

ARTICLES

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THE COMMUNION OF STRANGERS: REPRESENTATIVE GOVERNMENT, DIRECT DEMOCRACY, AND THE PRIVATIZATION OF THE PUBLIC SPHERE*

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I. INTRODUCTION

I am not from Oregon. Although lacking the literary quality (and authorial gravitas) of such openers as “In the beginning . . .” or “Call me Ishmael,” this admission is an appropriate introduction to the published form of a lecture that served as the keynote address for a symposium focusing on the problems and

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** Faegre & Benson Professor of Law, University of Minnesota. Many thanks to Hans Linde, the members of the *Willamette Law Review*, and others associated with Willamette University College of Law for providing me this opportunity. I also appreciate the indulgence of the Law Review editors in allowing me to publish this lecture without the usual abundance of footnotes that adorn the obvious or that support more controversial assertions that, in this context, I feel comfortable simply offering for consideration.

promise of direct democracy in Oregon.¹ I suppose that my mid-western domicile lends whatever credibility is inherent in the old saw that an expert is somebody from out of town, but my sense is that it poses the greater danger of being the stranger who purports to know more about a local situation than do the locals. There may be value, though, in hearing from outsiders who come from a different political culture² where direct democracy is not taken for granted as an essential element of state governance. Moreover, as I suggest below, it is sometimes in the company of strangers that local conventional wisdom loses its self-evident value.

In Minnesota, where I live, we lack statewide direct democracy, and our experience with its occasional local episodes has been unsettling at times.³ In the national community of legal

1. One of the most enjoyable aspects of preparing the lecture and this resulting paper was benefiting from the support of many colleagues. Virginia Gray was my sounding board on political science and provided me with helpful guidance on sources. Eugene Borgida led me to useful scholarship in the field of social psychology. Roy Phillips introduced me to the communitarian social commentary of Parker Palmer. Robert Daves of the Minneapolis-based *Star Tribune* helped me understand the difficulties of public opinion polling on ballot measures; he also helped me link up with Barbara Nash, a leading expert on public opinion polling in Maine, who provided me with insights concerning the recent referendum there that repealed the state civil rights law protecting gays and lesbians from discrimination. This project also provided me with the occasion to study a new set of teaching materials that contain an excellent overview of direct democracy from which I found important information that made its way into the lecture. See SAMUEL ISSACHAROFF ET AL., *LEGAL STRUCTURE OF THE POLITICAL PROCESS* ch. 10 (1998).

2. On the diverse political cultures found throughout the states, see DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984). I should note that Elazar's typology does not seem to capture the differing attitudes about direct democracy. For example, under his scheme, both Minnesota and Oregon have "moralistic" political cultures. *Id.* at 124-25. For an overview, see VIRGINIA GRAY, *THE SOCIOECONOMIC AND POLITICAL CONTEXT OF STATES, IN POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 24-28 (Virginia Gray & Herbert Jacob eds., 6th ed. 1996). The differences among the states on direct democracy have much to do with a regionalistic incorporation of progressive-era structural policies. See, e.g., Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL. REV. 11 (1997); Charles M. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243 (1975).

3. See, e.g., *St. Paul Citizens for Human Rights v. City Council of the City of St. Paul*, 289 N.W.2d 402 (Minn. 1979) (rejecting a state constitutional challenge to an initiative repealing a municipal measure protecting the civil rights of lesbians and gays). In 1990, the St. Paul city council enacted another ordinance protecting persons from discrimination on the basis of sexual orientation, and the voters later rejected an at-

scholars, the community in which I work, direct democracy has been under attack for at least two decades.⁴ Scholars have suggested that ballot measures tend to raise significant federal and state constitutional questions⁵ and at least sometimes should be construed cautiously so as not unduly to displace existing legislatively enacted law.⁶ This scholarly discontent with direct democracy is rooted in historical and contemporary concerns.

II. STRUCTURAL BACKGROUND

To begin, let us flash back two centuries. The framers of the United States Constitution sought to balance the desire for democratic government with the need for stability, protection of individual rights, and efficiency. They struck this balance by designing a representative government rather than a more direct form of democracy.

We have, of course, a bicameral Congress,⁷ which can enact legislation only by passing an identical bill through both houses and either obtaining the President's concurrence or overriding a presidential veto.⁸ The people have always directly elected the House of Representatives, in proportion to state population, for short (two-year) terms.⁹ But recall that originally members of each state legislature elected the members of the United States Senate;¹⁰ only in 1913 was the Constitution amended to provide

tempt to repeal it by ballot measure. See Jim Ragsdale, *Gay Rights Ordinance Survives Repeal Vote*, ST. PAUL PIONEER PRESS DISPATCH, Nov. 6, 1991, at 1A.

4. See, e.g., Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

5. See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990). But see Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373 (1996). For a brief overview, see DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 387-89 (2d ed. 1998).

6. See Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 NYU ANN. SURV. AM. L. 477. For other discussions of the use of interpretive techniques to cabin the effects of direct democracy, see John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535 (1996); Jane Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

7. U.S. CONST. art. I, § 1.

8. U.S. CONST. art. I, § 7, cl. 2.

9. U.S. CONST. art. I, § 2.

10. U.S. CONST. art. I, § 3, cl. 1.

for the direct election of federal Senators.¹¹ Senators have six-year terms,¹² which insulate them from short-term public opinion much more substantially than their colleagues in the House. Note, too, that the original conception of the electoral college was that its delegates would have some independence concerning whom to select for President.¹³

The Framers of the Constitution created such an elaborate, indirect form of representation, which can enact law only through burdensome processes, because they saw several basic problems endemic to democracy. First, although the Framers were familiar with the kind of direct democracy commonly associated with the New England town meeting, James Madison pointed out that it was impractical for the people to govern directly in a large country.¹⁴ Instead, decisions would have to be made by a relatively small number of people representing the larger population. Madison hoped this structure would promote the eventual emergence of legislators with ever-expanding expertise and ever-increasing good judgment.¹⁵

But, as best explained in Madison's *Federalist No. 10*, the Framers also saw a danger in more direct forms of democracy that transcended mere considerations of efficiency and expertise. That danger was the problem of faction. For Madison, "a faction" consisted of "a number of citizens, whether amounting to a majority or 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."¹⁶ Madison wrote that faction is endemic in any broad community—in his words, "sown in the nature of man."¹⁷ He wrote:

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to

11. U.S. CONST. Amdt. XVII.

12. U.S. CONST. art. I, § 3, cl. 1.

13. U.S. CONST. art. II, § 1, cl. 2-4.

14. THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

15. *Id.* at 82-83.

16. *Id.* at 78.

17. *Id.* at 79.

the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.¹⁸

If we look at our time and society, we have to admit that Madison's concerns still ring true.

Madison especially feared situations in which a majority of the people would be subject to such passion and would run roughshod over the minority. It is in light of these situations that he differentiated direct democracy from representative government and chose the latter as the better form. He wrote:

[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, [for] there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. 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.¹⁹

For Madison,

[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. . . . 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.²⁰

Madison wrote that representative government "refine[s] and enlarge[s] public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of our country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."²¹ This tendency to thwart faction, Madison stated, would be enhanced best in a large republic, where lo-

18. *Id.*

19. *Id.* at 81.

20. *Id.* at 81-82.

21. *Id.* at 82.

cal passions are unlikely to spread across the entire country.²²

The Founders were so attracted to the republican principle that they inscribed it into the Constitution as a requirement for both state and federal governments. Article IV, section 4 of the Constitution provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”

This principle of republicanism seems starkly inconsistent with the initiative and referendum, by which the people of a state directly enact or repeal statutes or state constitutional amendments at the polls. We must travel to the end of the nineteenth century, to the Progressive Era in American politics, to see where direct democracy originated and how it might be reconciled with republican principles.

During this time in American politics, the people perceived state legislatures as being corrupt and legislators as being in the pockets of powerful economic interests and political machines.²³ Populists and Progressives thought that direct legislation was the only way to get needed legislation passed to protect the common person and to break up the stranglehold held by powerful interests over public policy. In fairly short order, a number of states embraced the initiative and referendum. Today, about half the states have direct democracy.²⁴

As one would expect, there were immediate legal challenges to state laws adopted through direct democracy, on the ground that they violated the Federal Constitution’s Republican Form of Government Clause. In 1912, in *Pacific States Telephone & Telegraph Co. v. Oregon*,²⁵ the United States Supreme Court essentially ducked the issue. The Court concluded that any inconsistency between the Republican Form of Government Clause and state direct democracy was a “political question” for Congress, not the federal courts, to determine.²⁶ Since then, the federal courts have not directly returned to this issue. However, Justice Hans Linde of Oregon has argued that state courts not

22. *Id.* at 84.

23. See generally RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955).

24. See THOMAS CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 3-4 (1989).

25. 223 U.S. 118 (1912).

26. *Id.* at 150-51.

only may but, in fact, must address these challenges—an intriguing idea that is beyond the scope of this current project.²⁷

Even though the federal courts will not directly entertain the issue, we should consider the tension between direct democracy and republican government, for today it remains an appropriate question for consideration by both informed citizenry and responsible state officials.²⁸ On the one hand, by amending state constitutions to include direct democracy and by increasingly using direct democracy to pass legislation, the people clearly have indicated a desire to maintain, even expand, that process. On the other hand, direct democracy is inconsistent with both the premises of the federal Framers and, at least arguably, with the text of the Constitution itself. It presents, as Madison pointed out, a multitude of policy problems. Holding this tension before us, let us consider the current state of republicanism and direct democracy in the states.

III. STATE LEGISLATURES TODAY

It is no secret that state legislatures are not presently held in high repute. There are parallels between the public perception of them today and during the Progressive Era. Voters use direct democracy to circumvent the legislature and term limits to constrict incumbency. The media keeps an ever-watchful eye for anything that might seem to constitute questionable conduct.

In his recent book, *The Decline of Representative Democracy*, Alan Rosenthal, perhaps America's most knowledgeable and astute scholar of state legislatures, paints the picture of an institution in real decline, but not for the reasons citizens commonly suppose.²⁹ Rosenthal finds little evidence of legislative corruption, machine politics, or the other maladies that led the Populists and the Progressives to attack representative, party-

27. See Hans Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994).

28. Indeed, at the Willamette symposium, Attorney General Hardy Myers of Oregon announced that his office would entertain the question whether, in some circumstances, the use of direct democracy would violate the Republican Form of Government Clause. Attorney General Hardy Myers, Remarks at the *Willamette Law Review Symposium: Redirected Democracy: An Evaluation of the Initiative Process* (Feb. 28, 1998).

29. ALAN ROSENTHAL, *THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE LEGISLATURES* (1998).

dominated politics a century ago through the initiative, referendum, recall, popular primary elections, and other reforms. Indeed, instead of finding an autonomous, haughty, cavalier, self-serving, corrupt legislative process at the state level, Rosenthal argues that many state legislatures have traveled too far in the opposite direction.

Rosenthal is Madisonian in his perspective: he believes that there is real value in insulating legislators somewhat from faction and structuring legislatures to induce deliberation in the public interest.³⁰ Increasingly, that is not what he finds in state legislative processes today.³¹

Why is this the case? There are a multitude of potential causes. The ubiquity of public opinion polling puts legislators on the spot: Do you differ with your constituents' apparent opinion concerning the issue of the hour? Quick now, you have to decide this instant, without much time for reflection, so that the media can report it. Discussions about the various models of representation, including the so-called Burkean Model—in which the legislator perceives herself as a trustee for the public interest, with great discretion to deliberate and reach results consistent with the public interest regardless of short-term public opinion—are difficult in this environment. This is particularly true because any comment along these lines is subject to media spotlighting (and, perhaps, distortion). The so-called descriptive or agency theory of representation, in which the legislator merely sees himself as an agent who follows his constituents' command, is seemingly now more of a real possibility, by virtue of technology such as polling, e-mail, electronic town meetings, and so forth.³² Whether this is a good thing is, of course, a different question.

In this age of harsh media attention, polling, term limits, and a deeply divided and increasingly discontented electorate, the legislator who wishes to serve more than one term might merely want to keep her head low, doing case work for constituents and attempting to feed her district some additional public resources for which she can claim credit. In these respects,

30. *See id.* at 39-44, 325-44.

31. *See id.* ch. 1.

32. For discussion of theoretical models of representation, see, e.g., *id.* at 8-11, 21-22.

Rosenthal reports remarkable behavior by legislators. For example, a constituent complained to her Oklahoma legislator about overgrown weeds on a highway median strip.³³ Knowing that getting the highway department to take care of the problem would be difficult, the legislator simply brought over his own lawn mower and did the job himself.³⁴ Similarly, while door-to-door canvassing, a Colorado legislator asked a constituent if there was anything he could do for her. "Yes," the constituent answered, "You can water my petunias." And he did.³⁵ In Massachusetts a senator somehow began regularly picking up clothes that constituents wanted returned to Filene's Department Store.³⁶ In this atmosphere of go along to get along, keep your head low, smile and be responsive to and liked by your constituents, these stories are not really as surprising as one might think.

The decline of the deliberative ideal in the modern era has paralleled the revival of direct democracy. Proposition 13, the 1978 California tax-cutting measure, is usually credited as fueling the veritable frenzy in initiatives over the past two decades, first in California and then in Oregon and elsewhere.³⁷ In 1996 alone, California had 26 initiatives on the primary election ballot in March and twelve on the general-election ballot in November.³⁸ Oregon had 18 measures on the 1994 ballot and 23 in 1996.³⁹ The California experience led journalist Peter Schrag to write a remarkable article in 1996 called *Take the Initiative, Please: Referendum Madness in California*.⁴⁰ Consider his conclusion:

[T]he initiative, which for a half-century was regarded as an extraordinary expedient available in the rare cases of serious legislative failure or abuse, has not just been integrated

33. See Rosenthal, *supra* note 29, at 17.

34. See *id.*

35. See *id.*

36. See *id.*

37. See, e.g., CRONIN, *supra* note 24, at 3-4.

38. See Rosenthal, *supra* note 29, at 33.

39. See CITY CLUB OF PORTLAND, THE INITIATIVE AND REFERENDUM IN OREGON 13 (1996) (giving the number of initiatives in 1994); Nena Baker, *Need a Hand with Your Ballot?*, THE OREGONIAN (Portland, Or.), Oct. 27, 1996, at A1 (giving the number of initiatives for 1996).

40. Peter Schrag, *Take the Initiative, Please: Referendum Madness in California*, THE AMERICAN PROSPECT, Sept.-Oct. 1996, at 61-63 [hereinafter Schrag, *Take the Initiative, Please*]. For a more recent analysis, see Peter Schrag, *California, Here We Come*, ATLANTIC MONTHLY, March 1998, at 20.

into the regular governmental-political process, but has begun to replace it. Some students of California government think it's easier to amend the state constitution by initiative than to approve budgets or raise taxes, both of which require two-thirds votes in the legislature. Whether or not that's correct, the initiative has by general agreement become the principal driver of policy in California, sometimes for the good, but more often not. The cumulative effect of the plebiscitary reforms of the past two decades has been to strip cities, school districts, and especially counties of their ability to generate their own funds; to divide authority and responsibility uncertainly between state and local government and among scores of agencies; and to make it increasingly unclear who is ultimately accountable for the results of all these changes. That has put ever more emphasis on plebiscitary democracy—both as a device and as political ethic—to cut through the gridlock and confusion. And as each measure adds its mandates, takes money (in a process known as ballot-box budgeting) out of the budget and sets it aside for special purposes, or otherwise restricts legislative choices, it becomes still harder for voters to know whom to hold accountable and what rascals to throw out—which of course is one reason that voters enacted term limits, and thus made certain that every few years they all get thrown out.⁴¹

Indeed, according to one estimate, by 1990 the legislature controlled only eight percent of the state budget in California; voters had tied up the rest through the initiative process.⁴²

A colleague of mine, a political scientist who studies state government, says it is always a mistake to generalize from the California experience. While that is probably good advice on any subject, not just politics, it does seem appropriate to hold California up as, if you will, the Ghost of Christmas Yet To Come.

Oregon has its own direct democracy problems. Salem appears haunted by some Ghosts of Christmas Present. In February 1996, the City Club of Portland released a *Report on the Initiative and Referendum in Oregon*.⁴³ In my opinion, this report is one of the most thoughtful and balanced considerations of this

41. Schrag, *Take the Initiative, Please*, *supra* note 40, at 63.

42. See K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1189 n.23 (1995).

43. CITY CLUB OF PORTLAND, *supra* note 39.

controversy that I have seen.

One problem that the report highlights is that initiatives in Oregon have been used to propose specific governmental policies or programs with enormous potential fiscal consequences but without any financing scheme built into the proposal.⁴⁴ A second problem has been the use of direct democracy to earmark portions of the state's general resources for certain programs.⁴⁵ Both of these observations should remind us of the specter in California. The report also criticizes the placement in the state constitution of matters best left to the statutory domain.⁴⁶ Interestingly, the report found from survey data that Oregon citizens are concerned about abuses of direct democracy,⁴⁷ a sign that it is no longer merely a few lonely academics and journalists (who can be ignored as elitists) and a few courageous politicians (who can be shunted aside as self-serving) who have qualms about the state in which we find ourselves.

What can be said in favor of the initiative and referendum? There are a number of customary arguments, ranging from the highly theoretical (this is democracy in its purest form) to the functional (direct democracy is a useful, albeit extraordinary, procedure for breaking legislative gridlock and for providing a lawmaking path independent of legislators beholden to special interests; its mere presence makes legislators hew closer to the voters' wishes, to avoid being blind-sided by an initiative campaign).⁴⁸ There are reasons to quarrel with each of these arguments. For example, at least in California, as Schrag contends, direct democracy, not the legislature, seems now to be the primary driver of policy. Moreover, empirical studies have reached unclear results about whether legislatures in states with active direct democracy processes are, in fact, more likely to produce policies in accord with the average voter.⁴⁹ And if they do, is that necessarily a good thing? Is there not some room for a vision of the public interest measured in some way other than the often-

44. *See id.* at 32.

45. *See id.* at 31.

46. *See id.* at 30.

47. *See id.* at 61 (Appendix C).

48. *See id.* at 11 (offering a brief overview of these arguments).

49. *See, e.g.,* Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996); Edward L. Lascher et al., *Gun Behind the Door? Ballot Initiatives, State Policies, and Public Opinion*, 58 J. POL. 760 (1996).

transient popularity of some idea at a given moment?

It would be useful to explode one myth—that direct democracy today is somehow analogous to the old New England-style town meeting. Colonial New England town meetings involved the citizenry of very homogeneous little towns. The only persons allowed to participate were property owners, who were all of the same race, gender, and religious faith. These meetings were tightly run, to allow all entitled to speak an opportunity to do so. The meetings were designed to promote consensus.⁵⁰ They have nothing whatever to do with modern-day direct democracy in large states with millions of citizens—white and nonwhite, wealthy and poor, heathen and holy—who never meet in the same room, much less actually talk to each other, but nonetheless scratch and claw at each other over contentious ballot measures.

IV. DIRECT DEMOCRACY TODAY

Direct democracy today basically serves one important purpose—it provides another lawmaking outlet for organized interests that fail to get what they want from the legislature. Direct democracy sometimes may circumvent legislative deadlock, but it is hardly a process that promotes consensus. And often, of course, the presence of legislative deadlock actually may reflect a great lack of consensus in society. In such a situation, it might be better to work slowly toward an eventual compromise, rather than to present all-or-nothing, divisive proposals for popular votes.

Of the several major problems with direct democracy, I address four: the role of consultants, the role of opportunistic and entrepreneurial politicians, the absence of deliberation, and the role of courts. I then conclude with some comments about a recent referendum in Maine that illustrates several related core problems with direct democracy.

First, much of the explosion in direct democracy over the past two decades has not been the result of grass-roots citizens printing flyers in their basements and voluntarily canvassing to collect signatures for ballot campaigns. This has now become a

50. See Ronald H. Rosenberg, *Referendum Zoning: Doctrine and Practice*, 53 U. CIN. L. REV. 381, 385 n.15 (1984) (referring to Michael Zuckerman, *The Social Context of Democracy in Massachusetts*, 25 WM. & MARY Q. 523 (1968)).

big-dollar industry.⁵¹ At least in California, and probably in Oregon as well, it is almost impossible to get a measure on the ballot without a well-organized, well-funded campaign using paid signature gatherers.⁵² In California, even Common Cause and the League of Women Voters have used paid signature solicitors.⁵³

If the question today is, "Can we get something on the ballot?," that question is asked of highly professional political ballot campaign specialists and consultants, and their response will undoubtedly be, "Show me the money." In 1990, the average total expenditure for each ballot measure in Oregon climbed to more than \$900,000.⁵⁴ What does this really have to do with New England-style town meetings? And how is this process different from the expensive lobbying campaigns found in the legislative process? We worry about special interest capture of the legislature, but most initiative campaigns are controlled by well-heeled interests from the very outset. These interests effectively obtain petition signatures from the harassed, unengaged but too-polite-to-walk-away pedestrians of urban life and then sell the ballot product to the voters through media advertising.

The role of consultants in direct democracy has not been studied much until recently. However, a recent paper by David Magleby and Kelly Patterson offers interesting observations.⁵⁵ Consultants have been a part of the direct democracy process from the 1930s, but today consulting is a very big industry. For example, the \$130 million spent on California initiatives in 1988 exceeded the amount spent by the Bush and Dukakis campaigns for President that year.⁵⁶ Magleby and Patterson found that, in a number of instances, consultants made millions of dollars from running direct democracy campaigns. They discovered that, in

51. See, e.g., Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 21-22 (1997) (discussing the cost of initiative campaigns).

52. The Supreme Court has held that hiring signature gatherers is protected by the First Amendment. See *Meyer v. Grant*, 486 U.S. 414, 428 (1988). Thus, the Court eliminated the otherwise obvious reform of prohibiting such activity in the hope of alleviating some of the negative effects of money in the direct democracy process.

53. Rosenthal, *supra* note 29, at 34.

54. See CITY CLUB OF PORTLAND, *supra* note 39, at 19.

55. See David B. Magleby & Kelly D. Patterson, *Consultants and Direct Democracy* (Aug. 27, 1997) (unpublished manuscript on file with the Willamette Law Review).

56. See *id.* at 10.

addition to the income, consultants much prefer to run direct democracy campaigns, as opposed to candidate election campaigns, because they have much more freedom and control over the former. In initiative contests, one need not worry about the candidate's charisma and such human factors as spouses, scandals, meddlesome family members, and so on.⁵⁷ In short, initiative campaigns are more like consumer product advertising. Another advantage is that, unlike a candidate campaign that requires more infrastructure and employees at the regional and local levels, most money in a ballot campaign can go directly to advertising.

Consultants provide expertise on wording the ballot measure and framing a simple, stable image for the measure so that it can be sold to the public.⁵⁸ Compared to candidate campaigns, where issues like party affiliation and candidate appeal are important, "voters are more susceptible to persuasion in initiative campaigns," and we often see large opinion shifts, even within just a few days of actual voting.⁵⁹ "Consultants uniformly agree that spending is more important in initiative campaigns than candidate races."⁶⁰

Although many consultants support the initiative process, consultants from California, especially the most experienced ones, tend to be critical of the process. These consultants support direct democracy generally but recognize serious political problems with it.⁶¹ They express concerns about the displacement of the legislature's function, the timidity of California politicians on important matters because of the specter of the initiative, the confusion of citizens who are asked to vote on so many ballot measures, and the tendency of direct democracy measures to promote factional attacks on minorities.⁶²

Just as consultants have found economic incentives to embrace direct democracy, politicians have found political incentives. It is now common for candidates running for statewide office to embrace one or more ballot measures as their own, or

57. *See id.* at 12.

58. *See id.* at 15.

59. *Id.* at 18.

60. *Id.* at 24.

61. *See id.* at 28.

62. *See id.* at 28-29.

even to connive to get a measure on the ballot in the first place. In California, Governor Pete Wilson considered it an integral part of his campaign strategy to "adopt an initiative," particularly one targeting vulnerable groups like undocumented aliens or affirmative action beneficiaries.⁶³ There are obvious reasons why this can be a good electoral strategy: it allows the candidate to get on an existing bandwagon that seems headed for success. In addition, by conjuring up their own popular initiative, candidates can try to increase the turnout of their kind of voters: people who come to the polls to vote on the initiative measure, and while there also vote for the candidate.

The potential for skewing turnout explains why a political party might pour money into initiative campaigns. This synthesis of initiative campaigns, candidate campaigns, and our two-party system raises troubling questions about whether direct democracy has lost much of its grass-roots legitimacy and has become merely another tool for those able to manipulate it. It also creates an unfortunate dilemma for candidates and political parties: they have incentives to use direct democracy as a primary driver of their own electoral politics, but the effect is an undercutting of their institutional power as politicians. Ironically, these candidates are using the initiative to get themselves elected to posts that the initiative is rendering increasingly irrelevant and powerless.

The erosion of the deliberative independence of our representative institutions is particularly troubling because direct democracy offers no deliberative alternative. The legislative process provides many opportunities for gathering relevant information and deliberating about it. Committee hearings and floor debates are the most visible of these processes, but there is also much of practical importance in more informal contacts such as discussions with constituents and lobbyists, staff studies, consultations with officers of the executive branch and subdivisions of state government, and conversations among legislators. All affected interests at least have the chance to participate and to receive a measure of human concern and respect.

It is true, of course, that deliberation in the legislative process rarely resembles anything like an academic symposium. But, even in this era in which participatory democracy is eroding leg-

63. See Schrag, *supra* note 40, at 62.

islator independence, there is often considerable attention given to rather carefully gathered information. The exchange of opinions and ideas over a period of weeks or months, or even across several legislative sessions, helps ensure better drafting of bills. Over time, this builds institutional knowledge throughout the legislature and the expertise of at least a few legislators and staff members. The legislative process reduces the dangers of manipulation, misunderstanding, or misguided and unworkable policies. If a consensus cannot emerge, at least a compromise might. And if nothing productive results in the short run, the legislative door remains open in the future.

Consider Rosenthal's answer to a question during a magazine interview, in which he was asked about the deliberative quality of legislatures and whether citizens understand it:

No, I don't think we as citizens understand legislatures. . . . I've been watching them for 30 years and I don't understand legislatures. They are idiosyncratic; they change. . . . To be honest, you have to take it a bit on faith. It defies rationality. That is the beauty of the process and that's why it is such a wonderfully democratic process because you can't narrow it down. So people don't understand it. But in the environment in which they live, in which all news is bad news and everyone is trashing everyone else, they're not willing to take it on faith. When I say the legislature is deliberative, what I mean is that most issues get airings. Not necessarily an airing on the floor of the Senate or the House, Oxford-style debate. The airing is an airing on the run, in the interstices of the process, in the elevators and in the hallways as legislators chat with one another or lobbyists chat with legislators. By the time an issue has either been buried or made its way through the process, there's been a lot of deliberation, and views have changed, and people do influence each other, but not through the Daniel Webster kind of debate we think about and that we're taught. But legislatures do a lot better at deliberation than most of us do in our families or in our workplace.⁶⁴

Now compare this to the initiative process. A group to which a legislature has said "No" or one that decides it will not even attempt a legislative solution decides to take an issue to the voters.

64. Alan Rosenthal, *Too Much Democracy*, STATE LEGISLATURES, Dec. 1997, at 14, 15.

That group (perhaps only a small number of individuals) has total control over framing the issue and drafting the measure. Ordinarily a consultant is hired to handle these matters, including hiring paid signature solicitors. Once the petitions are floated to the public for signature, there is no way to correct any drafting problems discovered later, or to reformulate the measure in light of new facts, new arguments, or any sense of compromise. It is all or nothing, up or down, an unamendable matter. No hearings need be held and, in any event, whatever might be said at public meetings can have no effect on the measure's language.

Assuming that the requisite number of signatures is gathered—very likely if enough money is available to hire enough paid solicitors—the well-funded ballot campaign becomes an exercise in expensive product advertising. Voters are most likely to form their own views based on the advertising, not on the state voter pamphlet.⁶⁵ In fact, the voter pamphlet might be so gargantuan (Oregon's ran 247 pages in 1996⁶⁶) as to be worthless to all but the most dedicated or fixated voters. The great majority of the electorate is likely to be tuned out rather than turned on.

After all, unlike legislators, voters have never taken any oath to be diligent about performing public service. It would be fanciful to suggest that the electorate collectively has the same basis of information and opportunity for fruitful deliberation about a ballot measure as the legislature does for important pending bills. And, of course, the electorate, unlike the legislature, has no way to deviate from a ballot measure and reach a more acceptable compromise.

One consequence of the decline of the legislative process and the use of the initiative has been a practical increase in the power of courts. The judicial branch remains capable of serious deliberation about constitutional issues and public policy. Because it may perceive itself to be the only branch capable of checking direct democracy, it should come as no surprise that courts routinely review and often invalidate or modify ballot

65. See Schacter, *supra* note 6, at 130-39 (discussing the impact of the media on initiative campaigns).

66. See SECRETARY OF STATE OF OREGON, 1996 GENERAL ELECTION VOTERS' PAMPHLET (released in two volumes due to the large number of initiatives on the ballot).

measures the voters adopt.⁶⁷

An unconstitutional bill in the legislature—if it receives any serious attention at all—will have been analyzed and labeled legally dubious by staff, witnesses at hearings, and perhaps the media as well. Legislators take an oath of office to uphold the Constitution of the United States as well as of their state, and, for practical reasons, legislators rarely have much desire to promote unconstitutional bills because doing so is usually a waste of time, effort, and their credibility. So one would expect—and I think one finds—that the legislative process itself weeds out most bad proposals, including those that are faulty for legal reasons.

However, there are no similar safeguards in the initiative process. Presumably the group framing the ballot measure wants to avoid obvious unconstitutionality: why spend all that money just to have a court invalidate your measure? Nonetheless, ballot measures often run afoul of courts. It is hard to find helpful statistics on this matter, but it appears that of thirty-one initiatives approved in California between 1964 and 1988, courts either invalidated or modified over half of them.⁶⁸ California's Proposition 187, for example, which called for a restriction on providing state services to undocumented aliens, has been tied up in the federal courts since its passage in 1994 and has never taken effect.⁶⁹ In 1996, the United States Supreme Court handed down its landmark decision in *Romer v. Evans*,⁷⁰ holding that Colorado voters had violated the Equal Protection Clause of the Fourteenth Amendment by enacting a ballot measure that prohibited state and local governments from adopting civil rights provisions protecting gays and lesbians. Thus, one of the great ironies in this age of participatory democracy is that the least democratic branch has ended up with enhanced practical authority.

In conclusion, I would like to tie some of the various strands

67. See, e.g., David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 40-42 (1995).

68. See Charles M. Price, *Shadow Government*, CAL. J., Oct. 1997, at 32.

69. See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), *reconsidered in part*, *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (continuing the preliminary injunction against Proposition 187 indefinitely).

70. 517 U.S. 620 (1996).

of this Article together by looking at one common subject of ballot proposals—preventing legislatures from enacting laws protecting the civil rights of minorities. The most visible recent campaigns along these lines have been targeted against gays and lesbians; earlier campaigns attacked fair housing laws for racial minorities, for example.⁷¹ In this context, unlike many others, direct democracy is not currently ruled by big money. Indeed, the signatures for anti-gay measures are usually sought by volunteers motivated by religious or other deep personal values. It is also not clear how much of this has to do with opportunistic or entrepreneurial politicians. Someone running for statewide office is unlikely to gain many more votes than she loses by being closely associated with either side of such campaigns. But the fear of faction recognized by Madison, coupled with the lack of deliberation and accountability in the initiative process, come together explosively in this context.

Consider the recent experience in Maine. In 1995, by a 53% to 47% margin, Maine voters defeated a ballot proposal that would have rendered it beyond the state legislature's power to pass antidiscrimination laws protecting gays and lesbians.⁷² The Maine Legislature in 1997 then enacted antidiscrimination laws in this regard.⁷³ Then, on February 10, 1998, by a 51% to 49% margin, Maine voters repealed those laws by referendum.⁷⁴

What happened in Maine? There are probably many factors explaining why the "People's Veto," as it is called there, squeaked by. But one reason was that there was nothing else on the ballot: no election for Governor, United States Senator, or Representatives, or state legislators, or even local officials. The only reason to vote that day was to record one's view on gay rights. The turnout was around 30%, which was better than Maine officials expected, but much less than the voter turnout

71. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (declaring unconstitutional a California constitutional amendment that allowed land owners to refuse to sell or rent for whatever reason).

72. See Stephen G. Vagh & Joshua Weinstein, *Anti-Gay Measure Fails; Maine Won't Discriminate Throws a Party While Question 1 Supporters React in Disbelief*, PORTLAND PRESS HERALD, Nov. 8, 1995, at 1A.

73. S.B. 338, 118th Leg., 1st Reg. Sess., 1997 Me. Laws 205 (amending 5 ME. REV. STAT. ANN. §§ 4552-53).

74. A. Jay Higgins & Susan Kinzie, *Voters Repeal Gay Rights Law: Tally Splits Along Rural, Urban Lines*, BANGOR DAILY NEWS, Feb. 11, 1998, available in 1998 WL 3118910.

when important statewide candidate races are on the ballot.⁷⁵

A few weeks before the referendum was held, media in Maine reported that a statewide poll showed that 62% of the Maine citizenry favored retaining the antidiscrimination law.⁷⁶ What happened to all those people on election day? Maybe the poll lulled some supporters of the law to forgo voting. It is also possible that the 62% figure was misleading in the first place.

We often marvel at the accuracy of election polls, but the polls that tend to be most accurate involve candidate races, where public opinion is not usually so volatile. Public opinion on ballot proposals is considerably more fluid, particularly on hot-button issues where fear might lead a marginal supporter to become a marginal opponent at the last moment.⁷⁷ And in any event, the best information I have been able to glean from a Maine expert on public opinion is that the number of Maine voters who have relatively stable opinions supporting antidiscrimination laws protecting gays and lesbians is much less than 62%.⁷⁸ Indeed, as I understand it, perhaps one-quarter of the Maine electorate strongly opposes such laws, a smaller percentage passionately supports them, and a majority has no strong opinion one way or the other. Maine is basically a tolerant, live-and-let-live state. Thus, more than half of the people without strong opinions probably favor the antidiscrimination provisions in the abstract. The great majority of them have no strong incentive to turn out to vote, however, and many of them could be manipulated rather easily by advertising campaigns or other methods. In short, in such a context, when the only issue on the ballot is an anti-gay one, the supporters of the proposal have a great advantage: they can turn out their voters more easily than gay rights

75. *See id.*

76. *See* Susan Kinzie, *Voter Turnout Tops Concerns Surrounding Gay Rights Vote*, BANGOR DAILY NEWS, Jan. 29, 1998, available in LEXIS, News Library, Bangor Daily News File (poll indicated that 62% of registered voters would vote "no" on repeal, 29% would vote "yes," 9% were undecided). *See also* Steven G. Vegh, *Survey: Two-Thirds Favor Gay Rights Law: Independent Research Shows 29 Percent Favor Repeal and 9 Percent Undecided About the Feb. 10 Maine Vote*, PORTLAND PRESS HERALD, Jan. 29, 1998, at 1A (noting that in an Oct. 1997 poll, 65% had indicated they would vote to retain the law, 28% said they would vote to repeal it, and 7% were undecided).

77. My conclusions are based on my conversations with Robert Daves and Barbara Nash, two experts on public opinion polling, in February 1998.

78. I thank Barbara Nash, President of Market Decisions, Inc., of South Portland, Maine, for this assistance.

proponents, and if the great mass of people just stay home, the anti-gay proponents have an excellent chance of winning. Apparently, this is what happened in Maine. Had statewide races been on the ballot, the vote on the "People's Veto" likely would have come out differently.

This is a rotten way to decide a fundamental matter of public policy where the Madisonian fear of faction is not just visible but quite vivid. Contrast the ballot resolution of this issue with a legislative bill. In a legislature, a bill proposing antidiscrimination protection for gays and lesbians would be subjected to intense scrutiny through hearings and lobbying campaigns. Legislators would be on the spot and publicly accountable for their stances. They would be compelled to interact with people on all sides. They would see gays and lesbians at hearings providing testimony, coming to their offices to speak to them, and so forth. Legislators would see that such people do not have horns or two heads and seem no more likely to engage in harm to others than anybody else.

In a ballot campaign, on the other hand, the decision lies in the hands of the individual voter. If, as in Maine, the decision depends on what a vast majority of unmotivated and relatively uninterested people think, the decision turns on those who have not necessarily had much contact with openly gay and lesbian people, much less any meaningful conversation about issues of discrimination. The individual voter casts the ballot in private; there is no public accountability for the vote. Indeed, there is no need to go to the polls at all, for each voter may just punt and shift the responsibility of deciding public policy to others. A largely unmotivated and unaccountable electorate is much more prone to influence by campaigns based on fear and misunderstanding, if not outright misrepresentation. Those voters do not have to look gay people in the eye and say, "No, you don't deserve the protection of the law," nor do they have to face media and constituent scrutiny for those views.

The ballot campaign essentially privatized a quintessentially public function: lawmaking on extremely sensitive social issues where Madisonian fear of faction is evident. It was the voters who were in the closet on this one. And their repudiation of gays and lesbians may have a much stronger and longer-lasting

alienating effect than would legislative rejection.⁷⁹

Here are some startling statistics: a study of more than three decades of initiatives and referenda, from 1959-1993, concerning five civil rights areas (housing and public accommodations for racial minorities, school desegregation, gay rights, English language laws, and AIDS policies) found that direct democracy has been extraordinarily successful in restricting civil rights.⁸⁰ Voters approved more than three-fourths of these measures, while passing only about one-third of all initiatives and referenda in the same period.

In the study, a whopping 58% of all measures dealing with civil rights dealt with gay rights. Of the 43 ballot measures concerning gay rights, anti-gay forces had placed 38 of them on the ballot, and 30 of these were adopted by the voters—a 79% success rate for anti-gay measures. Of the five measures pro-gay forces placed on the ballot, only one passed. Thus, the anti-gay side won 79% of the time (34 out of 43 times).⁸¹ Upon reflection, when one thinks about how direct democracy privatizes intensely public issues, are these statistics really all that startling? I doubt that Madison would be surprised.

Statistics like these link up to a broader point: direct democracy reinforces an unhealthy trend in our society—that of increasingly privatizing the public sphere. In a thoughtful book, *The Company of Strangers*, educator and social commentator Parker Palmer argues that we have lost the connection between the private and public spheres of American life.⁸² Since the

79. For a vivid account of the two-decade alienation from politics of the lesbian and gay community in Miami in response to the adoption of an anti-gay measure, see William E. Adams, *Is It Animus or a Difference of Opinion?: The Importance of Ascertaining the Motive of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449 (1998). In contrast, as Professor Adams writes, the lesbian and gay community was willing to work with legislators after a recent defeat. Legislation is a repeat game with identified players who must operate in public. There is hope that legislators will reveal their concerns, which then can be alleviated. In contrast, losing in the private, anonymous, episodic direct-democracy game often may create a hopeless sense of rejection and community loathing, as Professor Adams well documents.

80. See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 254 (1997).

81. A more recent study, looking at a longer time frame, reached similar conclusions. See Donald P. Haider-Markel & Kenneth J. Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles over Lesbian and Gay Rights*, in POL'Y STUD. REV. (forthcoming).

82. PARKER J. PALMER, *THE COMPANY OF STRANGERS: CHRISTIANS AND THE*

1970s, the trend has been to turn away from the public sphere, to live our lives in the private realm where we have control and where we can exclude others with whom we do not wish to interact.

For Palmer, the key figure in the public sphere is the stranger. Our increasing unwillingness to take the responsibility of interacting with strangers in the public realm—people unlike us, people we do not know but may fear nonetheless—impoverishes our society. Even in more private settings, we have difficulty making the connection. Consider Palmer's own experience:

I know the importance of being open to [learning from community], having lived now for six years in a residential community of some seventy people who share a daily round of worship, physical work, study, decision-making, and caring for one another. There is laughter and joy in this community, but there is also pain—the pain of letting one another down, the pain of being seen for what one really is rather than what one would like to be, the pain of conflict with persons we may someday learn to love but will probably never like. Community, as I know it, is a continual process of unmasking, of having to let go of illusions about ourselves and others. . . .

Once, during a particularly trying time of my life in community, I came up with a definition which still seems true: "Community is that place where the person you least want to live with always lives!" Later, I developed a corollary: "And when that person moves away, someone else arises to take his or her place!"

Community always contains the person you least want to live with because there will always be someone who draws out the quality you least like in yourself. The external stranger reminds us of the inner stranger whom we do not want to acknowledge or confront.⁸³

"If we cannot learn to value such experience," Palmer concludes, "we will abandon community."⁸⁴

I think it is clear which lawmaking structure is better designed to deal with the privatizing urges citizens feel and the necessity of maintaining community in the face of them. Indeed,

RENEWAL OF AMERICA'S PUBLIC LIFE (1986).

83. *Id.* at 124-25.

84. *Id.* at 124.

the legislative process has a kind of a “due process of lawmaking,” to use one of Justice Linde’s phrases,⁸⁵ that is lacking in direct democracy.

Fair processes of law require two things.⁸⁶ First, they must embody processes that, as much as possible, objectively develop the relevant facts and legal standards so that people are not deprived of important rights or interests based on erroneous assumptions. This is the so-called utilitarian aspect of due process. Second, they require something more, sometimes called the dignitary interest in due process, the “promotion of participation and dialogue by affected individuals in the decisionmaking process.”⁸⁷ These twin interests preserve both the appearance and reality of fairness,

“generating the feeling, so important to a popular government, that justice has been done,” by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.⁸⁸

Federal constitutional law conclusively presumes that, when general legislation affects many people, the legislative process meets these criteria.⁸⁹ We presume that the legislature will not only meet but will engage and deliberate with and about the relevant strangers in the public sphere and that the strangers, although remaining strangers and never becoming friends, will be treated with concern and respect. This is an idealistic vision of the legislative process, and surely legislatures often fail to live up to it. But the assumptions are probably also essential for the operation of republican government. If we view the world as if these things are true, we are, on balance, better off than if we do not.⁹⁰

In contrast, note how fanciful these assumptions become in

85. See Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976), for a discussion of due process in the legislative process.

86. See, e.g., DANIEL A. FARBER ET AL., *supra* note 5, at 543-44.

87. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

88. *Id.* (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

89. See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

90. Cf. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1995) (making similar “as if” assumption in the context of designing a method of interpreting statutes to promote public rather than private ends).

the context of direct democracy. Is it surprising that judges—who are experts on process, if on anything—have intervened to neutralize some of the excesses of direct democracy?

When judges see an institutional void, they are going to suspect the policies that emerge from it, especially when sensitive constitutional values, such as equal protection, are at stake. Judges remember Madison, even if many others today do not. But having small bands of elite judges carrying the responsibility for society's deliberation in the public interest is definitely not a Madisonian idea. The judges may do it only in some instances, and even then grudgingly. They can never replace an even marginally functional legislative process, nor should they. And in states with direct democracy, the state judges are subject to electoral concerns of their own, as we well know from California.⁹¹

The federal judiciary is, of course, beyond direct electoral control. To the extent that the federal judiciary, our most elite and insulated institution, perceives itself to be the only institution left that can provide a deliberative overlay to direct democracy, we are endangering the evolution of a system in which our least democratic and least local institution ends up riding herd on our most populous and local process.

“In a society like ours,” Palmer writes,

with its fear of isolation and its quest for intimacy, relationships often take one of three forms: intimacy in which conflict is suppressed, indifference and the absence of conflict, or hostility in which no positive potentials are presumed. What is missing are the relations of strangers who will never achieve intimacy, but who meet with a sense of commonality which makes creative conflict possible—meetings of the sort which characterize the healthy public life.⁹²

In the context of anti-minority initiatives, Palmer's point is reinforced by social psychology research, which suggests that contact between conflicting groups, within an institutional framework of concern and respect, can help ameliorate stereotyping and prejudice.⁹³

It seems obvious that a society needs healthy, democrati-

91. See Julian N. Eule, *Crocodiles in the Bathub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 735-36 (1994).

92. Palmer, *supra* note 82, at 126.

93. For a recent overview, see Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCHOL. 65 (1998).

cally responsive but nonetheless deliberatively responsible institutions capable of providing the fora in which this "creative conflict" can be resolved. Many of these institutions will be private in form, such as religious organizations, civic organizations, and the like. But some of them must be governmental, and it seems clear to me that the most important of them must be the legislature.

This does not necessarily mean the abolition of direct democracy. That solution bespeaks too much of throwing the baby out with the bath water, and in any event it is politically infeasible. But it does suggest limiting direct democracy to extraordinary situations in which legislative processes have failed miserably, repeatedly, and irredeemably to achieve their important goals. And it also suggests that the back-door process of direct democracy should be used to make the front-door process of legislation work better, not to cripple the legislature as an institution. Direct democracy should be difficult to use, and it should be targeted at obvious legislative malfeasance or nonfeasance. It should not displace the legislative function.

Along these lines, the proposals made in the report of the City Club of Portland are an excellent place to start discussion. For example, the report suggested that the state constitutional amendment process be limited to matters of governmental structure, organization, and powers, and to the basic rights of persons as against their government.⁹⁴ It suggested that initiated constitutional amendments first be referred to the legislature for consideration and then be subjected to a supermajority requirement of sixty percent of the voters before taking effect.⁹⁵ It also recommended that statutory initiatives first be submitted to the legislature for consideration and that ballot-box budgeting be avoided.⁹⁶ The thoughtfulness of these ideas provides fodder for further useful conversation in Oregon and elsewhere.

In the final analysis, though, structural reforms, whether of direct democracy or state legislatures, can only partially restore a more appropriate balance between participatory democracy and representative democracy. Unfortunately, the most fundamental problem is relatively immune to structural reform be-

94. See CITY CLUB OF PORTLAND, *supra* note 39, at ii-iii.

95. See *id.* at iii.

96. See *id.*

cause it is attitudinal. American citizens today simply hate politics.⁹⁷ They do not trust government officials,⁹⁸ and they do not even collectively trust themselves. A January 1996 poll indicated, for example, that only 35% of the people polled believe that “most people can be trusted.”⁹⁹ This certainly reinforces why Americans distrust legislators, but it should also suggest that Americans should distrust voters using direct democracy as well.

Where one turns at that point is anybody’s guess. History does provide, however, some chilling reasons to attempt to find a way out of this negative environment, for it fosters the rise of certain political figures who seek office by running not for, but against, the government, who seek to lead the government so that self-defined outsiders may conquer some ill-defined elite, and so that “our kind” of people are privileged against those other, less worthy kinds of people. Madison understood all these problems of the treatment of strangers in the civic sphere, and his structural solution of representative government can be a somewhat effective response—if we will only let it. Beyond that, I would suggest that cartoonist Walt Kelly provided us with the best analytical starting point when his character Pogo said: “We have met the enemy, and he is us.”¹⁰⁰

97. See, e.g., E.J. DIONNE, *WHY AMERICANS HATE POLITICS* (1991).

98. See, e.g., STEPHEN C. CRAIG, *THE MALEVOLENT LEADERS: POPULAR DISCONTENT IN AMERICA* (1993); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* (1995).

99. See Rosenthal, *supra* note 29, at 68-69.

100. WALT KELLY, *THE IMPOLLUTABLE POGO* 128 (1970), cited in Christopher H. Pyle, *Women’s Colleges: Is Segregation by Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209, 264 n.237 (1997).

