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DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES. By David B. Magleby.† Baltimore: The Johns Hopkins University Press, 1984. Pp. xi, 270. $25.00.‡

Reviewed by Richard Briffault*

The current rediscovery of state constitutions has had a singular and curious feature: it has been focused largely on state constitutional provisions that are analogous, if not identical, to provisions of the United States Constitution. Scholars and jurists have devoted their attention to state protections of speech, state equal protection clauses, state privileges against self-incrimination, and state proscriptions of cruel and unusual punishments, and have developed interpretations of these texts that diverge from those adopted by the United States Supreme Court in construing comparable federal constitutional provisions.[1] These attempts to play state variations on federal constitutional themes have not been matched by a similar degree of interest in those elements of state constitutions that are not paralleled in the federal constitution. And yet many state constitutions make extensive departures from the federal "model," particularly in the design of the structure and processes of government.

A striking innovation found in many state constitutions is in the role of citizens in the process of legislation. The United States has a representative government: citizens elect representatives who then run the government. The formal lawmaking role of the citizens is exhausted by the election of representatives.[2] By contrast, virtually every state provides

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‡ Hereinafter citations to page number only refer to this book.

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1. *E.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1976); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165 (1984); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982). For additional sources on state bills of rights, see *id.* at 1378 n.20.

2. The only potential exception to this otherwise absolute statement is provided by article V of the United States Constitution, which, among alternative procedures, authorizes the calling of a "convention for proposing amendments" and the use of state conventions for the ratification of proposed amendments. In light of the extraordinary nature of constitutional revision as compared to the process of ordinary lawmaking and given the paucity of conventions under article V, this excep-

for some measure of direct citizen involvement in lawmaking. Nearly all states require popular approval of constitutional amendments.[3] Most state constitutions require voter approval before the state may issue debt.[4] Half the states allow a relatively small group of citizens to suspend the operation of any new law pending its submission to and approval by voters in a referendum.[5] And almost two dozen states authorize citizens to initiate legislation directly, that is, to draft proposals that are then placed on the ballot and, if approved by the electorate, become law.[6]

Voter-initiated legislation—"the initiative"—is a product of the turn-of-the-century Progressive movement. The Progressives believed that party bosses, political machines, and special interests had seduced representative institutions away from serving the public interest. Late nineteenth century politics, like the marketplace of that era, was believed to be in the grip of powerful and rapacious combinations. Much as antitrust law was designed to break the economic power of these combinations and restore free competition, the initiative, with the allied reforms of the direct primary, the popular election of Senators, the referendum, and the recall, was intended to break the stranglehold these combinations had on the political process by bringing the people directly into lawmaking.[7] "The people" would act only on behalf of the public as a whole, not to advance selfish, private interests. Moreover, Progressives thought that direct democracy would improve the people as well as their government. Direct legislation would have an educational and social function. Through involvement in government, people could learn about important issues; they would discuss and debate them with each other; they would develop civic virtue.[8] Even today, proponents of the initiative, who range across the ideological spectrum from Jack Kemp to Ralph Nader, assert that direct democracy can liberate politics from special in-

tion may be said to prove the rule stated in the text that the United States government is representative.

3. *See* THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 1984-85, at 223 (1984) (table 2) (voter ratification of constitutional amendments proposed by the legislature required in all states except Delaware) [hereinafter cited as BOOK OF THE STATES].

4. *See* A. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 11-12 (1963); J. MAXWELL & J. ARONSON, FINANCING STATE AND LOCAL GOVERNMENTS 207-08 (3d ed. 1977).

5. *See* pp. 38-39 (table 3.1).

6. *See id.*

7. *See* R. HOFSTADTER, THE AGE OF REFORM 257-68 (1955).

8. *See* pp. 21, 24, 28; Munro, *Introductory,* in THE INITIATIVE REFERENDUM AND RECALL 1, 22-24 (W. Munro ed. 1912). For a contemporary statement of the same philosophy, see Legislature v. Deukmejian, 34 Cal. 3d 658, 690, 669 P.2d 17, 39, 194 Cal. Rptr. 781, 803-04 (1983) (Richardson, J., dissenting) ("The most effective way to increase public interest in political issues is to assure that the people have the widest practical opportunity to share in making the public decisions which directly affect them.").

terest groups, reduce voter malaise, and energize the electorate.[9]

David Magleby says they are wrong. In his book, *Direct Legislation: Voting on Ballot Propositions in the United States,* he asserts that the initiative, in practice, has fallen far short of the original reformers' expectations, and that use of the initiative actually has harmed the political process by weakening political parties and legislatures and by accelerating the growth of single-issue politics. Rather than giving power to the people, the initiative, he contends, has been taken over by special interest groups and has reinforced their strength.[10]

Magleby develops two lines of attack. The heart of his book is an effort to study the initiative in the light of empirical research rather than civics rhetoric.[11] Magleby uses survey and aggregate data from leading initiative states—California, Florida, Massachusetts, and Washington—as well as national surveys, to examine how the direct legislation process actually works. Focusing on how measures get on the ballot, who votes, and the factors that affect how people cast their ballots, he finds that the initiative process is structured to favor the well-organized and well-heeled, to fence out minorities and the politically weak, and to produce unreasoned election results. Although his conclusions are not free from doubt, he makes a powerful case and provides a valuable addition to the store of knowledge on how the initiative works.

The second component of Magleby's book is a more theoretical comparison of direct and representative democracy, in which he finds that direct legislation is inherently unsatisfactory.[12] His conclusions here

9. *See Voter Initiative Constitutional Amendment, 1977: Hearings on S. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. 90-102 (1977) (testimony of Ralph Nader). Jack Kemp has stated: "The time is right . . . for the United States to take the lead in a fresh global wave of democratization that demonstrates the efficiency of government forms that rest on the wisdom of ordinary citizens—The most fundamental change we could make . . . is to provide for a national initiative . . . ." J. KEMP, AN AMERICAN RENAISSANCE 189 (1979).

10. Although Magleby's title refers broadly to "ballot propositions," his book is concerned only with one type of ballot proposition, the initiative. Initiatives, which involve the enactment of measures through petition and popular vote, are distinctive among ballot propositions in that the legislature plays no role at all in the drafting, consideration, or enactment of such measures. Other categories of ballot propositions involve a combination of legislative and plebiscitary actions. A referendum occurs when the legislature has passed a law but petitioners have been able to gather enough signatures to suspend the new law pending its special submission to the voters. *See* p. 402; *supra* note 5 and accompanying text. The remaining ballot propositions are measures which under state law must be approved by the voters after passage by the legislature before they can be considered enacted. Typically, these consist of state constitutional amendments and bond issues. *See* p. 402; *supra* notes 3-4 and accompanying text. Although some of Magleby's statistics concern ballot propositions generally, he discusses noninitiative ballot propositions only in passing, and the focus of his analysis is on the initiative. Consistent with his approach, this review will focus also on the initiative.

11. *See* pp. 35-179.

12. *See* pp. 180-200.

are far less compelling, and largely unsupported by his empirical research. Ironically, although his discussion of direct democracy is well-informed by an understanding of its defects in practice, his analysis of legislatures is at the abstract level of the textbook model. When direct legislation "in the field" is set against an idealized construct of the legislative process, it is bound to fall short.

Indeed, 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 twenty-three states we have both. In these states the legislature and the initiative not only coexist but interact in a system of lawmaking.[13] 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. Magleby does not examine these questions directly. But the evidence suggests that the initiative may work well with the legislature and that direct democracy may enhance the representativeness of representative government.

The first two parts of this Review summarize the main points of Magleby's critique of the initiative process and present additional empirical evidence, including data gleaned from his book, that may take some of the sting out of his criticisms. The next part analyzes Magleby's more theoretical comparison of the initiative with representative democracy. Differing from Magleby, I find that the legislature is afflicted by flaws similar in kind to those that he asserts mark direct democracy. The final portion of the Review attempts to present a view of the initiative as part of the system of representative government in which direct legislation remedies some of the legislature's shortcomings and serves as a fitting complement to the legislative process.

I.

The key to understanding the workings of any legislative body is an appreciation of who controls the agenda, who is able to vote, and what elements influence the voting decision. This is as true for the electorate-as-legislature as it is for the state assembly. The most valuable element of Magleby's book is his multi-state examination of these mechanics in the context of direct legislation.

Initiative measures get before the voters only if they qualify for the ballot. Qualification requires that the proponents of an initiative obtain signatures on petitions of a certain number of voters, usually equal to a

13. *See* pp. 36-37.

percentage of the votes cast in the preceding general or gubernatorial election. Signature requirements range from a low in North Dakota of 2% of the voting-age population to a high in Wyoming of 15% of the preceding gubernatorial vote. The median requirement nationwide is 8% of the vote in the last gubernatorial election.[14] As Magleby points out, "The fact that states have set their siguature threshold requirements in percentage terms rather than as a set number of valid signatures has affected the practice of direct legislation . . . ."[15] When California adopted its 8% requirement in 1914, that threshold could be crossed with about 30,000 names.[16] Today, 630,000 signatures are required.[17] Such an undertaking requires enormous amounts of time, energy, and wealth. At this first critical hurdle, "most citizens lack the organizational strength and financial resources" to get on the ballot.[18] Indeed, although California since 1970 has witnessed an extraordinary level of initiative activity, only 12% of proposed initiatives have surmounted the signature threshold and actually appeared on the ballot.[19]

To overcome the difficulty of securing a ballot position, initiative proponents have turned for assistance to the "initiative industry"—professional "petition management" firms that specialize in designing attractive initiative proposals and gathering the requisite signatures. These professional signature collectors mobilize armies of workers trained in the arts of cajoling the public into signing on the dotted line. The techniques these solicitors use at shopping centers and street corners are more those of the pitchman than the civic educator. The solicitor summarizes the initiative in the briefest and most appealing way possible. Voters are urged to "lower taxes" or "stop corrupt practices" by signing the petition. Under tight time constraints to gather the required signatures, the solicitors have no interest in debating the merits of the measure with citizens or even in enabling potential signers to read and consider the petition carefully. Rather, solicitors appeal to the voters' sense of fairness; solicitors tell wavering voters that signing the petition does not mean that they favor the initiative but simply helps get the measure on the ballot so that the public can vote on it. One solicitor apparently obtained great resnlts by asking people to sign because it was his birthday. Others employ less innocent methods, such as "dodger cards," which

14. *See* p. 41.
15. *Id.*
16. *See id.*
17. In California's most recent gubernatorial election, 7,876,698 people voted. *See* BOOK OF THE STATES, *supra* note 3, at 210 (table 12). Eight percent of that figure is 630,136.
18. P. 182.
19. *See* p. 67 (table 4.1).

cover up the text of a measure so that voters cannot see undesirable or confusing provisions, or outright forgery of signatures of voter names drawn from the telephone book.[20]

Petition firms usually charge about one dollar per signature.[21] In California, this can make the cost to qualify a proposition for the ballot as much as $1 million,[22] especially when qualification expenses continue after the signature circulation stage. Appropriate state officials must validate the signatures, and opponents may question the signatures' authenticity or the qualifications of the signatories. Further legal challenges may concern the formal sufficiency of the petition proposal or the constitutionality of the measure. After recounting these costs, Magleby concludes that

> to meet signature thresholds, legal challenges, and campaign costs, [initiative] sponsors must have substantial political resources (money and manpower). Organized interests clearly have an advantage over most individuals in overcoming these hurdles. Thus, if a test for the popular sovereignty of initiatives and referendums is equal access in placing an issue on the ballot, the initiative and referendum fail.[23]

Magleby's thesis that structural barriers impede popular participation in direct legislation applies to voter turnout as well as ballot access. Although proponents treat the initiative as a means of realizing the "will of the people," in practice "the people" do not engage in direct legislation—*voters* do—and the two groups are far from coextensive. Recent voter turnout data from the initiative states of California, Massachusetts, and Washington reveal that only 50%-60% of the population votes at all[24] and that between 8% and 17% of those who do vote do not cast

20. *See generally* pp. 61-65 (describing signature collecting techniques). *See also* Grant v. Meyer, 741 F.2d 1210, 1214 (10th Cir. 1984) (discussing abuses by petition circulators).

21. *See* p. 64.

22. *See id.* Recently, petition managers have developed new techniques, including contacting potential signers by direct-mail. Direct-mail is roughly twice as expensive as face-to-face signature collection, but it allows proponents to target persons who are likely to be receptive to an initiative and who may contribute to the campaign. *See* pp. 64-65. The first initiative to qualify entirely by mail was a 1980 proposal to reduce and index California state income tax rates. The qualification cost was just over $2 million, but an equal amount was received in contributions. *See* A. RABUSHKA & P. RYAN, THE TAX REVOLT 159-60 (1982). For an example of direct-mail in another initiative, see Assembly v. Deukmejian, 30 Cal. 3d 638, 646 n.6, 639 P.2d 939, 944 n.6, 180 Cal. Rptr. 297, 302 n.6 (1982) ("slightly more than half" of signatnres on petitions to subject legislature's reapportionment plan to referendum gathered through direct-mail effort).

23. P. 58.

24. In California, voter tnrnout for the period of 1970-1982 ranged from a low of 44% in 1974 and 1978 to a high of 61% in 1972, with an average of 51%. In Massachusetts during the same ycars the range was 47% (1974) to 63% (1972), with a 12-year average of 54%. In Washington, over the period from 1960 to 1982, the low turnout was 39% (1978) and the high was 73% (1960 and 1964), with the average turnout 58%. *See* pp. 84-85 (tables 5.2, 5.3, 5.4).

ballots on initiative questions.[25] The low turnout is exacerbated in California where initiatives may be presented to the voters at primaries and special elections. Voter turnout for such special elections has ranged from 24% to 30%, thereby permitting roughly one-sixth of the electorate to enact an initiative into law.[26]

Furthermore, voter turnout and initiative drop-off are not scattered randomly throughout the population but are correlated with income, education, and race. The poor, the working class, those without a college education, and nonwhites are less likely to vote than are other citizens, and even if they do get to the polls they are far less likely than others to vote on ballot propositions.[27] In one California election, for example, nearly 50% of persons with less than an eighth-grade education who voted for Governor failed to vote on an initiative measure.[28] In that election, voters who had never gone to college cast 42% of the votes for Governor but only 33% of the votes on the proposition.[29] Analyzing a dozen elections in California over an eight year period, Magleby found that the less educated were significantly underrepresented in most initiative contests but not in candidate races.[30] In sum, "Compared with voters generally [and the population as a whole], people who typically vote on propositions are disproportionately well educated, affluent, and white."[31]

One significant cause of this tendency to exclude the poor and the uneducated is not hard to find; the complexity of ballot proposition wording prevents many citizens from understanding the initiative.[32] Initiative measures are more than mere voter opinion polls; they are intended to make law. As a result they often are written in technical, legal language with cross-references to other provisions of law and use terms of art impenetrable to the lay person. One of the most provocative portions of Magleby's book is his assessment of the readability of such ballot measures. Magleby applied three academic readability formulas[33] to pro-

25. Average drop-off in voting for initiatives during 1970-1982 was 14% in California and 17% in Massachusetts. Average drop-off in initiative voting in Washington from 1960 to 1982 was 11%. *See id.*

26. *See* p. 88.

27. *See* pp. 103-11.

28. *See* p. 109.

29. *See id.*

30. A similar study of the 1978 Florida election in which a governor's race and eight propositions were on the ballot disclosed that less educated voters, nonwhites, and blue collar workers consistently were underrepresented on ballot propositions but not in the vote for Governor. *See* pp. 112-13.

31. P. 145.

32. *See* p. 121.

33. The formulas measure word difficulty, sentence length, complexity, and conceptual difficulty of the text. *See* pp. 118-19, 207-08.

positions that appeared on the ballots of four states between 1970 and 1979. He found most measures in California and Oregon were readable at approximately the eighteenth grade level, that is, an average reader would need a bachelor's degree plus two additional years of education to understand the proposal.[34] The ballot descriptions in Massachusetts and Rhode Island were only somewhat more readable. They required reading at the fifteenth grade level, or third year of college.[35] Given the educational attainments of the citizens of these states, it is unlikely that more than one-fifth of the adults in California, Massachusetts, Oregon, and Rhode Island could read and understand the ballot questions.[36] Voters who do not understand the issues before them may simply abstain and in effect delegate the decision to the better educated members of the electorate, who have no obligation or interest to act as representatives of the "drop-offs."

Magleby's analysis of the voting behavior of those citizens who actually cast ballots extends his negative picture of initiative voting. If one reaction to the inability to understand ballot proposition language is to abstain, an alternative response is to attempt to garner the necessary information from other sources and vote anyway. Several states concerned about the problem of voter ignorance have sought to educate voters by publishing handbooks that describe the initiative. These materials provide the ballot title, a summary of the proposition, usually prepared by the state attorney general or secretary of state, and arguments for and against each measure, usually submitted by the proposition's sponsors and opponents. The handbooks are mailed to every registered voter shortly before each election in which a statewide proposition is on the ballot.[37]

As Magleby notes, "Voters' handbooks constitute one of the largest governmental efforts at both mass communication and civic education."[38] The costs of publication and mailing range from over $350,000 per election in Massachusetts to over $2 million per election in California.[39] Some researchers have found that the handbooks enjoy significant readership and are an important source of information for initiative voters;[40] Magleby sharply disagrees. Applying the same academic readability tests that he uses to test the ballot propositions, Magleby concludes

34. *See* p. 119.
35. *See id.*
36. *See id.*
37. *See* pp. 38-39, 56, 136.
38. *See* p. 138.
39. *See id.*
40. *See* pp. 136-37.

that the handbooks are often less comprehensible than the propositions themselves[41] and that more than two-thirds of those who receive handbooks cannot use them effectively.[42]

With the voter handbook of limited utility, and with the factors that are usually of great importance in candidate elections—party affiliation and the candidate's personality and record—absent, voters are largely thrown back on the mass media for the information necessary to make a knowledgeable decision about an initiative. This tends to result in two types of proposition voting. A handful of measures are like Proposition 13, California's property tax reduction scheme. These initiatives are the subject—or cause—of considerable controversy and heated contests. The news media attend to these as much as to candidate races and their campaigns may involve large advertising expenditures. Either because the issues are fairly straightforward or because of extensive media coverage or advertising campaigns, voters become relatively well-informed and can vote on the merits. A *Los Angeles Times* exit poll found that 89% of the voters believed they understood the provisions of Proposition 13.[43]

But few ballot measures are as salient to the voters as Proposition 13. Many initiative proposals are difficult to comprehend and involve matters about which voters have little independent knowledge and few fixed beliefs. Extensive media coverage is unavailable for most ballot propositions, and few voters have the ability or incentive to invest the time and energy necessary to study the issues and cast an informed ballot. Proposition campaign advertising is largely sloganeering, providing, at best, a radically simplified analysis of complex and difficult questions and, often, distorted or deceptive portrayals of the initiative. As a result, voters, especially the less educated and the poor, often misunderstand proposals and may vote against their own interests or beliefs. Indeed, Magleby suggests that miscast votes are not uncommon, that many people cast votes for the position opposite to that for which they think they are voting.[44] For the less salient measures and the less knowledgeable voters, then, "voting becomes a form of electoral roulette"[45] rather than an informed and reasoned lawmaking process.

41. *See* pp. 138-39. Citizens need a reading level equivalent to that of a third-year college student in order to understand the arguments printed in the handbooks. *Id.*

42. Magleby's research on recent California elections found that only 13% to 33% of the voters list the handbook as a source of information. Moreover, as might be expected, handbook usage correlates significantly with education: only 7% of those with less than an eighth-grade education mentioned that they used the handbook, but 44% of those with advanced degrees indicated that the handbook provided some information about the propositions. *See* pp. 136-37.

43. *See* p. 141.

44. *See* pp. 142-43.

45. P. 167.

Although voting on less controversial measures may take place "in an informational vacuum,"[46] that rarely results in passage of the initiative proposal. Voters appear to be 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. Even one-sided campaign spending in favor of an initiative may fail to overcome voter caution or doubt. Over a thirty-year period, in more than half the cases in which a proposition's proponents outspent its opponents by a factor of two-to-one, the proposition still failed to pass.[47] On the other hand, only two out of fifteen proposals were enacted in the face of such one-sided negative spending.[48]

High levels of negative campaign spending can plant seeds of uncertainty and sow confusion, especially when not matched by comparable advertising in support of the measure. The most successful negative campaigns play to the voter's predisposition to vote "no" by suggesting that an initiative that seems desirable on its face will have negative side effects or consequences unintended by the proponents. Opponents may suggest that they are sympathetic to the aims of the proposal but contend that the specific method provided in the initiative will backfire or be ineffective.[49] An initiative that starts with broad but thin support often falters when extensive negative spending casts doubt on the measure and causes voter uncertainty about the proposal's merits or effects. With campaigning, as with ballot qualification, the advantage lies with the well-organized and well-financed, who can mobilize multi-million dollar opposition campaigns.[50]

This voter reluctance to pass ballot measures is so strong that even endorsements by "elite" groups—leading newspapers, Chambers of Commerce, labor federations, Common Cause, and taxpayers' associations—cannot always secure passage of an initiative. Although Magleby found that voters often followed the positions taken by elite groups when

46. *Id.*

47. *See* p. 148 (table 8.1).

48. *See id.*

49. A measure to restrict air pollution was lauded for its goals but attacked as a threat to jobs; a proposal to require separate smoking and nonsmoking sections in public places was characterized as a government intrusion into people's lives; a proposal to replace a proportional with a graduated income tax was characterized as likely to result in higher taxes. *See* pp. 168-70.

50. An initiative with adverse affects on a special interest group can face powerful resistance from the affected group. For instance, Califoruia's Proposition 5 (1978), requiring nonsmoking sections in public areas, was ahead in an early poll 57% to 38% but received only 46% of the vote following an opposition campaign in which the tobacco industry spent $6.4 million—more than the combined sum spent by all the candidates for Governor in the same election—while proponents mustered only $700,000 in support. *See* p. 213; Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment,* 29 UCLA L. REV. 505, 537-40 (1982).

those elites were unanimous, elites and voters frequently disagreed, and in 80% of elite-voter disagreements, the elites supported the ballot proposal and the voters said "no."[51]

Thus, except for those initiatives that, like Proposition 13, are well-publicized or that concern subjects on which the voters have strong opinions, such as the death penalty, it is far harder for proponents to pass a proposition than for opponents to defeat one. Proponents must convince voters to change the status quo. Even substantial affirmative spending is often unable to do this, while opposition campaigns strive to create confusion, reinforce uncertainty, and suggest the wisdom, "When in doubt, vote no." In short, Magleby sees initiative voting as a mix of uninformed, confused choices biased by voter caution and well-financed negative special interest campaigns that defeat whatever desirable measures may have managed to get on the ballot.

II.

Magleby's indictment of the direct legislative process, though often compelling, at times reaches too far and exceeds his evidence. Indeed, his own research demonstrates that structural barriers to citizen participation in the initiative process can be, and have been, surmounted, that turnout for initiatives is often comparable with that for other state elections, and that the voters often reach decisions congruent with the interests of the majority.

Although Magleby's analysis of the high hurdles tending to limit access to the initiative agenda to special interest organizations is difficult to refute, a significant number of ballot measures have been the product of forces outside the power elite who are not usually successful at the ordinary politics of working the lobbies of the State House. In the last decade, such outside groups have qualified proposals to control handguns, restrict indoor smoking, ban nonreturnable beverage containers, limit nuclear power plants, and legalize the possession and use of marijuana.[52] Although in a sense all ballot measures are due to the work of some "interest group" because an organizational effort is necessary to get on the ballot, these proposals plainly were not attributable to the regular players in the game of legislation. Indeed, established groups often strongly opposed these proposals and many of these measures would never have received serious legislative consideration without the initiative.[53]

51. *See* pp. 152-53.
52. *See* pp. 74-75, 209-10, 213.
53. One rough indicator of the attitudes of the more powerful special interest groups is their

According to one survey of sixty years of initiative activity in the state of Washington, roughly one-quarter of initiative proposals came not from the usual special interest groups but from "anomic or short-term interest groups" that came together spontaneously to promote or combat a particular policy proposal and disappeared soon after the election.[54] Indeed, the most successful initiative drive in the history of the state was started and led by a thirty-two-year-old furniture salesman who was so upset by a salary increase the legislature voted itself that he formed his own group and collected nearly 700,000 signatures on a petition to cut the pay raise.[55] The record of the last decade suggests that similarly anomic groups have had some success and may account for one-fourth of recent initiatives in California, where the financial and organizational barriers to ballot qualification are greater than in Washington.[56] The initiative process may be dominated by the rich and the well-organized but it is not their exclusive preserve, and it is far from clear, the signature hurdle notwithstanding, that the ballot is less accessible to citizens out of the usual channels of power than is the legislature.

On voter turnout, Magleby is convincing that only a portion of the people participate and that participation rates are skewed toward the upper end of the socioeconomic scale. Here, too, however, a close examination of the data tempers Magleby's criticism. In computing the "drop-off" rates, Magleby compares the rate of voting on ballot measures with the rate of voting for the candidate contests with the highest turnouts—Presidential and gubernatorial elections.[57] In making that comparison he found a drop-off rate of 8%-17%.[58] A more appropriate standard of comparison, however, is voter participation in legislative races, because the function of the initiative voter is analogous to that of a state legislator, not a governor. In California, the drop-off rates for initiatives and

campaign expenditures. The proponents of the California handgun, antismoking, beverage container, and nuclear power plant initiatives were all heavily outspent by their opponents. Indeed, the negative spending campaigns on these measures ranked first, second, fourth, and sixth, respectively, of all California ballot proposition expenditures between 1954 and 1982. *See* p. 209 (appendix E). Industry and labor groups particularly opposed the nuclear power and antismoking initiatives. *See* Lowenstein, *supra* note 50, at 526, 537-38. Proponents far outspent opponents on the marijuana decriminalization proposal, but the amounts involved were quite small. *See* pp. 209-10 (appendix E).

54. *See* Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience 1914-1973*, 28 W. POL. Q. 330, 332-35 (1975).

55. *See* C. SHELDON & F. WEAVER, POLITICIANS, JUDGES AND THE PEOPLE: A STUDY IN CITIZENS' PARTICIPATION (1980).

56. *See supra* note 52 and accompanying text; *see also* Lee, *California*, in REFERENDUM 87, 118 (D. Butler & A. Ranney eds. 1978) ("grass-roots organizations will continue to compete successfully in the initiative process with relatively modest financial resources"); Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 260-61 (1975) (asserting that the initiative process serves a useful purpose for citizens' groups).

57. *See supra* notes 24-31 and accompanying text.

58. *See supra* note 25 and accompanying text.

state assembly races were almost identical.[59] In addition, the drop-off for initiatives was not much greater than for congressional contests in Washington[60] and Massachusetts.[61]

Furthermore, the drop-off rates for initiatives compare favorably against those in two other areas—lesser executive officials and other ballot measures. In Massachusetts, for example, the voting rate on initiatives was only slightly less than that for state Treasurer and nearly identical to that for state Auditor.[62] In Washington, the drop-off for those two offices considered in the aggregate was actually higher than the rate for initiatives; at least one other state office had a drop-off rate more than double that for initiatives.[63] Voters in California and Washington also considered other ballot measures, such as constitutional amendments and bond issues, that are passed by the legislatures and then referred to the electorate for their approval. Magleby's data show that participation was higher for initiatives than for these measures sponsored by the legislature.[64]

Finally, for well-publicized or hotly contested propositions the drop-off was relatively small. Even when buried at the middle or end of a long ballot, such initiatives drew a high turnout. As Magleby notes, "[V]oters searched the ballot for the controversial propositions and voted on them . . . ."[65] Thus, although turnout and drop-off figures must disappoint direct democracy partisans, they can stand comparison with voting on lesser candidate races, and initiative voting is quite high in certain cases.

Magleby's conclusion that direct legislation often results in uninformed, unreasoned decisions seems largely on the mark, yet it is not clear what this adds to his indictment of the initiative process. First, given the asymmetry in initiative voting, unreasoned votes may do little long-term harm. As Magleby demonstrates, voters usually vote "no"—only one-third of citizen-initiated measures pass. Although these negative votes may be uninformed or irrational—that is, the "no" voter may vote against her own interests without realizing it—no new law is thereby enacted; rather, the status quo is left unchanged. The uninformed voter

59. The drop-off rate for both was 8%. *See* p. 84 (table 5.2); Lee, *supra* note 56, at 108.

60. The drop-off rate was 11% for initiatives and 8% for congressional races. *See* p. 85 (table 5.4).

61. The drop-off rate was 17% for initiatives and 11% for congressional races. *See* p. 84 (table 5.3).

62. The drop-off rates for those two elective state offices were 14% and 16% respectively. *See id.*

63. *See id.* (table 5.4). The drop-off was 11% for initiatives and for Treasurer, 13% for Auditor, and 28% for Superintendent of Public Instruction.

64. *See* pp. 84-85 (tables 5.2, 5.4); Lee, *supra* note 56, at 108.

65. P. 94.

might have been better off had the initiative passed, but after the initiative's failure she is not worse off than before the election. Moreover, the electorate or the legislature can still consider the defeated measure at a later date.

Second, the existence of this "negative bias" in voting somewhat undercuts the contention that initiative voters vote irrationally. If, as Magleby contends, special interest groups have de facto dominance over ballot qualification, the edge in financing expensive media campaigns, and a more sophisticated understanding of the technical legal language of propositions, then the most reasonable step for most voters to take is to vote "no."[66] Finally, for some initiatives, voters were well-informed, understood the proposition's terms, and voted intelligently according to their beliefs.[67]

III.

For Magleby the full extent of the flaws inherent in direct legislation

66. This bias does not seem to extend to ballot proposals submitted by the legislature. Of ballot propositions voted on between 1898 and 1979, the public approved only 34% of citizen-initiated measures, but passed more than 60% of proposals that had originated in the legislature and needed voter approval in order to become law. *See* pp. 73 (table 4.4), 167. There is no evidence that the legislative proposals were written in more comprehensible language or that they affected areas of unusual voter interest or knowledge. In fact, the legislative proposals "have been largely of a technical and noncontroversial nature." Lee, *supra* note 56, at 91. The much higher approval rate appears to be a reflection of voter perception of the legislature as on average a more trustworthy source of lawmaking than private citizen groups. Magleby's own analysis suggests that the public is right. The electorate seems to be able to make a reasonable discrimination among ballot propositions, adopting most of those certified by the legislature as in the public interest while rejecting most of those that are the product of the special-interest dominated initiative process.

67. *See* pp. 141, 143 (lack of confusion concerning open-housing referendum), 211-12 (well-defined voter opinions on death penalty, political reform, marijuana, open-housing proposals, and Massachusetts Equal Rights Amendment).

Recently, the courts in initiative states have become more active in trying to upgrade the quality of voter understanding. The Florida and California Supreme Courts have become embroiled in controversy over the so-called "single subject rule"—the requirement in the constitutions of those states that initiatives be limited to a single subject. State supreme court justices who favor strict enforcement of the rule hope that it will "minimize the risk of confusion and deception" to voters by making an initiative proposal easier to understand. Brosnahan v. Eu, 31 Cal. 3d 1, 7, 641 P.2d 200, 203, 186 Cal. Rptr. 100, 103 (1982) (Mosk, J., concurring and dissenting); *see also* Brosnahan v. Brown, 32 Cal. 3d 236, 266-68, 651 P.2d 274, 292-93, 186 Cal. Rptr. 30, 48-49 (1982) (Bird, C.J., dissenting) (arguing that the single subject rule narrows the breadth of issues voters must consider and facilitates informed decisions); Evans v. Firestone, 457 So. 2d 1351, 1357 (Fla. 1984) (Overton, J., concurring) (noting that the rule helps focus voters' attention on relevant issues); Fine v. Firestone, 448 So. 2d 984, 995 (Fla. 1984) (McDonald, J., concurring) (favoring "fair notice" of a proposition's contents). *See generally* Lowenstein, *California Initiatives and the Single Subject Rule,* 30 UCLA L. REV. 936 (1983) (discussing the difficulty of developing an adequate definition of a "single subject" and urging loose enforcement of the rule).

Even more dramatic than enforcing the single subject rule, the Florida Supreme Court recently struck a proposition from the ballot because it had a misleading title and description. *See* Askew v. Firestone, 421 So. 2d 151, 155-56 (Fla. 1982). The Oregon Supreme Court simply rewrote one title it found misleading. *See* Wells v. Paulus, 296 Or. 338, 675 P.2d 482 (1984).

can be perceived only by comparing direct with representative democracy, a contrast he draws in the final chapter of his book.[68] He makes three claims. First, representative democracy is "generally structured to facilitate . . . a degree of access for all segments of the community"[69] unlike direct democracy, which effectively excludes "those without plenty of money or an organizational base."[70] Second, the legislative process is designed to produce "deliberative, substantive, and rational" outcomes, unlike the unreasoned nature of direct democratic decision making.[71] Finally, the legislature, as an institution, is more sensitive to the interests of minorities. Elected representatives can accommodate and support a numerical minority's intensely held views while direct democracy involves no more than a counting of heads in which numerical minorities will always lose.[72]

Unlike the predominantly empirical nature of his study of direct legislation, Magleby's analysis of lawmaking by elected representatives is unsupported by research evidence. Instead, his summary description is largely a restatement of traditional pluralist theory coupled with an idealized vision of the operation of the legislative process. Rather than engage in an extensive critique, a few points may suffice to show how he exaggerates the democratic nature of representative government and overstates the comparative failings of direct legislation.

It is ironic that Magleby, who is so astute in recognizing the hidden barriers to access to the initiative process for the nonaffluent and unorganized, should be so inattentive to the same barriers to access to representative government. Private wealth and special interests dominate the financing of candidate elections as well as initiative petition drives and ballot proposition campaigns.[73] Inequalities of wealth and organization influence both the outcome of elections and the postelection behavior of legislators.[74] Indeed, heavy affirmative spending seems to be even more effective in candidate elections than in initiative balloting.[75] More significantly, campaign contributions influence the conduct of government. A legislator comes to represent a financial constituency in addition to his

68. Pp. 180-99.
69. P. 181.
70. P. 182.
71. P. 188.
72. *See* pp. 184-85.
73. *See* D. ADAMANY & D. AGREE, POLITICAL MONEY (1975); H. ALEXANDER, FINANCING THE 1980 ELECTION (1983); L. BERG, H. HAHN & J. SCHMIDHAUSER, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM (1976); E. DREW, POLITICS AND MONEY (1983); Briffault, *The Federal Election Campaign Act and the 1980 Election,* 84 COLUM. L. REV. 2083 (1984).
74. *See* Briffault, *supra* note 73, at 2100-02.
75. *See id.* at 2100 & n.86.

geographic constituency, so that campaign contributions provide access to the legislative agenda.[76] Although voter turnout may be slightly lower in initiative contests than in candidate elections, the number of Americans who influence the political arena through financial contributions is much more limited. That group—like the initiative electorate—is composed disproportionately of persons of above-average income and education.[77] Magleby fails even to touch upon the role of private wealth and special interest groups in setting the legislative agenda or determining legislative outcomes. The problems of wealth and organizational limits on access are common to both direct and representative government; Magleby certainly makes no showing that the legislative process is less skewed by campaign finance and special interest lobbying than is direct democracy.

Magleby's claims about the deliberative nature of the legislative process seem more plausible on the surface, but they, too, are overstated. Legislators are expert specialists in lawmaking, equipped with staffs and resources that help them reach informed decisions. They work through a process of hearings, amendments, revisions, and debates that promotes reasoned consideration of a bill. In short, as Magleby contends, the legislative process is designed to foster deliberation.[78]

But, of course, the potential for deliberation does not ensure that deliberation always occurs. In fact, much legislation is enacted without the informed, thoughtful analysis or extensive consideration contemplated by the legislative ideal. Many state legislatures act on a significant number of their bills in marathon sittings at the end of the legislative session.[79] According to one commentator, "The crush of end-of-session business . . . buries state legislators in the closing weeks . . . . In many states it becomes impossible even to find bills."[80] In one session of the New York Legislature, for example, 508 bills were passed in the last three days the legislature met.[81]

Lack of deliberation is not reserved for the end of the session. One California state senator entitled his political memoirs *What Makes You Think We Read the Bills?*[82] and proceeded to explain:

76. *See id.* at 2100-01 & nn.87-89.

77. *See id.* at 2101 & n.92.

78. *See* pp. 184-88.

79. *See* Wahlke, *Organization and Procedure,* in STATE LEGISLATURES IN AMERICAN POLITICS 147 (Am. Assembly ed. 1966).

80. *Id.* at 147.

81. *See* J. ZIMMERMAN, THE GOVERNMENT AND POLITICS OF NEW YORK STATE 144 (1981). One critic contends that "legislation by fatigue means that a trio—the governor, the speaker, and the Senate president pro tempore—determine the bills to be enacted into law." *Id.* at 145.

82. H. RICHARDSON, WHAT MAKES YOU THINK WE READ THE BILLS? (1978).

> 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.[83]

Rather, most legislators usually abide by the decision of a party caucus, follow the lead of influential members, or defer to the recommendations of lobbyists and interest groups.[84] That the legislative process has a greater potential for deliberative decision making than does initiative voting is likely, but Magleby has simply posited the case for the legislature's greater rationality; he certainly has not proven it.[85]

Magleby's third point, that legislatures are more sensitive to the interests of minority groups than the initiative electorate, also has a logical appeal. Other critics of direct democracy have made the same point.[86] Pluralist theorists argue that because legislatures represent so many different interests, building a legislative majority requires the formation of coalitions among various minorities. Legislators deal with the broad range of issues that come before government, so that minority groups with differing intensities of preference on different issues may bargain with other groups for their votes. This legislative log-rolling over a broad agenda brings minorities into the process and ensures that the resulting compromises will accommodate their interests. In contrast, the initiative agenda is thin, presenting only a few isolated questions to the electorate seriatim.[87] Various groups in a statewide electorate cannot sit down and bargain with each other, with one group pledging support on one initiative in one year in exchange for support from another group on

83. *Id.* at 37-38.

84. *See id.* at 42-46. *See generally* J. ZIMMERMAN, *supra* note 81, at 123-57.

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. *See* Heimbach v. State, 89 A.D.2d 138, 454 N.Y.S.2d 993 (1982).

85. Other critics of direct democracy join Magleby in emphasizing the comparative superiority of the legislature for deliberative decision making. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 266-67, 651 P.2d 274, 292-93, 186 Cal. Rptr. 30, 48-49 (1982) (Bird, C.J., dissenting); Sager, *Insular Majorities Unabated: Warth v. Seldin and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373 (1978).

86. *E.g.*, Bell, *The Referendum: Democracy's Barrier to Racial Equality,* 54 WASH. L. REV. 1 (1978).

87. *See* Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy,* 53 IND. L.J. 145, 175 (1978).

another ballot proposition in the next year.[88] In theory, then, it is reasonable to believe that legislatures are more responsive to minority groups than is the electorate as a whole.

Yet, as with Magleby's praise of legislative rationality, the greater *potential* for attentiveness to minority groups has not always been matched *in practice*. Indeed, it is difficult to argue that historically minorities—in particular, blacks and other racial minorities—did all that well in state legislatures. Racial discrimination was largely a product of state legislative action, not initiative votes. Nor are the great advances of minorities in recent decades attributable to state legislative action. The initial successes of the civil rights movement were won in the courts or on the streets. The legislatures resisted and delayed and became more responsive only under extraordinary political and legal pressures. Even today, in times of fiscal stringency, states may be more prone to cut programs that help minorities and the poor than those that serve more politically powerful groups.

At another level, the challenge to the initiative for lack of sensitivity to minority interests is misguided; the initiative, like other devices of direct democracy, was designed as a *majoritarian* tool, to be used when the legislature failed to act on a program the majority desires.[89] The appropriate question here is whether the initiative is more likely than the legislature to be a source of measures that discriminate against minorities or infringe upon the rights of the politically powerless. Without offering a firm answer, I suggest that there are two institutions that tend to mitigate the antiminority potential of direct legislation: the judiciary and the initiative process itself.

The electorate-as-legislature can no more infringe upon constitutionally protected rights than can the representative legislature. Although the courts frequently bestow rhetorical plaudits on direct democracy,[90] they have not hesitated to invalidate initiative measures as

88. *See id.* at 182.

89. *See supra* notes 7-8 and accompanying text.

90. *See, e.g.*, James v. Valtierra, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy . . . ."); Brosnahan v. Brown, 32 Cal. 3d 236, 241, 651 P.2d 274, 277, 186 Cal. Rptr. 30, 33 (1982) ("[I]t is our solemn duty jealously to guard the sovereign people's initiative power . . . . *[W]e are required to resolve any reasonable doubts in favor of the exercise of this precious right.")* (emphasis in original); Amador Valley Joint Union High School Dist. v. Board of Equalization, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978) ("[T]he power of initiative must be liberally construed . . . to promote the democratic process.") (quoting San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 210 n.3, 529 P.2d 570, 572 n.3, 118 Cal. Rptr. 146, 148 n.3 (1974)); Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) ("[T]he initiative and referendum . . . articulat[e] 'one of the most precious rights of our democratic process.' ") (quoting Mervynne v. Acker, 189 Cal. App. 2d 558, 563, 11 Cal. Rptr. 340, 344 (1961)).

unconstitutional.[91] Indeed, the recent enhanced use of direct legislation appears to have called forth a more aggressive judicial policing of the initiative process and a judicial scrutiny of initiative proposals for constitutional violations. In 1983, the California Supreme Court reversed its long standing rule of not engaging in pre-election review of initiative proposals and struck a proposition from the ballot on constitutional grounds.[92] In 1984, the same court invalidated a second measure before it could be submitted to the voters[93] and the Florida Supreme Court twice removed measures from the ballot on constitutional grounds.[94] This judicial enforcement of the federal and state constitutions goes far to constrain whatever threat direct legislation may pose to minority interests and individual rights, assuring that direct legislation is no more a source of "majority tyranny" than the legislature itself.[95]

91. *E.g.,* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); *see also* Yelle v. Kramer, 83 Wash. 2d 464, 472, 520 P.2d 927, 932 (1974) ("We reject the contention . . . that appropriate constitutional provisions do not apply to initiatives.").

92. Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983). According to one scholar, this decision "confirms that state courts will resist strenuously any majoritarian efforts to limit state constitutional jurisprudence." Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence,* 11 HASTINGS CONST. L.Q. 43, 82 (1983).

93. *See* AFL-CIO v. Eu, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

94. *See* Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984); Fine v. Firestone, 448 So. 2d 984 (Fla. 1984).

95. The real problem for minorities with the initiative process grows out of the limitations of federal constitutional doctrine. In order to invalidate under the federal equal protection clause a measure that discriminates against a racial minority, a plaintiff must prove that the measure was adopted with invidious intent. *See* Hunter v. Underwood, 105 S. Ct. 1916, 1919-20 (1985); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977). The substantial difficulties of proving discriminatory intent on the part of legislatures pale in comparison to the challenge of demonstrating that a ballot proposition was enacted with an invidious purpose. It is far from clear whose intent is relevant—that of the drafters of the proposal, the thousauds who signed the qualification petitions, or the voters, who can number in the millions. For one court's view of this problem, see Carman v. Alvord, 31 Cal. 3d 318, 331 n.10, 644 P.2d 192, 199 n.10, 182 Cal. Rptr. 506, 513 n.10 (1982) (stating that the intent of Howard Jarvis, a principal drafter of Proposition 13, "may deserve some consideration . . . but by no means does it govern our determination how the voters understood the ambiguous provisions"). In considering recent equal protection challenges to voter-initiated legislation, the United States Supreme Court has eschewed independent inquiry into intent and has relied entirely on the findings of the state courts. *E.g.,* Crawford v. Board of Educ., 458 U.S. 527, 543-45 (1982); Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

More generally, minorities may suffer from the limited substantive definition of their rights. Recent experience has been that few antiminority ballot proposals are adopted in the first instance. Rather, the electorate usually becomes active only after a state court or state legislature has expanded minority rights beyond the minimum guaranteed by the federal constitution. Antiminority voters may then seek to roll back those minority gains. This was the pattern in the fair housing referenda in the 1960s, *see generally,* Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting,* 62 AM. POL. SCI. REV. 753 (1968) (analyzing voting behavior and attitudes toward civil rights), and the referenda to repeal municipal gay rights ordinances in the late 1970s, *see* Bell, *supra* note 86, at 18. Unless the repeal itself deprives minorities of a federally protected right or creates new discriminatory barriers, the minority groups are left without a consti-

The second constraint on majoritarian abuse lies in the nature of the initiative process. As Magleby demonstrates, it is difficult to get measures on the ballot and it is difficult to get them passed. Minority groups benefit from the "negative bias" in the system. A minority group that intensely opposes a measure can seek to block ballot qualification and it can mount a campaign that generates doubts and uncertainties about the proposition, exploiting the electorate's innate caution and reinforcing the tendency to reject initiatives even if the proposition appeals to antiminority prejudices. 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.[96]

In short, instead of being radically different, representative and direct democracy in the United States today suffer in varying degrees from similar defects of wealth- and organization-based barriers to access, low levels of popular participation, unreasoned decision making, and potential for antiminority abuses. The question is whether direct democracy merely compounds the flaws of representative government or, rather, whether direct democracy may function as a corrective to the defects in legislative representation. I believe there is evidence in Magleby's book and elsewhere which suggests that at least in certain situations, direct legislation may be more ameliorative than harmful.

tutional claim. *See* Fischer, *supra* note 92, at 69-72. *Compare* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (invalidating initiative that undid school busing program because it intentionally reallocated political power in a manner more burdensome for minorities) *with* Crawford v. Board of Educ., 458 U.S. 527 (1982) (upholding initiative to limit court-ordered busing to cases mandated by the federal constitution, thereby undoing state court extension of busing as a remedy for segregation).

96. Thus, opponents were able to defeat a proposal to prevent homosexuals from teaching in California public schools, notwithstanding widespread prejudice against homosexuals, by calling attention to drafting defects and the lack of due process protection. *See* pp. 168-69, 183.

It may be that minorities are less adversely affected by voter-initiated legislation than by the other types of ballot propositions. Voter caution may protect minorities from the antiminority potential of the initiative; however, when minorities are able to make the legislative process work for them in pluralist textbook fashion, *see supra* text accompanying notes 86-88, requiring voter approval after legislative passage may permit popular antiminority sentiment to join with voter caution to block adoption of such measures. Although voters pass a far higher percentage of ballot propositions originating in the legislature than of initiatives, about 40% of the legislative measures submitted to the voters fail to obtain the necessary approval. *See supra* note 66. Requiring voter approval of a measure which has surmounted all the hurdles internal to the legislative process creates an additional barrier to the enactment of legislation—a barrier with particularly adverse effects for minorities. A classic example of such a barrier is the California constitutional provision considered and upheld in James v. Valtierra, 402 U.S. 137 (1971), which conditioned the development of low-rent public housing on voter approval. *See also* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) (upholding a city charter provision requiring both city council approval and referendum vote for local zoning variances). Scholars critical of direct democracy because of its implications for minority interests generally have based their critique on the consequences of requiring voter approval of legislative enactments, without separately considering the distinctive features of voter-initiated legislation.

IV.

Representative government, if it is to be worthy of the name, must be responsive to the governed. This does not require regular submission of all governmental policy choices to the voters for approval: in a large, complex, and heterogeneous society that would be impractical as well as unwise, for many of the reasons Magleby suggests. Nevertheless, as Hanna Pitkin put it, "[T]here must be a constant condition of responsiveness, of potential readiness to respond."[97] The requirement of periodic elections may help ensure that elected representatives are responsive to the wishes of the governed. Yet the imperative of re-election may not prove to be a sufficient guarantee. Indeed, it 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. The institutional setting, thus, may divide representatives from their constituents and create incentives for elected officials to disregard the preferences of popular majorities.[98] This potential cleavage between the representatives and the represented is well-illustrated by legislators' regulation of politics. The legislators' stake in remaining in office or keeping their party in power influences legislative reapportionment, campaign finance regulation, access to the ballot for third parties and independents, and ethics-in-government laws in ways that may diverge from the views of most voters.[99]

So, too, legislative taxing, spending, and regulatory decisions are likely to favor those politically active interest groups that are benefited by government spending or affected by regulation. Like legislators contemplating the needs of re-election, and unlike the ordinary citizen, these groups have strong incentives to become deeply involved in the regular fiscal operations of the legislature.[100] Working through elected officials who need their campaign contributions, through bureaucrats whose agencies they work with and support, and through the very force of their presence in state capitals, these politically active groups strive for programs that benefit them and block those that do not. Pluralist political

97. H. PITKIN, THE CONCEPT OF REPRESENTATION 233 (1967).

98. *See generally* D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (examining how the quest for re-election affects representatives).

99. *See* J. ELY, DEMOCRACY AND DISTRUST 120 (1980) (favoring strict judicial review of restrictions on the right to vote and of legislative malapportionment because "[w]e cannot trust the ins to decide who stays out").

100. *See generally* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1967) (models for analyzing political organization); W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (economic theory for an efficient burcaucracy to supply public services within a representative government).

theory suggests that the multiplicity of competing interest groups will ensure that no one interest will dominate the legislature because the strength of one cluster of lobbyists will be offset by the countervailing demands of organizations with opposite interests.[101] These interests, however, are not always in conflict; many of these groups may support each other's spending programs, forming coalitions of "high demanders"[102] that drive the total level of government taxing and spending above that preferred by most of the voters. Similarly, interest groups usually antagonistic to each other may be on the same side in a dispute over an issue of government regulation. If that is the case, the pluralists' process of conflict and compromise, of pulling and hauling among interest groups, which is said to result in the virtual representation of the unorganized will not occur and the unorganized will be shut out of the legislative process.[103]

The best case for direct legislation in a system of representative government is that it may play an important role in just those areas in which institutional pressures cause representatives to stray from the interests of popular majorities: government structures and regulation of the political process, taxation, and spending. An unsystematic review of the evidence in Magleby's book and elsewhere suggests that initiatives have done just that. According to Magleby, "A categorization of the more than twelve hundred initiatives voted on since 1898 would reveal that the . . . subject areas most apt to result in initiatives are governmental processes and revenue and taxes."[104] Another study concluded that 26% of all initiatives between 1898 and 1976 involved governmental and political processes—

101. *See generally* A. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES (1949) (noting that society is a balancing of many group pressures); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) (examining types of democratic theory); D. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951) (examining effects of interest groups on political decision making).

102. *See* Denzau, Mackay & Weaver, *On the Initiative-Referendum Option and the Control of Monopoly Government*, in TAX AND EXPENDITURE LIMITATIONS 191, 194 (H. Ladd & T. Tideman eds. 1981); *see also* Rothenberg, *Discussion of A. T. Denzau, R. J. Mackay, and C. L. Weaver, "On the Initiative-Referendum Option and the Control of Monopoly Government,"* in *id.* at 223, 229 (arguing that high demander groups "will only be allies if they coalesce—i.e., form an explicit or implicit coalition . . . that establishes a log-rolling relationship").

103. Environmentalism, at least at its inception, may be one example of this phenomenon. Business and labor groups that disagree on most issues of economic regulation often unite in opposition to measures that might restrict industrial pollution. Such measures, despite broad public support, frequently become stalled in the state legislature. *See, e.g.*, Lutrin & Settle, *The Public and Ecology: The Role of Initiatives in California's Environmental Politics*, 28 W. POL. Q. 352, 360-61 (1975) (noting combined business and labor opposition to air pollution control measures); *see also id.* at 362 (noting eight years of legislative inaction on measure to protect California coastline). *See generally* G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 166-95 (1966) (arguing that power in state government is concentrated in special interest groups, leaving large segments of the public unrepresented).

104. P. 74.

the largest single category of initiatives.[105] An additional 21% involved revenues and taxation—the second largest category.[106] A survey that sought to determine which types of initiatives were "most interesting" to voters—and thus likely to result in higher turnout and more informed ballot decisions—concluded that "voters [are] most interested in the kinds of propositions that they decide most often—government organization and revenue and taxation questions."[107]

Through the initiative process, the voters have acted directly on matters that professional legislators would have preferred to keep to themselves. California's Political Reform Act of 1974,[108] which regulated campaign finance practices and conflicts of interest, was the result of direct legislation.[109] California and Washington voters initiated measures concerning legislative redistricting.[110] The Washington electorate legislated directly on open meetings, lobbying, and campaigu practices,[111] and Florida voters adopted a measure regulating ethics in government.[112]

Direct legislation has also been successful in bringing the electorate into the otherwise relatively closed process of state finance and taxation. Certainly one of the most well-known initiatives in modern times is California's Proposition 13,[113] the tax-limitation measure adopted in 1978 that may have sparked the "Taxpayer Revolt" of the late 1970s, with ramifications continuing to this day.[114] Proposition 13 was followed by a multitude of tax and expenditure limitation propositions on ballots throughout the nation.[115] Regardless of the wisdom of constitutional limits on the size or growth of state budgets, Proposition 13 and its prog-

105. *See* Ranney, *The United States of America,* in REFERENDUM, *supra* note 56, at 67, 78 (table 4-5).

106. *See id.*

107. Pp. 75-76.

108. CAL. GOV'T CODE §§ 81000-81016 (West 1976).

109. *See* Fair Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (invalidating parts of the Political Reform Act); Citizens for Jobs & Energy v. Fair Political Practices Comm'n, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976) (same).

110. *See* p. 75 (table 4.5) (redistricting initiatives in the 1960s). In 1983 a reapportionment initiative received enough signatures to qualify for the ballot but was removed because it violated California's constitutional limitation of reapportionment to once each decade. *See infra* note 125; *see also* Bone & Benedict, *supra* note 54, at 347 (reapportionment initiative in Washington).

111. *See* Bone & Benedict, *supra* note 54, at 347.

112. *See* FLA. CONST. art. II, § 8 (1976). The provision, known as the "Sunshine Amendment," was approved by voters in the November 1976 general election. *See* Williams v. Smith, 360 So. 2d 417 (Fla. 1978).

113. CAL. CONST. art. XIII(A) (1978).

114. *See* CALIFORNIA AND THE AMERICAN TAX REVOLT (T. Schwadron ed. 1984); R. KUTTNER, REVOLT OF THE HAVES (1980); A. RABUSHKA & P. RYAN, *supra* note 22 (discussing the aftermath of Proposition 13).

115. *See* R. KUTTNER, *supra* note 114, at 273-327; A. RABUSHKA & P. RYAN, *supra* note 22, at 143-200.

eny certainly demonstrate that direct legislation has empowered the electorate to participate more directly in state budget processes.[116]

These political and fiscal measures are less subject to the general criticisms that Magleby levels at the typical initiative.[117] First, these ballot propositions were sponsored by diverse grass-roots organizations, citizens groups, and taxpayers' associations not ordinarily active, let alone successful, in legislative politics. They were often vigorously opposed and outspent by the business and labor groups that Magleby asserts usually dominate the initiative process. Moreover, surveys indicate that in the 1970s, which may be viewed as the renaissance of direct legislation, this participation by political outsiders increased.[118] Advances in communications technology may enhance the ability of outsider groups to qualify proposals for the ballot and increase the possible uses of direct legislation as an avenue of participation by these interests.[119] Second, these propositions were often highly controversial and hotly contested. The voters turned out in relatively high numbers, with drop-off rates usually below 10%.[120]

The successful initiative drives often were characterized by factors that served either to educate the voters or to suggest an element of deliberation in the voters' decisions. Proponents of California's Political Reform Act conducted sixty public hearings around the state to educate the voters about the measure's purpose and provisions.[121] Proposition 13 passed only after a decade of unsuccessful efforts by tax limitation activists, and subsequent efforts to build on Proposition 13 with more draconian tax cuts were also defeated.[122] The voters appear to be able to pick

116. Environmental regulation may also constitute an area where the initiative has played a significant role in constraining legislative deviation from constituent desires and assuring consideration of measures popular among the voters but less attractive to legislators. Environmental measures comprise a relatively small percentage of initiative proposals historically—only 7% of the proposals between 1898 and 1976; they only began to be significant in the 1970s. Ranney, *supra* note 105, at 78 (table 4-5), 80. A number of important initiatives have focused on problems of environmental protection and energy conservation. California's first substantive piece of environmental legislation—The California Coastal Zone Act of 1972, 1972 Cal. Stat. A-181 (current version at CAL. PUB. RES. CODE §§ 30000-30900 (West 1977))—was the result of an initiative. Lutrin & Settle, *supra* note 103, at 363-70. The success of the Coastal Zone initiative was particularly significant because it was one of the very rare initiatives that passed in the face of heavy negative spending against it. *See* Lowenstein, *supra* note 50, at 529 (noting that opponents outspent proponents $1,185,246 to $251,308). Other initiative proposals on the California ballot in the 1970s sought to restrict air pollution and nuclear power plants, while voter-initiated legislation in Maine and Michigan resulted in restrictions on the sale of nonreturnable bottles and cans. Ranney, *supra* note 105, at 83.

117. *See supra* Part I.

118. *See supra* note 56 and accompanying text.

119. *See* Fischer, *supra* note 92, at 87.

120. *See* p. 75 (table 4.5).

121. *See id.*

122. *See* A. RABUSHKA & P. RYAN, *supra* note 22, at 15-21, 159-85. Before Proposition 13, tax limitation or reduction schemes—including one proposed by Governor Ronald Reagan—were de-

and choose among the tax-cut and spending-limit proposals according to the merit of the proposition and the state of the economy. Finally, these measures also usually came before the voters only after prolonged legislative inaction. The problem of burgeoning property taxes had been before the California legislature for years before the passage of Proposition 13, but the legislature had failed to act until it was too late.[123] The California legislature also had failed to enact effective campaign finance controls before the electorate acted.[124] The recent California reapportionment initiative was a response to perceived legislative gerrymandering.[125]

In these cases, the initiative served as a remedy for legislative failure—much as the Progressives had envisioned. Direct legislation did not serve as a substitute for the legislative process but as a complement when the legislature had displayed prolonged indifference to the wishes of a significant portion of the public. The initiative was an effective device for getting the legislature's attention and reminding representatives of the public outside the community of political insiders.

Magleby's concern that the initiative will prove too effective and displace the legislature seems unfounded. The difficulties of qualifying measures for the ballot and overcoming voter resistance to initiative proposals indicate that most laws, even those dealing with subjects prone to initiative activity, will remain the product of legislative lawmaking.[126]

feated in 1968, 1972, and 1973. *Id.* Efforts by Howard Jarvis to follow Proposition 13 with more draconian cuts were defeated in 1980 and 1984. Jarvis's Proposition 9 on the June 1980 ballot, informally known as "Jaws II" by its critics, proposed to halve state income taxes, to index the tax rates to inflation, and to eliminate the tax on business inventories. *See id.* at 159, 219. It received only 39% of the vote, *see* p. 75 (table 4.5), in part because of voters' concern about its economic effects and in part because legislative tax revision enacted in the aftermath of Proposition 13 reduced the public's sense of grievance and enhanced belief in "a responsible and responsive state government." A. RABUSHKA & P. RYAN, *supra* note 22, at 160; *see id.* at 161-83.

Jarvis's Proposition 36 (1984), the "Save Proposition 13" initiative, sought to curtail the ability of local governments to use special taxes and fees to replace the property tax revenues lost after Proposition 13. Fifty-five percent of the voters said "no" to Proposition 36. *See* St. Budget & Tax News, Nov. 8, 1984, at 1. In the same election, California voters rejected a proposal to cut welfare spending. *See id.* at 3.

Tax expenditure limitation measures have received mixed receptions in other states as well. *See generally* R. KUTTNER, *supra* note 114, at 292-324 (recounting diverse fates of tax and expenditure limitation proposals in Michigan, Oregon, Washington, Ohio, and Florida).

123. *See* R. KUTTNER, *supra* note 114, at 50-65.

124. *See* Lutrin & Settle, *supra* note 103, at 362-63.

125. In a referendum held in June 1982, the voters rejected the district lines drawn by the legislature in 1981. In a special session in 1982-1983, the legislature adopted a new set of legislative districts; California Republicans soon qualified an initiative intended to displace those lines as well. The California Supreme Court denied that initiative a place on the ballot, finding that the state constitution allowed only one reapportionment per decade. *See* Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983). *But see id.* at 690, 669 P.2d at 40, 194 Cal. Rptr. at 804 (Richardson, J., dissenting) (arguing that the initiative and ballot "constitute the people's only weapons to dislodge entrenched political dynasties created and sustained primarily by virtue of their own use and misuse of the reapportionment device").

126. As Professor Lowenstein explains, "[V]oters can act collectively by means of the initiative

The legislature is not disabled from acting; in fact, legislative lawmaking that occurs in the shadow of a vigorous initiative process may be more responsive to popular wishes than a legislature not subject to check by direct legislation. Even unsuccessful initiatives have a role, alerting legislators that public concern on a subject that the legislature has neglected has become great enough to get a measure on the ballot, yet giving the legislature a grace period in which to move on the matter before the voters become sufficiently aroused to do it for them.

The initiative cabins the legislature's discretion and ensures that certain proposals not ordinarily high on the legislative agenda are given consideration, yet still leaves most lawmaking to the more "deliberative, substantive, and rational" legislative process. Seen from this perspective, the high hurdles blocking passage of direct legislation may have considerable merit. So long as enough initiatives succeed periodically to demonstrate the electorate's potential lawmaking power, it is probably better that most laws emerge from the legislative process, with its greater capacity for rationality, compromise, care, and deliberation. The legislature will still write most of the laws, but the existence of the initiative process as a supplement to the legislature will influence the pattern of legislative behavior in the direction of greater conformity to popular interests.[127] In states where initiatives are common, "the initiative seems to have become deeply ingrained in the political culture of the state almost like another step in the legislative process. Groups and interests become accustomed to going the initiative route when the legislature-governor channel is blocked . . . ."[128] Although there is no necessary virtue to providing a supplemental avenue for legislative losers, the susceptibility of the legislative channel to "blockage" and to deviation from the majority when government structure, the political process, and taxing and spending are at stake will indicate the need for such a mechanism to assure that proposals unappealing to the legislature but popular with the people get a fair measure of consideration. The most important function of direct legislation may not be to pass initiatives—very few citizen-initiated proposals succeed—but to get certain subjects on the *legislative* agenda. For poorly organized and underfinanced citizens' groups that

process only episodically and at moments of high political passion . . . ." Lowenstein, *supra* note 67, at 964.

127. Many successful initiative endeavors occurred only after legislative inaction had broadened the legislative agenda rather than narrowed it. *See supra* notes 123-25 and accompanying text. One political scientist concluded that states frequently using the initiative have legislatures that are at least as accountable and effective as those in noninitiative states. Indeed, California, the state most associated with vigorous use of the initiative, was ranked first by the Citizens Conference on State Legislation in its assessment of legislative performance. *See* Price, *supra* note 56, at 255-57.

128. *Id.* at 251.

do not enjoy ready access to the legislative process, this can be a vital addition to their political resources.

Direct legislation, for all its failings, does seem to provide a means for mobilizing citizen activism when legislators pursuing their own self-interests stray too far from what a popular majority conceives of as the public interest. Although only a minority of initiative proposals fall into this perhaps idealized category of attempts by political outsiders to check the legislature, it is a crucial minority because these outsiders ordinarily would not be heard at all. That most initiatives fail says little about the quality of the politics that emerges. As Albert Hirschman paraphrased Robert Dahl in another context, "[T]he ordinary failure, on the part of most citizens, to use their potential political resources to the full makes it possible for them to react with unexpected vigor—by using normally unused resources of political power and influence—whenever their vital interests are directly threatened."[129] The occasional successes of direct legislation in areas like campaign practices and taxing and spending are much more important than the failures. The initiative has value because it can facilitate the deployment of those "resources of political power and influence" on the relatively rare occasions when the public is sufficiently aroused to act, and because even initiative failures shape legislative behavior by reminding legislators of the electorate's residual power.

V.

Professor Magleby's book is of enormous value for its collection and analysis of the empirical research on direct democracy and for its demonstration that the initiative falls short of the aspirations of its Progressive Era sponsors and its contemporary proponents. In the future, scholars will have to deal seriously with his conclusions concerning financial and organizational restrictions on ballot access, voter turnout and drop-off, proposition and handbook readability, and the troubling quality of initiative voter decision making.

I believe he errs, though, in treating direct and representative democracy as mutually exclusive alternatives and in his idealized view of how representative democracy functions. Although the shortcomings of direct democracy that Magleby identifies are real, he overstates its defects while ignoring the possibility that representative democracy suffers from many of the same problems. His view of direct democracy and representative democracy as inherently incompatible fails to account for

129. A. HIRSCHMAN, EXIT, VOICE AND LOYALTY 32 (1970) (paraphrasing R. DAHL, WHO GOVERNS? 309-10 (1961)).

almost a century of fruitful coexistence in many state political systems and sidesteps the evidence, admittedly sketchy, that direct legislation may constrain special-interest domination and check the tendency of legislators to pursue their own self-interest.

Partisans of direct democracy may find the preceding tentative defense of the initiative to be a bit strange. Theorists from Rousseau to the authors of the Port Huron Statement have focused on direct democracy as a means of transcending political mechanics by satisfying human needs as well as providing broad popular participation in lawmaking.[130] Participatory democracy was urged as a means to give people a sense of control over their environment, promote solidarity with the fellow members of the community, and, by forcing citizens to grapple repeatedly with difficult civic decisions, develop their intellectual and moral faculties.[131] The model of direct democracy has been the small, face-to-face assembly, working by consensus—the Swiss canton or the New England town meeting.[132] Indeed, contemporary forms of direct legislation have been seen as harking back to the tradition of the New England town meeting.[133] Yet without denigrating the educational and social virtues of participation, the town meeting metaphor may do the initiative a disservice. It is painfully obvious that none of our states is small enough in population or area to be analogized to a town, nor can one compare most contemporary ballot proposition campaigns to meetings. Running town meetings on a grand but uninformed and undeliberative scale is clearly not a desirable way to run a state. The town meeting metaphor, however well-intentioned, suggests that initiatives, like town meetings, cannot make useful contributions to the effective and responsible government of a modern state.[134]

130. *See* J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 3-22 (1980); J. MILLER, ROUSSEAU: DREAMER OF DEMOCRACY 107-08, 165 (1984); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 22-44 (1970).

131. Pateman uses the term "political efficacy" for the sense of control over one's environment that comes from participation. *See* C. PATEMAN, *supra* note 130, at 45-66. In the theory of participatory democracy, participation is "educative in the very widest sense, including both the psychological aspect and the gaining of practice in democratic skills and procedures." *Id.* at 42. Following Rousseau, Pateman also characterizes participation as "integrative . . .[,] increas[ing] the feeling among individual citizens that they 'belong' in their community." *Id.* at 27. Mansbridge emphasizes the role of "solidarity" and "friendship" in supporting political institutions predicated on face-to-face assembly and consensus. *See* J. MANSBRIDGE, *supra* note 130, at 4-5.

132. *See* J. MANSBRIDGE, *supra* note 130, at 39-135 (study of New England town meeting); J. MILLER, *supra* note 130, at 41 (citing Swiss cantons as a model of ideal democracy).

133. *See* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 672-73 (1976).

134. *See, e.g.*, J. MILLER, *supra* note 130, at 208 (noting tendency of modern political theorists to treat direct democracy as "a dream, a utopia, destined not to survive"). Both Pateman and Mansbridge are skeptical about the possibilities of broad participation in a large polity, but instead argue for the expansion of avenues of participation at the local level or the workplace. J. MANSBRIDGE, *supra* note 130, at 278-98; C. PATEMAN, *supra* note 130, at 109.

But direct democracy can make practical contributions and at least partly realize the vision of the Progressives. As Woodrow Wilson explained seventy-five years ago, the initiative was intended "to restore, not destroy, representative government."[135] He saw the initiative "as a sobering means of obtaining genuine representative action on the part of legislative bodies."[136] Direct legislation in practice has fallen short of this ambitious goal. Yet I think Wilson was essentially correct in seeing in direct legislation, not a threat to legislatures, but a potentially significant device for enhancing the representativeness of representative government.[137]

135. Wilson, *The Issues of Reform,* in THE INITIATIVE REFERENDUM AND RECALL, *supra* note 8, at 69, 87.

136. *Id.* at 88. At least one prominent Progressive was very critical of the Wilsonian view of reinvigorating representative democracy. Herbert Croly dismissed the initiative as "merely another expression of the old superstitious belief in political mechanics." H. CROLY, PROGRESSIVE DEMOCRACY 269 (1914). For Croly direct democracy had "little meaning except in a community which is resolutely pursuing a vigorous social program." *Id.* at 270. Without substantive social and economic reform, changes in the political structure would do little to liberate the popular will. Indeed, foreshadowing Magleby, Croly predicted that the initiative process would result in low turnouts and domination by "alert and energetic voters" to the detriment of the more apathetic or diffuse majority. *Id.* at 306-08.

137. This defense of direct democracy is based only on an analysis of the initiative. *See supra* note 10. The referendum and the requirement of voter approval of legislative enactments present different issues. Under the latter forms of direct democracy, the legislature plays the critical role of originating proposals for popular consideration. Thus, the problems of special-interest domination of the agenda, poor draftsmanship, and unreasoned decisions, which Magleby suggests are endemic to the initiative, are substantially mitigated. These aspects of the referendum and voter approval are comparable to actions taken by the legislature without popular participation. On the other hand, while the appeal of the initiative is that it opens up a new avenue for lawmaking when the legislature is blocked, the referendum and the requirement of voter approval after legislative passage add a new barrier at the end of the legislative process. Magleby's statistics suggest that this is a barrier which effectively blocks many legislative proposals. *See supra* note 66. Moreover, given the socioeconomic composition of the electorate that tends to vote on ballot propositions and the apparent voter predisposition to vote "no," these forms of direct democracy may have a built-in conservative bias. The distinction between the initiative and a requirement of voter approval requires further exploration, but not in this already overextended review.