THE PHILADELPHIA II PROPOSAL

by

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My intent here is to indicate both the strengths and weaknesses of The National Initiative for Democracy, as I see them. I support what I take to be its fundamental objective, but I fear aspects of it approach are problematic. Consequently, much of what I have to say will appear critical, but it is offered with the hope of assisting the proponents of the National Initiative in their goal of obtaining its enactment.

The National Initiative proposal generates three interrelated bundles of questions:

1. **The Substantive Questions:** What are the anticipatable costs and benefits of a national initiative, and how likely is it that significant unanticipated consequences would materialize? In short, how likely is it that a national initiative would be a good and useful addition to the political structure of the United States?

2. **The Strategic and Tactical Questions:** What are the goals and their priority of the Democracy Foundation, Philadelphia II and their related organizations? Is the central point to further the adoption of a national initiative process, or more generally the creation of a "legislature of the people" (and do the two differ)? Does the manner of adoption matter, or is that simply a tactical question? Is the point instead to promote a certain conception of political rights and relationships that may have implications far beyond the particulars of the National Initiative proposal? And to what extent is the primary point of the present efforts educational with respect to that conception?

3. **The Drafting Questions:** Given the objectives to be accomplished, are the proposed Democracy Amendment and Democracy Act of the National Initiative felicitously drafted?

I. The Substantive Questions

When asked to contribute to this symposium, I thought my main task would be to update my previous work that analyzed a similar proposal the last time the national political scene caught notice of the possible virtues of a national initiative proposal.[2] Back then, I began my work as a skeptic, but finished as an enthusiast. I began as a skeptic under the influence of both

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[1] John Henry Wigmore Professor, Northwestern University School of Law. I am indebted to my colleagues, Robert Bennett, Andrew Koppelman, and Gordon Wood, for commenting on drafts of this article.

[2] Ronald J. Allen, The National Initiative Proposal: A Preliminary Analysis, 58 Neb. L. Rev. 965 (1979).

academic and journalistic accounts that systematically portrayed the problematic aspects of statewide initiatives and referenda, and slighted their positive contributions, a process that continues today.[3] I finished as an enthusiast because the actual political dynamic of the experience in the states is quite positive, and in my judgment compares favorably to the work product of the nation's legislative bodies. The basis of my views included a review of all empirical studies of statewide initiatives, and in addition I personally examined every statewide ballot proposition in every state with these mechanisms, excluding only certain categories of required referenda (such as school levies whose numerosity would have overwhelmed my resources). I also obtained all the data on campaign expenditures that were then collected by the various states and examined it (in a pitiable and pathetically amateurish way–this is one of the costs of consulting work done in one's youth, I fear). From this effort emerged a number of conclusions, including:

1. The standard journalistic and political theorist's treatment of ballot propositions focused inappropriately on idiosyncratic propositions that were not placed in historical context. In addition, invalid comparisons to the legislative process were made, in particular between ballot propositions and legislative bills passed, whereas the proper comparisons are between ballot propositions and bills proposed, and between propositions and bills that pass. Correcting for these two obvious flaws alone is sufficient to invert the standard, adverse, theoretical analysis of ballot propositions.

2. The work product of ballot measures that pass is collectively quite impressive, including numerous significant and beneficial political reform measures. Propositions involving clear cases of abuses by majoritarian power of minority interests are virtually nonexistent (again, distinguishing between measures on the ballot and those that pass). The few such cases were tame by reference to the surrounding legislation passed by duly elected legislatures[4]; moreover, many problematic initiatives result from legislatures consistently ignoring the legitimate desires of their constituents (typically when the legislator's own best interests are at stake).[5]

3. The aforementioned amateurish empiricism indicated that money did not equate in any simple and direct way to success at the ballot.

4. Although popular democracy is by no means an unalloyed good, a properly constructed national initiative process would likely be a useful addition to the

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[3] See David S. Broder, Democracy Derailed (2000), which is a standard impressionistic/journalistic (and negative) account of a complex process that to comprehend requires careful and meticulous study.

[4] See Allen at p. 1022, n. 282.

[5] See the discussion of California's famous Proposition 13, id. at 1039, n. 368. Proposition 13 passed only after a series of similar propositions failed with decreasing margins, with the California legislature remaining steadfast in its refusal to deal with spiraling property taxes. While there were difficulties with Proposition 13, it is more a tale of legislative failure than of the problematics of ballot measures.

political structure of the United States that would primarily be used (at least in terms of bills passed) to offset perverse deficiencies in the "electoral connection."[6]

Although I think considerable work remains to be done concerning the actual operation of initiatives and referenda in the states, and how that experience maps on to the national political arena, a growing body of literature largely confirms the conclusions I reached. Elisabeth R. Gerber's meticulously researched book, The Populist Paradox (1999), concludes that the simplistic fear that ballot propositions can be bought and paid for by the rich is ill founded. As Dr. Gerber demonstrates in impressive detail, the relationship between money and ballot success is complex and nuanced, and anything but straightforward. For example, citizen groups have greater ballot success than do moneyed special interests, which is the opposite of the conventional wisdom (and conventional mass media critique).[7] This pattern continued in the 2000 election, where, for example, "[d]espite being outspent over 8000 to 1, opponents of charter schools defeated a Washington state initiative, bankrolled largely by millionaire Paul Allen that would have authorized school districts and public universities to sponsor charter schools."[8] There were numerous similar outcomes.[9]

Analyses of the substantive output of ballot propositions is considerably more difficult than analyzing the effect of money because of their tremendous diversity, which in my judgment is where future work should focus. However, in another impressive study, John G. Matsusaka compared the fiscal effects of initiatives, comparing states with and without the procedure.[10] He found that while "demographic factors are by far the most important determinants of fiscal behavior, availability of the initiative does matter as well. After one controls for income, population density, metropolitan population, population growth, mineral production, ideology of U.S. senators, and federal aid, initiative states have lower combined state and local direct general expenditure, spend more locally and less at the state level, and rely less on taxes and more on charges to generate revenue than pure representative states." State spending, in short, is somewhat less in states that allow initiatives than in other states, but importantly the distribution of spending does not differ: "[O]ne might expect to see initiative effects in specific categories of spending, for example, pure transfer programs such as welfare. However, I estimated a number of exploratory regressions on categories of expenditures, including welfare, education, and highways, and was unable to find significant initiative effects."[11]

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6 See David Mayhew, The Electoral Connection (1974).

7 See, e.g., Broder, supra n. .

8 Ballot Initiative Strategy Center Foundation, Buying Law at the Ballot 6.

9 Id.

10 John G. Matsusaka, Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years, 103 J. Pol. Eco. 587-623 (1995).

11 Id. at 620-621.

Matsusaka's finding that the distribution of state resources does not seem much affected by initiatives is particularly important because of the second major concern of the initiative opponents, that initiatives will be used by majorities to tyrannize minorities. This argument was given some sustenance by Barbara S. Gamble's article, Putting Civil Rights to a Popular Vote,[12] which purports to be an empirical study demonstrating that "Citizen initiatives that restrict civil rights experience extraordinary success: voters have approved over three-quarters of these, while endorsing only a third of *all* initiatives and popular referenda." I say "purports" because this study does not rise to level of competent empiricism. Dr. Gamble apparently collected her data set in a wholly inappropriate way. By her own admission "To build a catalogue of cases, I read extensively in the political science and legal literature on initiatives and referenda to find those that dealt with civil rights issues. I also scoured the post election issues of *The Washington Post*."[13] In short, she used sources notorious for their biases. She also failed to include an unspecified set of initiatives she did identify, and excluded all initiatives on women's issues. Moreover, the article has no discussion of the criteria employed to determine if the results were, in her term, "tyrannical." Last, no effort was made to distinguish statewide ballot measures from local ballot measures, although obviously the political dynamic underling them may differ.

Although Dr. Gamble did not use reliable and complete data sets, and apparently did not review all ballot measures herself (as I did twenty-five years ago), others have identified such sets and they contradict Dr. Gamble's conclusions. Todd Donovan and Shaun Bowler identified data sets containing "state and local ballot measures dealing with civil rights of gays and lesbians, including measures dealing with AIDS . . . Of the eleven state measures identified, three passed (27%), but only two (18%) can be said to have produced decidedly anti-minority outcomes. This compares to a 38% approval rate for all state initiatives from 1898 to 1992 . . In this policy area, the electoral majority in states typically do not deprive this minority of civil rights and are less likely to pass these policies than other initiatives."[14]

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[12] Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 A.J. Pol. Sci. 245-269 (1997).

[13] Id. at 251-252.

[14] Todd Donovan & Shaun Bowler, Direct Democracy and Minority Rights: An Extension, 42 A.J. Pol. Sci. 1020, 1021-1022 (1998). See also James Wenzel, Todd Donovan & Shaun Bowler, Direct Democracy and Minorities: Changing Attitudes About Minorities Targeted by Initiatives, in Shaun Bowler, Todd Donovan & Caroline J. Tolbert (eds.), Citizens as Legislators (1998), at p. 271, reaching a similar conclusion ("State-level direct democracy seems less likely to translate opinions about unpopular minorities into anti-civil rights policies than critics would suggest, or state voters might have less hostility to minority civil rights than some would have us expect."). See also Caroline J. Tolbert & Rodney E. Hero, Race/Ethnicity and Direct Democracy: The Contextual Basis of Support for Anti-Immigrant and Official English Measures, id. at 209: "Plainly, the initiative process may be more difficult for a discrete interest group to

The picture that emerges today from the empirical literature is similar to the rougher picture I constructed some twenty years ago. Neither the grandest hopes nor the deepest fears for the initiative process have come to fruition.[15] The evidence continues to suggest that a properly constructed national initiative process plausibly would be a useful addition to the political structure of the United States. Whether the National Initiative legislative proposals are properly constructed will be discussed in section III below.

II. The Strategic and Tactical Questions

The Democracy Foundation' sponsorship of the National Initiative has certain strategic and tactical questions to consider. As it pursues its goals, it will meet a buzz saw of criticism, which it must be prepared for. I endeavor here to indicate some of those questions and the nature of some of the criticism it can expect to face. First, The Democracy Foundation must be clear about its overriding objective, and to me its literature is ambiguous. The literature is not clear whether obtaining the adoption of a properly structured National Initiative is the primary point of the Foundation. Other possibilities implied are the dissemination of a particular view of popular sovereignty and attempting to win adherents to it, civic education somewhat more diffusely, and relatedly a more educated and energized electorate with a concomitant rejuvenation of the public sphere.

I would put aside general concerns about the state of the electorate. The state of the electorate in the United States has generated the most astonishing and richest civilization the world has ever seen. Complaints about the uninformed or unengaged electorate confuse, I think, the interests of the political pundits with the interests of the nation. All of us find it curious that others are not fascinated with those things that fascinate us, but it is a good thing, not a bad thing, that most of us may pursue our professions and trades without wasting productive hours worrying about the minutiae of governance. Fairly plainly, when things in the body politic go awry, the attention of the average voter turns to political issues, which plausibly is the optimal level of political engagement.

The remaining two goals, promoting a national initiative and a particular political conception of citizenship, are to me interestingly intertwined. I would favor promoting a national initiative for the reasons previously identified. As a tactic to obtain the National Initiative, I would favor the general approach of The Democracy Foundation in presenting the issue to the people, but I am not persuaded that the underlying political conception of citizenship is either wise or correct and thus doubt that it should be pursued independently. The notion that

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capture than a legislature (or have enough resources to logroll successfully), but that is a two way street that affects not only the modern liberal agenda and but the modern conservative agenda as well."

[15] For intelligent and careful examinations, see David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States (1984), Larry J. Sabato, Howard R. Ernst & Bruce A Larson, Dangerous Democracy? The Battle Over Ballot Initiatives in America (2001); Philip L. Dubois & Floyd Feeney, Lawmaking by Initiative (1998).

the public has a free standing "right" to vote to change the Constitution or enact legislation without enabling acts, constitutional or statutory, is plainly wrong, and in any event will convince virtually no one with any substantial training in the law. In fact, I predict that it will convince practically no one, no matter what their training or background. It clearly will not convince the governmental actors whose assistance would be required for it to work, such as Congress who must take enabling steps, the President who must enforce initiated "law," and the courts who must treat the work product as law. Rather than pursue this likely futile path, I would use the planned mechanism of presentation to the people as a means, and possibly a very effective means, of selectively educating the voting public about the advantages of a properly constructed national initiative process, and thus working toward the more arduous goal of amending the Constitution to provide for a national initiative.

I am thus opposed to the strategy of promoting the view of citizenship as inherently possessing a right of "majority rule," although I accept it as a legitimate tactic to advance the pursuit of a national initiative. To make clear my objections to the strategy of promoting this view of citizenship, the two different understandings of the underlying political conception of citizenship that may be at play must be sorted out. One, which seems to be the official position of The Democracy Foundation, is that there is an inherent right of majority rule in a body politic. As is stated on its website:

> Obviously, the Constitution does not and cannot limit the powers of its creator –the People. The People can at any time exercise First Principles to amend the Constitution and enact a law establishing legislative procedures to legislate in an orderly fashion.

If this is meant as a statement of rights that exist independently of the constitutional structure, I venture to say that it is held by virtually no one, and that virtually no one will be persuaded that it is correct or should be adopted. The arguments against it are devastating, ranging from the philosophical to the practical. They are also complex, and I will just adumbrate a few points here.

On the philosophical plane, I will give two examples of the problems. First, rights exist as a part of duly constituted institutions rather than in states of nature. The argument of a free standing right of majority vote/majority rule proceeds to the contrary, as though there are rights which pre-exist political organization, but it is completely unclear what that might mean. Rights emerge from political institutions, and are defined by it, and thus nothing precludes political organization that excludes direct democracy. Second, majority voting is a solution to various problems of decision-making, but to my knowledge in no political philosophy is it offered as the theoretical foundation of a political edifice.[16] In part this is because it is not even obvious what the phrase "majority

[16] The closest political theory to this position is Jean-Jacques Rousseau's, but for Rousseau political equality was simply a means of keeping tyranny at bay, and in any event does not map directly onto some notion of majority vote rules. For a discussion, see Andrew Koppelman, Sex Equality and/or the Family; From Bloom vs. Okin to

vote" means. Is it a majority of those who vote, of the entire population, of some other subset, or what? What about children, the infirm, convicts, and so on? By contrast, some version of equality is central to many political philosophies, as is respect for human rights, among which the right to vote is often included (and the right to effective representation in the political sphere), but a particular decision rule of this sort (Rawlsian "veil of ignorance" is an entirely different kind of decision rule, for example) is not the "first principle" of any political philosophy of which I am aware (and even for Rawls it is a mechanism, not a "first principle").

Another problem. Who are the people who possess this right? In 1789 did it include slaves, the indigenous population, the French inhabitants of the Louisiana Territory, and the Spanish inhabitants of the west and southwest? Why not? Does it include Mexico and Canada today? If we had a referendum that called for annexing Canada that passed overwhelmingly in the "United States" but was ignored in "Canada" (but still with an "overall" favorable majority) would we then possess Canada? Again, why not? Why is this metaphysical entity (popular sovereignty/majority vote) limited to contemporary American borders but independent of the Constitution that creates those borders? This is another example of the problem noted above that rights are integral to rather than standing apart from political organization.

More problems. First principles, in addition to being clear, are normally clearly articulated, and this is anything but. Before, during, and after 1789, no such first principle was ever expressed in any authoritative way (or at all, really), nor was it robustly woven into the actual fabric of decision making anywhere in the relevant world (even in Greece, where there were disenfranchised slaves and women, and in any event different political structures than Athenian democracy). All the American colonies had restricted franchises, and most colonies seriously limited the power of the "people" to enact binding legislation or constitutional (charter) amendment on their own without governmental involvement. Indeed, one of the innovations of the French and American revolutions was the idea that through revolution, not majority vote, "the people" had the right to overthrow repressive governments. To my knowledge, over the last 200 years no such claim (popular sovereignty/majority rule) has been made that has been taken seriously on any large scale anywhere in the country or been the basis of authoritative political action. Again, this is not to say that majority vote was never used as a decision tool, for it was. That is a far cry from the argument that majority vote is or was the most fundamental right and the essential font of political power, the "first principle," as it were, of a body politic.

Rousseau vs. Hegel, 4 Yale J.L 399 (1992). As I understand it, the Kantian view is that "Votes can determine what the general will is only where they are the duly constituted procedure for determining the general will." Christine M. Korsgaard, Taking the Law into Our Own Hands: Kant on the Right to Revolution, in Andrews Reath, Barbara Herman, and Christine M. Korsgaard (eds.), Reclaiming the History of Ethics: Essays for John Rawls 297, 312 (1997), and so on.

Is it even plausible to think of this as a first principle that supercedes life, liberty, the pursuit of happiness, and numerous specific issues, such as no bills of attainder or convictions without trial? If a vote were held in the United States that a certain person or group of persons should be enslaved or executed, should such an act be carried out? Innumerable similar hypotheticals can be posed that suggest why a robust political philosophy may use majority vote as a decision tool but not as the foundation of political and human rights. The trial of Socrates, after all, is taken as an example of how justice and majority rule can stand in opposition to each other. In any event, claiming an undifferentiated human or political right of this sort will quickly take The Democracy Foundation into the morass of metaphysical arguments largely distinguished by their inability to persuade anyone of anything. This is a fate that a good idea like the national initiative should avoid.

The Democracy Foundation relies heavily on the scholarship of Akhil Amar, but to my knowledge Prof. Amar has never made the metaphysical claim that there is a “first principle” out there somewhere that empowers majority voting independent of conventional constitutional structure. Quite to the contrary, he is a constitutional textualist whose argument has been that this “first principle” of a right to adopt constitutional change by majority vote of the electorate was written into the Constitution as it was adopted.[17] This argument shifts the focus from metaphysics to interpretation. This shift does not, however, much affect the argument’s likely persuasiveness, and it is critical, in my judgment that the proponents of the National Initiative consider carefully the potential persuasiveness of the arguments they rely on or endorse. Good ideas should not be burdened with what will appear to be bad arguments, if at all possible. Thus, the critical question is not whether Prof. Amar, or anyone else, has constructed a theory that supports the efforts of The Democracy Foundation; the critical question is whether the argument will convince many others of its wisdom or truth. To appraise that, in turn, requires that the basic form of Prof. Amar’s work be understood. In what follows, I attempt to identify that form and its implications. Before doing so, let me say that this should not be taken as a criticism of Prof. Amar’s work. It, and he, are justly celebrated. However, the work is celebrated for what it is, and I fear that the organizers of behind the National Initiative may intend to put that work to a purpose for which it is ill suited.

One distinguishing feature of interpretative arguments of the kind under examination is that they are limited only by authorial creativity, and Prof. Amar is quite creative. From a vast universe of contrary data, he skillfully picks and chooses a few strands that he weaves together to proclaim the discovery of this fundamental right that has been there unobserved all along, and there is no scientific test that can be applied to demonstrate objectively that he is “wrong.” This is one of the charms of unfalsifiable propositions, of course. One can, however, painstakingly review his arguments, and situate his data in its larger

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[17] To my knowledge, he has never claimed a parallel right to enact positive law through majority vote.

context, which Prof. Monaghan has done. He demonstrates virtually point by point the implausibility of Amar's claims.[18] Others have followed various aspects of this argument to a similar conclusion. As my colleague, Robert Bennett has pointed out:

> [T]here is not a word in the Constitution that would support such a procedure. . .[S]uch a procedure is thoroughly at odds with the most fundamental assumptions of our constitutional order, including importantly the role of the states. For instance qualification to vote in federal elections was originally and remains to a degree within the discretion of the states, see U.S. Const. Art. I, sec. 2, cl. 1; Art. II, sec. 1; Amend. XVII, so that there are not even uniform national qualifications that would seem necessary to give coherence to the notion of a "simple" national majority.[19]

Still, even Prof. Bennett's point does not provide us the deductive closure sufficient to put a rhetorical argument to rest. This is a reflection of the point above that this kind of argument resists formal or empirical disproof. If such arguments are to be tested rhetorically, then Amar's argument has the most serious problem imaginable from the perspective of the National Initiative. He has convinced virtually no one knowledgeable in constitutional law or history or fluent in interpretative methodologies that he is correct.[20]

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[18] Henry Paul Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 Colum. L. rev. 121 (1996).

[19] Robert W. Bennett, Democracy as Meaningful Conversation, 14 Const. Com. 481, 494 n. 28.

[20] His co-author, Alan Hirsch, is the only person in print I could find that seems to accept Amar's perspective. I shepardized two of Amar's articles, and sampled the citations. I did not spend enough time to canvass this issue thoroughly, however, and easily could have missed something. Still, it is fairly clear that the standard reactions to Prof. Amar's theory have been rejection and pointing out its problem a la Prof. Monaghan.

Typical is his colleague, Bruce Ackerman, who emphasizes how the framers viewed the revolutionary period and methods as unique, and, while justifying those particular expressions of the will of the people, cast doubt upon them as ordinary modes of conducting civic affairs:

For all this, Publius does not succumb to the self-intoxication of "permanent revolution." He is clear that the Convention's efforts to speak for the People can be credible only under very special conditions. The core of his analysis appears in an important paper explaining why all constitutional disputes shouldn't be submitted to the general public for resolution:

> Notwithstanding the success which has attended the revisions of our established forms of government and which does so much honor to the virtue and intelligence of the people of American, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied. Bruce Ackerman, We the People 175-176 (1991), quoting Federalist 49.

For a thoughtful exploration of some of Amar's claims that further demonstrates their implausibility, and exemplifies why informed observers have difficulty embracing his positions as accurate or acceptable interpretation of the

This is not really a surprise, because the data suggest that Prof. Amar has substantial doubts about his own theory. If he did not, he would have to answer some of the hypotheticals I gave above affirmatively, that indeed a majority vote can do anything, but he rejects such a troublesome conclusion. As Monaghan has summarized the situation:

> Interestingly, Amar distances himself from these consequences of undiluted majoritarianism. In a footnote in "Philadelphia Revisited," he argues that some "popular" amendments might be rejected by courts. In "Consent of the Governed," Amar greatly expands the latter suggestion. He suggests several possible limitations on the amendment power of "We the Majority." First, Amar quotes Wilson in order to make an appeal to natural law -- the very kind of appeal which was thrown up against the appointment of Justice Thomas. The difficulties with natural law theories need not be explored here, but it would take yet another article for Amar to demonstrate that his conception of natural law could be employed lawfully to check the will of his "We the Majority." Amar's other arguments turn out to have similar difficulties. He posits an "unamendable" Constitution, i.e., he claims that certain constitutional amendments must be rejected because they do not "fit" the American constitutional order. (Like his appeal to natural law, this proposal has many precursors.) What this amounts to in the end is that Amar seems prepared to permit "We the Majority" to amend only if he has no deep disagreement with the substance of the amendment. "We the Majority" are free to be right, but not free to be wrong. "If Amar believes that there are some decisions the people absolutely cannot make, it seems ironic for him to say that these same people cannot require that constitutional alterations be effected only by the actions of extraordinary majorities." Amar's failure to embrace the consequences of his belief in the authority of "We the Majority" is a basis for doubting that it constitutes the fundamental principle around which the constitutional order should be organized.[21]

Those expecting to rely on Prof. Amar's work to mount a campaign for the hearts and minds of the electorate would do well to study his argumentative form. As Prof. Monaghan points out, faced with difficulties in his argument, Prof. Amar makes some obviously ad hoc moves that may be difficult to defend, or at any rate that the supporters of the National Initiative need to be prepared to defend or explain away. Consider, for example, Amar's move to religion and natural rights that Monaghan refers to: "It does not necessarily follow from the First Theorem that the majority can simply do whatever it likes. Majority rule does not necessarily imply majority will or majority whim. James Wilson, for example, clearly stated that the People stood under God and natural law; and

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Constitution, see G. Edward White, Reading the Guarantee Clause, 65 U. Col. L. Rev.787 (1994)

[21] Monaghan at 175-176, quoting John R. Vile, Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms, 21 Cumb. L. Rev. 271, 304 (1991)

that a majority was not entitled to do simply whatever it pleased."[22] I am concerned that a quotation from a person 200 years ago invoking God and natural law will strike many disinterested observers as grasping at straws in a plainly ad hoc effort to dispose of difficulties, and in any event I very much doubt that the National Initiative sponsors will want to enter into debate that relies on properly interpreting God's will in order to justify its political agenda.

Such ad hoc moves are integrally woven throughout Amar's positions. Consider the following argument, which is another effort to avoid the "everything goes" principle, but that, surprisingly, indicates that perhaps the "first principle" of majority vote may not be the sole occupant of that lofty position:

> A further turn of the screw: Article V, if exclusive, seems to say anything goes; no right is immune from abandonment--except Senate equality and (prior to 1808) the slave trade. So much follows from the logic of expressio unius and a blindered examination of Article V in isolation. But these are the very flawed interpretive premises the "First Theorem" challenges. Once we see the Constitution through, say, James Wilson's eyes, we see that perhaps not everything is properly amendable. Certain higher law principles – including popular sovereignty majority rule, but encompassing other inalienable rights as well--frame Article V itself. If we look at state declarations, we see, for example, that the individual "right of conscience" may, like popular sovereignty itself, be "unalienable." Ordinary Government should arguably not be allowed to amend this away--despite the fact that Article V itself says nothing explicit about "conscience"--at least in the absence of a solemn (judicial) declaration of the People themselves, in convention assembled, that they no longer judge conscience an "inalienable" right.[23]

Many observers will rightly wonder about the nature of "first principles" if they can so effortlessly multiply. They will also rightly wonder just exactly what the extension of this set is, how it is formed and how it changes. If we look at the Constitution through somebody else's "eyes"–Patrick Henry's, say–do we get a different set, and if so how are the differences worked out?

Let me generalize some of these points. In pursuing its goals, the organizers of the National Initiative need to be aware that legal scholarship in modern American law schools has split into two quite disparate areas (not, to be sure, hermetically sealed from each other, but the rough generalization holds). One area is governed by the creative imagination in which what is prized is the fashioning of an insightful argument. This, in fact, is the dominant mode of legal scholarship today in the more distinguished law schools, and is the form of scholarship that informs Prof. Amar's work, its far distant competitor comprised of those toiling in the fields of empiricism where the concerns are with

[22] Akhil, Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Columb. L. Rev. 457 (1994) 502-503.

[23] Id. at 504-505.

verifiable propositions with truth value and the validity of arguments.[24] While legal scholarship in the creative vein is wonderfully interesting, and here Amar's work is among the very best, its very nature makes it unpersuasive in general, and in particular to the grounded and practical people who both run the country and make up the electorate. Indeed, its point is not really to be persuasive. It strives to generate debate, to break things down and reconstruct them in a new light, and so on. It is not a matter of building on what has come before in the way that knowledge accretes in science; it is a matter of distinguishing one's own views from everything else that has come before and ably defending whatever edifice has been constructed.

As part of my work on the nature of decision making, I am in the midst of testing the power of legal academic work to effect legal change in various areas, and the results are striking. The "influential" legal theorists, and here I would certainly include Prof. Amar, who receive great attention in legal scholarship receive virtually no attention from actual decision makers, such as legislators and courts, largely because their methodology–grand theorizing in just the vein I have been examining–does not map onto the actual problems posed by many areas of law and governance.[25]

I respectfully suggest that for the National Initiative proposals to persuade the country at large the arguments in support of its program must be realistic and grounded, not abstract and literary. They must show why a national initiative and any necessary corollaries are sensible, useful, and not likely to lead to deleterious consequences. Abstract arguments invoking God, natural law, and scattered statements from James Wilson taken out of historical context will not accomplish what I think the organizers desire. Moreover, rigorously pursuing the conception of citizenship latent in the "majority vote" first principle will likely dissuade rather than attract adherents. My last bit of

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[24] Plainly, the fashioning of "insightful arguments" often requires vast knowledge, and again Prof. Amar's prodigious historical work is a good example.

[25] Ronald J. Allen & Ross Rosenberg, Legal Phenomena, Knowledge, and Theory: a Cautionary Tale of Hedge Hogs and Foxes, (forthcoming, Chi. Kent L. Rev.). The data in this paper are complex and not easily reportable succinctly. Let me give two anecdotes, however. In Vacco v. Quill, 117 S. Ct. 2293 (1997), and Washington v. Glucksberg, 117 S. Ct. 2258 (1997), the Supreme Court held that state bans on assisted suicide do not violate the fourteenth amendment. A distinguished group of American philosophers (Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon and Judith Jarvis Thomson. wrote an amicus brief to the contrary (this being perhaps the only issue on which they have agreed in quite some time), which the Court did not even mention in reaching its unanimously opposite conclusion. The second anecdote concerns Prof. Amar's very distinguished colleague, Bruce Ackerman, who constructed, and testified before Congress about, a wonderfully interesting theory that the House of Representatives could not impeach President Clinton because the proceedings stretched over the end of a congressional term. He was politely listened to and basically ignored. His testimony can be found at 1998 WL 850444 (F.D.C.H.). These two points do not establish the textual thesis but do indicate the clear indication of the data we have compiled.

gratuitous advice is that the supporters of the National Initiative would do well to demonstrate how their efforts are consistent with rather than opposed to a two hundred year history that most of the electorate will think has largely been an impressive success (which is not to be equated with perfection or the impossibility of improvement), how what is being proposed is a natural and beneficent extension of previous evolution rather than a wholesale rejection of it.

Yet, I say I support The Democracy Foundation's approach. I do tactically. I think it permits an effective presentation of the limits of the electoral connection that a national initiative could ameliorate. It thus may serve as the means of fostering an important national dialogue about the nature, successes, and deficiencies of modern representational government, all hopefully leading to amending the Constitution through Art. V to provide for a national initiative process. For that to occur, the proposals that actually go to "the people" must be reasonable, persuasive, and obviate criticisms.

III. The Drafting Questions

A. The Democracy Amendment to the Constitution

The proposed constitutional amendment raises both conceptual and practical issues. At the conceptual level:

1. Why is a constitutional amendment necessary at all if this power already exists?

2. If the power exists, is it subject to amendment in any event? How does that square with whatever political vision underlies the National Initiative?

At the practical level, section by section:

Sec. 1. See above. How can this sovereign power be abridged? Isn't this surplusage? If not, why not?

Sec. 2. a. How is a "legislature of the people" any different from the power to enact laws that the organizers of the National Initiative already assert exists? b. Why extend this to state and local governments? Why are individuals in these political subdivisions incompetent to make their own choices concerning their governmental structures?

Sec. 3. This is complete surplusage, simply announcing what is or is not true. Either way, no purpose is served by placing this in a constitutional provision.

Sec. 4. Again, either the Democracy Act "passes" or it does not. If it does, it does whatever it does, and there is no need for an announcement here. All the internal operations of the Electoral Trust likewise are dealt with elsewhere, or not at all if the statute fails of adoption, and nothing is served by cluttering up a constitution with this kind of material. The last sentence, directing funding, is less obviously surplusage but nonetheless better placed in the enabling statute itself. Failure to heed these suggestions may render the

amendment subject to one of the criticisms of state ballot measures that they clutter up the relevant constitutional documents needlessly.

Sec. 5. What, again, is the point of this? The ballot will or will not be presented to the population. This seems like an advertisement stuck in the middle of a constitutional amendment.

Sec. 6. a. Is “inoperative” an infelicitous word? The amendment will be adopted or not, as will the statute. Even if not adopted, whatever power presently exists will continue, so it is unclear what is going to cease “operation” in the event of a negative vote on the amendment. b. Even if the amendment fails, but the statute passes, is not the statute still good law? Is not that one of the main points of the National Initiative, and is not this inconsistent with that fundamental point? c. Isn’t it possible that the amendment would pass but not the statute? Does this preclude that outcome? Why? d. Fifty percent of the total number of votes cast in the previous presidential election is a small minority of the country as a whole. How does that square with “first principles”?

In sum, I have trouble seeing what is being accomplished by this “amendment,” and its proponents should be clear about its objectives. After its point is clearly articulated, then a document should be drafted that achieves the desired results in sparse and elegant language.

B. The Direct Democracy Act

Sec. 2. Preamble Is a single “legislature of the people” being enacted or thousands of them encompassing every political subdivision within the United States? What is a “governmental jurisdiction”? Can the individual boroughs of New York City pass initiatives inconsistent with that of the population of the City itself? Why not?

Sec. 3. B Public Opinion Poll. I think relying on public opinion polling to qualify constitutional amendments would be the kiss of death for this proposal. There are indeed aspects of modern technology that should be explored for this purpose, such as electronic signatures, but I urge the drafters to reconsider this aspect of the statute.

Sec. 3. D Deliberative Committee. Allowing amendments by those other than the sponsors that are “consistent” with the original proposals may be inviting a hornet’s nest. I would recommend having the Committee make suggestions to the sponsors, for them to accept or reject.

Sec. 3. E. Legislative Advisory Vote. That the vote acts as a “cue” is statutory surplusage.

Sec. 3. F. Enactment of Initiatives. I think the proposal for two elections for constitutional change will be taken as demonstrating conceptual confusion in these proposals. What power by statute is there to change the “first principle” of majority vote that, apparently, does not require two votes to enact laws and constitutions?

Sec. 3. K. Campaign Financing. While I understand the motive behind limiting financial support to "natural persons," it is both unworkable and elitist. People organize themselves into groups, and it is good that they do. This seems oblivious to these points. Moreover, this limitation will systematically inject an undesirable wealth effect by increasing the power of wealthy individuals relative to those less well off. And, what does it mean that the "intent" of the law is that only natural persons may contribute funds, etc.? Is it what the law says or not? Is it distinct from what the law says?

Sec. 4. B. Trustees. It is curious that "groups" are forbidden to assist in the politics of initiatives but nonetheless send their representatives to the Electoral Trust. More troublesome, plainly this list will generate a firestorm from the thousands of groups that are excluded, and raise the question why this particular set is being favored. If the point really is trust in the people's judgment, why not call for national elections for service as Trustee?

As I said in 1979, and reiterated above, I personally would favor a national initiative process. I think the proposal discussed back then is superior to this one because it did not focus on unconvincing claims about "first principles," and as a consequence stuck to the relevant issue. That issue, to me, is to provide for a national initiative process in an orderly and legitimate way, and that possesses appropriate safeguards to increase the odds of reasoned and deliberate legislation — The path to that lies through Art. V of the Constitution, as understood by virtually anyone fluent in the English language. I support the National Initiative because I think its ultimate goals and mine are compatible, and its approach may be useful to bring about the desired effects. As presently drafted and defended, however, I fear and suspect that this is likely to remain purely an academic exercise. It will be chewed up by academics, the media, and the present governmental institutions.

Still, maybe these predictions are wrong. And if The Democracy Foundation is actually able to deliver the goods in a manner that is immune from substantial doubts about the legitimacy of votes, and so on, I would embrace the results (except for the unnecessary meddling in local affairs) and think that my academic theorizing had been disproved by the exercise of the political will of the population. In any event, my effort here has been to be the rigorous critic to assist those involved in this effort to send to "the people" the most acceptable proposals possible.