

Notes On The Democracy Amendment and Democracy Act
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THE DEMOCRACY AMENDMENT

Section 1. The sovereign authority and the legislative power of citizens of the United States to create and amend all policies, laws, charters, and constitutions by local, state and national initiatives shall not be denied or abridged by the United States or any State.

Graber Notes

Section 1 of the revised **Democracy Amendment** incorporates **Sections 1** and **2** of the old **Democracy Amendment**. Some changes were stylistic. Many statutes have rhetorical flourishes, but constitutional amendments in the United States do not. Hence, the expressions “We, the people” and “the exercise of First Principles” were cut from the text. Both are more likely to confuse than aid future interpreters. Serious scholarly debate exists, for example, over what the first principles of the constitution were or whether (John Adams comes to mind) the framers were animated by first principles. Other stylistic changes were made to make the text of **Section 1** consistent with the text of **Section 2** (second paragraph) of the proposed **Democracy Act**.

The text makes clear that citizens of the United States have the right to use the initiative process to make and change all legal texts in the United States by initiative. The original **Democracy Act** did not clearly specify that initiatives were the chosen method of legal reform. **Section 1** as originally written could easily be interpreted as giving the people a right to recall all government officials, issue binding instructions to all elected officials, and overrule judicial decisions. Many Americans have asserted that recall elections, binding instructions and judicial overrides are also part of original sovereignty. If the National Initiative for Democracy wishes to sanction these procedures, the text of **Section 1** should say so explicitly.

Section 2. An initiative that enacts, modifies or repeals any statute assumes the force of law when approved by more than half the registered voters who participate in a duly sanctioned election. An initiative that modifies a constitution or charter shall require majorities in two successive elections. Any initiative that receives more than fifty percent of the votes in the first election shall be scheduled in a subsequent election to be held no early than six months and no later than a year and a week after the first election.

Graber Notes

Section 2 is a revised version of **Section 3F** of the **Democracy Act**. Rules for amending the constitution and making laws generally belong in the constitution rather than in statutes. Most of the changes in the text are stylistic. **Section 5** makes clear that all initiative elections are supervised by the Electoral Trust. Dates were made more specific. The “year and a week” limitation permits constitutional initiatives to be held on successive election days.

Section 3. Only natural persons who are citizens of the United States may provide funds, property or services in support of, or in opposition to any initiative.

Graber Notes

Section 3 of the revised **Democracy Amendment** is an edited version of the old **Section 5**. Changes were stylistic only. Several questions are worth considering. First, do you intend to ban contributions by non-citizens. Second, would it be better to put **Section 3** in **Section 4**, which discusses powers to enforce this amendment. If Congress and/or the people favor corporate contributions, all they have to do at present is provide no punishment for violations of **Section 3**. If enacted, **Section 3**, the Thirteenth Amendment, and the treason clause would be the only constitutional provisions defining crimes. Whatever one thinks of corporate contributions (and I support the policy of the amendment), they do not amount to slavery. Thus, giving Congress and the people the right to ban corporate constitutions seems more consistent with the general constitutional structure.

Section 4. The people through the initiative process and Congress shall have the power to enforce, by appropriate laws and legislation, the provisions of this article. These powers shall include, but are not limited to, the power to pass laws requiring public identification of all persons registered as initiative sponsors or who contribute more than \$1,000 in funds, property or services in support of or in opposition to any initiative. The people through the initiative process and Congress shall also have the power to forbid all courts in the United States from enjoining any initiative election except on the ground of fraud.

Graber Notes

Section 4 of the revised **Democracy Amendment** incorporates the old **Section 3** and part of the old **Section 6**. The revised version makes clear that the **Democracy Act** is not the exclusive means for enforcing the **Democracy Amendment**. Under the new **Section 3**, Congress and the people may pass, repeal, modify or supplement the original Democracy Act. With the exception of the Electoral Trust, discussed in new **Section 5**, the revised **Section 3** also provides explicit constitutional foundations for those provisions of the **Democracy Act** that might be interpreted as violating some contemporary constitutional norm. Reasonable persons may dispute whether the text should say “substantial sums” trigger the identification process or a fixed sum. A fixed sum may become out of date, but gives less interpretive leeway to courts and was chosen for that reason.

As noted in my comments on **Section 3**, I would add the following clause to the second sentence in revised **Section 4**: “and the power to ban contributions by non-natural persons or persons not citizens of the United States.”

Section 5. The Democracy Amendment and all legislation passed under the Democracy Amendment shall be administered and implemented by the Electoral Trust. The Electoral Trust shall be composed of one member from each congressional district in the United States who shall serve a four year term. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into two classes. The seats of the members of the first class shall be vacated at the expiration of the second year; the seats of the members of the second Class shall be vacated at the expiration of the fourth year. Congress shall have the power to make rules respecting the all procedures used by the Electoral Trust when making decisions and administering the initiative process.

Subject to rules and regulations made by the people through the initiative process and Congress, the Electoral Trust shall have the power to register voters for initiatives elections, provide voters with information on all initiative elections, and administer all initiative elections. The Electoral Trust shall not have the power to recommend the passage of any initiative or law, with the exception of legislation implementing this article.

Graber Notes

Section 5 of the revised **Democracy Amendment** replaces the old **Section 4**. The powers of the Electoral Trust are set out in the Constitution, rather than specified by statute. Rather than deal with the constitutional problems about devolving public power on private groups, as is done in **Section 4B1** of the **Democracy Act**, I recommend that the National Initiative for Democracy follow the procedures set out in the Constitution for the original Senate.

The Electoral Trust is a separation of powers nightmare and could probably use a phone conversation. Is this an executive agency, a legislative agency, or something different. Note that the Supreme Court in **Buckley v. Valeo** and subsequent cases has declared unconstitutional efforts to staff agencies that combine executive and legislative input in certain ways. To avoid this problem, the method of staffing and replacing all Electoral Trust officials must be set out in the Constitution. I would prefer a provision based on Article I, Section 5, indicating that the members of the Electoral Trust “shall be the Judge of the Elections, Returns and Qualifications of its own Members,” and “may determine the Rules of its Proceedings.”

Section 6. All states and localities in the United States shall have the power to pass legislation implementing this amendment, provided that such legislation be approved by the Electoral Trust and not violate federal law. The Electoral Trust shall administer all initiatives in states and localities that do not by law establish alternative administrative procedures.

Graber Notes

Section 6 makes clear that states and other localities have power to establish initiative procedures that differ from those used at the national level, provided those provisions do not conflict with federal law and are approved by the Electoral Trust. That provision also makes

clear that the Electoral Trust will supervise all initiatives in jurisdictions that do not establish alternative procedures.

Section 7. [rules for ratification]

THE DEMOCRACY ACT

Section 1. TITLE

As is

Section 2. PREAMBLE

First and third paragraphs, as is.

Second paragraph—**We, the People**, choose to participate directly in our local, state and national self-governance by creating and amending policies, laws, charters and constitutions.”

Fourth paragraph—“**THEREFORE, We, the People**, exercising First Principles and power under the Democracy Amendment, enact this Democracy Act establishing thereby a “Legislature of the People.”

Graber Notes

Section 2 should state explicitly that the constitutional source of power for the Democracy Act is the Democracy Amendment. The revision to paragraph 2 makes clear that the Democracy Act applies to local and state as well as national initiatives. This actually raises a bit of a problem, to be noted below.

Section 3. PROCEDURES

Sections A to E, H, K to M, as is.

Section F—eliminated. Is now **Section 2** of the Democracy Amendment

Section G—“No local, state or federal court shall have the power to enjoin any initiative election, except on grounds of fraud. After the People have enacted an initiative into law, courts in a proper case may determine the constitutionality of any law so enacted.

Section I, as is?

Section J—“Any communication, regardless of the medium through which conveyed, that promotes or opposes an initiative shall conspicuously identify the names, organizational affiliations (if any), city and state of residence of all persons contribute more than \$1,000 in funds, property or services in support of or in opposition to any initiative.”

Section N.—“The Electoral Trust shall have the power to make additional regulations, provided they are consistent with existing federal, state, and local law.”

Section O.—“All state and local governments shall have the power to adopt procedures for local and state initiatives different from those laid out in **A** to **E**, **I** to **J**, and **L** to **M** of this section, provided such procedures are approved by the Electoral Trust.

Graber Notes

The changes in **Sections F, G, and J** make the **Democracy Act** consistent with the amended **Democracy Amendment**. Virtually all scholars agree that courts have no power to declare unconstitutional a constitutional amendment (this is actually not entirely uncontroversial among scholars). Hence, no need exists for claiming that “initiatives that change the Constitution of the United States are not subject to judicial review.” I remain a little troubled by Section I. That section is clearly constitutional under the revised **Democracy Amendment**. Still, you may want to think whether say a major employer should be able to learn the identity of all employees who support an initiative that would require the business to pay more taxes.

Sections N makes clear that the Electoral Trust has the power to make additional regulations not inconsistent with the act. **Section O** deals with the preemption problems that arise when when a particular state or locality wishes to implement different initiative procedures. The recommendation is that such procedures be legal, provided they are approved by the Electoral Trust. The revision, however, does not permit states to legalize corporate contributions to local initiative campaigns or permit courts to enjoy local initiative elections.

Note that all sections will have to be relettered.

Section 4. ELECTORAL TRUST

Preamble—“The Electoral Trust shall administered the procedures of the Democracy Act in all initiative campaigns, unless a state or locality has by law established another institution to administer state or local initiative campaigns in that jurisdiction. A Board of Trustees and a Director shall govern the Electoral Trust.

Section B—eliminate **Sections 1** and **2** (covered by **Section 5** of the revised **Democracy Act**)

Section E1—must be revised in light of decisions made about **Section 3N**

Graber Notes

Most of the revisions simply take matters in the original **Democracy Act** and move them to the revised **Democracy Amendment**. **Section E1** needs revision given federalism questions discussed above.

Section 5. SELF-ENACTMENT

As is.