A Critique of The National Initiative for Democracy

by
Paul Jacob

First, let us pity the poor souls of Philadelphia II and the Democracy Foundation, who through perspiration and inspiration have fashioned the National Initiative for Democracy (comprised of the Democracy Amendment and the Democracy Act). At this point, kind words simply do them no good. So I'll offer few.

The authors desperately need the sting of penetrating criticism if they are to synthesize it into a proposal capable of gaining an affirmative democratic majority. That's what is required establish a Legislature of the People. Moreover, if these dreamers succeed, the People will have to live under the proposed Democracy Act. Let us then be additionally diligent in the construction of something that may one day be part of our highest law.

In keeping, I'll generally limit my critique to the negative, meaning that elements left un-addressed are seen as positive. But first let me express my gratitude to Philadelphia II and the Democracy Foundation for their bold work in bringing forward this proposal and for their inspiring confidence in the common sense and intelligence of the people. Congratulations to Senator Mike Gravel and all those involved in creating the National Initiative for Democracy.

First Principles

When we use first principles, we should be respectful and humble of the power being grasped, and also succinct and measured as were the Framers of the Constitution. Any detail of the process that can be removed from the Democracy Act should be. After establishing the National Initiative for Democracy, voters can use their new process to effectively write the rules and regulations themselves.

The potential to enact the National Initiative for Democracy will also improve if the essential concept of the initiative process itself is not encumbered with numerous regulations that are not essential and will likely engender increased opposition.

On the Shoulders of the Past

In the official rationale for the National Initiative for Democracy, it is asserted that, "We cannot build the foundation for a *Legislature of the People* on the existing non-deliberative state Initiative and Referendum laws." But of course, new ideas do owe something to our experiences with our past and present constructs. It would be a mistake to ignore the positive aspects of the 24 state initiative processes, both on the merits and in terms of developing a concept able to obtain the needed public support.

Absent a compelling reason for change, the Democracy Act should mirror the state initiatives, which have been thoroughly tested with over 100 years of experience. Wise change builds upon what has worked, upon what people have already given their approval.

In downgrading the value of the present 24 state initiative laws, the authors point out that the state I&R processes are "subject to the control of state governments." Indeed they are, but the National Initiative for Democracy will be subject in many similar ways to the control of the Electoral Trust. No governing body will be perfectly respectful of the people, not even the Electoral Trust.

Furthermore, the National Initiative for Democracy's drafters also dismiss the value of the state I&R laws on the basis that, "Legislators and judiciaries, along with elected and appointed officials, media pundits and powerful interest groups, have increasingly criticized and curtailed the People's use of their initiative power." The fact that enemies of democracy have sought to derail the people's use of I&R is not a failing of the initiative. It is, rather, a further example of the need for a process protected from such assaults. Similar attacks against the National Initiative for Democracy should be expected.

The National Initiative for Democracy argues that the state initiatives have been "heavily tilted toward large, organized and wealthy organizations and away from We, the People." First, there is nothing inherently wrong with being "large" or "organized" or "wealthy." Secondly, elsewhere in the "Author's Notes re: The Democracy Act," it is acknowledged that, "experience has shown that wealthy interest groups have been largely unsuccessful in getting their initiatives enacted by the public." The Public Policy Institute of California in a 1998 research brief concurs, writing, "Despite their vast monetary resources, economic interests are severely constrained in their ability to pass new laws through the initiative process."

The problem isn't that some groups have the strength to overcome the roadblocks placed in their path by legislators, while others do not. Rather, the problem is that so many groups have not been able to reach a raised I&R bar. The National Initiative for Democracy should concentrate on lowering the bar, not attack those able to leap the bar more effectively than their contemporaries. To its credit, the Democracy Act's requirements to qualify an initiative by petition do indeed move strongly in this direction.

The Details

TITLE & SUMMARY The title and summary process is critical to the ultimate adoption or rejection of any measure. This is true regarding the current state initiative laws, where experience suggests that most voters never read the proposal itself and rely on the ballot title & summary -- along with media reports. This behavior will likely be the same with the National Initiative for Democracy as well.

When the proponents submit the original language, the Electoral Trust -- not the partisan proponents -- should determine the language of the ballot title and summary. Once the Electoral Trust sets the language, which should be done quickly (with clearly set deadlines), there should be an appeals process open to both proponents and opponents. This process should also be expedited so that bureaucratic or legal delays do not thwart the interests of those who propose a new law. Furthermore, final decisions need to be made at the beginning of the process so that courts cannot derail efforts, as they have done in a number of initiative states, mere weeks before voters come to the polls -- and after proponents have invested all the work to gather the necessary petition signatures and invested significant resources into the campaign.

SINGLE-SUBJECT The Democracy Act also contains a "single subject" clause, reading: "An initiative shall address only one subject, but may include related or mutually dependent parts." This wording seems clear enough and addresses a valid concern. However, experiences with state initiatives suggest this is also a potential area for courts to rollback the rights of the people. In recent years courts have markedly and arbitrarily changed their interpretation of "single-subject" and invalidated numerous initiatives that clearly contain only a one general subject. Therefore, I suggest this change to the wording: "An initiative shall address only one *general* subject, *which* may include related or mutually dependent parts."

WORD LIMITS The Democracy Act proscribes that no initiative may contain more than 5,000 words. This word length restriction should be removed. Though it does seem reasonable, since voters are likely to oppose having to vote on measures so complex as to require more than 5,000 words, why restrict the voters?

Let us put our faith back in the voters by trusting their ability to defeat measures they view as too complex or measures they do not care to spend hours reading and studying. Moreover, if voters desire to place such a limit on themselves, let them do it through the soon to be functional Legislature of the People and not tied into the original proposal for the National Initiative for Democracy.

QUALIFICATION REQUIREMENTS The petition requirements to qualify an initiative for a vote -- 2 percent for a statute and 5 percent for a constitutional (or charter) amendment -- are well positioned between the current state initiatives, where extremely difficult requirements discourage poorly-funded or smaller groups from pursuing an initiative, and requirements so easy to achieve that they might entice less than serious initiatives.

POLLING Polling done with objective wording and using scientific methods is as valid, if not more so, than assessing public interest by requiring a percentage of voter signatures on petitions. But because polls can be and have been slanted to achieve a set result, thus destroying their scientific nature, public skepticism about polling runs high. If the goal is to convince the people to embrace the concept of a Legislature of the People, this

provision should be reconsidered. The polling component will be seized upon by the enemies of the process to disparage the National Initiative for Democracy, and I think with great potential for success.

DELIBERATION COMMITTEE No one is against deliberation. To think long and hard, to discuss, research, to hear both sides, to consider the consequences is to deliberate. It's what we do each time we make a major purchase in our personal lives or a decision about voting. Of course, legislatures have a much more formal and detailed process for deliberation. The initiative will never replicate the give-and-take of the legislative process, but in any lawmaking process, deliberation must cease at some point and an up-or-down vote must be taken.

For many of those actively participating in initiatives at the state level, "deliberation" is a term used by opponents of the process to suggest that voters are incapable of enacting law with the same quality as legislatures. Proponents fear deliberation is a euphemism for delaying or detouring the people. The Deliberation Committee should be a service and not a hurdle for sponsors of initiatives. That means sponsors should be free to take or leave the "advice" and services offered.

Yet, the Deliberation Committee can by a two-thirds vote overwrite the wishes of the sponsor of the initiative concerning the text. Granted, the Committee is restricted by clear language, which says, "By two-thirds margin, the Committee may amend the Title, Summary and text of the initiative, provided that the amendments are consistent with the stated purposes of the initiative." But clear language has been known to get fuzzy when governments or judges become conflicted by special interests or self-interest. Who is to interpret what is "consistent" with the stated purposes of the initiative? The Electoral Trust is not immune to the corrupting influences of power. For this reason, the proponent(s) of an initiative should have the final authority on the text. After all, the exact language desired by the sponsors *is* the exact purpose and ought not be abridged even by a unanimous vote of the Deliberation Committee.

Another ingredient to deliberation is time. That's why I believe it would be a monumental mistake to suggest that voters would consider an initiative every week. There should be initiatives as often as voters want them. But an initiative vote every week is more attention to lawmaking than I believe voters desire, or will even stand for. This puts enactment of the Democracy Act at risk.

Constitutional Framer James Wilson put the case for direct citizen involvement this way: "All power is originally in the People and should be exercised by them in person, if that could be done with *convenience*, or even with little difficulty." (Emphasis is mine.) Convenience is a very apt term. Voters will not find weekly elections very *convenient*.

It is not clear if the citizens "selected at random" and compensated for participating on Deliberative Committees are free, once chosen, to refuse service. Jurors, who are in a similar role, are not free to refuse service but are given wide latitude to be excused from

service. The Deliberative Committees should be filled only with those randomly selected individuals who voluntary agree to serve.

LEGISLATIVE ADVISORY VOTE The requirement that legislative bodies in the jurisdiction considering an initiative must conduct an advisory vote on the proposal will likely be ruled unconstitutional. Furthermore, while it might indeed be what their constituents would want and even be the moral duty of our elected officials, our representative bodies will not "mature" by being *forced* to address issues of public importance. Let them instead make their own decisions and improve their public esteem through positive action, not by being forced to do so against their will.

ENACTMENTS OF INITIATIVES Perhaps the most serious, dangerous and helpful aspect of the National Initiative for Democracy is the new path it creates to amend the U.S. Constitution. The amendment process contained in the Democracy Act provision means that Congress can no longer stonewall constitutional changes that enjoy super-majority support, and thus solves the most intractable problem of our current Constitution.

Yet, the state-based ratification process is abandoned in favor of a two-vote requirement. First, the second vote comes too soon to allow sufficient deliberation between votes, making it a weak check on current passions. More importantly, abandoning the requirement that 3/4th of the states ratify any amendment could create great dissention between various regions of the country, weakening the union ultimately, and more immediately threatening the public support needed for enactment.

A better approach would be to allow a vote of the people to propose an amendment, as Congress or a constitutional convention would do. The amendment would then go to the states needing 3/4th of the states to ratify by the state legislatures or ratifying conventions, the two current ratification procedures, or by a new third method of statewide voter plebiscites. The proponents of the amendment would choose the method of ratification.

While the Democracy Act would make it far easier to amend the U.S. Constitution, it would make it tougher to amend state constitutions and local charters. Because federal law supercedes state law, state constitutional amendments cannot diminish any of our federally guaranteed rights. Thus, the two-vote requirement is unnecessarily difficult. A simple majority should be sufficient.

JUDICIAL REVIEW While our courts too often operate in an arbitrary manner, corrupted by power, the general concept of judicial review is nonetheless widely accepted and valid. Thus, the willingness to make all but constitutional amendments subject to review in the courts sends a strong signal that the National Initiative for Democracy respects individual rights and the rule of law. This is wise both in terms of acknowledging the legitimate concern that completely untrammeled and instant democracy can turn into mob rule as well as the fact that the people desire such legal "protections" at least as a general rule.

PROMOTIONAL COMMUNICATIONS The regulations governing communications constitute a serious attack on freedom of speech and are largely unworkable. This section of the Democracy Act reads: "*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 *substantially* contributing directly or indirectly to the payment for the communication."

While the motivation behind this sweeping regulation is to provide greater public knowledge, there are a number of serious problems:

1) The words italicized above offer ample opportunity for mischief in interpretation and thus for endless litigation.

2) This provision would outlaw anonymous speech. (See Financial Disclosure below.)

3) Requiring extensive labeling of communications will either disrupt the ability of proponents and opponents to express a message or will be reduced to a small label that is conveniently ignored by the public. Voters seem to have little interest in current labeling of advertising, though far less draconian than the Democracy Act's labeling system.

If voters want communications to be labeled as they are here, let them pass an initiative to do so. That's superior to endangering the passage of the National Initiative for Democracy by including it in the Democracy Act.

CAMPAIGN FINANCING There is some validity to the stance that corporations, unions, PACs, and other associations do not -- as non-persons -- have rights. But their members do have rights to freely associate with one another. Banning organizations from communicating with their members or forbidding individuals from creating associations to advance their political interests violates the basic human rights of the people associating. Furthermore, no harm has been shown under the current state initiative system, which allows these groups to contribute.

FINANCIAL DISCLOSURE Requiring full disclosure of campaign contributions meets precious little resistance today, but it cuts against a long tradition of respect and protection for anonymous speech. Americans should not forget that the Federalist Papers, arguably the most important political tracts in our history, were published anonymously. There are more contemporary examples of the importance of political anonymity as well. In *NAACP v. Alabama*, the U.S. Supreme Court overruled an Alabama law requiring the NAACP to release a list of their donors. It isn't hard to see that public disclosure could carry a very real risk to contributors and thus effectively blocks contributions.

PUBLIC INFORMATION While providing information to voters is positive, the apparent desire of the Electoral Trust to be the primary source of information is unrealistic.

Numerous initiative states provide voters' pamphlet and booklets as well as public hearings and other communications, but voters continue to take their cues from the "independent" media, proponents and opponents.

Admittedly, no states currently produce TV and radio ads, but the idea that the Electoral Trust would advertise enough to seriously compete with supporters and opponents is actually much more troubling. Such a system makes the Electoral Trust a political force unto itself, with no controls on the message conveyed. The Democracy Act says that "fair and balanced" information will be presented, but no two people are likely to agree that a certain message is truly "fair and balanced." After the experiences initiative activists have had with government officials who claim to be fair and balanced, this provision could make the National Initiative for Democracy anathema to its otherwise most likely enthusiasts.

Lastly, the provision that Electoral Trust materials would only be in English will under-serve an increasingly significant segment of the voting public. If materials are to be produced, they should not be limited to English, but be in any language necessary to communicate with every significant segment of the population.

Electoral Trust

It is difficult to address the make up of the Board of Trustees without knowing what organizations will be allowed representations, but the general approach strikes me as too "insider" to pass muster with the public. A better approach would be to hold simultaneous elections along the same lines as the election process for the National Initiative for Democracy.

Opponents of a direct initiative process for citizens will seize on every instance of potential conflict of interest among those spearheading the enactment of the Democracy Amendment and Act. It is critical that the people have the means to control who serves on the Electoral Trust. While the term limits rule will improve voter confidence in the Electoral Trust, the choosing of the Board of Trustees must be fully under the democratic control of the people.

Conclusion

The goal of the Democracy Amendment is to empower the people, to make them full and ultimately mature citizens in control of their government. This paper argues that the National Initiative for Democracy needs important changes in order to be a truly free and accessible process as well as to gain the necessary public approval.

While numerous provisions concern me, I remain impressed by the intellectual underpinnings of the effort and very excited by the opportunity the National Initiative for Democracy presents to educate and empower the individual citizens of America.

Paul Jacob is president of Citizens in Charge, dedicated to expanding the citizen initiative process.