id., art. IX, § 35 (“[T]he Legislature may, by law, from time to time, alter, amend, revise, or repeal sections from eighteen to thirty-four, inclusive, of this article, or any of them, or any amendments thereof . . . ”).
than John Marshall's conception\(^{309}\) (and my own) of what a constitution is supposed to be.

Nor is the organization of that document always apparent: the common-law fellow-servant doctrine is abrogated in the article creating the Corporation Commission,\(^{310}\) and the boards of regents of the University of Oklahoma and Oklahoma State University are created in two separate articles.\(^{311}\) Apart from coherence-for-its-own-sake, comprehensibility, and utility, the phenomenon of scattering related concepts throughout the constitution's various articles not only makes amendment extraordinarily difficult should state courts elect to interpret amendment-limitations obstructively,\(^{312}\) but also renders amendment-by-article—even if permitted\(^{313}\)—an inadequate remedial device.\(^{314}\)

To this point, I have not yet addressed the substantive idiosyncrasies of the Oklahoma Constitution. In that context, too, that constitution is unsuitable to present-day realities. It establishes a Governor who is one of the weakest in the nation; that official is so saddled with boards and commissions—most, unelected—over which he or she has no control

\(^{309}\) See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("The constitution is either a supreme, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.").

\(^{310}\) Okla. Const. art. IX, § 36.

\(^{311}\) Compare id., art. VI, § 31a (Oklahoma State University) with id., art. XIII, § 8 (University of Oklahoma).

\(^{312}\) See infra notes 332-55 (discussing Oklahoma Supreme Court's approach).

\(^{313}\) Prior to 1952, the Oklahoma Constitution provided: "No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted." See Okla. Const. art. XXIV, § 1. In that year, however, the voters, pursuant to a referendum petition, added a liberalizing proviso. Infra text accompanying note 332.

\(^{314}\) LeFrancois, supra note 293, at _ See generally In re Initiative Petition No. 342, State Question No. 628, 797 P.2d 331, 332 (Okla. 1990) (Article IX of Oklahoma Constitution "does not deal with a single scheme, only with subjects which are loosely related."); In re Initiative Petition No. 344, State Question No. 640, 797 P.2d 326, 329 (Okla. 1990) (Article VI of Oklahoma Constitution also found unamendable by article for similar reasons); infra notes 332-46 and accompanying text (criticizing Oklahoma Supreme Court's approach to this issue).
that political accountability remains only the most remote of dreams.\textsuperscript{315}

The antibusiness character of the constitution is also legendary.\textsuperscript{316} Prohibiting bank holding companies;\textsuperscript{317} imposing exhaustive restrictions on passenger railroads\textsuperscript{318} (which, perhaps ironically, no longer exist in the state); prohibiting non-United States citizens from owning real property in the state;\textsuperscript{319} banning corporations from owning rural land;\textsuperscript{320} and permitting the legislature (under certain circumstances) to "alter, amend, annul, revoke, or repeal any charter of incorporation . . . whenever in its opinion it may be injurious to the citizens of this State"\textsuperscript{321}—all in the state's basic charter—do not appear to furnish a prescription for success in an increasingly competitive national and global economy.

While these examples by no means exhaust the list of the constitution's deficiencies, those limitations are discussed at length in the OCRSC's final report,\textsuperscript{322} and, given my purposes, need not be rehearsed here.

\textbf{B. The OCRSC Proposals}

Into the constitutional abyss stepped the OCRSC, which ultimately made recommendations for additions, deletions, and reorganization which affected virtually all of the constitu-


\textsuperscript{316} \textit{1991 Oklahoma Constitution Report}, supra note 42, at 595 ("Contemporaries of the original constitutional convention remarked that it was in . . . article [IX] that the document fairly bristled with hostility toward business and its presumably wicked designs.").

\textsuperscript{317} \textsc{Okla. Const.} art. IX, § 41.

\textsuperscript{318} See, e.g., \textit{supra} text following note 296; \textit{supra} notes 302-03; \textsc{Okla. Const.} art. IX, §§ 2, 3, 6, 7, 8, 9, 10, 11, 12, 27.

\textsuperscript{319} \textsc{Okla. Const.} art. XXII, § 1.

\textsuperscript{320} Id., art. XXII, § 2.

\textsuperscript{321} Id., art. IX, § 47.

tion's thirty-three articles, and proposed to add a thirty-fourth. It elected to proceed first with revisions of Article VI (relating to the executive branch) and Article IX (relating to the Corporation Commission), since in the OCRSC's judgment, those were the articles that were the most fundamentally flawed. (I assure the reader, however, that there were numerous other extremely credible candidates for that distinction.) Consequently, Articles VI and IX were the first whose revision was completed by the OCRSC. It decided to simultaneously pursue the addition of a new article which would create and grant broad powers to a statewide Ethics Commission, since in its judgment, an already-existing legislatively-created one was susceptible to political manipulation and structurally ineffective.

In pursuing the constitutional-initiative remedy, the OCRSC, which had no statutory authority, turned over its proposals with respect to these three articles to an independent and privately funded group for the ensuing initiative campaign. At the close of the ninety-day period for collecting signatures, a total of nearly 600,000 signatures had been gathered on the three initiative petitions. Oklahoma's Secretary of State certified the petitions in November, 1989.

What happened next is described by the OCRSC's final report as follows:

A small group of people who preferred Oklahoma's politics-as-usual thereupon challenged the petition in the

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323. While, at the time of the OCRSC's work, Okla. Const. art. XXVIII was formally the "last" article, various other articles, with roman numeral and letter designations, have been inserted into the document from time to time. E.g., Okla. Const. art. XII-A (dealing with homestead exemptions from taxation).

324. The addition, which involved the creation of a constitutionalized Ethics Commission, was adopted by the citizenry pursuant to constitutional initiative, and is now codified at Okla. Const. art. XXIX. See generally supra notes 39-42 and accompanying text (discussing that commission); supra note 323 (discussing articles' numbering).

325. See generally supra text accompanying notes 315-21 (describing some of those articles' most glaring defects).

326. See generally supra notes 40, 42 (further developing OCRSC's rationale).

327. OCRSC members received no compensation for their work, and such funds as were required for printing, mailing, and the like were also private funds.

state supreme court. Freely admitting that what they really opposed was the *substance* of the change—most vehemently, the strengthening of the governorship— their legal assault attacked, instead, its *form* . . .

To the shock of commission members, its attorneys, and the state attorney’s general office, the supreme court . . . in split decisions . . . struck down two of the three proposals.329

While rejecting the pre-ballot challenge to the proposed Ethics Commission article,330 the court precluded the executive branch and corporation commission article revisions from submission to a popular vote.

C. Obstruction

The OCRSC was not legally naive. Of its thirty-three members (including its chairman), nine were attorneys, including the Governor’s chief counsel, the state’s Attorney General, one Assistant Attorney General, the Director of the state’s Department of Human Services, one state senator (later appointed United States Attorney), and four law professors, from two of the state’s three law schools. At the beginning of the process, we were aware that we would have two procedural hurdles to overcome.

First was Oklahoma’s version of the “single subject” rule, created with the laudable purpose of preventing logrolling in constitutional initiative campaigns.331 In this respect, the OCRSC took comfort from the manifest intent of a 1952 amendment to the state’s constitutional amendment process, which specifically authorized an amendment-by-article approach: “[P]rovided, however, that in the submission of proposals for the amendment of this Constitution by articles,
which embrace one general subject, each proposed article shall be deemed a single proposal or proposition.”

The OCRSC was aware of the ambiguities of the proviso’s “which embrace one general subject” clause; those ambiguities exist at a multitude of levels. But a threshold question concerns the applicability of any single-subject limitation to popular constitutional initiatives. The source of those limitations, after all, is contained in Article XXIV of the Oklahoma Constitution, which addresses, by its own terms constitutional-initiatives generated by the legislature. But the single-subject sentence is phrased categorically, and I, at least, assumed arguendo that it would apply to popular constitutional initiatives.

This brought the OCRSC’s legal analysts to the ambiguities of Article XXIV’s amendment-by-article proviso. At the first level, the question of what a “general subject” was presented itself. This conundrum, the OCRSC was unable to resolve, since the Oklahoma Supreme Court, while occasionally articulating lenient tests, had also occasionally applied the “general subject” test quite restrictively.

At the second level, the manner in which the “which embrace one general subject” clause is inserted into the amend-

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332. OKLA. CONST. art. XXIV, § 1.
333. The popular constitutional initiative is created in a different constitutional article, see generally supra text accompanying notes 310-12 (ironically, not only illustrating the difficulty of an amendment-by-article approach, but also highlighting interpretive problems arising from constitution’s structural incoherence), which contains no single-subject limitation within its text. See OKLA. CONST. art. V, § 2.
334. But cf. OKLA. CONST. art. XXIV, § 3 (emphasis added) (“This article shall not impair the right of the people to amend this Constitution by a vote upon an initiative petition therefor.”). Section 1 of the same article, however, provides: “No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject.” Id., art. XXIV, § 1 (emphasis added). The self-contradictory nature of many of the Oklahoma Constitution’s provisions is but one of its numerous endearing features. Cf. infra text accompanying note 337 (noting example of syntactical ambiguity).
335. E.g., Rupe v. Shaw, 286 P.2d 1094, 1097 (Okla. 1955) (emphasis added) (“[M]atters germane to the same general subject indicated in the amendment’s title, or within the field of legislation suggested thereby, may be included therein.”).
336. E.g., In re Initiative Petition No. 314, State Question No. 550, 625 P.2d 595 (Okla. 1981) (finding that an initiative petition to legalize liquor-by-the-drink, liquor advertising, and permit brewers’ exclusive franchise arrangements violated the single-subject rule). If the Rupe “germane” test were really being applied, it would seem that all the above were germane to the subject of liquor sales.
ment-by-article proviso—and the logical relationship of the proviso to the preceding clause (which establishes a generally applicable single-subject rule)—both give rise to further interpretive problems. Given the manner of the clause’s insertion (and the consequential ambiguity of the word “which”), two diametrically opposed meanings can be inferred. On the one hand, the clause might be explanatory, providing guidance to the effect that amendments-by-article will be interpreted to embrace one “general subject.” On the other, the clause might be one of limitation, confining the sweep of the amendment-by-article authorization to articles which would independently qualify as embracing only one “general subject.”

But in the OCRSC’s judgment, two factors rendered the latter interpretation irrational. Both relate to courts’ general unwillingness to assume that legislation—let alone a constitutional amendment—is an idle act, without legal consequences.

First, if “general subject” is to be construed as the Oklahoma Supreme Court interpreted it in 1981 (when it decided that liquor-by-the-drink, beer franchising, and liquor advertising were not sufficiently related to the “general subject” of liquor sales), then it is doubtful that any of the Oklahoma Constitution’s then-thirty-three articles (save, perhaps, Article IV, which contains but a single section)

337. See supra text accompanying note 332. Correctly employed, “which,” as contrasted to “that,” is a nondefining and nonrestrictive term, W. STRUNK, JR. & E. WHITE, THE ELEMENTS OF STYLE 59 (3d ed. 1979). Such subtleties, however, often escaped the Oklahoma Constitution’s framers elsewhere in its text, creating doubt that the use of “which” instead of “that” in the instant context was intended to carry legal significance. See generally, e.g., Lipscomb v. Bd. of Educ., 305 Or. 472, 485-6, 753 P.2d 939, 947 (1988) (“That approach puts a greater burden on draftsmanship than the legislative institutions then, or now, can bear, let alone the initiative process . . . . Nor are we dealing with the work of the kind of committee on style that produced the text of the United States Constitution.”) The context and logical consequences of such an interpretation further contribute to this doubt. See infra text accompanying notes 333-43.

338. See supra note 335.

339. See supra note 323.

340. OKLA. CONST. art. IV, § 1 (providing for separation of powers). Ironically, at least one justice may have found that section unamendable for different reasons. See supra note 42.

Perhaps one other candidate is article XX, which contains but two sections. The first expressly permits the manufacture and sale of denatured alcohol; the second, as has been noted, see supra note 303, constitutionalizes the flash point and specific gravity of kerosene. OKLA. CONST. art. XX, §§ 1, 2. But if liquor-by-the-drink, liquor
would be amendable pursuant to the proviso. Moreover, if any such article were deemed to contain a single general subject, such article would already be amendable, in its entirety, even without the proviso.

Corroborating this conclusion (so the OCRSC thought) was dictum from In re Initiative Petition No. 314, State Question No. 550,341 the liquor-related case discussed above. While rejecting the proposition that the liquor-related measures contained in that constitutional initiative342 satisfied the single general subject standard, the Oklahoma Supreme Court stated:

The changes sought by the multifarious proposal could have been effected either by submission of three separate proposals or a submission amending, under Art. 24, § 1, the entirety of Art. 27, as an amendment by article, as was done in 1959 when prohibition was repealed and Art. 27 was submitted and adopted by a vote of the people.343

Taking this dictum seriously, and assuming that the court’s analysis of the amendment-by-article proviso paralleled the OCRSC’s own, it proposed its modifications to the executive branch and corporation commission as amendments-by-article to Articles VI and IX, respectively. Its efforts were nullified, respectively, by In re Initiative Petition No. 344, State Question No. 630344 and In re Initiative Petition No. 342, State Question No. 628.345 Both rested in part on a restrictive interpretation of the single-subject rule.346

advertising, and beer franchising do not adequately relate to the “general subject” of “liquor sales,” it is doubtful that denatured alcohol sales and the qualities of kerosene would adequately relate to the “general subject” of “fluids.”

341. 625 P.2d 595 (Okla. 1980).
342. See supra text accompanying note 338.
343. In re Initiative Petition No. 314, 625 P.2d at 608 (emphasis added).
344. 797 P.2d 326 (Okla. 1990) [hereinafter Executive Branch Case].
345. 797 P.2d 331 (Okla. 1990) [hereinafter Corporation Commission Case].
346. Executive Branch Case, supra note 344, at 329; Corporation Commission Case, supra note 345, at 332-33. Amazingly, though citing In re Initiative Petition No. 314, (which had liberally interpreted the constitutional amendment-by-article proviso, see supra text accompanying note 343), both the Executive Branch Case and the Corporation Commission Case ignored not only that interpretation, but the amendment-by-article issue, in toto. See Executive Branch Case, supra note 344, at 329; Corporation Commission Case, supra note 345, at 332-33. But see id. at 334.
Apart from that, the Oklahoma legislature, by statute, has imposed a number of ballot-description restrictions, one of which—limiting such descriptions to 150 words (in eighth-grade language)—the court found to be unmet. While it is true that fully explaining the impact of the amendment-by-article of Article IX (which was then, and is now, twice as long as the Constitution of the United States) in 150 words of eighth-grade language may well be impossible, it may also be true that the same can be said of virtually all of the Oklahoma Constitution's other articles. Thus, if the legislature is permitted to impose such restrictions by statute, we are furnished with yet another example of the ability to amend the Oklahoma Constitution (in this case, Article XXIV) legislatively (though in this case, only de facto). Of course, the court may have already amended the constitution judicially, by reading the "amendment-by-article" proviso out of Article XXIV.

I will have more to say, later, about the ability of legislatures to obstruct constitutionally-guaranteed popular rights to the initiative device. For now, it suffices to say that the Oklahoma citizenry was protected from voting on amendments to facilitate governmental accountability and economic growth. In these instances, due to judicial obstruc-

(Lavender, J., dissenting) (invoking and applying the amendment-by-article approach).


349. Corporation Commission Case, supra note 345, at 333-34; Executive Branch Case, supra note 344, at 330.

350. See generally, e.g., supra notes 308-09 and accompanying text (describing constitutional provisions authorizing legislature to amend the constitution, de jure, by statute).

351. See supra notes 336-40 and accompanying text; supra note 346.

352. Infra notes 374-76 and accompanying text. See also LeFrancois, supra note 293. See generally supra note 61 (inducements to legislative restrictions on ballot access).

353. See supra note 315 and accompanying text. See also Mager, supra note 322, at 138-55.

354. See supra text accompanying notes 316-21. See also Stone, supra note 322, at 93, 114-19.
tion, the Oklahoma Constitution survived a close brush with improvement.\textsuperscript{355}

IV. A PROPOSED FACILITATION MODEL

Logicians have argued that political philosophy\textsuperscript{356} stands or falls on the transition it makes from factual judgments to value judgments;\textsuperscript{357} applied political science, on the other hand, stands or falls on the transition from value to fact. In making that transition, I will construct a model based upon a clean-slate assumption. While that model will necessarily be

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\textsuperscript{355} Two cases subsequent to the OCRSC-generated cases may furnish a limited basis for optimism.

In \textit{In re Initiative Petition No. 347}, State Question No. 639, 813 P.2d 1019 (Okla. 1991), the Oklahoma Supreme Court applied a more lenient version of the single-subject rule, see \textit{id.} at 1027-28, and the ballot-description restrictions described above. See \textit{id.} at 1027-29. But that case did not speak to the amendment-by-article issue, since it involved a \textit{statutory} initiative, and such initiatives are governed by different constitutional provisions. \textit{Id.} at 1026-27. \textit{Compare} Okla. Const. art. V, § 57 with \textit{id.}, art. XXIV, § 1.

In \textit{In re Initiative Petition No. 348}, State Question No. 640, 820 P.2d 772 (Okla. 1991) (which, unlike \textit{Initiative Petition No. 347}, dealt with a constitutional initiative), the court, though citing the \textit{Corporation Commission Case, supra} note 345, applied both the single-subject and ballot-description limitations in a fairly lenient manner. See \textit{id.} at 776-79. Again, however, amendment-by-article was not in issue.

\textsuperscript{356} I attempt, in this article, to both articulate (or, at least, to partake of) a particular democratic political philosophy, and to apply it to a particular governmental mechanism. In so doing, I have attempted to heed Strauss's admonition that

[a] considerable part of the matter formerly treated by political philosophy is now treated by a non-philosophic political science which forms part of social science. This new political science is concerned with discovering laws of political behavior and ultimately universal laws of political behavior. Lest it mistake the peculiarities of the politics of the time and the places in which social science is at home for the character of all politics, it must study also the politics of other climes and other ages.

L. STRAUSS, \textit{supra} note 45, at 8 (1964).

Thus, my proposal, while of some relevance to the \textit{statutory} initiative device, is not directly applicable to such initiatives, due to their somewhat different dynamics: my proposed 8\%-10\% signature requirement, for example, might well be lowered in the case of statutory initiatives. Moreover, while aspects of my proposal might well prove germane to a hypothetical \textit{federal} constitutional initiative, I advance no argument in behalf of such a proposal herein. See generally \textit{supra} notes 274-75 and accompanying text (relying, in part, on federal bill-of-rights guarantees to rebut the existence of a threat to liberty in connection with my proposal); \textit{Hearings, supra} note 145 \textit{passim} (articulating factors supporting and opposing a federal constitutional initiative). Finally, I expressly disclaim any intent to proffer prescriptions necessarily applicable to political systems other than those within the United States.

\textsuperscript{357} L. STRAUSS, \textit{supra} note 45, at 8. \textit{But cf. id.} at 11, 35-80 (tenuous nature of fact/value distinction).
incapable of direct application to the seventeen states which currently employ the constitutional initiative device in some form.\(^{358}\) (perhaps especially, to the most restrictive regimes, such as Arizona's, Illinois', and Oklahoma's),\(^ {359}\) it is constructed in such a manner as to be applicable, \textit{mutatis mutandis}, even to those states.

\(^{358}\) See \textit{supra} note 16 and accompanying text.

\(^{359}\) No single criterion establishes the relative degree of restrictiveness of a constitutional-initiative regime. \textit{Cf.}, \textit{e.g.}, Williams v. Rhodes, 393 U.S. 23, 34 (1968) ("totality of circumstances" approach applied to ballot-access restrictions). I classify Arizona as among the most restrictive constitutional-initiative states due to the high number of signatures it requires for constitutional-initiative ballot qualification, Ariz. Const. art. XXI, \S\ 1 (15\% of the votes at the last gubernatorial election, which, along with Oklahoma, is the highest among the constitutional-initiative states), and its restrictive single-subject rule. \textit{See} Kerby v. Luhrs, 44 Ariz. 208, 220-21, 36 P.2d 549, 554 (1934). \textit{But see} Tilson v. Mofford, 153 Ariz. 468, 471-72, 737 P.2d 1367, 1370-71 (1987) (applying the Kerby single-subject test in a relatively lenient fashion); \textit{State ex rel. Jones v. Lockhart}, 76 Ariz. 390, 396, 265 P.2d 447, 451 (1953) (same). (Ironically, the more recent Arizona cases, while formally invoking Kerby, \textit{e.g.} Lockhart, 76 Ariz. at 396, 265 P.2d at 451, may well have undercut the vigor of Kerby's bite; despite that fact, the Oklahoma Supreme Court, in the cases which invalidated two of the three OCRSC proposals, see \textit{supra} notes 331-46, relied heavily on Kerby to support its restrictive single-subject approach. \textit{Corporation Commission Case, supra} note 345, at 332; \textit{Executive Branch Case, supra} note 344, at 329). Illinois makes my list due to the restricted subject matter encompassed by its constitutional-initiative authorization, \textit{supra} note 16, and Oklahoma for the same reasons as Arizona, \textit{see supra} note 17; \textit{supra} notes 344-46 and accompanying text, coupled with its legislatively-imposed, 150-words-of-eighth-grade-level-language ballot-description limitation. \textit{See supra} notes 347-50 and accompanying text.

Other candidates for the most-restrictive list fall by the wayside when the totality-of-circumstances approach is applied. While Missouri requires 8\% of voters in each of two-thirds of the congressional districts in that state to sign the qualifying petition (in addition to 8\% statewide), Mo. Const. art. 3, \S\ 50, that state employs relatively lenient versions of the single-subject rule, see, \textit{e.g.}, Buchanan v. Kirkpatrick, 615 S.W.2d 6, 13-14 (Mo. 1981), and ballot-title requirement. \textit{Id.} at 14-15. Moreover, while the Missouri Constitution provides that "[p]etitions for constitutional amendments shall not contain more than one amended and revised article of this constitution . . . ." Mo. Const. art. 3, \S\ 50, \textit{id.}, art. 12, \S\ 2b (emphasis added), the Missouri Supreme Court, reasoning that "substantial compliance" with the Missouri Constitution's amendment procedures is legally sufficient, \textit{see State ex rel. Bd. of Fund Comm'rs v. Holman}, 296 S.W.2d 482, 495 (Mo. 1956), has held that "one constitutional amendment may change several articles . . . . if all these changes are germane to a single controlling purpose." \textit{Id.} at 491 (emphasis added) (quoting Moore v. Brown, 165 S.W. 2d 657, 662 (Mo. 1942)).

Nevada might also be a candidate, since it requires that the 10\% of signatures it requires include 10\% from each of 75\% of that state's counties, Nev. Rev. Const. art. 19, \S\ 2, and requires that voters approve such constitutional initiatives at two consecutive general elections. \textit{Id.}

But that state has only fifteen counties, and employs no single-subject rule.
A. Prerequisites to Ballot Qualification

Depending on state population, proponents of a constitutional initiative should be required to secure between one hundred and two hundred formal sponsors and pay an appropriate filing fee, in order to discourage frivolous initiative petitions. The designated sponsors should be required to seek legal counsel to review the proposed initiative for effectiveness, federal constitutionality, and potential unintended consequences. The requirements imposed by Oklahoma and other states that the circulated petition include the “full text of the measure so proposed” and that a simple statement of the general gist of the proposal be printed at the top of each signature page facilitate the education-for-citizenship goal described above, and should be constitutionalized. The “general gist” requirement, however, should not be obstructively construed absent a substantial misleading effect.

Invoking “core political speech” concerns, the United States Supreme Court has recently applied strict scrutiny to invalidate a Colorado statute which prohibited the payment of individuals for circulating any constitutional or statutory initiative petition for signature. That decision, its underlying premises, and my conclusion that such initiatives should be facilitated support the propositions that any citizen should be permitted to circulate such petitions, and that the time period for their circulation not be unreasonably brief.

While some have suggested that geographic distribution requirements for petition signature collection serve important public purposes, I am sufficiently persuaded by the “one person, one vote” approach articulated in Reynolds v.

361. But cf. id. at 234-35 (describing alternative approaches).
364. See supra notes 82-90, 150-66 and accompanying text.
367. E.g., T. Cronin, supra note 7, at 44.
Sims and subsequent cases to conclude that such limitations have outlived their principled utility.

Secretaries of State or similar officials should be required to verify signatures by means of standard statistical sampling techniques, and provisions for judicial review of the validity of those signatures should be provided to facilitate governmental efficiency. Stiff penalties for fraudulent signature-collection should be imposed.

B. Ballot-Title Requirements

Once a constitutional initiative has been procedurally qualified for the ballot, the ballot title should be required to be as concise as the constitutional initiative's subject matter will permit, and should be required to be constructed in twelfth-grade-level language. Almost four-fifths of the American population today has a high school degree, and that percent is rapidly increasing. Archaic statutory limitations such as Oklahoma's eighth-grade-level language requirement should straightforwardly be held unconstitutional by state supreme courts, lest the statutory tail be permitted to wag the constitutional dog. Such holdings can readily be

370. I will later defend the proposition, however, that such review should not extend to the substantive validity of such proposals. Infra notes 401-04 and accompanying text. Should judicial review of procedural prerequisites not be concluded prior to the election, and the measure be approved by the citizenry at that election, judicial review of such matters should cease. See, e.g., N.D. Cent. Const. art. III, § 7; Kerby v. Griffin, 48 Ariz. 434, 444-46, 62 P.2d 1131, 1135-36 (1936).
371. See T. Cronin, supra note 15, at 236-37. By “fraudulent”, I mean to implicate such practices as falsifying signatures or knowingly submitting signatures from individuals not registered to vote, and not collecting valid signatures from registered voters on initiative petitions later found to contain misleading “general gists”. See supra text accompanying note 363.
372. Statistical Abstract, supra note 54, at 139.
373. See id. (almost 86% of Americans in the 25 to 29 year-old age group now possess that degree); id. at 130 (historical trend). Moreover, even such popular magazines as People and Reader's Digest, which are readable for most people, “range between the ninth- and twelfth-grade levels in reading difficulty and fall closer to the Flesch 'standard' reading-ease score of 50.” D. Magley, supra note 15, at 138.
grounded on either federal or state constitutional grounds.

It may be objected that such an approach effectively disenfranchises those citizens who cannot read at the requisite level, but that critique fails to take cognizance of the non-written channels of information available to voters prior to their entry into the voting booth. Moreover, the fact that about 7% of the population has less than an eighth-grade education, and some small percentage cannot read at all illustrate that a line must be drawn somewhere. In light of the mischief wreaked by unduly restrictive constructions of state ballot-title requirements and the vital necessity of a meaningful state constitutional-initiative procedure, overly restrictive ballot-title limitations, such as the one described above, effect their solicitousness of the relatively minute portion of the citizenry which cannot comprehend People magazine at far too high a cost to the citizenry-at-large.

375. See, e.g., supra note 365 and accompanying text.

376. E.g., N.D. CENT. CONST. art. III, § 1 ("Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these [constitutional initiative] powers."); Mo. CONST. ANN. art. 1, § 3 ("[T]he people . . . have the inherent, sole, and exclusive right . . . to alter and abolish their constitution and form of government whenever they may deem it necessary . . . "); OKLA. CONST. art. II, § 1 ("all political power is inherent in the people . . . and they have the right to alter or reform the . . . [government] whenever the public good may require it . . . "); id., art. V, § 2 (emphasis added) ("The first power reserved by the people is the initiative . . . ."); id., art. XXIV, § 3 (emphasis added) ("This article shall not impair the right of the people to amend this Constitution by a vote upon an initiative petition therefor."). See also supra note 359 (citing Missouri Supreme Court caselaw finding "substantial compliance" adequate to satisfy even constitutionally-imposed limitations).

377. See supra text accompanying note 158.

378. See generally, e.g., supra notes 347-51 and accompanying text (functional nonamendability of Oklahoma Constitution's provisions, by article, despite constitutional authorization of such procedure).

379. Supra notes 7-322 and accompanying text. It should be noted that even apart from my claim on behalf of the state constitutional initiative, eighth-grade-language-type restrictions may impede the legislatively-generated constitutional amendment process as well. E.g., OKLA. STAT. ANN. tit. 34, § 9(A) (West 1990).

380. See supra note 373.
C. Single-Subject Requirements

While the constitutions of about half the constitutional-initiative states contain single-subject language relevant to such initiatives, both lenient and restrictive versions of that requirement have evolved.

The Wisconsin Supreme Court, in a non-constitutional-initiative context, first attempted to construct a single-subject test in State v. Timme, decided in 1882383 The test which that case announced, a general and almost tautological one, unwittingly revealed the problem which has haunted single-subject jurisprudence to the present day: At what level of generality is the “subject” to be defined? Should overly broad definitions of the “subject” (such as “governmental power,” “rights,” or “public welfare”) be found to satisfy the test, then there would be, in reality, no “single subject” rule at all. Log-rolling, and the “ice cream truck” approach of packaging something-for-everyone (which so pervades the legislative process), could proceed unabated in the constitutional initiative process as well, and a critical comparative advantage which I claim for my proposal would be lost. But should an overly narrow level of generality be imposed, efficient and rational constitutional initiatives would be thwarted. State supreme courts have struggled with the level-of-generality problem (which is not confined to constitutional initiatives, or, for

381. But cf., e.g., supra note 359 (describing Nevada’s constitutional-initiative regime).

382. ARIZ. CONST. art. XXI, § 1; CALIF. CONST. art. II, § 8(d); FLA. CONST. art. XI, § 2; MASS. CONST. art. XLVIII, § 3; MO. CONST. art. III, § 50; OHIO REV. CONST. art. XVI, § 1; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. XVII, § 1. S.D. CONST. art. XXIII, § 1 provides that “[a] proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment.”


384. Timme found that an act related to more than one subject where “amendments have different objects and purposes in view,” or where the proposition at issue “relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other.” Timme, 54 Wis. at 335-36, 11 N.W. at 791 (emphasis added). The level of generality at which “purposes,” “subjects,” and “objects” were to be defined went unexamined.

385. See supra text following note 69; supra notes 175-78 and accompanying text.
that matter, to initiatives at all) in the century-plus since Timme.\footnote{386}

The most restrictive view, now abandoned in most states, traces to a 1934 Arizona case, \textit{Kerby v. Luhrs}:\footnote{387}

If the different changes contained in the proposed amendment all cover matters \textit{necessary} to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, \textit{and if}, \textit{logically speaking, they should stand or fall as a whole}, then there is but one amendment submitted. But, if any one of the propositions \ldots does not refer to such matters, or \textit{if it is not such that the voter supporting it would reasonably be expected to support the others}, then there are in reality two or more amendments to be submitted \ldots.\footnote{388}

Both the "necessary" precondition, and the basic approach articulated in the latter two italicized passages, severely undermine the constitutional initiative as a general matter, and render complex and comprehensive institutional reform impossible, since, given the inevitability of alternative approaches to \textit{means}, very little must \textit{logically} stand or fall as a whole.

While the Arizona Supreme Court, although continuing to invoke \textit{Kerby}, has deprived that case of its more draconian implications,\footnote{389} its narrow level-of-generality approach occasionally resurfaces elsewhere. One recent manifestation of its residual impact may be found in the Oklahoma Supreme Court's decision, discussed above, in the \textit{Executive Branch Case}\footnote{390} which I discussed earlier in Part III of this Article.\footnote{391}

\footnote{386. \textit{See generally}, \textit{e.g.}, \textit{Kerby v. Luhrs}, 44 Ariz. 208, 217-21, 36 P.2d 549, 553-54 (1934) (tracing judicial approaches in various states from 1882 to 1934).


387. 44 Ariz. 208, 36 P.2d 549 (1934).

388. \textit{Kerby}, 44 Ariz. at 221, 36 P.2d at 554 (emphasis added).

389. \textit{See supra} note 359.


391. \textit{See supra} notes 344, 346-49.
In that case, the court, invoking Kerby and selected\textsuperscript{392} Oklahoma caselaw, found comprehensive reform of the executive branch (which granted power formerly held by some independent boards and commissions to the Governor, enhanced gubernatorial control over such boards, and required the Governor and Lieutenant-Governor to run together as a ticket)\textsuperscript{393} insufficiently related to the single subject of gubernatorial power.

I propose abandonment of the restrictive view in those few jurisdictions where it still occasionally\textsuperscript{394} surfaces, and its replacement with the prevalent, "reasonably germane" approach. That approach was recently described by the California Supreme Court:

"[A]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are 'reasonably germane' to each other", and to the general purpose or object of the initiative.

\ldots

\ldots [W]e [recently] admonished that the single-subject rule "obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare'." We continued by referring to our "liberal interpretive tradition \ldots of sustaining statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose."

\ldots As we have previously held, the single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship.\textsuperscript{395}

Such an approach strikes an appropriate balance between the need to prevent logrolling, on the one hand, and the need for comprehensive reform, on the other. Although my prof-

\textsuperscript{392} Cf. \textit{supra} text accompanying note 343 (examining amendment-by-article approach).

\textsuperscript{393} \textit{See Executive Branch Case}, 797 P.2d 326, 329. \textit{See generally} \textit{supra} text accompanying note 315 (rationale for proposed modifications).

\textsuperscript{394} \textit{See supra} note 355.

ferred approach creates no bright line (the Kerby approach, which creates a brighter one, does so at the cost of virtual abnegation of the constitutional initiative's utility), it employs a rule of reasonableness which I am confident that state supreme courts are perfectly capable of applying. The experience of the California Supreme Court (and other states, as well) in applying the "reasonably germane" approach should adequately evidence my point. Actuality, again, proves possibility.

D. Publicity

All states possessed of the constitutional-initiative device have discovered and applied adequate mechanisms for informing their electorates of the fact of a constitutional initiative's pendency; such methods appropriately vary from state to state, given variances in population density, geography, and the state's political and cultural traditions.

With respect to the contents and impact of such measures, however, I am persuaded that both the education-for-citizenship values which I adduce above, and the achievement of the most informed decisionmaking process possible, unqualifiedly favor a ballot pamphlet approach. Such pamphlets should be disseminated to every voter (or at least voting household), based on the model now employed by California. (While other states employ some form of ballot pamphlet, the California system provides both the most comprehensive information and the broadest distribution.)

396. State supreme courts are not known for their political naiveté. With respect to abusive logrolling attempts, I have every confidence, as Justice Stewart once remarked about obscenity, that such courts will know it when they see it. Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring).


E. Judicial Review

State supreme courts have long struggled with the question whether to review the substance of proposed constitutional initiatives prior to the popular vote, and have divided in their approach to that issue. Some supreme courts have approached that issue differently at different times. Scholarly commentators have also divided as to the merits of the competing approaches.

Most courts, however, have determined that substantive issues are unripe and thus nonreviewable in pre-election litigation. On the legal side, I am persuaded that this approach is the preferable one, due not only to ripeness concerns, but also because such review interferes with what is, in effect, an ongoing quasi-legislative process, and undermines the policy disfavoring the litigation of what may be unnecessary constitutional issues. On the political side, I am persuaded (though I cannot document) that state supreme courts tempted to obstruct rather than facilitate will think twice about so doing, in close cases, after the citizenry has spoken.

CONCLUSION

In the year of the American Declaration of Independence, Jeremy Bentham, toward the end of A Fragment on Government, wrote:


403. See U.C. Davis Comment, supra note 402, at 479.

404. See, e.g., Gordon & Magleby, supra note 402, at 320.
God forbid, that from any thing here said it should be concluded that in any society any convention . . . can be made, which shall have the effect of setting up an insuperable bar to that which the parties affected shall deem a reformation: —God forbid that any disease in the constitution of a state should be without its remedy . . . . Although that body itself which contracted the engagement be no more, a larger body, from whence the first is understood to have derived its title, may still subsist. Let this larger body be consulted.\textsuperscript{408}

Though the Framers of our federal constitution constructed a document which did not employ direct citizen participation in lawmaking at that level, all recognized the necessity for a firm grounding of government in popular consent.\textsuperscript{406} By a hundred years after that, the Hobbesian model (pursuant to which representatives are elected by the people, but governmental is not consensual after that election)\textsuperscript{407} had been called into question, and by the first decades of this century, the Lockean model (pursuant to which popular consent, once given, can be withdrawn)\textsuperscript{408} had become ascendant. The Progressives, who effectuated that model, left us with the popular democratic devices as their most valuable enduring legacy.\textsuperscript{409}

We now live in an era in which, due to still more recent historical experience, the Lockean model is being pursued with renewed vigor.\textsuperscript{410} In this Article, I first examined the manifestations of that impetus, which occur in both candidate elections and outputs of the popular democratic devices. Next, I examined its causes, and demonstrated that our purely representative governmental forms suffer from inherent and structural limitations insofar as the pursuit of the substantive and procedural ends of good government are concerned. Moreover, due to re-election exigencies and logrolling, I illustrated the virtual inevitability of the prevalence of minority-

\textsuperscript{405} J. BENTHAM, A FRAGMENT ON GOVERNMENT 224-25 (F. Montague ed. 1891) (1st ed. 1776) (first emphasis in original) (second emphasis added).
\textsuperscript{406} See, e.g., T. CRONIN, supra note 15, at 8.
\textsuperscript{407} See supra text accompanying note 3.
\textsuperscript{408} Supra text accompanying note 4. See also, e.g., J. ROUSSEAU, ON THE SOCIAL CONTRACT 52-113 (R. Masters ed. 1978) (1762 ed.).
\textsuperscript{409} See supra notes 14-18 and accompanying text.
\textsuperscript{410} E.g., supra notes 7-43 and accompanying text.
faction combinations, and the consequential sacrifice of permanent and aggregate community goals.\textsuperscript{411}

Having criticized unmodified representationalism, I turned to the construction of a positive case for enhancement of the popular democratic devices, most particularly, for facilitation of the state constitutional initiative. Given the binary nature of that device, I demonstrated its ability to provide a check on combined minority factions.\textsuperscript{412} Moreover, I defended its inherent educational value \textsuperscript{413} and its ability to provide a check on legislative excess, unresponsiveness, and self-interest.\textsuperscript{414} While I noted the theoretical ability of the populace to simply vote out legislative malfeasors, I established the practical inadequacy of that remedy standing alone.\textsuperscript{415} And given the prevalence of "generalized grievance"-type barriers to judicial recourse,\textsuperscript{416} popular self-recourse remains the only check of the majority on our representative institutions.

I then presented non-structural comparative advantages of the constitutional initiative, which related to governmental innovation and the quality of citizen participation in self-government,\textsuperscript{417} and rebutted the commonly posed objections to that device.\textsuperscript{418} Finally, I provided a concrete example of the deleterious effects of judicial obstruction,\textsuperscript{419} and constructed a model for both constitutional initiative-enactment and judicial review.\textsuperscript{420} I urge that that model be adopted, so that we citizens may become more than largely passive bystanders to our own political fates.

\begin{itemize}
  \item \textsuperscript{411} Supra notes 48-132 and accompanying text.
  \item \textsuperscript{412} Supra notes 167-73 and accompanying text.
  \item \textsuperscript{413} Supra notes 150-66 and accompanying text.
  \item \textsuperscript{414} Supra notes 133-49 and accompanying text.
  \item \textsuperscript{415} Supra note 145.
  \item \textsuperscript{416} See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).
  \item \textsuperscript{417} Supra notes 174-202 and accompanying text.
  \item \textsuperscript{418} Supra notes 203-87 and accompanying text.
  \item \textsuperscript{419} Supra notes 288-355 and accompanying text.
  \item \textsuperscript{420} Supra notes 356-404 and accompanying text.
\end{itemize}