Analysis of the Democracy Amendment and the Democracy Act

by
Robert M. Stern and Craig B. Holman

The Democracy Amendment is an amendment to the United States Constitution, which, along with the accompanying statute called the Democracy Act, establishes an initiative process for the United States and each state and local governmental jurisdiction.

A. Summary of the Constitutional Amendment

The constitutional amendment permits citizens of the United States to act as a Legislature of the People, allowing them to create and alter governments, constitutions, charters, and laws at the national, state, and local levels. The amendment also creates a new federal agency, the Electoral Trust, which is empowered to administer and implement the procedures of the Act. Congress is required to appropriate sufficient funds to the Electoral Trust so that it can fulfill its mandate.

The constitutional amendment prohibits campaign expenditures in support of or in opposition to any initiative by persons other than individual citizens of the United States.

Before the amendment or the Act can become effective, it must be presented to the national electorate for approval in a national election conduced by Philadelphia II, a private, non-profit organization incorporated in California.

The vote in favor of the proposal must be at least 50% plus one of the total votes cast for the Presidential election that occurs immediately prior to the results being announced and must amount to more than the negative votes cast against the proposal. The voting process may take up to seven years to complete, and citizens who vote may change their vote at any time prior to the date of certification.

Comments and Questions

1. The amendment is extremely broad. It allows the people to change the U.S. Constitution by two successive votes. For example, the First Amendment free speech provision could be deleted by an affirmative vote of the people in two successive elections. In a political culture that has prided itself upon the stability of the federal constitution, this relative ease in modifying the U.S. Constitution may trouble many citizens. State constitutions are frequently subject to amendment and even wholesale revisions. The U.S. Constitution, however, is very distinct from state constitutions in scope and significance. The federal constitution establishes a general framework of governance and principles of civil liberties that apply to all federal, state and local governments. State constitutions and local charters serve only to supplement that framework and tailor its application to unique state and local situations. As such, modifications to state constitutions do not carry the same significance as modifications to the federal constitution. A state, for example, could not amend its constitution to prohibit free speech; such an action would be overridden by the U.S. Constitution.

2. Pursuant to First Principles, the amendment allows the people to create and change governments. Does this mean the people can change the structure of Congress; for example, can the people change the U.S. Senate so that it no longer has two Senators per

state, but instead consists of Senators representing a certain number of people, such as in the House of Representatives?

3. While the people may support the idea of a national initiative, making the proposal so broad so that the U.S. Constitution can be changed, may create intense opposition from persons who might otherwise be in favor of the idea.

4. Should the Philadelphia II be the organization that conducts the national election to establish the national initiative process? Will people believe that it is too biased to do so in a neutral manner? Should a group that has no ties to the proposal conduct the election?

5. The term "Legislature of the People" should be examined. It may scare people away from the concept of a national initiative. People want the opportunity to vote on important questions, but they do not like legislatures and may not want to be part of one.

6. Is this the only way to adopt an initiative at any level of government? What if a state or local jurisdiction has a process that is better for it? The proposal is silent on this subject.

7. The concept that only individuals should be allowed to support or oppose initiatives is laudable, but it may create many problems. It may result in very little information being disseminated during the circulation of an initiative. Group support and opposition to initiatives provides its members and voters with an important voting cue. Many voters decide how to cast ballots on candidates and issues based on which groups support or oppose those candidates and issues, ranging from political party endorsements to the League of Women Voters to the Chamber of Commerce. Perhaps a more appropriate restriction would be to limit *contributions*, rather than expenditures, for and against initiatives to individuals. This way, the League of Women Voters and the Chamber of Commerce, for example, may solicit contributions from individuals concerned about a ballot initiative, and use only those funds to make expenditures for and against the measure.

B. Summary of the Democracy Act

The Democracy Act details the procedures that must be followed to enact an initiative. The Democracy Act will allow citizens of all government bodies, including cities, counties, and special districts, to enact initiatives.

The Democracy Act permits citizens to adopt or amend constitutions, charters, laws, and policies. There are no restrictions on what can be adopted. Thus, foreign policy, such as decisions on war and peace and other major international decisions, apparently could be decided by a vote of the citizens. It also appears that the citizens could impose taxes on certain segments of the population and could require the legislature to appropriate money for certain programs.

Comments and Questions

1. The Democracy Amendment authorizes the people "to create and alter governments, constitutions, charters and laws" while the Democracy Act discusses "creating and amending policies, laws, charters, and constitutions." The Democracy Act does not mention the power to "create and alter governments," while the Democracy Amendment

does not mention "policies." Both the Democracy Amendment and the Democracy Act should be consistent and identical with each other in referring to what the people are empowered to do through the initiative process.

2. It is unclear what is meant by "policies." This term is not necessarily the same as "legislation." If it is meant to be the same as legislation, it should be deleted to reduce the confusion over it.

1. Contents of the Initiative [Section 3. A.]

An initiative must contain a Title, Summary, a Preamble that provides the purposes and reasons for the measure, and the complete text of the initiative. The sponsor is responsible for writing all of these parts, subject to the approval of the Electoral Trust. The initiative must relate to a matter of public policy that is relevant to the jurisdiction where it is to be considered.

The initiative may only contain a single subject, but there may be related or mutually dependent parts. It may be no longer than 5,000 words, with the exception of the Preamble and sections of existing law.

Comments and Questions

1. The Act requires that the sponsors prepare not only the text of the initiative but also the Title and Summary, subject to the approval of the Electoral Trust. Experiences in state jurisdictions have shown that it is a mistake to have the sponsors prepare the Title and Summary. These are the most important materials that are presented to the public. It would be better to have the Electoral Trust or some other entity prepare the Title and Summary.

2. The Act follows the recommendation of the California Commission on Campaign Financing, which suggested that initiatives not be more than 5,000 words. It is believed that the public has less confidence in a process where they are presented with complicated measures. In fact, a statistical analysis by the Commission has found that initiatives of 5,000 words or less are more likely to be ratified by the voters than longer initiatives. However, experience has shown that the public will enact detailed initiatives, such as campaign financing reforms, despite the length of the measure. Some public policies may require more than 5,000 words to address adequately. A limit to 5,000 words may result in more initiatives since some measures need to be comprehensive and may require two or three 5,000 word initiatives to achieve. It is worth noting that the 5,000 word limit poses a trade-off between simplification for voters and added complications for initiative proponents.

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2. Qualification of the Initiative [Section 3. B.]

The initiative may be put on the ballot in one of three different ways:

(1) The legislative body may put it on the ballot but may not amend or change the language as originally submitted to it by the sponsors.

(2) The sponsors may circulate a petition for a period of up to two years. They may gather signatures by manual or electronic means.

a. For a change in law or a change in policy, the sponsors must obtain signatures of registered voters within the jurisdiction representing at least two percent of the last vote for President in the jurisdiction held prior to the time the first signature is collected.

b. For a change in a constitution or charter, the sponsors must gather signatures of registered voters within the jurisdiction representing at least five percent of the last vote for President in the jurisdiction held prior to the time the first signature is collected.

(3) The sponsors may commission a poll that is approved by the Electoral Trust. If the poll determines that at least 50% of those polled believe the proposal should be put on the ballot, it qualifies for the ballot.

Comments and Questions

1. This is one of the most important parts of the proposal. The Act permits the legislature to submit an initiative to the ballot but only as submitted by the proponents. Legislative bodies should be permitted to put any measure on the ballot, even one that is different from the one submitted by the proponents. Although a legislative body may put a competing measure on the ballot in order to confuse the voters, it is important to allow the legislative bodies to submit questions to the voters.

2. The process might work better if the legislative body were given the opportunity to pass the measure on its own (if a statute) after a measure qualifies for the ballot rather than go to the trouble of having the voters approve it. This process would reduce the number of measures on the ballot and would increase the confidence of the voters that the legislature is being responsive.

3. It would also be better if the legislature were required to consider each measure and be given the opportunity to pass it with amendments. If enacted, the measure would not go on the ballot. The proponents would be given veto power over the amendments, so if the legislature passes something that the proponents are against, the measure would still be placed on the ballot.

4. The two-year period to circulate the measure seems appropriate. Research by the California Commission has shown that if initiative proponents are not able to collect the requisite signatures in two years, the measure is very unlikely to qualify for the ballot anyway. An organization's momentum for signature gathering has a short lifespan.

5. The Act permits signatures to be gathered by electronic means. This needs to be carefully considered in order to make sure that there is not fraud or tampering with the system. Some states, such as California, have studied the prospect of allowing electronic voting and signature gathering and have thus far decided that there is insufficient protection against fraud. However, the military and the Democratic Party have tried some electronic voting experiments that they believe were successful.

6. The Act requires that 2% of the number of voters in the last presidential election sign petitions for statutory measures and 5% of the number of voters in the last presidential election sign petitions for constitutional or charter changes. The percentages seem reasonable. Some persons in smaller states, however, will be concerned that a few

states, such as California and New York, may be able to qualify a measure on their own. Some states currently require a geographical representation to qualify initiatives within their own states.

7. The Act has a very creative alternative to signature qualification. It allows the sponsors to commission a poll. If 50% of the persons polled indicate that they would like the measure on the ballot, it qualifies for the ballot. In smaller jurisdictions, this may not be cost effective, but in large jurisdictions or nationally, this is a much less expensive way to qualify for the ballot. The one concern that must be addressed is the public's reaction to the idea of a poll putting something on the ballot. The public, for some reason, believes that the signature procedure is the most effective way of determining whether a measure should go on the ballot. All jurisdictions that have an initiative process only use the signature method. Because the polling feature is new, it must be carefully drawn to instill confidence in the public.

8. Most jurisdictions require that a measure qualify within a certain number of days before the election. This proposal does not do so.

3. Hearings on the Qualified Initiative [Section 3. C.--E.]

Once an initiative has qualified for the ballot, a number of hearings must be held before the voters have the opportunity to approve or reject it.

a. The Electoral Trust must appoint a Hearing Officer who is required to hold public hearings on the measure. The sponsors, members of the legislative body, proponents, opponents, and experts must be given the opportunity to testify and provide information concerning the initiative. All testimony must be published.

b. The Electoral Trust must establish a Deliberative Committee for each initiative that has qualified for the ballot. This committee is given the power, by a two-thirds vote, to amend the Title, Summary and Text of the initiative, as long as the amendments are consistent with the purposes of the initiative. The committee consists of citizens selected at random from the voter registration rolls of the jurisdiction covered by the initiative. Members must be compensated for time spent on the committee. The committee, before making any changes to the initiative, must review the record of the Hearing Officer, recruit expert advice, if needed, debate the merits of the initiative, and prepare a written report of its deliberations along with its recommendations.

c. After the Hearing Officer and Deliberative Committee finish their deliberations, then the initiative must be sent to the appropriate legislative body for consideration. The legislative body must vote publicly on the measure within 60 days. The vote, however, is non-binding and has no effect on the initiative other than providing information on the views of the legislators.

Comments and Questions

1. Once an initiative qualifies for the ballot, a Hearing Officer selected by the Electoral Trust must hold hearings with testimony provided by supporters and opponents. Should this be done before the initiative qualifies so the proponents are given the benefits of such a hearing before drafting the measure? Some states provide for pre-circulation hearings in order to improve the quality of initiative drafting. There are two problems with pre-

circulation hearings. First, in jurisdictions with many initiatives, requiring hearings on all initiatives—serious and trivial—can stretch government resources. Second, initiative proposals tend not to be given serious consideration in hearings as long as the measure has not yet qualified for the ballot. A compromise may be a pre-circulation review of the initiative proposal by a panel of experts to correct obvious deficiencies but no hearing; and reserve the full hearing process for post-qualification.

2. After the Hearing Officer completes hearings on the initiative, a Deliberative Committee must issue a report on the initiative and may also amend the Title, Summary, and text of the measure. This committee is given enormous powers, particularly the power to amend the text of the measure. The power to amend the text over the objections of the sponsor must be carefully drawn so that the rights of the sponsor are protected.

3. The Deliberative Committee is composed of a group of registered voters randomly selected. This is similar to a jury pool. What if people don't want to serve on the committee? How many people serve on the committee? Shouldn't this committee consist of people who are familiar with the subject matter of the initiative, rather than a random group of registered voters? It is unclear from the language, which says that the Committee prepares a written report with its recommendations, whether the committee can actually recommend supporting or opposing the measure. The Act should clearly state that the Committee may not take a position for or against the initiative.

4. The legislature must take a vote on the initiative, but the vote is not binding. Is each legislator forced to vote yes or no, or may they abstain? Where is the vote published? Since most initiatives are not circulated unless the legislature has refused to pass them, it is likely that most legislators will vote no on the initiative. Does this have a negative impact on the initiative if voters see that their own representative is voting no on the measure?

4. Enactment of an Initiative [Section 3. F.]

An initiative that does not change a constitution or charter becomes law if approved by more than half of the voters participating in an election certified by the Electoral Trust. An initiative that changes a constitution or charter becomes effective if approved by a majority of voters at two succeeding elections, conducted at least six months apart. If the voters fail to approve the measure changing the constitution or charter at either of the two elections, it fails.

Comments and Questions

1. What is an "election certified by the Electoral Trust?" Is it a regularly scheduled election? Does it have to be in November in the even numbered years or can it also be held when a primary election is held in the state? (California's initiatives can appear either on the March primary election ballot or the November general election ballot.) Can it be a special election conducted only for the purpose of voting on the measure? It may be prudent to limit national initiatives to November general election ballots. First of all, most states hold general elections about the same time. Thus, campaign information for and against national initiatives could target a specific election period. Second, general elections tend to have higher voter participation rates than other elections.

2. The section requires that 50% of voters approve a measure, but if the measure is a constitutional amendment or charter amendment, 50% of the voters must approve the measure at two successive elections. It is possible that the legislature may put a competing measure on the ballot. (This is frequently done to confuse voters.) If the competing measure put on the ballot by the legislature amends the State Constitution or State Charter, shouldn't it also be subject to the two-election requirement?

5. Judicial Review [Section 3. G.]

The courts may not take any action regarding an initiative prior to the time it qualifies except in the case of fraud. If an initiative is enacted, however, the courts may determine the constitutionality of a measure, except for initiatives that amend the U.S. Constitution. Absent fraud, constitutional amendments are not subject to court review.

Comments and Questions

1. If an initiative is absolutely unconstitutional, should the courts be prohibited from keeping it off the ballot? There are arguments on both sides of this issue. It seems wasteful of state resources to conduct an election on behalf of a ballot measure that will most certainly be invalidated by the courts. Pre-election review by the courts can serve to undermine the credibility of the courts if they invalidate popular initiative proposals. That is why the courts in many initiative states prefer to wait until the voters approve an initiative before considering the measure "judiciable." Perhaps, only appellate courts should be permitted to invalidate an initiative, either before or after the election.

6. Effective Date [Section 3. H.]

Each initiative that is enacted goes into effect 45 days after the certification of election unless the initiative states a different date.

Comments and Questions

1. Many initiatives are very complicated, so should the effective date be more than the 45 days set forth in the Act? In no event, however, should the sponsor of the initiative be permitted to make the effective day the day after the election or before the 45 day period (or whatever period is eventually selected.)

7. Disclosure of the Initiative's Sponsors [Section 3. I.]

The initiative that is circulated must contain the names, organizational affiliations (if applicable), as well as the city and state address of the persons who are sponsoring the initiative. This information must be printed on the face of the initiative, any printed matter, or other media advertising issued by the sponsors, and on any poll used to qualify the measure.

8. Communications Promoting or Opposing the Initiative [Section 3. J.]

Any communication that supports or opposes the measure must prominently identify the names, organizational affiliations (if applicable), as well as the city and state address of the persons who have substantially contributed to the payment for the communication, whether directly or indirectly.

Comments and Questions

1. There should be a threshold level, perhaps $1,000, before a person needs to comply with this disclosure. The U.S. Supreme Court's *McIntyre* decision has invalidated such universal disclosure requirements that would apply even to very small-scale distribution of home-printed leaflets. Additionally, other court rulings have determined that the anonymous distribution of election information is permissible when a danger of harassment may be demonstrated by the proponents of the speech, such as members of the Socialist Workers Party.

2. The Electoral Trust will need to determine what a substantial contribution is. If this amount is set too low, then it will be a burden to list all the contributors. It would be better to list the top two or three.

3. Media editorials should be excluded from this requirement.

9. Campaign Financing [Section 3. K. and L.]

Only individuals may make a contribution of funds, services or property in support of or in opposition to an initiative. All non-individual contributions, such as from corporations, labor unions, PACs, and associations, are prohibited. These entities may not coerce support from customers, employees, stockholders, or others to support or oppose the measure.

The Electoral Trust is authorized to require full financial disclosure of those supporting or opposing initiatives. The thresholds for such disclosure will vary depending on the jurisdiction. The information disclosed must be made public immediately.

Comments and Questions

1. What if a jurisdiction requires more extensive disclosure than is enacted by the Electoral Trust? Does each jurisdiction have to have the same disclosure requirements or can the disclosure of the Electoral Trust be the minimal requirements?

10. Information Provided to the Public Regarding the Initiative [Section 3. M.]

The Electoral Trust must provide balanced information regarding the initiative to the public prior to the election. This information must consist of at least the pros and cons, its societal, environmental and economic implications, its costs and benefits, a summary of the Hearing Record, the report of the Deliberative Committee, the results of the vote by the legislative body, and statements prepared by proponents and opponents.

All of this information must be mailed to the voters in a ballot pamphlet at least 10 days but not more than 30 days before the election on the initiative. It also must be placed on a web site or some other equivalent electronic media, along with any other appropriate information.

In addition, the Trust must make use of other mass media, to the extent feasible, such as television, radio, newspapers, and telephone voice response systems.

Comments and Questions

1. A ballot pamphlet containing useful information about the initiative is vital to making the program work. Who mails the pamphlet? Does it contain all the initiatives on the ballot for the election, or is it tailored by jurisdiction to the voter's residence?

2. San Francisco permits supporters and opponents of ballot measures to include their own statements in the ballot pamphlet for a small fee. These are in addition to the statements by the proponents and opponents.

11. Electoral Trust [Section 4]

The Electoral Trust is given a variety of powers. Its prime mission is to administer the procedures of the Democracy Act. A Board of Trustees and a Director govern it.

Comments and Questions

1. The Act should specifically state that the Executive Committee also governs the Trust.

12. Mission of the Electoral Trust [Section 4. A.]

The mission includes four parts:

a. Registering voters;

b. Providing information in English regarding each initiative that qualifies for the ballot;

c. Making voting as convenient as possible for all citizens;

d. Administering the initiative process.

Comments and Questions

1. The whole thrust of the Amendment and the Act has centered on a national initiative, but for the first time, the Act refers to registering voters and making voting as convenient as possible. Does this violate the spirit of the single subject rule?

2. The sections on registering voters and elections are very vague.

3. Why is information regarding initiatives only made available in English? In many states, voters are more comfortable receiving information in other languages.

13. Selection of the Electoral Trustees [Section 4. B. 1)]

The trustees of the Electoral Trust for the first few years consist of representatives from 25 to 50 nationally recognized civic organizations, foundations, and nonprofit corporations. The list of such organizations has not yet been developed. The Board of Directors of each of the organizations will choose its representative. In order to participate, the organization must enact a resolution acknowledging their understanding of First Principles, their acceptance of the mission of the Electoral Trust, and a pledge to empower U.S. citizens.

Half of the first members picked to be trustees on the Electoral Trust will serve a two year term; the other half, a four year term.

Comments and Questions

1. A two-year term on the Board of Trustees seems too short. These members should serve a sufficient time period to develop expertise.

2. What are the criteria that will be used to select the organizations that choose the original members of the Electoral Trust? What happens if a respected organization, such

as the League of Women Voters, declines to participate? An alternative might be to have the Governor of each state pick the original members.

14. Election of the Electoral Trustees [Section 4. B. 2)]

After the expiration of the terms of the first members appointed to the Electoral Trust, the succeeding members are elected in a national election, one per Congressional district. Elected trustees serve one four-year term and may not be re-elected. Half the trustees will be elected when the two years terms of the appointed trustees expire, and the other half after the four-year terms expire.

Comments and Questions

1. A Board of Trustees of 435 members seems very unwieldy.

2. A member of the Board of Trustees represents a Congressional district of about 640,000 residents. With such a large district, it is very possible that the person elected will be a former public official or someone very well known in the area.

3. There seems to be no campaign finance regulations that apply to the election: no disclosure, no limits on contributions, etc.

4. The Act says that the people elect the members of the Board of Trustees. Should it read registered voters within the district?

5. There are no provisions for what happens when a member resigns or leaves office? Is a special election held; does someone fill the vacancy; or does the vacancy continue until the next election?

15. Meetings of the Board of Trustees [Section 4. B. 3)]

The trustees of the Electoral Board must meet at least once a year but may meet more often. Its minutes and a video recording of its meetings must be placed on the web site of the Electoral Board.

Comments and Questions

1. Do the meetings have to be open to the public? The Act does not require it.

2. What is a quorum and what vote is required for action? Is it a majority of those present and voting, or a majority of the membership of 435?

16. Executive Committee [Section 4. B. 4)]

The Board of Trustees must select from its members an Executive Committee consisting of 15 members. The Executive Committee monitors the day-to-day activities of the Trust and provides the Director with policy direction as specified by the Board of Trustees.

17. Director of the Electoral Board [Section 4. C.]

Except for the first Director, the Director is selected by the President of the United States and confirmed by a majority vote of the Board of Trustees. The Director may serve one six-year term and may not be re-appointed. The Philadelphia II Board of Directors will select the first Director, who may serve one six-year term.

The Director is the Chair of the Board of Trustees and is responsible for the implementation of the Act.

Comments and Questions

1. What if the Director leaves office before his or her term has expired? Who appoints the successor?

2. What if a Director takes over in the middle of a term? Can a Director be re-appointed if the Director has served less than three years of the term?

3. Why should Philadelphia II select the first director? Shouldn't it be the members of the first Electoral Trust or the Board of Trustees?

18. Responsibilities of the Electoral Trust [Section 4. E.]

The Trust must comply with all the laws and regulations of every governmental jurisdiction in the United States, unless they conflict with the provisions of the Democracy Act. In such a case, the Democracy Act supersedes any other law or regulation.

The Trust must develop simplified voter registration procedures, which result in lifetime registration that is binding on every jurisdiction in the country.

The Trust must establish a legislative drafting and research service to provide assistance to individuals who need help in preparing initiatives.

The Trust must develop procedures to ensure the integrity and uniformity of elections.

The Trust must take advantage of new technologies in developing voting procedures for initiative elections.

Comments and Questions

1. The Act requires the Trust to comply with applicable laws and regulations of every government jurisdiction. What if these laws conflict with each other? Which laws apply?

2. Section 4. E. 3) has a typo. In line two, the word "of" should be "by."

3. The voter registration sections seem incompatible with the mission of the Democracy Act, which is to establish an initiative process.

19. Appropriations [Section 4. F.]

The Act appropriates from the United States Treasury sufficient funds to pay for the organization of the Electoral Trust. It also appropriates funds to reimburse the Philadelphia II corporation for its activities in enacting the Democracy Amendment and the Democracy Act.

20. Self-Enactment [Section 5]

The proposal calls for self-enactment instead of Congress and the states passing a constitutional amendment and statute. Each registered voter complete an identical ballot containing certain identifying information, an acknowledgment that the voter received the

text of the amendment and the Act, an indication of support or opposition to the adoption of the Amendment and the Act, the date the vote was cast, and the physical or electronic signature of the voter.

Comments and Questions

1. The ballot presented to the voters must contain some information that voters may not have: e.g., phone number, email address. The ballot should indicate that the voter needs to provide this information, if applicable.

General Comments

1. The Act contains no enforcement provisions with the exception of felony penalties for violating two sections. The Act should contain both criminal and civil remedies for violating its specific provisions. It also needs to be determined who has the jurisdiction to enforce the law.

2. The Act contains no provision concerning the amendment of a measure once the voters adopt it. Only California prohibits legislative amendments to initiatives (although California allows the initiative to establish an amendment procedure.) Many initiatives require some fine-tuning, and it is a waste of resources to have to go to the ballot again to make minor changes. An amendment procedure should be incorporated into the Act, but it should have some safeguards to prevent the legislature from repealing or gutting the measure.