

INITIATIVE
AND
REFERENDUM:

THE
PEOPLE'S
LAW

Geoffrey de Q. Walker



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Foreword

Australian experience of direct involvement in legislation has been limited almost entirely to referendums on the constitutional amendments which governments propose from time to time. In this book, Professor Walker recommends extending the procedure in two main ways: first, by making it possible for binding referendums to be held on ordinary legislation as well as on constitutional changes, and second, by introducing the 'initiative', which would give ordinary citizens the power to submit proposals to referendum (this power is at present the exclusive preserve of parliaments). In addition, Professor Walker considers using the procedure, in the form of the 'recall' mechanism, as a popular check on 'unelected officials in high places', and in particular the judges on the High Court.

These proposals reflect a growing trend towards direct, popular law making in the Western democracies. Switzerland, Austria, Italy, Canada and the USA all make use of it in various forms. Even the UK, where the doctrine of parliamentary sovereignty is deeply entrenched, has in recent years resorted to it. True, the British referendums during the 1970s on membership of the European Community and on devolved government for Scotland and Wales were not strictly binding on Parliament. But many commentators believe that a convention has now been established whereby quasi-constitutional changes in Britain must be sanctioned by popular vote.

Professor Walker demonstrates that the trend is accelerating in Australia. In 1979 Senator Colin Mason tabled a petition signed by 10 000 voters calling for a constitutional amendment referendum on the citizen initiative. The proposal was discussed in 1985 by the Australian Constitutional Convention; it is also one of the most popular submissions to the Constitutional Commission, whose report is due to be submitted by mid-1988. Professor Walker is fully justified in claiming that 'It seems likely ... that the initiative and the referendum are destined in the near future to become the subject of lively debate in Australia'(p 9).

The case for extending the referendum procedure, however, requires to be clearly argued; and Professor Walker devotes a chapter to dealing with opposing arguments to it, such as the possibility of popular majorities using the power of direct legislation to violate the rights of

minorities. He remains confident that this outcome is very unlikely, and certainly no more likely than it already is under our present system of representative democracy. In this context it is worth recalling that Australian voters had no hesitation about granting aborigines full constitutional rights when invited to do so in the 1967 referendum.

Indeed, it is the presence of the opposite problem — that of public opinion being frustrated by influential minorities — that more than anything else explains the growing interest in the initiative and the referendum. Professor Walker sees these procedures as a logical step in the development of liberal democracy, a development which has in recent years been arrested by the theory and the practice of 'democratic elitism'. In the 1950s and 1960s many political scientists, concerned with the need to reconcile democracy with social stability and to avoid collapse into populist dictatorship of the kind that had occurred in Germany in the 1930s, welcomed the activism of elites of politicians and lobbyists, and sometimes even welcomed voter apathy and citizen passivity. More recently, public choice theory has demonstrated how this version of democracy leads to the capture of political processes by elites determined to promote their own interests and values, however unrepresentative and unpopular, resulting in oversized government, economic stagnation, and public services run in the interests of their employees. Professor Walker argues convincingly that the extended referendum would be a useful weapon in the hands of politicians willing, but otherwise unable, to resist the demands of vested interests and promotional groups. He also notes that the influence of that procedure could not be measured solely in terms of the frequency with which it was employed, since the mere fact that it was available to be used would encourage political actors to behave with more respect for public opinion.

This lucidly written and admirably comprehensive study opposes the current drift of Australia's constitutional practices towards ever greater centralisation and authoritarianism, and proposes a major step towards reviving the Constitution's proper function as a guarantor of good government. If Professor Walker is right in believing that the initiative and the referendum will soon become the subject of a popular debate, his book deserves, and is likely, to become the standard work of reference on the topic.

Michael James

Author's Note

It will become apparent to the reader that I support the system of direct legislation via the initiative and referendum and favour its adoption in any state or country where it does not already exist. Nevertheless, I have endeavoured to set out all the arguments against the system as articulated by its most effective critics, such as Dr David Magleby of Brigham Young University in Utah. My case would not be helped if I could be shown to have overlooked any significant opposing argument. It is striking, however, that even the severest critics such as Dr Magleby attack only some forms of direct legislation and do not oppose the principle as a whole.

A point of style on which many people hold strong views is how to write 'referendum' in the plural. Memories of high school Latin would incline me to 'referenda', a spelling that has many partisans. On the other hand, the Romans never used the word in anything like its modern sense, and there seems to be a growing consensus that 'referendums' is preferable in modern English (and for that matter, as will be seen from the Swiss writings cited in this work, in modern French as well). I have therefore opted for 'referendums'.

A special project research grant from the University of Queensland has greatly assisted the preparation of this work. I would also like to thank the responsible editor at CIS, Rose McGee, and assistant editor Ann Mossop; Annette O'Hara, Karen Schultz and Frances Xavier for their help with proof-reading; and David Keenan of the University's Prentice Computer Centre for solving some awkward data processing problems.

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Chapter 1

The People's Law

I. THE PEOPLE RULE

One of the most striking developments in Western politics and government in recent years has been the sharp increase in the use of the referendum as a means of obtaining a popular verdict on controversial legislation, on treaties or on other major matters of policy. During the 1970s Great Britain, Ireland, Denmark and Norway all held referendums to determine whether they should join the European Community, and in 1986 the Danes by the same means approved some reforms to the Common Market system. In 1986 the Spanish by referendum decided not to leave NATO and the Swiss voted to remain out of the United Nations Organization.

A particularly important aspect of this move towards greater democracy is the increasing resort to direct legislation by the people through the systems of the initiative and the referendum. These mechanisms allow the voters, on presenting a petition bearing the prescribed number of signatures, to compel the government to hold a binding referendum in which the people may approve or disallow parliamentary legislation or may enact laws of their own choosing. In the 1970s and 1980s this system has become more popular than ever in Switzerland, the country that pioneered popular law making in its modern form. In the United States, where 24 states or territories have it, direct legislation is greatly prized by the voters. Since the early 1970s there has been a boom in citizen-initiated legislation on a wide range of subjects including the environment, nuclear safety, taxation and political reform. A parallel trend can be observed in Canada, where the right of

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citizen initiative is widespread at the local government level. Italy's direct legislation system, which had been a dead letter since its creation in the aftermath of World War II, came into active use during the 1970s and has now been invoked eight times. Austria's initiative system had been dormant even longer, but it was awakened in 1964 and in 1985 was invoked over an issue of environmental law.

Throughout the democratic world, observers are taking keen interest in initiative and referendum as a supplement to the usual machinery of representative democracy. Direct legislation is increasingly seen as a valuable means of taking controversial issues out of the hands of extremists, pressure groups and power elites. Observers have also been impressed by the commonsense and moderation of Western electorates when acting as a whole. The Italian voters' rejection in 1985 of an indexation measure that would have given many people higher pay in the short term, but at great long-term cost, is typical of the referendum results that are causing many political scientists to reject dire predictions that the electorate would vote in accordance with mere prejudice and short-term interest.

The increased attention being given to direct legislation has been reflected in constitutional debate in many countries. The matter has been discussed in the United Kingdom since that country's successful Common Market referendum in 1975; a proposal in the United States for a national initiative system is supported by a 2 to 1 majority of voters; at any given time there are bills for the introduction of the system before the legislatures of some 20 American states that do not yet have it. The New Zealand Royal Commission on the Electoral System was required to report by late 1986 on (among other things) the question 'To what extent referenda should be used to determine controversial issues, the appropriateness of provisions governing the conduct of referenda, and whether referenda should be legislatively binding'. The Australian Constitutional Convention in 1985 debated the question of whether the Commonwealth Constitution should be amended so as to provide for a form of citizen initiative. The matter has been raised with the newly established Commonwealth Constitutional Commission, which has already received many submissions in support of the idea from people in all walks of life and from all over Australia. Citizen initiative bills have been introduced by the Democrats in federal parliament at intervals since 1979, and a similar measure is proposed in Western Australia. In October 1985 the National Party in Queensland recommended the adoption of the citizen initiative as federal policy.

II. THE FALL AND RISE OF POLITICAL ELITISM

This worldwide activity and interest in direct legislation is an important development in the history of political philosophy as well as in practical government.

At the philosophical level, it is part of a continuing conflict between the idea of government by the people and the idea of rule by an elite. This struggle between democracy and elitism is as old as the Western political tradition itself. In fact political philosophy was founded on this controversy; Plato's *The Republic* was largely an expression of his criticism of democracy in the form in which it was practised at Athens. The democracy of the Athenians gave citizens the right to participate in law making and public office, but guaranteed them little, if anything, in the way of legal rights, embodied few constitutional safeguards and had been known to degenerate into tyranny. Plato urged the creation of a trained philosophical elite, not only as a safeguard against the extremes of lawless democracy, but also as a way of supplanting the claims of the two traditional elitist positions, those of birth and of wealth. But he never contended that his elite derived its claim to power from some form of providential or historical inevitability.¹

Whereas classical political speculation began with an assault upon a form of democracy, modern political philosophy was launched with an attack on a special kind of elitism, that of hereditary status and privilege. Neither Machiavelli nor Hobbes, two of the main founders of modern political theory, favoured democracy, yet each was a strong critic of hereditary aristocracy.

Both democracy and elitism presumably stem from a common search for the best way to further the interests of the community. But the solutions they offer depend on fundamentally different assumptions. The two assumptions on which all elite theories rest are: first, that the masses are inherently incompetent in matters of government, and second, that they are at best apathetic and at worst are unruly creatures with an incurable propensity to destroy culture, society and liberty. All elite theorists share a belief in these assumptions, though they differ as to how, and to what ends, the masses should be manipulated. Leninists, who see the individual as a helpless being hypnotized by 'false consciousness', believe that a disciplined elite vanguard will be able to break the grip of bourgeois culture and drive the proletariat to the socialist paradise. From a different point on the political spectrum, Ortega y Gassét argued that Western civilization was lost unless the

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cultured elite could imbue the 'mass man' with a deferential attitude congruent with the mediocrity of his nature.²

Democratic theory does not deny that individuals are unequally endowed with ability; in fact, some democrats such as Thomas Jefferson stress the pursuit and achievement of excellence as essential to a vital and free society.³ Where the democrat parts company with the elitist is in rejecting the belief that any class has a monopoly of the ability to make sound political decisions, or that any person or class is able to judge the ultimate worth of a human being, or is possessed of absolute truth concerning the values that will produce the good life for society. The democrat sees no basis for dividing the population into higher and lower orders and consequently believes that each individual's judgment on the general direction of government policies should receive equal weight. The proposition is not that all persons have the same ability, but rather that ability is randomly distributed throughout society. 'It is important to note what was new about democracy', adds David Lebedoff. 'It was not the observation that ability is randomly distributed. It was the attachment of political significance to that observation. The political significance attached to the fact that all people are created equal is, therefore, that all people should be permitted to govern. The will of the majority should prevail'.⁴

Elitism has been dominant throughout most of history. Tyranny and poverty have been the usual lot of the common man. In most of the world they still are. The democracy that survives in the countries of the Western tradition is only two centuries old, a legacy of the French and American revolutions. When united with the English traditions of liberty and the rule of law, democracy has produced not only an unprecedented measure of individual liberty, but also a huge and unsurpassed increase in the material well-being of the masses.

Despite democracy's success, elitism has never conceded defeat. Throughout the 19th century, critics assailed the belief that the common man could govern as being contrary to experience and an absurdity. One after another, new theories were advanced to justify rule by a select few, on technocratic grounds, on the basis of some romantic 'superman' mystique, or by reason of a supposed historical inevitability.

For about a century, from 1865 to 1965, democratic principles were more than able to hold their own in the world of ideas. But after about the mid-1960s they were increasingly forced onto the defensive. We will be looking more closely at this change later, but essentially the reversal began in the 1930s with a call for the creation of a new elite for democratic societies, this time an elite of intellectuals or of persons

trained by them. The proposal was for a model of government that lay somewhere between the traditional poles of democracy and elitism, a model in which the power of an enlightened minority would help democracy to survive and progress. The several variations of this proposed model came to be known as the 'theories of democratic elitism'. Little came of these ideas until the 1960s, when the prosperity of the Western democracies reached such levels that such a class of persons could be supported without being directly productive. This 'new class' or 'new elite' has since expanded and moved into areas of political power, notably in government administration and in what has been called the 'consciousness industry': education, the media, the church, the arts and the like. From these centres of power it has attained the position, not of directly ruling, but of making all other centres of leadership accountable to it. Further, its success in securing the triumph of the theories of democratic elitism has spread a halo around the surviving older elites and around the remnants of the 19th-century elitist theories, such as those of Saint-Simon, Ruskin, Stephen and Maine.

But this triumph has produced an interesting reaction. One of the weapons used by the new elite to break down established power in business, the universities and elsewhere was the demand that workers, consumers, students and parishioners should be allowed to play a part in the decision-making processes of the organizations that affected their lives. It was already the case that people could make decisions and choices between the end products of these organizations. They could choose to acquire, or not to acquire, goods or services from one business or another; they could choose to attend one university or church rather than another, or to work for one employer rather than another. But there was a new element, a demand to be involved not only in choices between end products, but also in the processes whereby the end product came into being. This demand proved to be a powerful weapon in weakening existing structures of authority in industry, the family, education and the like. It was intended to make the new elite into a tribunal to which the social system would be accountable. Very largely it succeeded.

The appeal of this idea proved, however, to be wider than its originators had expected, or probably wished. It developed into a virtual renaissance of populism, a counterattack by the democratic ideal against elitism in all its forms, including the form embraced by the new elite. It has crystallized into a kind of moral principle, a rebuttable presumption about the way in which decisions should be made, which

can be displaced only by convincing evidence. These prescriptive qualities have earned for this trend the name of 'the participatory ethic'.

III. THE PARTICIPATORY ETHIC

The spread of the ethic of participation is one of the most marked social trends to be seen in the liberal democracies today. In industry, in trade unions, in the universities, in the churches and municipalities, people are claiming the right to be involved in, or at least to be consulted on, decisions that affect the conditions under which they live or work. No longer are they prepared to assume that their 'leaders' know best in all things, especially on novel or momentous issues for which day-to-day experience provides no precedent. Anyone who today occupies what used to be called a 'position of authority' in an organization knows that it is no longer enough just to make and announce a decision. It is necessary to 'sell' it, and the best way to make it acceptable is to involve those affected by the proposed change in the decision-making process, in such a way that they have a real chance of influencing the outcome. If people are to support a decision with any enthusiasm, they must be able to feel that they have a degree of 'ownership' in it. Indeed, the manipulative idea of 'selling' a decision is itself part of an outmoded conception of authority that is losing its effectiveness. The emerging style of leader is someone who neither barks orders nor manipulates people, but one who, to the extent that the function of the organization permits, facilitates the search for a workable consensus and helps people to achieve in a common endeavour. The old power-based methods produce only surface changes in conduct or attitudes. Even these superficial results are bought at the cost of an inward alienation that takes its revenge later on. The continuous and ready availability of sanctions, which enabled the old methods to work as long as they did, can no longer be taken for granted. Even if it could, the efficacy of sanctions today is marginal.

Traditional structures of authority are adapting or perishing, depending on whether they have understood the transformation that is taking place or not. 'We have leadership — there's just no followership', is how one politician sums it up.⁵

This transition is a firmly established trend, not a mere passing fad, according to the social forecaster John Naisbitt. In his widely read book *Megatrends*, he and his co-workers have concluded, on the basis of a study of 2 000 000 articles in local newspapers over a period of twelve years, that genuine trends are generated from the bottom up, mere fads

from the top down.⁶ By this criterion, the participatory ethic is undoubtedly a trend rather than a fad.

The strongest case for greater public participation must surely be government. Unlike business corporations, universities and the like, governments make decisions that are binding on all, not just on persons within the organization. Governments have the exclusive right to coerce, to legalize the use of violence against the citizen. Not surprisingly, Naisbitt and his co-researchers found that the most striking and most potentially far-reaching manifestation of the participatory ethic is a shift from representative government to participatory government. This change is manifested in popular support for direct legislation by the people, bypassing traditional elected assemblies.

The underlying trend is greatly reinforced, according to the Naisbitt group, by the fact that technological change has caused representative government to outlive its usefulness. The representative system was originally adopted, he argues, because it was at the time the only practicable way to organize a democracy. Direct citizen participation was simply not feasible, so the people elected representatives to go off to the capital, to represent them, vote and then return home to tell the voters what had happened. The representative who did a good job was re-elected, the one who did not was defeated. For 200 years or so, this system worked quite well.

But the picture has changed with the arrival of the communications revolution and the emergence of a well-informed and well-educated electorate. Today, with instantaneously shared information, the voters may know as much about what is happening as their representatives do, and they will know it just as quickly. To this extent, Naisbitt concludes, representative democracy has outlived its effectiveness — not entirely, of course, because the habit of electing representatives is deeply entrenched and is politically convenient. People do not want to vote on every issue, only on the ones that will make a significant difference to their lives.

The initiative and referendum are the tools for this new democratic revolution. 'These devices furnish direct access to political decision making, which is what informed, educated citizens want'.⁷ The popularity of the initiative in particular exploded during the 1970s, when there were twice as many initiatives at the state level in the United States as there had been in the 1960s. Yet the trend seems to be only beginning. The initiative procedure is available in 23 states (plus the District of Columbia) and 100 cities in the United States, but active campaigning for its adoption is under way in at least 20 other American

states.⁸ The initiative is supported by public figures from virtually every part of the political spectrum, from Ralph Nader's Public Interest Research Group to the American Conservative Party. Both Democrats and Republicans are supporting a move for a constitutional amendment to permit the initiative at the federal level. Even at the outset, this proposal was found by a Gallup Poll to be supported by 57 per cent of the nation's adults, with only 21 per cent against and the remainder undecided. Four years later the approval ratio was 2 to 1.⁹

The Naisbitt findings are based on American data, but the same trend is clearly apparent elsewhere. British politicians found that the referendums held on the questions of Britain's Common Market membership and Scottish devolution were popular with the voters. The people also made it plain that they expected to be similarly consulted on important questions in the future.¹⁰ An opinion survey of voters taken equally from the pro- and anti-Market sides showed that 75 per cent were pleased that the issue was put to the electors.¹¹ This response was particularly interesting in view of the many assertions made at the time that the referendum was an institution that would never work in Britain, being totally at odds with the nation's alleged 'tradition' of an absolutely sovereign parliament. But nobody had ever troubled to ask the people whether they recognized any such 'tradition'. It is now clear that they do not.

Conversely, it is generally agreed that lack of member participation in the decisions of the coalminers' union was a key factor in the failure of Britain's twelve-month coal strike in 1984-1985. The miners were ordered into the fray by their leader, Mr Arthur Scargill (whose lifetime tenure of the leadership was itself at odds with most people's ideas of democracy), in a manner that drew comparisons with Britain's World War I generals. From the outset he refused to allow a nationwide ballot of members on whether to strike or not. This caused resentment even among those who did walk off the job, and support was further eroded by the sight of the violence used by union pickets against fellow unionists at the mines that remained open. It became apparent to members that their leader was attempting to substitute power and force for democracy, an inference that was underlined by his appeals for support to the governments of Libya and the Soviet Union. This gave miners a moral basis for returning to work in defiance of union orders. The strike collapsed when a majority did so. Shortly afterwards, disaffected miners formed a rival union that was explicitly structured to work on democratic lines.

Italy is another country where the rise of the participatory ethic has had a discernible impact. The popular initiative principle, which had been inserted in the Italian Constitution after World War II but had remained a dead letter, suddenly assumed great significance in the 1970s. It was by means of the initiative that the Italian voters confounded many political experts by introducing and adopting measures to liberalize the law relating to abortion and by giving their approval to the nation's first divorce statute. In Switzerland, the popularity of the initiative in particular has risen to extraordinary heights. Seldom does a week pass without an initiative being instituted or at least announced and the range of subjects covered is expanding continually.¹² This popularity shows no signs of waning, even though it means that Swiss citizens are called to the polls at least every three months. Admittedly, a growing number of voters are choosing not to cast a ballot on particular issues, but this has had no effect on the popularity or perceived legitimacy of the process.

After the usual time lag, this wave of interest in direct legislation has reached Australia. In March 1979, the Democrat Senator Colin Mason tabled a petition signed by 10 000 voters (the largest petition tabled in federal parliament for eight years) calling for a constitutional amendment to provide for a citizen initiative. He subsequently introduced, and has since reintroduced, a draft Bill which, if approved in the prescribed manner by the voters, would make the necessary constitutional change. On each occasion the Senate has rejected the proposal with a minimum of discussion and in a dismissive manner which, according to Senator Mason, has aroused strong resentment among the voters who favoured it. Senator Mason claims that his addresses to over 100 public meetings on this subject have been met with strong voter approval, and indeed that not a single dissenting voice has been heard. Democrat legislators expect to be introducing similar bills on these subjects in the state parliaments of New South Wales, Tasmania and Western Australia.

It seems likely, therefore, that the initiative and the referendum are destined in the near future to become the subject of lively debate in Australia and New Zealand. This study will seek to assist that debate by giving a preliminary analysis of how these processes work in other countries, of the main lines of argument for and against them, and of how they could be structured and organized in Australia and New Zealand.

While directed at the possibility and desirability of adopting the system in both countries, the discussion will focus mainly on

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conditions in Australia. This approach flows partly from a desire to avoid repetition and partly from the general similarity of the constitutional and political conditions in the two countries. New Zealand is not a federation, but its constitution shares a common ancestry with those of the Australian states, that of the 19th-century self-governing British dominion. The legal and constitutional questions raised in New Zealand will therefore be broadly similar to those that would be presented in an Australian state. The general arguments for and against could apply, and be expected to arise, in any country in which the discussion of democratic institutions is permitted.

IV. MEANING OF INITIATIVE AND REFERENDUM

Initiative and referendum are procedural mechanisms, created by statute or by constitutional amendment, which enable the people directly to approve or reject particular laws that have passed through parliament but have not yet taken effect, or that enable the people to compel the repeal of an existing law or the enactment of a new law.

The initiative and referendum as here discussed differ from existing uses made of the referendum at the state and federal levels in Australia and in New Zealand in several respects. First, they are not confined to constitutional amendments; they cover all kinds of laws that may currently be passed by parliament. In Australia and New Zealand over the years some ordinary laws, such as liquor licensing laws in the Australian states or conscription at the federal level and in New Zealand, have been submitted to referendum in order to resolve a particular controversy. But these have been a minority.

Second, we are here concerned with machinery to allow the people to **compel** the holding of a referendum regardless of opposition from the government of the day. This power may be exercised when a certain number of enrolled voters, or more often a specified percentage of the electorate, sign a petition calling for a poll to be held. This is a critical difference from existing procedures, because if the government has the exclusive power to say whether and when a referendum will be held, the device can be used, and has often been used, in a manipulative way. This is not possible if the people themselves can require a vote to be taken.

Third, we are here concerned with referendums that are binding. Australian and New Zealand governments already have the power to hold referendums on any subject, but except in the case of certain constitutional matters, the government is free to disregard the result. On occasion it has done so, after some time has been allowed to elapse. But

the initiative and referendum are conclusive in the sense that the proposed statute is enacted (or repealed, if that was the proposal) automatically. If the poll result is positive, the measure must be submitted for the head of state's assent (the governor's or the governor-general's assent in Australia, the latter in New Zealand), and the parliament has no power to tamper with it.

The initiative and referendum principle can be put into effect at the federal, state, or local levels. Actually, it already exists to a limited extent at the local level. For example, some liquor licensing legislation permits a certain number of local residents to require the holding of a local option poll on whether liquor sales should be prohibited in the area. Our main focus, however, will be the state and federal levels, where the concept is more novel and its potential is greatest.

V. VARIETIES OF DIRECT LEGISLATION

As will already have been noticed, there are several different varieties of initiative and referendum. For this reason, and also because the word 'referendum' is being used slightly differently from its usual Australian acceptance, the discussion should begin by clarifying how the terms will be used. The main line of classification is between the initiative on the one hand and the referendum on the other. We will look at the subclassifications under each of these headings as well.

The Initiative

The initiative is a procedure that allows a prescribed number of voters to compel the holding of a binding poll on whether a proposed law of their own choosing should be adopted, or whether a particular law already in force should be repealed. Although we distinguish the initiative from the referendum, the initiative itself obviously involves the holding of a 'referendum' in the ordinary sense of the word.

Initiatives are of two kinds, constitutional and legislative.

The constitutional initiative gives a prescribed number of voters the power to petition for the holding of a ballot on a proposed amendment to the constitution. This is one of the less widespread forms of initiative, and it exists in Switzerland, in the Swiss cantons, and in 14 of the American states. In Switzerland the procedure can be triggered either by 100 000 voters or by eight of the canton governments. The proposed citizen-initiative statute introduced into the Australian Commonwealth Parliament by Senator Colin Mason would include the

constitutional initiative. The proposal debated by the 1985 Constitutional Convention was purely for a constitutional initiative.¹³

The legislative initiative exists in Austria, in Italy, in the Swiss cantons and in 23 American states (plus the District of Columbia). It does not exist at the federal level in Switzerland, with the result that the constitutional initiative is sometimes used for measures that would be more appropriately dealt with by a legislative initiative.

There are two kinds of legislative initiative, the direct and the indirect.

(i) Under the direct initiative, the petition causes the proposed measure to be placed on the ballot paper for submission to the electorate without any action or intervention by the parliament. This form is to be found in 15 American states, including California. Senator Mason's proposed Commonwealth initiative system would be of this type.

(ii) The indirect initiative gives the parliament a specified time in which to enact the measure proposed by the citizen initiative. If parliament refuses or fails to act, the measure is then submitted to the voters for their verdict. This version exists in Italy and in seven American states. The current proposal for a national initiative procedure in the United States takes this form, as did Queensland's Popular Initiative and Referendum Bill of 1915–1919.

The Referendum

Some types of referendum are familiar enough in Australia and New Zealand. But remember that we are here talking specifically about referendums that, first, are automatically binding, and second, must be held if a certain number of voters sign a petition. The latter aspect means, therefore, that the referendum as we are defining it includes an element of citizen initiative. The label 'petition referendum' is sometimes used to describe this kind of referendum.

There are two types of referendum, the constitutional and the legislative.

The constitutional referendum. The Commonwealth of Australia Constitution provides for compulsory referendums for constitutional amendments. Three state constitutions provide them for certain constitutional amendments and also for the purpose of resolving deadlocks between the upper and lower houses, which occur when the houses cannot agree on a particular bill. Forty-nine of the American states require voter approval of constitutional amendments.

The legislative referendum. The legislative referendum allows a specified number of voters (usually between 3 and 5 percent) to petition for a referendum concerning a bill that has passed through parliament in the normal way but has not yet taken effect. The effect of a valid petition is that the statute will not come into force until the voters have had the opportunity to approve or reject it in a referendum. If the majority vote against it, the measure is repealed and the parliament may not introduce a similar measure for a specified period. This type of referendum is often described as the 'people's veto'. It was pioneered in Switzerland, where it operates at both the canton and federal levels. Thirty-nine of the American states have some version of the legislative referendum and, of these, 24 enable the specified number of voters to require that the matter be put to the ballot. The Swiss have in addition the right to vote on the ratification of certain international treaties. All Swiss cantons also have the *référéndum financier*, which deals with budget legislation. Senator Mason's Bill does not provide for this kind of referendum. The people could repeal a law made by parliament only by using the initiative and could not, therefore, prevent it from coming into operation in the first instance.

It will be noticed that the essential difference between all these classifications is the degree to which the people retain legislative power in their own hands. Obviously, therefore, the arguments for and against direct legislation will not apply equally to all these categories. For example, the argument that legislating requires specialized expertise would carry more weight if one were considering the constitutional initiative than it would in relation to the legislative referendum. It is important to bear this in mind, because sweeping generalizations tend to be made in respect of all forms of direct legislation.

The Recall

Initiative and referendum have often been advocated by groups such as the Progressives and the Australian Labor Party as part of a triad of related reforms, the third element of which is the recall. This is the power of the people to petition for the holding of an election on the recall, or removal, of a public official. Sometimes it is confined to elected officials, but more often it applies to both elected and appointed members of the legislative, executive and judicial branches. It was first used in the American Articles of Confederation of 1777 and currently exists in 13 American states for state officials and in a great many

American cities. The primary concern of this paper being legislation, we need only note the meaning of the term here.

The term 'recall' has also been used on occasion to refer to the legislative petition referendum, in the sense of a 'recall' of legislation. This confusing usage should be avoided.

VI. HISTORY OF DIRECT LEGISLATION

Switzerland to France and Back Again

The early history of the institutions of direct legislation need not long detain us, for it is in the modern setting that they need to justify themselves; and in any case their history is marked by long periods of eclipse. It would appear that the Greek city-states knew direct legislation both in the form of direct democracy (that is, the legislature composed of all the citizens meeting for that purpose), and of the plebiscitary type, which came into use when numbers made direct democracy unmanageable. Direct legislation of a primitive kind re-emerged as the *folk moot* of the Germanic tribes, which seems to have evolved in due course into the *Landsgemeinden*, the general assemblies of all adult male citizens that met twice a year to resolve all important questions, including the settling of the laws by which all would be bound. By the time of the Middle Ages, these survived only in the original Swiss cantons and, apparently, in parts of Norway. Elsewhere in northwestern Europe, the democratic traditions of the *folk moot* had been suppressed by prince and empire.

The referendum was used in the late Middle Ages in the cantons that had no *Landsgemeinde*, notably in Bern. During the wave of absolutism that swept continental Europe in the 17th and 18th centuries, the referendum disappeared and was replaced by oligarchic government. The *Landsgemeinde* survived, however, in a number of Swiss towns and cantons. Jean-Jacques Rousseau, who lived in Geneva until he was 16, was impressed by the working of the *Landsgemeinde* and was familiar with the referendum tradition. It was his Swiss background that led him in his *Du contrat social* to contend that all laws ought to be voted on by universal male suffrage, and that no law that had not received this direct sanction ought to be binding.¹⁴ Rousseau's writings had, of course, a strong influence on the leaders of the French Revolution. The first great instrument they put forward — the Declaration of the Rights of Man and of the Citizen — guaranteed to the citizen the right of personal participation in the framing of laws. This provision was proposed by

the Bishop of Autun¹⁵ (better known as the statesman Talleyrand). As it was never debated, we do not know precisely what it was intended to guarantee. What is clear, however, is that interest in direct popular participation in law making was growing, not least in the revolutionary constitutional committee, the members of which included Condorcet and Thomas Paine. On this body's recommendation, the *Convention nationale* in 1793 wrote the principle of the citizen-initiated referendum into the constitution adopted in that year. Although it was put to the people and ratified by them in August 1793, this constitution never came into operation. Abortive though it was, the French constitution of 1793, among its other effects, did offer an example that motivated the Swiss to revive the referendum principle in their own country.

After 1830 the referendum became a regular and permanent element in Swiss government, initially at the canton level. The first federal constitution in 1848 prescribed a compulsory referendum only in the case of a total revision of the constitution. At the instance of the Radical Party, the 1874 revised constitution in article 89 added to this the right of 30 000 citizens or eight cantons to require a referendum on any act of parliament, at any time within the 90 days following publication of the statute.¹⁶ In 1921 this right was extended to include international treaties intended to endure indefinitely or for a period of 15 years or more. The Swiss provisions are reproduced in Appendix A.

North America and post-Versailles Europe

A parallel development was taking place in the United States. During the colonial period, the 'town meeting' as constituted in New England, which spread to many other parts of the American colonies, was the local example of direct democracy. But its adaptation to the problems of larger populations through the device of the referendum had to wait until after the Declaration of Independence, when Massachusetts in 1778 became the first of the newly independent colonies to submit its proposed constitution to the people. Other states followed, with the result that today only Delaware does not submit constitutional amendments to the judgment of the voters.

The idea of a referendum for ordinary legislation did not emerge until much later. The democratic theory of James Madison was for long the dominant influence on American political thinking, and it favoured legislation by representative bodies that would, according to the theory, filter and refine popular opinions and aspirations through the presumed experience and expertise of the elected representatives. But widespread

control by powerful pressure groups and political party machines led to disillusionment with this model. Later in the 19th century the political coalition known as the Progressive Reform Movement, which brought together Democrats such as Woodrow Wilson and Republicans such as Theodore Roosevelt, put forward a number of remedies for the then perceived defects of American government. The Progressives advocated the initiative, the referendum and the recall at both the state and federal levels, as well as other measures such as women's suffrage. In their campaign for direct legislation they were joined by the American Federation of Labor, especially after the publication of a popular book on the subject by a New York trade unionist, James W. Sullivan, in 1892. Their arguments found support in a number of states, notably in California, where the legislature and government of the time were seen to be controlled by a monopoly pressure group identified with the Southern Pacific Railroad. According to the Progressives, the initiative, the referendum and the recall would neutralize the power of political parties and special interest groups, curtail party machine corruption, provide a vehicle for civic education on major policy issues, create pressure on legislatures to introduce progressive legislative reforms, and when they failed to act would allow the people to bypass representative political institutions altogether.¹⁷

The Progressives' case rested on different grounds from those that had supported the successful case in Switzerland. The Swiss adopted direct legislation mainly for reasons of principle, as an expression of the ideal of popular sovereignty. There had been few complaints against the nation's legislatures.¹⁸ In America the case for reform rested more on the need to combat specific shortcomings in the legislative process.

These arguments met strong opposition, however, based largely on fears of 'mobocracy'. At this time there was little experience with the referendum outside Switzerland, while the initiative for purely legislative purposes existed only at the canton level even in that country. In reply to these objections, the Progressives fell back on speculation from general democratic principles.¹⁹

The first state to take the step of adopting these reforms was South Dakota in 1898. Their introduction was greeted with prophecies of disaster from conservatives and ultraconservatives,²⁰ but between 1898 and 1918 a total of 17 American states adopted the direct initiative in response to popular pressures.²¹ California adopted direct legislation in 1911; the California constitutional provisions are reproduced in Appendix B. Between 1918 and 1958 no state added the initiative and

referendum, but after 1958 the spread of these institutions resumed and they are now more popular than ever.²²

The Canadian province of Saskatchewan passed legislation establishing the initiative and the referendum in 1913, but immediately repealed it in the following session. Manitoba also passed an Initiative and Referendum Act in 1916, but it was struck down in a judicial appeal to the Privy Council in London. The province of Alberta's Direct Legislation Act 1913 came before the Privy Council three years later; this time, the Judicial Committee made a point of saying that it was minded to find the legislation valid (though its validity was not directly under challenge in the case before it). British Columbia's Act to Provide for the Initiation and Approval of Legislation was enacted in 1919 but was never proclaimed, allegedly because of doubts over its validity. It remains on the province's statute book, however, and could be revived at any time by proclamation. But there would be little point in this because its extremely onerous signature requirements (25 per cent of voters in 75 per cent of electorates) would make it unworkable. Direct legislation has been extensively used at the local level in Canada, however.²³

The constitutions of Weimar Germany and of Austria also adopted the two innovations. Information about their operation in these two nations is scarce, but available material on the Weimar republic suggests that, especially at the state level, they were among the more successful institutions of that ill-starred polity.²⁴ Austria's direct legislation system has emerged from oblivion in recent years, as we have seen. Ireland's Sinn Fein was in favour of the initiative and the referendum and they were incorporated in the constitution of the Irish Free State in 1922. They were later removed at the instance of Eamon de Valera, who considered them to be dangerous in circumstances where the basic institutions of the state and parliament itself were violently rejected by a considerable minority of the population.²⁵ Under Article 27 of the present Irish constitution, however, it is possible for a majority in the senate and one-third of the members of the lower house to require a bill awaiting the president's assent to be submitted to a binding referendum. This system is similar to the one existing in Denmark.

British Stirrings

Although Britain held out until the 1970s against the principle of direct legislation at the national level, it did on several earlier occasions this century give serious consideration to it. In 1910, the possibility of

adopting a permanent referendum mechanism as a means of resolving deadlocks between the House of Commons and the House of Lords was an issue in a general election. The election resulted in a stalemate between the Liberal government and the Conservative opposition. Nevertheless, the Conservatives proceeded to introduce a Bill that would have required the holding of a referendum when the House of Lords rejected a bill passed by the Commons, or failed to pass it within 40 days after receiving it from the Commons, or made amendments unacceptable to the House of Commons. The matter would go to the ballot on the demand of either house of parliament. Further, a bill that had been passed by both houses could be put to a referendum if 200 members of the House of Commons signed a petition — a mechanism somewhat similar to the one that today operates in Denmark.

The Bill was introduced by Lord Balfour and had the support of constitutional experts such as A. V. Dicey and Sir William Anson, as well as political figures such as Stanley Baldwin, Joseph Chamberlain and Bonar Law. It was defeated on party lines.

In 1911 the Conservative opposition in the House of Commons put forward a further proposal by way of an amendment to the Liberal government's Parliament Bill. This would have made a referendum compulsory in the case of any statute effecting any one of a number of specified major constitutional changes. It was defeated in the same way. In 1913 the Liberal government did make provision for local referendums in Scotland on the sale of liquor, but the idea of a national referendum was losing ground. At the end of World War I a Conference on the Reform of the Second Chamber, presided over by Lord Bryce, considered the use of the referendum for adjusting differences between the two houses. A key reason for its rejection of the idea was that once introduced, the referendum 'could not be confined to the cases for which it was in this instance proposed'.²⁶ In other words, if the people were given a direct say in one class of case, they might want a say in other cases too.

The referendum reappeared in 1930, but this time as a solution to a particular controversial issue, not as a proposal for a permanent mechanism of popular legislation. It was proposed in connection with the suggested scheme for tariff reform and Empire preference. This change in tariff policy involved the question of taxes on food, which represented such a departure from the settled policy of free imports as to rank almost as a constitutional change. Ramsay MacDonald's Labour Government was not in favour of a referendum, and in due course the

debate on Empire preference moved into other channels, in which a tax on foreign food was not the central issue.

Legislation was passed in 1933 that consolidated the tradition of holding local referendums in certain cases when local government authorities were seeking private legislation, but no further attention was given to the idea of a national referendum.

Until the Common Market referendum proposal was put forward in 1975, a national referendum was suggested on only one other occasion. This was in 1945, when Winston Churchill suggested a referendum to prolong the life of the existing wartime coalition government until Japan was defeated. This proposal made no headway either, again because of the opposition of the Labour Party which, unlike its Australian counterpart, had been cool to the referendum idea from its earliest days.

Subsequently, however, it was a Labour government that held a referendum on the Common Market. This, like the other British referendums of the 1970s on regional government in Northern Ireland, Scotland and Wales, was a purely *ad hoc* affair. But now the radical wing of the Labour Party under Mr Tony Wedgewood Benn began to argue for direct legislation on a more regular basis and on a wider variety of issues, such as those that are normally dealt with by private members' bills. Mr Benn also looked forward to the day when everyone could take part in a perpetual electronic referendum by pushing buttons on their television sets, a development from the viewer-response television systems operating in Hawaii and in Columbus, Ohio.²⁷ Since then a low-key debate has continued,²⁸ but nothing further has been done either with this or with his more conventional suggestion.

Australia Hesitates and Is Lost

Australia at the turn of the century was a noted innovator in the practical application of democratic principles. It must have seemed fertile ground for the adoption of the initiative and referendum. Its people had enjoyed universal manhood suffrage well before those of Great Britain or of many parts of the United States. It had been (after Wyoming and New Zealand) a pioneer of the vote for women. The secret ballot was first used in this country and is still so closely identified with it that, even today, Americans refer to it as 'the Australian ballot'. The Constitution of the new Commonwealth of Australia was democratic in nature and origin. It emerged from public debate among the people and in their legislatures and was finally approved by the people in referendums held

Initiative and Referendum

throughout Australia. Its opening words, 'Whereas the people [of the several states] have agreed to unite', were therefore no mere rhetorical flourish. The Constitution could be amended only with the concurrence of the Australian people, and a novel procedure in s.57 allowed a deadlock between the two houses of parliament to be resolved by the electorate. This provision in particular emphasized the extent of the democratic quality of the Constitution: the people as the ultimate source of power were to resolve any parliamentary impasse. Professor W. Harrison Moore was on firm ground when he wrote in 1902 that 'The predominant feature of the Australian Constitution is the prevalence of the democratic principle, in its most modern guise'.²⁹ Queensland, and later New South Wales, Victoria and South Australia, adopted variations of this procedure for their state constitutions.

The Australian Labor Party, from its earliest days in the 1890s, adopted the principle of initiative and referendum (and later the recall) not merely as policy, but as one of the primary objectives of the party, both nationally and in the states. The constitutional initiative even found a place in the policy.³⁰ The party was supported in its initiative and referendum policy by a range of other individuals or groups, including the old Nationalist Party,³¹ the Liberal federal Attorney-General P.M. Glynn and *The Age* newspaper.³²

After some 25 years of campaigning on this issue, the Labor Party in 1915 introduced a Popular Initiative and Referendum Bill in Queensland, which at the time had a Labor government. This measure was initially blocked in the opposition-controlled upper house.³³ Even so, the opposition indicated that it would support a constitutional amendment providing for the legislative petition referendum, though it would not support the principle of the initiative.³⁴

The Bill was introduced a total of four times and was heavily amended in ways unacceptable to the government. It was not effectively defeated, though. Pursuant to the Parliamentary Bills Referendum Act 1908, the government could have resolved the deadlock between the two houses by submitting the Bill to the electors, who might well have approved it. Instead, when the Bill was introduced for the last time in 1919, it was not proceeded with at all.³⁵ The incoming Labor Premier, Edward Theodore, did not share the belief of his predecessor, T.J. Ryan, that the people should have their own power to make laws. Paradoxically, it was Theodore, the former mineworker and union official, who held the people in low esteem as being 'fickle and irresponsible',³⁶ whereas Ryan, the middle-class lawyer, trusted them.

Initiative and referendum were introduced into the federal platform of the Australian Labor Party in 1908, to be joined in 1912 by the recall.³⁷ A motion by W.M. Hughes for leave to introduce an Initiative and Referendum Bill in the House of Representatives was passed in November 1914.³⁸ It would appear that at some stage a motion was also passed unanimously adopting the principle of the initiative and referendum.³⁹ But interest in these devices waned sharply after World War I. The war had helped to weld the states together and in that respect had created a sense of nationhood, but it had also revitalized the British connexion and had stirred up a wave of anglophilia and of identification with British institutions; this was again boosted by the 1939–45 war and did not peak until the early 1960s. For this reason a number of historians consider that Australia was less independent of British ideas for most of the 20th century than it had been in the 19th.⁴⁰

Now of course Great Britain has made unrivalled contributions to liberal democratic theory and practice. But it has been more inclined towards liberalism than democracy, more creative in relation to the rule of law aspect than the popular participation aspect. In the extension of the franchise it lagged behind France, the United States, Australia and New Zealand. At a time when the secret ballot had become normal in Australia, it was still being denounced as 'un-English' in Britain.⁴¹ Britain has favoured representative institutions rather than direct democracy and, as we have seen, had never held a national referendum until 1975. This poll was highly successful, but it had been bitterly opposed on both sides of parliament. Obviously, the post-war Australian deference towards English institutions could not help the cause of the popular initiative and the referendum.

A core of Labor members of the House of Representatives led by Dr W.R.N. Maloney continued the struggle for direct legislation for many years, with the support of a great many Labor voters outside parliament.⁴² But an increasing unwillingness of politicians to share power with the people, coupled perhaps with the habits of regimentation and stifling of dissent acquired during the two World Wars, led the Labor Party to lose interest in this objective. Initiative, referendum and recall were removed from the party platform at the party's Perth Conference of 1963, on the motion of Mr D.A. Dunstan. The main reason given was that the people could not be expected to understand the legislation introduced by the party and might, for that and other reasons, vote against it.⁴³

Hostile Philosophical Influences

This loss of interest in direct legislation was accentuated by two streams of thought in constitutional and legal philosophy (in addition to the general philosophical developments discussed in Chapter 7). One of these was the doctrine of legal positivism. This theory was, and still is, the dominant legal and philosophical answer to the question 'What is Law?' in the Anglo-Australian universities and the legal profession. The thinkers who are described as legal positivists are a long line of philosophers extending from Hobbes to Austin to Kelsen and beyond who have seen the essence of law as being a pyramidal structure of state power. In its more modern formulations, notably that of H.L.A. Hart, the pyramid of power is replaced by a pyramid of authority, and law is not seen merely as something imposed by force. But today's middle-ranking to senior academics, practitioners, politicians and judges were brought up on the cruder, pre-Hart version, which sees law as a command and pays little attention to the social interaction necessary to create and maintain a legal system. The positivists' preoccupation with law as an official, one-way command impulse has tended to crowd out scholarly interest in the sociocultural conditions and processes from which the impulse derives its energy. They have enthroned a formalistic, elitist and power-oriented view of law, which fails to see that law is an outgrowth of popular consciousness and a dynamic process of transaction and conflict among people, groups and institutions.

The adherents of this school have been almost entirely successful in displacing what is known as the 'democratic' theory of law,⁴⁴ which is in some aspects the antithesis of positivism. For the positivist, if law is not imposed, if necessary against the will of the citizen, it is not law at all but some other kind of norm that lacks the backing of superior authority or force. In the democratic tradition, the position is reversed. If law is imposed against the will of the people, in contravention of their mores and sense of justice, it is not law at all but power, force and suppression.⁴⁵ However this view of law has sunk into juristic oblivion.

This predisposition towards seeing law making as a process whereby commands are issued by a ruling body to a separate and subordinate population has been greatly strengthened by uncritical acceptance of A.V. Dicey's theory of absolute parliamentary sovereignty. According to this theory, the British parliament was omnipotent. It could do anything, and there was no person or body in

the kingdom with power to set its Acts aside. No matter that the purported statute flew in the face of customs and moral values of the people. No matter that parliament could therefore validly pass retroactive criminal statutes, decree that its critics be boiled in oil, or (to use Leslie Stephen's example) command that all blue-eyed babies be killed.

Earlier English legal writers had acknowledged that parliament possessed sweeping powers to alter the common law and make new rules with the force of law, but none had been prepared to say that there were no higher principles of law or constitutional practice by which parliament itself was bound. But Dicey rejected all the qualifications and reservations put forward by earlier writers and propounded a theory of legally unlimited sovereignty. The only limits on this power were practical, not constitutional: an internal limit constituted by the fact, as he saw it, that members of parliament were not usually men of outrageous views, and an external limit in the possibility that the public would not obey outrageous statutes. In positivist fashion he emphasized, however, that these practical limits would have no effect on the legal validity of even the most extreme legislation. He seemed unwilling to face the absolutist consequences of the doctrine he was expounding: 'If the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament, the dogma is no better than a legal fiction, and certainly it is not worth the stress here laid upon it'.⁴⁶ Yet he spelled out the legal implications in the doctrine as if the legal fiction were a legal reality.⁴⁷

Incredible though it may seem, Dicey's absolutist theory was not, and still is not, supported by any binding legal authority whatever. There is not a single constitutional instrument, not a single binding decision of an authoritative court to support this sweeping and dangerous theory. There have been numerous passing references to it in judicial *obiter dicta*, but this can hardly be enough foundation for a theory that is supposed to sweep all other legal and constitutional doctrines and safeguards before it.⁴⁸ Nevertheless, it has been taught in the law schools as unchallengeable dogma for 100 years, absorbed by law students and later carried by them to the bench or into parliament. As Professor Wade puts it, British (and Commonwealth) lawyers are 'Brainwashed in their professional infancy ... by the dogma of legislative sovereignty'.⁴⁹

There is no necessary conflict or inconsistency between direct legislation and the theories of legal positivism or parliamentary sovereignty. A.V. Dicey himself, when the ink was hardly dry on his

treatise *The Law of the Constitution*, embarked on what was to be a life-long campaign for the introduction of the constitutional and legislative referendum in Britain. 'The latent sovereignty of Parliament,' he urged, 'is in truth an argument, not against, but in favour of the Referendum'.⁵⁰ (This issue is further discussed below.) Similarly, there is no logical obstacle to modern legal positivism's accommodating the notion that the people are sovereign. The problem is that most graduating law students carry away with them only crude and oversimplified versions of the positivism and parliamentary supremacy theories. These harden into a prejudice that all law must be something imposed on the people from above and forced downwards, rather than the crystallization of values and opinions that move from the grass roots upwards. This mind-set is particularly pronounced among politicians, who have a vested interest in constitutional theories that leave their power unfettered.

The recent revival of interest in the initiative and referendum in Australia is the result of developments similar to those that motivated the Progressive movement in the late 19th century. The main goals of the Progressives were to forge new constitutional institutions that would combat the corruption that existed in state legislatures, weaken the grip of the party machines, and help to educate the population in civic responsibility. One of the opposition arguments against the 1917 Bill in Queensland was that corruption on the scale seen in the American state legislatures in the 19th century was unknown in Australia.⁵¹ That may well have been true. It is probably still true that the actual bribery of individual members of parliament with a view to influencing their vote on legislative measures is quite rare. One reason for this may be public morality, but another is surely that, given the iron grip of party discipline in Australian legislatures, it would serve no useful purpose to corrupt an individual member in relation to a legislative matter. Corruption and blackmail of entire political parties is common, however, and becoming increasingly so. Promises of campaign funds, or promises of support or neutrality at elections are regularly used to procure legislation favouring special interests, such as occupational licensing statutes that grant monopoly privileges to particular businesses or professions. In this sense the sale of monopolies seems to be at least as widespread now as it was in the worst days of the Tudors and Stuarts. Conversely, threats to campaign against the government at a forthcoming election are used to blackmail incumbent governments for similar ends.

The Progressives' goal of weakening the undue power of political parties has even greater validity in contemporary Australia. An educated electorate finds it increasingly frustrating to be given a choice only between two packages of personalities and policies when it might prefer to elect certain individuals but reject some of their policies. It is of course possible to vote for one of the smaller parties, but this in practice means wasting one's vote. The spectacle of party conferences at which unelected delegates purport to tell the elected government which policies it may or may not implement also shows a disregard for democratic principles and contempt for the voters.⁵² It is hardly surprising, therefore, that the renewed advocacy of the initiative and referendum has apparently met with unanimous approval from all voters who have had it brought to their attention. On the other hand, it is also unsurprising that most politicians are at best lukewarm towards the proposal, though to date only Senator Gareth Evans has openly attacked it.

FOOTNOTES CHAPTER 1

- 1 P. Bachrach, *The Theory of Democratic Elitism*, Boston 1967, vii.
- 2 id., ii.
- 3 e.g. 'There is a natural aristocracy among men. The grounds of this are virtues and talents. ...There is also an artificial aristocracy, founded on wealth and birth, without either virtue or talents'; quoted in W.K. Bettorff, *Thomas Jefferson*, Boston 1979, 121.
- 4 D. Lebedoff, *The New Elite*, New York 1981, xiii.
- 5 J. Naisbitt, *Megatrends: Ten New Directions Transforming Our Lives*, New York 1982, 162.
- 6 id., 5.
- 7 id., 164.
- 8 D. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States*, Baltimore 1981, 1.
- 9 D. Butler, A. Ranney eds, *Referendums: A Comparative Study of Practice and Theory*, Washington 1978, 75; 2 Initiative News Report No.11, 7(1981).
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- 13 *Proceedings of the Australian Constitutional Convention, Brisbane 29 July-1 August 1985*, Brisbane 1986, 286-7.
- 14 W.E.H. Lecky, *Democracy and Liberty*, New Edn London 1899, Vol.1, 277.
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- 16 L. Tallian, *Direct Democracy*, Los Angeles 1977, Ch.2; Saladin, op. cit. supra, 332-3.
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- 21 H. Graham, 'The direct initiative process' (1979) 27 *UCLA L. Rev.* 433, 436.
- 22 id., 438; J. Snyder, 'The proposed national initiative amendment' (1981) 18 *Harv. J. on Legislation* 429, 429-30.
- 23 J. Boyer, *Lawmaking by the People: Referendums and Plebiscites in Canada*, Toronto 1982, xviii, 1.
- 24 R. Thoma, 'The referendum in Germany' (1928) 10 *J. of Comparative Legislation and International Law*, 3rd series, 55.
- 25 M. Manning, 'Ireland' in Butler and Ranney, op. cit. supra, 193-7.
- 26 C. Emden, *The People and the Constitution*, 2nd edn. Oxford 1956, 302. The source for the rest of this outline of the British referendum movement is P. Goodhart, *Referendum*, London 1971, Ch.1.
- 27 Magleby, op. cit. supra, 24.
- 28 e.g. *The Economist*, March 22, 1986, 16.
- 29 W.H. Moore, *The Constitution of the Commonwealth of Australia*, London 1902, 327.
- 30 L. Crisp, *The Australian Federal Labour Party 1901-1951*, Sydney 1978, 207-13, 241, 261.
- 31 92 *House of Representatives Debates*, 15 July 1920, 2279.
- 32 (1916-17) 123 *Qld. Parliamentary Debates (L.A.)* 367.
- 33 A.C.V. Melbourne, *Early Constitutional Development in Australia*, St. Lucia 1963, 483-86; C. Bernays, *Queensland Politics During Sixty (1859-1919) Years*, Brisbane c.1919, 184-7, 275-6.
- 34 (1916-17) 123 *Qld. Parliamentary Debates (L.C.)* 686.
- 35 Melbourne, op. cit. supra, 486.
- 36 D. Murphy, R. Joyce, *Queensland Political Portraits 1859-1952*, St. Lucia 1978, 295.
- 37 Crisp, op. cit. supra.
- 38 75 *House of Representatives Debates*, 12 November 1914, 599.
- 39 92 *House of Representatives Debates*, 15 July 1920, 2779.
- But Dr W.R.N. Maloney M.H.R. may here have been referring only to the motion referred to in note 38 above.

- 40 To date this view has been expressed by historians orally rather than in print, being still a rather tentative position. But indications of it can be seen in G. Dutton, *Snow on the Saltbush*, Ringwood 1984, 10-12, and the pre-World War I attitudes are sketched in R. Joyce, *Samuel Walker Griffith*, St. Lucia 1984, 141, 214.
- 41 W. McMinn, *A Constitutional History of Australia*, Melbourne 1979, 63.
- 42 Crisp, op. cit. supra, 209.
- 43 Australian Labor Party, *Official Report of the Proceedings of the 25th Commonwealth Conference*, Perth, July 1963, 29ff, 90-2.
- 44 V. Aubert, 'On methods of legal influence', in *The Imposition of Law*, S. Burman, B. Harrell-Bond eds, New York 1979, 27, 28. I have outlined the thematic thrust, and the eclipse, of this school in *The Rule of Law: Foundation of Constitutional Democracy*, forthcoming, Ch. XIV.
- 45 Aubert, loc. cit. supra.
- 46 A.V. Dicey, *The Law of the Constitution*, 10th edn London 1969, 71.
- 47 The constitutional authority C.H. McIlwain questioned the value of a doctrine which, even according to its supporters, had nothing to do with reality, especially coming from the analytical school, which had 'always prided itself on keeping close to the ground, on avoiding the metaphysical speculations of which others have been guilty': McIlwain, *The High Court of Parliament and its Supremacy*, New Haven 1910, 382-3.
- 48 See generally Walker, 'Dicey's dubious dogma of parliamentary sovereignty' (1985) 59 *A.L.J.* 276.
- 49 H.W.R. Wade, *Constitutional Fundamentals*, London 1980, 68. There are some signs that the courts may now be taking a more critical view of Diceyan orthodoxy: see *Building Construction Employees and Builders' Labourers' Federation v. Minister for Industrial Relations*, N.S.W. Court of Appeal 31 October 1986 per Street C.J. and Priestley J. Glass J. reserved the point.
- 50 A.V. Dicey, 'The referendum and its critics' (1910) 212 *Quarterly Rev.* 538, 555.
- 51 (1916-17) 123 *Qld. Parliamentary Debates* 372-3.
- 52 In 1984 the Australian Labor Party, which held power in Canberra and in four of the six states, numbered only 54 000 members out of a population of 15 million.

Chapter 2

The Case for the Initiative and the Referendum

The above brief outline of the various kinds of initiative and referendum gives us a basis from which to consider the general arguments for or against them, together with some other general issues which they raise. Procedural details can be left until later, because some of the objections to the initiative and referendum principle might be met by adopting particular procedures or safeguards. Further, if we can form a preliminary attitude one way or the other on the main issue, the significance of particular procedures should become clearer.

First let us consider the arguments for the initiative and referendum.

I. THE SHORTCOMINGS OF REPRESENTATIVE DEMOCRACY TODAY

Many of the arguments for direct legislation embody the view that the representative principle, which is the basis for the present parliamentary monopoly on legislation, is inadequate or has broken down.

Representation—Theories and Reality

The familiar representative model of government was developed in the 19th and late 18th centuries under the influence of philosophers such as Rousseau, Paine, Edmund Burke, J.S. Mill and James Madison. It has

much so that when people think of democracy they tend to think of the representative form rather than the direct form. Yet, strange to say, there is not and never has been any generally accepted definition of the concept of representation for these purposes. There have in fact been two rival theories, one favoured by the voters and the other privately preferred by elected representatives.

The debate between the two views could be summarized in this way: Should (must) a representative do what his constituents want, and be bound by mandates and instructions from them; or should (must) he be free to act as seems best to him (or the party) in pursuit of their best interests?¹ This mandate-independence controversy is a variation of the long-standing debate about wishes as opposed to welfare.

The mandate view is that the representative must do what the voters would do if they were acting themselves. He may exercise some discretion, but must consult his constituents before doing anything new or controversial, and then do as they wish or else resign his post.² A more moderate version of this view might be that the representative may act as he thinks the voters would want, unless or until he receives instructions from them to the contrary, and then he must obey.³ Campaign promises are regarded as binding on him unless totally unforeseeable factors intervene.

Most voters would favour this view of representation. Politicians are well aware of this and tailor their public utterances to the mandate view. Maiden speeches in particular, as the political scientist Dean Jaensch observes, 'are full of protestations of undying fealty to the people back home, and a total commitment to serving their interests'.⁴

The preference of most politicians, however, is for the independence theory, as one can see from their more private utterances.⁵ In its pure form the independence view would deny the constituents the right even to exact campaign promises; once a representative is elected he must be completely free to use his own judgment.⁶

The independence view of representation is most closely associated with the writings of Burke, Mill and Madison. They believed that an elected representative, while sensitive to the opinions and interests of his constituents, would alleviate the mischiefs of faction and the risks of tyranny of the majority by reinterpreting those opinions and interests in the light of his own superior education, expertise and breadth of vision. Madison wrote that the effect of representation is 'to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations'.⁷ The representative, after weighing and evaluating the intensity and soundness of the views held in his constituency, could speak and act on behalf of the voters generally, and across the whole spectrum of their interests.

Never has the case for the representative principle been put more lucidly or effectively than by Edmund Burke in his famous 1774 address to his new constituents, the electors of Bristol. 'Parliament is not a congress of ambassadors from different and hostile interests', he urged. 'You chuse a member indeed; but when you have chosen him, he is not a member for Bristol, but he is a member of parliament. ...Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion'.⁸

This speech has ever since provided a formidable argument for representatives and parties who think it demeaning to give too much weight to the people's preferences. Unfortunately, it is usually forgotten that the electors of Bristol were unimpressed by this theory. Burke did not deliver his celebrated speech until after he was safely elected; when the next election drew near and Burke returned to Bristol, he faced such criticism from the voters for disregarding their views on major issues that he had to withdraw from the contest and give up his seat.⁹

Central to the idealized independence model is the principle that legislators are free to vote according to their own perception of the long-term interests of the community.¹⁰ At the same time, however, the representative principle is supposed to ensure that no divergence between the opinions of the representative and those of the elector could arise, or if it did, it would soon disappear. The permanent wishes of the representatives would not in the long run differ from the wishes of the people.¹¹

It must be obvious that the reality of Anglo-Australian representative government today is far from that ideal, let alone from the mandate view. This is due mainly to the undue strength and rigidity of the party system. The candidates who are to contest the election are chosen not by the electors, as under the American system of primaries, but by the parties. They are selected not primarily for their individual wisdom but for their ability to take orders and to sell the party platform to the electorate. And above all, they have no freedom whatever to vote according to their own perception of long-term community interests. As Professor C.J. Hughes of the University of Leicester, speaking of the British parliament, puts it, 'the House of Commons no longer behaves like the deliberative body it was in the 19th century. The House today is a collection of two sets of whipped dogs who follow their masters'.¹²

Yet in Australia the position is much worse in this respect than in Britain, or for that matter in Canada or New Zealand. British members of parliament are under a degree of enforced cohesion, but they can and do abstain from voting on divisions, and even cross the floor, without facing severe penalties. This is not possible in Australia. The Labor Party requires all its parliamentary representatives to take a pledge acknowledging that they are the delegates of the party and promising to

be bound by the platform and rules of the party and decisions of the party conference, and to vote according to the majority decision of the caucus of the parliamentary party. They face expulsion from the party if they break any aspect of the pledge.¹³ Liberal or National Party members are not required to take a formal pledge, but they face strong pressure to conform and failure to do so will jeopardize their future within the party. Dr Jaensch believes that the degree of enforced cohesion makes Australian parliaments unique and has smothered many of the functions of parliament and parliamentarians.¹⁴ Parliamentary debate on legislation has become an empty ritual, as the outcome is a foregone conclusion and it is well known that members are often forced to speak in support of legislation they personally oppose.¹⁵

In maintaining this Prussian discipline, the parties are able to make use of the rules, forms and procedures in parliamentary standing orders that were prepared before the existence of parties in their modern form.¹⁶ The procedures known as the gag and the guillotine have destroyed the free and rational debate that was supposed to be the soul of the representative system. With it passed not only the liberty of voting, but also the function of debate between parties. This became observable as the power of party increased during the 19th century. The moderating influence exercised by statesmen such as Peel and Palmerston, their capacity for conciliating the support of sensible members of all parties and putting a brake on sudden or imprudent legislation, likewise disappeared.¹⁷ Some party discipline is essential in the Westminster constitutional system if stable government is to be possible. The problem is that it has been taken to the extreme where parliament is redundant, an empty shell of a legislature.¹⁸

Information Feedback

Representative assemblies, moreover, could be representative only if their members knew the wishes of their constituents. Ideally, there would be full and free communication in both directions, but in practice there is apparently little communication and so much as does exist is misleading. In the days when electorates might number only 300 voters, it was possible to speak of the member representing that part of the population that was enfranchised. But in Australia today, House of Representatives electorates average over 75 000 voters, so that real communication between the member and any significant part of the electorate is impracticable. In any case, the persons who actually do communicate with members of parliament appear to be an unrepresentative sample. The 'upper middle class' may well be the largest single group of correspondents, though it could hardly be typical of the electorate. In Australia especially, membership of organized political groups (other than trade unions) is heavily concentrated in those

strata.¹⁹ Consequently, different viewpoints and perspectives may never reach the representative.²⁰

Besides, the strength of party discipline in Australia makes communicating with any individual backbencher an enterprise of dubious value. Representations may be effective if the voter is seeking to influence an administrative decision in an individual case, but will carry little or no weight in relation to legislative policy, which is made by the party. It is possible for voters to put together a petition for presentation to parliament, but we saw in the case of the 10 000 signatures requesting consideration of the initiative and referendum proposal that even the largest petitions are ignored. They are ignored not only in the sense that they are not acted upon, but also in the sense that they are not even listened to. The list of petitions received by the Clerk of the House is read, but the full wording of the petition is not read out. The Speaker is often forced to call for order and for attention from members, as there is no sign that anyone is concerned with the process. 'Given the general attitude to petitions in the Parliament', concludes Dr Jaensch, 'it is a wonder that people still bother with the effort of organising them'.²¹

Professor A.N. Allott sees the core of the problem in Westminster constitutions as being the nexus between legislator and people, the feedback mechanism represented by the people's right to elect or refuse to re-elect its law-makers from time to time:

if we look only at the modern British constitution, which after all has been evolved by the law-makers rather than by those subject to them, one might almost say that it has been expressly designed to reduce any such feedback to a minimum. First, the feedback is generalized and diffuse; it is not particular to any given law. If the people do not like a new law, there is no immediate comeback for them, other than a refusal to observe it. Secondly, the feedback is delayed: unless there is a revulsion of feeling in Parliament, which leads those who normally support the government of the day to withdraw that support [not a possibility in Australia, as we have seen], then the unpopular law-maker with his unpopular law will not be turned out of office until the statutory life of Parliament is ended. Even then, the law-maker will be willing to take his chance that by then the objection will have been forgotten, or that the electorate may be willing to waive it in the interest of securing some other promised good.²²

The Decline of Debate

Contemplating the Commonwealth of Australia Constitution, Professor G.S. Reid (now Governor of Western Australia) sees a number of different influences combining to undermine the intended character of the representative Commonwealth parliament as embodied in s.1 of the constitution. This section gives the elected parliament its power to legislate, which is its sole legal sanction over the executive government. He argues that s.1 adopts the populist ideal of 'government of the people, by the people, for the people'²³ (and the very fact that those words now sound mawkish is itself suggestive of what has happened).

Professor Reid believes this democratic ideal is being sapped of its vitality and 'subordinated to the monarchical components of earlier autocratic regimes which lingered in the constitutional mix of 1901. Today these older components manifest themselves in a vastly expanded government both numerically and in coercive power'.²⁴ The executive has used the gag and guillotine procedures to forestall debate and has resorted to the 'floodgate technique' to induce legislation by exhaustion.²⁵ Over 99 per cent of proposed laws are initiated by ministers of state; only eight acts passed since federation have been initiated by private members. Taxation measures may now only be proposed by ministers; and the executive government has 'brought to Australia Cambridge-based preconceptions that the science of economics [is] far too complex and important for elected politicians to worry about'.²⁶

Only a small part of the legislation passed by federal parliament is dealt with in committee — that is, in detail, clause by clause. In 1924, 20 per cent of proposed laws were not examined in detail, but by 1978 this proportion had risen to 78 per cent. And whereas in 1924 committee debates were marked by lively participation from backbench members on both sides of both houses, by 1978 ordinary members had almost ceased even to propose amendments to bills. Professor Reid concludes that this baleful trend has spread a pall of futility over the federal parliament and a pall of passivity across Australian politics. It foreshadows even greater dangers in the future: 'My thesis is that if the Parliament, in practice, suppresses, or condones the suppression of, the populist ideal implicit in Section 1 of the Constitution, then it will, indirectly, suppress the populist element in every other theory of Parliament'.²⁷

Bipartisanship and Choice

Nor can one agree with Dicey's proposition that the wishes of parliament could not differ from those of the people in the long run. On the contrary, there are many instances of such divergences. They can

happen, for example, when both parties are agreed on a particular policy. This occurred in Great Britain in 1970, when Conservative, Labour and Liberal parties were all agreed that Britain should enter the European Common Market. This meant that there was no way in which a voter in the 1970 general election could cast a meaningful vote on this vitally important issue.²⁸ In Australia, both major party groups are seemingly agreed that there will be no legislation to reform the trade union movement by introducing more democracy into their proceedings, by requiring that they be bound by their agreements, or in any other significant respect. The motives are different: on one side is a lack of inclination, on the other a lack of courage. But the result is the same, and this notwithstanding that all opinion polls in recent years show the majority of people, including a majority of union members, to favour such reforms. Again, while probably a great many Australians approve the underlying policy of granting some tribal land rights to Aborigines, other aspects of land rights legislation, such as prohibitions on access and the grant of mineral rights, have been unpopular. The grant of mineral rights and entitlements to mining royalties in particular is a privilege not available to other citizens in respect of their own landholdings. Even minimal historical perspective or political foresight would have shown that this apparent creation of a privileged rentier class would generate divisions in society, and it has. But, both parties being agreed on the policy, there was no way for a voter to register an effective protest. Similarly, the New South Wales parliament legislated for Sunday opening of bars nine years after the same proposal had been rejected by voters in a referendum (for reasons mainly connected with drunken driving), by a majority of 2 to 1. There was nothing to suggest that public opinion had changed in the meantime. But both parties agreed to this deliberate overriding of popular opinion, presumably for the sake of the extra liquor license revenue.

A further source of agreement among parties contrary to popular opinion is the birth of single-issue politics. This new phenomenon means that tightly cohesive groups sharing an interest in only one issue (and whose position on that issue need not be but often is extreme) can exert disproportionate pressure on members of parliament by concentrating all their resources on campaigning against members in marginal seats. They can also resort to attracting media attention through demonstrations, violence and other incidents calculated to embarrass decision-makers, particularly those in government. Organizations such as Right to Life, feminists, anti-uranium groups and land rights activists have made effective use of some or all of these methods. Single-issue tactics, especially if coupled with sympathetic media coverage, can pressure governments into legislation with which the majority of the electorate does not agree.

Delegation of Policy Making

A trend of a different kind, but with similar effects, is for governments to delegate difficult areas of decision making to independent commissions or boards. This is done ostensibly with a view to removing the particular subject matter from the political arena. It may have that effect, but it may also cause policy to diverge from the opinions of the people. Indeed, the real reason for doing it is more likely to be that it will facilitate the adoption of policies that public opinion would oppose. For as Professor Roger Scott points out, delegating power to such bodies 'appeals to those who emphasize the virtues of professionalism and define accountability in terms of self-responsibility and peer group regulation and a code of ethics. In institutional terms, the preference is for bodies which insulate the provision of key services from political interference. Departmental arrangements are less attractive than public corporations'.²⁹ He illustrates this tendency by referring to the creation of education commissions: 'In the field of education, this line of approach would favour the setting up of autonomous commissions with membership drawn from the affected groups such as parents and teachers, educational administrators, trade unions and some token political representation'.³⁰

But transferring power to education commissions sharply reduces the ability of the people to influence, much less control, an area of vital public concern. Professor Scott quotes the evidence of another political scientist given before a parliamentary inquiry into the desirability of such a commission:

In opposing this and similar proposals, I wish to emphasise that this sort of scheme should be clearly recognised as a political rather than an educational proposal: it envisages the transfer of decision-making power from the Government and the Education Minister to another body. Now, despite the evident good intentions of the proponents of the plan, the scheme runs counter to the traditions of responsible government in a democratic society. At present, the Government makes important decisions on educational matters, and is answerable to Parliament and the people for those decisions. Such an independent (or nearly independent) body as an education commission as thus envisaged would be effectively beyond the power of the people to dismiss, and therefore beyond their power to influence in ways favoured by the community. Here we must recognise that issues concerning community values and priorities must inevitably arise in relation to education in a rapidly changing world. The political arena is the proper place

to resolve these matters: it is right and proper that our elected representatives should debate them in Parliament, in the media, at party meetings, at public meetings, and in any other forum where people engage in such discussion. Education is not, cannot be and should not be 'above politics'.³¹

Yet autonomous commissions continue to proliferate as recklessly as ever, removing more and more subjects from effective democratic control. We have commissions to define and guard the national heritage, to contemplate locust plagues, to make films, to manage airports and to enforce someone's version of human rights. A federal Law Reform Commission seeks ways of using legislation to reform the people. There is a Telecom commission to monopolize communications and a new Interstate Commission to interfere with domestic commerce. The Trade Practices Commission encourages market competition and a multitude of regulatory and marketing commissions prevent it.

Once created, such bodies generate internal and external vested interests in their own preservation. Students of regulation conclude that the only practicable time to abolish an agency is soon after it comes into existence.³² Thereafter, the commission becomes a pressure group in its own right which almost invariably gets the better of any dispute with popular opinion.³³ As a matter of practical politics, a representative assembly cannot enact a law abolishing such a body. But a popular initiative ballot might.

Scale, Distance and Isolation

The sheer size and complexity of modern units of government can also lead to long-term divergence between the opinions of the legislative assembly and those of the people. 'The weakening of representative practices', writes Professor Nevil Johnson, 'appears to be correlated positively with the size and complexity of contemporary units of government and the density of administrative organization employed'.³⁴ Other things being equal, in federal nations the representative principle seems to be more severely distorted in the federal legislatures than in the state parliaments. This is true even in compact states such as Switzerland, where people are more suspicious of the federal government in Bern than of their canton legislatures, but it is even more observably true in the countries such as Australia where long distances separate populated areas.

Matters are made even worse in Australia, where the legislature sits in an isolated, purpose-built capital and comes under the influence of a bureaucracy that has little contact with, or understanding of, the people in the states. In Canberra, bureaucrats representing the third generation of their families to be Canberra public servants are now moving into

positions of power and influence. And one cannot help but be struck by the attitudes of many of the bureaucrats and courtiers who surround the elected legislators in Canberra. They seem to see themselves as representatives of an occupying power charged with the task of pacifying an ignorant and rebellious populace. These elitist attitudes are not as widespread among the parliamentarians themselves, who after all must pay some attention to the people who elected them. But one must remember that all the policy advice and information that comes to members of parliament is filtered by a bureaucracy with political opinions and objectives of its own, which is able to discipline recalcitrant ministers and members by means of selective leaks, work bans and other overt or covert means.

The Rise of Political Elitism

The emergence of elitist political theories has helped this process. During most of the 19th century, progressive thought had reposed increasing confidence in the citizenry. In the United States, to a lesser extent in Britain, but perhaps to an even greater extent in Australia, democratic thought viewed the common man as inherently capable of good judgment and favourably disposed towards the extension of democracy and constitutional liberties. This view was congenial to reformers, who needed a philosophical basis on which to appeal to mass support as a means of overcoming the entrenched resistance of vested interests. But once the most popular changes in the reformist agenda had been accomplished, those who sought even more radical changes found they could no longer count on the support of the people. Thereupon they turned against the people and embraced the latest elitist theories of government that seemed to legitimate the idea of minority rule. One of the most influential of these theories, of course, was Marxism-Leninism, which among other things enabled the minority to chastise people's lack of revolutionary zeal as a manifestation of 'false consciousness'. Others favoured the more democratic theories of elitism such as those of Mosca and Pareto, who saw elite leadership as the only hope for the survival of democracy itself. Earlier contributors to this view of society were not completely clear on who the elite were to be, but members of the intellectual and academic classes such as Adolf Berle and C. Wright Mills soon stepped forward to propose themselves and their associates for the position.³⁵

The hold of elitist theories strengthened as a result of economic and social developments in the 1960s and after. Western economies had attained a level of prosperity sufficient to permit a rapid expansion in the number of jobs in the tertiary, quaternary and quinary sectors of the economy that were not directly productive. These positions involved communication, advocacy, research and analysis, and had to be filled

largely by the educated products of the universities. But increasingly, young people with above average intellectual attainments have been segregated from the rest of the population, especially from the tertiary education years onwards. This has tended to mean that they marry members of the same group and that subsequently their children are educated and segregated in the same way. When these people leave university, they are self-segregated, as they tend to work, live and associate only with one another. Their only contact with others is usually with people in subordinate or service roles. This emerging self-perpetuating class of people who believe themselves to be measurably more intelligent than anyone else has come to be known as the New Class or the New Elite.³⁶ In terms of law making, its most significant characteristic is that it no longer instinctively believes in majority rule, regarding the mass of the population as selfish, closed-minded, irrational and stupid.³⁷

We will be examining the theories of democracy and elitism more closely in Chapter 7. At this stage we will leave this topic, noting only the curious fact that the new elitist view of society is advanced with particular vehemence precisely in those countries where respect for the common man had traditionally been strongest, such as Australia and the United States. A recent Australian work purporting to deal with the politics of law reform illustrates this: it begins on page 1 with an approving outline of an array of pseudo-sociological works that portray the average Australian as a gross, besotted boor devoid of all worthwhile human qualities. The implication is that the reformer preparing legislative measures is fully justified in ignoring the customs and opinions of such a rabble. In this 295-page work there is only one sentence that allows that the opinions of the citizenry might have some relevance to law reform, viz. 'There is no way of knowing whether the public will readily accept the reform',³⁸ a proposition which itself is quite unfounded.

Conclusions

Thus, we see on the one hand that the representative principle (whether viewed in terms of mandate or of independence) has been perverted by a variety of institutional and other factors. The weakness of the feedback mechanism, the strength of party discipline, the decline of parliamentary debate, the size of modern electorates, governmental tampering with electoral boundaries, problems of physical distance in large countries such as Australia, the deliberate insulation of policy making from popular influence, the size and complexity of modern government, all have weakened the accountability of members of parliament to the electorate.

On the other hand, this development serves the interests of many politicians who, as Professor Johnson puts it, are 'inclined to behave as if securing government office gives them the right to appropriate the state for their own benefit'.³⁹ Further, it is consonant with the ambitions of the bureaucracy, it advances the interests of pressure groups, and now it harmonizes with the political philosophy of the new elite. It is also favourable to militant minorities who are able to use rallies, violence and the like to extract from governments legislation that is contrary to the will of the majority. In Australia, where some of these tendencies exist in more extreme form than in other Western democracies, we should heed the warning of United States Congressman Thomas Foley, a Democrat, who warns that 'the increasingly elitist approach of governments to many questions vitally affecting the daily lives of the citizens is liable to create a disillusion with democracy that, in certain circumstances, could be highly dangerous to democratic institutions'.⁴⁰ Parliaments are supposed to represent the people but have instead usurped their power, and the consequences could be grave.

The positive side of the picture is that tested, effective remedies for these ills are available. These remedies are largely immune to the arts of electoral geometry and the other techniques used by the parties to reduce the influence of the people over the legislative process. The communications revolution and the appearance of a more educated and interested electorate removes any justification for giving representative assemblies a monopoly on law making. It is now safe and practicable, even assuming it was not before, to return to the people a portion of the power that is rightfully theirs. This would not be a power suitable for exercise on the day-to-day affairs of government and the legislature, but one to be reserved for measures that the people see as likely to affect their lives in a significant way. As we shall see, over a century of experience with the initiative and referendum have proved these devices to be proper mechanisms for the exercise of that power.

Not only have these institutions proved themselves in action, but they have also produced irrefutable evidence of the prior need for them. Statistics show that a high proportion of the challenges launched by referendum against acts of the legislature are successful, in that the impugned statute is annulled. This is the clearest possible proof of the fact that elected legislatures do not always represent popular feeling and opinion.⁴¹

One remedy for the distortions of the representative principle that has been put forward from time to time is that members of parliament should vote on legislative measures by secret ballot. This might indeed weaken the hold of parties and the influence of pressure groups, but it would be quite inconsistent with any notion of representation. It would not correct the distortions of the representative principle so much as abolish it altogether. This would be undesirable. There is nothing to

suggest that representative democracy can no longer serve any useful purpose at all. Direct legislation is not intended to replace representative assemblies, nor has it had that effect in any country where it has been adopted. Its purpose is to serve as a check on forces that tend to make representative assemblies misrepresentative.

II. SEPARATING POLICIES FROM PERSONALITIES

In Westminster-style democracies, the conceptual link between parliamentary law making and public opinion is the theory of mandate. (This is separate from the mandate-independence debate in representation theory.) A candidate for election to the legislature usually belongs to a party, which has as the basis of its appeal to the voters a platform setting out its legislative and policy objectives. A vote for a candidate who is an endorsed member of that party is taken by the successful party as being an expression of consent to the legislation proposed in the platform.

This link has become frayed in recent years by the practice of extending the notion of mandate to cover not only explicit planks in the platform, but also any promises or threats made by a candidate in the course of a policy speech or even in reply to an interjection. The massive Commonwealth expenditure on the Albury-Wodonga growth centre, for example, was apparently based in political terms on nothing more than such a reply uttered by Mr E.G. Whitlam to an interjection during the 1972 federal election campaign.

The theory of the electoral mandate presents serious difficulties even apart from these extensions, however. Many objections have been taken to it on both theoretical and practical grounds.⁴² The main practical problem is that in modern conditions of essentially two-party democracy, mandate theory gives governments a specious justification for legislation to which the majority of the voters may not have consented at all. They may not have consented to the legislation either because they were not in fact aware of it, or because they were acting under duress in the sense that (i) they favoured other policies of that government and were forced to accept the ones they did not favour, or (ii) they accepted some policies of that party and simply hoped that if elected it would not be so foolish as to put the others into effect, or (iii) they favoured one group of candidates and distrusted its opponents, even if the opponents' policies had greater appeal. Mandate theory breaks down, therefore, because individual legislative proposals are bundled together with a wide range of other legislative policies, foreign policies, questions of personality and perhaps extraneous factors such as fortuitous improvements in the state of the economy.

Initiative and Referendum

The Irish historian W.E.H. Lecky, writing at the turn of the century, contended that 'Confused or blended issues are among the gravest political dangers of our time'.⁴³

Revolutionary and predatory measures are much less likely to be carried on their merits than because their proposers have obtained a majority by joining with them a sufficient number of other measures appealing to different sections of the electorate. ...In the House of Commons, a measure may often be carried which would never have had a chance of success if the members could vote on their own conviction of its merits: if they could vote by [secret] ballot; if they could vote as they thought best, without destroying a ministry, or endangering some wholly different measure.⁴⁴

The intermixture of issues in a general election was an important part of A.V. Dicey's arguments for a referendum procedure for constitutional or other major legislation. He pointed out that while a general election and a referendum are both appeals to the people, they differ in vital respects. An election is 'a choice of persons or of parties: it is not a judgment on the merits or the demerits of a proposed law'.⁴⁵ Personalities played a great part in the outcome and, moreover,

our English system of government makes it a certainty that statesmen of all parties will do their best to confuse the issues which at an election are nominally submitted to the verdict of the nation. A Ministry will always, if possible, dissolve at the moment when any adventitious circumstance enhances the popularity of the Cabinet. A success abroad, any circumstance which for the moment discredits a leading opponent, any sudden event which may have raised the reputation of the Government or brought odium upon the Opposition, will be used...⁴⁶

There is no circumstance so irrelevant or trivial that politicians will not turn it to account if it favours their side or discredits the other — a controversial decision of a court, the breaking of a drought, a sporting victory, all will be used to confuse the issues, to divert attention from the contents and implications of a party's legislative program.

Admittedly, there have been rare occasions on which a general election has been treated by the participants and voters as a referendum on some vital piece of legislation. The British election called in 1831 was de facto a referendum on the Reform Bill, the 1911 election on the Parliament Act. Prime Minister Heath attempted to make the 1974 election a referendum on the coalminers' strike, but failed. The 1922 Irish elections were treated by common consent as a referendum on the

constitution for the new Irish Free State. This is nevertheless an unsatisfactory way of presenting a single issue to the voters. The election may produce a resounding endorsement of the particular bill, but there is nothing to prevent the victorious party from amending the bill in parliament. The Reform Act of 1832 differed in important respects from the Reform Bill that had been placed before the voters. Further, no matter how much the parties may agree to treat the election as a referendum on a single issue, the fact remains that other issues are embroiled in it. Voters may be confronted with the dilemma of having to choose between the result they desire on the legislative issue and being stuck for the next three or four years with a government they may regard as incompetent or worse.

It is sometimes suggested that the opinion poll is an effective substitute for the referendum. If a sample survey can show what people think, the argument goes, why go to the trouble and expense of a referendum? The poll results can warn politicians of the possible electoral consequences of a policy that they are pursuing and may therefore help to improve the working of the representative principle in modern conditions.

There are several objections to this suggestion. People may simply not believe the results of an opinion poll, especially in light of the poor record of the polls in predicting election results. The answers that a voter gives to an interviewer who raises some policy question without notice may be very different from those that would be given in the polling booth at the conclusion of a long campaign through information pamphlets and the media. A citizen has every reason to think more carefully about a vote that will have legal consequences than about an answer given to a pollster.⁴⁷ And, most importantly of all, the government is free to disregard even the clearest opinion poll results, knowing that when the next election comes it can once again present the voters with the same take-it-or-leave-it package. This was the response of the New South Wales government in 1981 when it proceeded with legislation for compulsory taxpayer funding of political parties' election expenses,⁴⁸ despite opinion polls showing three-quarters of the electorate to be opposed to the measure. For obvious reasons, the government also refused to submit the matter to a referendum.

While we are on the subject of opinion polls, it is worth noting that when they first came into use in the 1930s, they were subjected to the same kinds of broadsides as are now discharged against direct legislation. It was said that opinion research would destroy the foundations of representative government by inducing legislators to bow to majority opinion as revealed by the polls, rather than bringing to bear their own judgment and experience. Public opinion, it was argued, was fickle and unreliable and an altogether unsuitable basis for effective government. Socialists claimed that opinion polls were in the hands of

'reactionaries', while the extreme right attacked them as 'too democratic'.⁴⁹

So the intermingling of issues described above, the bundling together of personalities, world trading conditions, favourable weather and sporting victories, all weighed and reckoned by the government when selecting the election date, has greatly increased the powers of parties and party leaders at the expense of the citizen. It gives to the major parties the kind of monopoly power possessed by the Australian domestic airlines under the two-airline agreement legislation (an Act that would not last twelve months if a referendum were available). Just as the airline duopoly, having succeeded in persuading the government to prohibit competition, is able to present the traveller with a Hobson's choice, the political parties under the present system are able to package their offerings in such a way as to limit the voter's freedom of choice. They are able to put voters in the position of having to vote for a party whose platform contains planks that are unacceptable. There may also be important issues that are not faced in the platform of either party because the parties are agreed on the particular point or because they are both equally in bondage to pressure groups or single-issue lobbies. 'It seems clear', concludes Professor P.H. Partridge in his study *Consent and Consensus*, 'that both in actual practice and in the assumptions and expectations of ruling democratic doctrine in large, industrialized Western democracies the norm that legitimate government requires the consent of the governed is maintained only in the weaker senses of consent'.⁵⁰

Ironically, all politicians seem to be agreed that such cartel-like, monopolistic conduct should be prohibited when practised by business corporations in trade and commerce. Both major party groups have legislated against monopolies and restrictive practices that limit the options available to consumers. They have in particular prohibited the practice of tying, which occurs when a powerful seller is able to force buyers to pay for supplies they do not want as a condition of being supplied with the product they do want.⁵¹ This used to occur, for example, when major manufacturers of photographic film required customers to have the film processed by the manufacturer's own laboratories. Yet politicians see no reason to improve competition and freedom of choice in the large and flourishing 'industry' of statute manufacturing. They practise tying in the most unscrupulous and pervasive way.

One of the main advantages of the initiative and the referendum, therefore, is that they sever legislation from politics. They make it possible for the laws of the land to emerge from the values and reasoned opinions of the people, rather than from party strife, lobbying, secret deals and corruption. They make it impossible for a minister or party to give to a lobby group a dependable promise that certain legislation will

be passed, no matter how large the promised contribution to party funds. They allow the people, in Dicey's words, to 'distinguish between men and measures'.⁵² They give a new freedom to all those who take part in public life, whether as parliamentarians or simply as voters. No longer need a citizen vote for a party of which he disapproves because he loathes some statute proposed by its opponents, or vote for the expulsion from office of ministers who command his approval because they are promoting a bill that he condemns.

Conversely, a politician enjoys greater security of tenure when he is no longer liable to be turned out of office because the voters disapprove of one particular piece of legislation which he has promoted. As Dicey pointed out, this was the position in the days of Pitt. For that matter, it is not unfamiliar in contemporary Australia. No one seemed to think the less of the New South Wales government when its proposal for Sunday liquor trading was roundly defeated in a government-initiated referendum in 1969; certainly, no one publicly suggested that it should resign as a consequence. In Switzerland it has been apparent for a century that one of the effects of the referendum has been that ministers (who are chosen by the federal assembly from all parliamentary parties) enjoy almost permanent tenure of office.⁵³ When a measure proposed by cabinet is defeated in a referendum, the cabinet simply bows to public opinion, changes its policy line, and continues in power.⁵⁴

A valuable side effect of this separation of personalities from policies is, as Dicey once again pointed out, to encourage greater honesty and candour in politics. As matters stand, a politician who is forced by public opinion to give up a particular policy is in the difficult position of having to renounce legislation proposed by himself without at the same time giving the impression of having been too quick to trim his sails to the wind. At present, 'legitimate changes of conduct are apt ...to bear the appearance of dubious changes in opinion'.⁵⁵ The referendum and the initiative give him much more freedom to move. If the popular verdict is against his proposal, he need not pretend that his opinion has changed. Submitting to the popular verdict does not in the slightest prevent him from publicly maintaining his belief that his own policy was preferable. This is what the New South Wales government did in 1969; indeed it thanked the voters for giving such a clear and unambiguous decision. Direct legislation puts the minister somewhat in the position of a minister under the Tudor monarchy: 'A Tudor monarch retained valued servants in his employment even though he rejected their advice. ...The Swiss people in like manner, being the true Sovereign of Switzerland, retain, in the service of the State, Ministers whose measures the voters nevertheless often refused to sanction. The Swiss democracy values the legislative ability of the Federal Parliament, but, like an English King of the sixteenth century, constantly withholds assent from Bills passed by the two Houses'.⁵⁶

In another important respect the initiative and referendum would strengthen the hand of the honest politician. The existence of the legislative referendum in particular means that a government has nothing to sell. It is therefore useless to attempt to corrupt or blackmail it. Even if a minister agrees to push some special interest legislation through parliament, he cannot promise that it will not be repealed by referendum or superseded by initiative if the public do not want it. At last, the elected representative will have an unanswerable basis for saying 'no' to ideologues and pressure groups.

This leads us to the next argument in favour of direct legislation.

III. LOOSENING THE GRIP OF PARTY AND PRESSURE GROUP

Political parties serve a purpose in a democracy. They focus and moderate the wishes and opinions of different people, while providing an effective framework in which those wishes and opinions can influence the law and government of the nation. Even the two-party system, for all the disadvantages stemming from the monopoly power that it confers, has the advantages of ensuring continuity of policy and administration and of providing continuous, if inadequate, supervision of the bureaucracy.

Political parties become a danger when they prevent their members from being the true and loyal representatives of the people who elected them, and when loyalty to party prevails over loyalty to country. This has undoubtedly happened in Australia. Dr Jaensch sums it up thus: 'Parliamentary discussion, and Parliament itself, have been all but destroyed by the political parties. The major parties have claimed almost the whole of politics to themselves, and with one purpose — to put their interests first, and those of the electorate second. Politics in Australia has become a matter of conflict, of confrontation, of a refusal to compromise'.⁵⁷

One of the arguments put forward in support of Queensland's Initiative and Referendum Bill between 1915 and 1919 was that it would attenuate party conflict. Admittedly, it was not suggested that it would lessen the power of parties; it would be too much to expect that such a proposition would commend itself to party politicians. But it was seen that it would 'do away with a great many of the acrimonious discussions' that marred parliamentary debate, and that party strife would be generally lessened.⁵⁸

Lobby and pressure groups are not inherently bad either. It is hard to think of a single reform of lasting public importance that has come into being without the efforts of pressure or lobby groups. But in recent years such groups have become so aggressive and unscrupulous that the perversion of public legislative power to private ends has become an

everyday phenomenon. This is partly the result of the theories of legal positivism and absolute parliamentary sovereignty mentioned earlier. As modern public choice theory has shown, a parliament (more especially a state parliament) with supposedly unlimited powers and a proven willingness to exercise them on behalf of sectional interests becomes trapped into the position of no longer having any grounds of principle for saying 'no' to any pressure group seeking legislation in its favour. In order to stay in office, the government must procure the enactment of discriminatory legislation in favour of more and more groups. Paradoxically, unlimited government soon becomes weak government, as Dr Michael James has pointed out.⁵⁹

Australia has now reached the stage where much of the law-making activity of our parliaments is seen to be conducted on a basis of blackmail and corruption. Governments are engaged in the uninhibited sale of statutory monopolies through licensing procedures whereby government-imposed barriers to entry enable participants to effect a coercive wealth transfer from consumers to themselves.⁶⁰ Thus, the Petroleum Retail Marketing Franchise Act 1980 was rushed through the final stages in federal parliament on September 18, 1980, the last sitting day before parliament rose for a general election. This legislation was promoted by the service stations' associations, a group with a long history of collusive price-fixing in consumer petroleum products. The Bill was criticized by the Australian Federation of Consumer Organizations on the ground that it was clearly calculated to lessen competition at the retail level and raise petrol prices to consumers. The service stations associations procured its speedy enactment by threatening to instruct their members to distribute leaflets urging customers to vote against the government in the forthcoming election. But their most effective weapon was a threat to organize a national service station strike on the eve of the election, thereby producing a fuel crisis for which the government would be blamed.⁶¹

Other privileges also may be obtained by this type of coercion. A spectacular example is to be found in the demands made by truck owner-drivers during their blockade of certain of the nation's highways in 1979. The operators cut off food supplies to major cities and threatened to maintain their blockade until parliament abolished a road maintenance tax that was levied on heavy trucks on a mileage basis. The truck operators' demand was immediately acceded to. Shortly afterwards, Queensland coalminers won the continuance of a discriminatory tax concession in their favour after a costly strike on coal exports and after union members physically assaulted the then federal treasurer, Mr J.W. Howard.

The ranks of the industries seeking to be benefited by special interest legislation may have now been joined by the gymnasium operators, the undertakers, who seek a national, not merely a state-wide,

statutory monopoly, and by the health food stores. The 600-member National Nutritional Food Association, which represents the health food manufacturers, distributors and retailers, even formed a committee to draft the necessary legislation for enactment by parliament. One of the few groups that have not succeeded in obtaining a statutory monopoly in recent times are the hypnotherapists, whose move for licensing in New South Wales was defeated by the medical profession. This was not because the doctors came to the view that occupational licensing goes against the interests of consumers, but on the contrary because they wanted the practice of hypnotherapy to be reserved exclusively for the medical profession.

Increasingly coercive methods of obtaining legislative change are being adopted by professional and other associations that previously had shunned such tactics. Organized bans by the medical profession on all but emergency treatment in public hospitals in New South Wales in 1984 were an instance of this. This action did stem in part from proposed Medicare legislation, which contained, among other things, an infringement of the medical practitioners' right of free speech.⁶² Nevertheless, it is representative of a broader phenomenon: the increasing tendency of militant pressure groups of all kinds to blackmail legislatures for their own purposes.

Professor Harmon Ziegler points out that a country with a population as concentrated as Australia's is especially vulnerable to pressure group coercion. Because the economy has fewer points of access, disruptive tactics by organized groups have an immediate and dramatic impact on everyday life. 'The disruption is given vast coverage by the mass media and quickly occupies a substantial portion of the attention of national decision-makers'. Nor are the effects of population concentration purely economic. They make the stakes of politics more immediate and tangible and tend towards the elimination of all but the most affluent and persistent lobby groups: 'The ramifications of a concentrated population appear to be the enhancement of the position of established groups, rather than the proliferation of many groups'.⁶³

The more spectacular type of pressure on governments is only a small corner of the picture, however. The short-term goal of coercion may be to enable the group to have its way on a particular issue, but in the longer term it is calculated to bring about, and often does bring about, what political scientists call the 'incorporation' of the group into the policy-making process on a permanent basis. Incorporation is a kind of 'sweetheart deal' whereby representatives of a group are privately consulted on current issues before any decision is made. It produces an outward air of tranquility at the cost of excluding the public interest and the flow of ideas that shape it. Thus, notes Professor Scott, 'The tendency to incorporation...is frequently accompanied by an explicit rejection of the notion of community participation in policymaking and

the embracing of institutional arrangements which will assist the exclusion of non-elite views'.⁶⁴

The initiative and referendum will not eliminate political parties or lobby groups, nor should they. But they will force pressure groups to persuade rather than dictate. They will check the tendency of parties to ignore their duty as elected representatives and make laws that are contrary to the wishes or interests of a majority of the people. One can see this from the Swiss experience. The Swiss parliament contains strong political parties, but it makes law under the threat of a referendum. The resulting search for political consensus means that the legislature does not legislate as if it were a sovereign or a ruler, but in a way that accommodates the opinions of the majority.

The impact of initiative and referendum is therefore not to be measured merely in terms of the number of petitions launched and their direct outcome. In one sense the most successful referendums are those that do not take place. Similarly, initiatives that fail to gain a majority vote may still lead the parliament to put forward a counter-proposal tending in the same direction as the ideas formulated by the petitioners.⁶⁵ In such a setting the bigotry of party would not disappear, but its power to distort the democratic process would be drastically reduced.

Critics of direct legislation such as Mr Enoch Powell argue that in countries like Britain (and presumably Australia and New Zealand) where partisan rivalry is strong, the party loyalties of the voters will deprive the initiative and referendum of any real value: 'If a question is put to them, they will judge it in terms of party politics, because that is how they get their way through the parliamentary institutions'.⁶⁶

Dacey considered this argument almost a century ago. He agreed that it contained an element of truth and that the party system might for quite a long time often vitiate the working of the referendum. But he saw no reason to suppose that the result of an appeal to the voters on whether they would pass or reject a particular law would also have the same result as an appeal to the electorate at a general election. There are fundamental differences between the two questions: a referendum is about a particular enactment, an election is above all about people.⁶⁷

Observation of the contemporary Australian scene suggests that, while party loyalties are weakening, on some issues people would indeed vote on party lines. Even that would not deprive the referendum of its value, though, since party loyalties work somewhat differently in different contexts and at the state and federal levels. Election returns show that a significant number of people vote for one party in the lower house and for a different party in the upper house, believing, quite rightly, that one can serve as a partial check on any excesses by the other. Again, the federal Labor Party is committed to the objective of abolishing the states, whereas at the state level Labor politicians are in

practice opposed to this. Experience in the United States, where party divisions have become much more pronounced since the 1960s,⁶⁸ does not suggest that the initiative and referendum are any less valuable for that. Indeed, as we have seen, they are more popular than ever.

Similarly as to pressure groups. They would not disappear, but they could no longer rely on simply corrupting, blackmailing or intimidating governments. Whereas now they can at no cost to themselves claim to represent the views, even if only the tacit views, of the people at large, under initiative and referendum they could be challenged to prove their claim by launching an initiative petition drive. Extremist pressure on governments would thereby lose much of its point and impact.

While the capability of curbing excessive party power is one of the attractions of the initiative and the referendum in the Australian context, these procedures can also remedy the opposite problem. In legislatures where there is no party discipline and it is difficult to marshal a majority for any bill, direct legislation by the people can provide a means for bypassing a paralysed representative assembly.⁶⁹

IV. INCREASING THE LEGITIMACY OF LAW

One of the most powerful arguments for direct legislation is that it gives statute law greater legitimacy than it otherwise enjoys. Legitimacy is essential for the maintenance of the rule of law, because without it people will feel no inner impulse to obey the law. They may do so out of fear, but keeping the majority of the people in a sufficient degree of fear to maintain even a fraction of all statute law would require a degree of coercion that would be intolerable in a free and democratic society.

The law's legitimacy can come from various sources, depending on what people believe to be the proper source and origin of law. Legitimacy might come from a shared belief in the right of a priesthood to interpret divine law, or from the perceived divine right of a king to declare the laws for his subjects. In a democracy, the only possible source of legitimacy is the will of the sovereign people. As the most direct way of ascertaining the will of the people, initiative and referendum have great advantages in this respect. The citizen is more likely to feel entitled to flout a law promoted by an elite, or procured by blackmail or corruption, than one that is seen to reflect the free and informed consent of the majority of citizens.

Legitimacy and the Rule of Law

The rule of law doctrine is the basic assumption of our legal order. This doctrine means that the actions of individuals, groups and governments should be guided by the law, and that at the same time the law should have the properties that will enable it to command obedience. It must therefore be both capable of obedience, in the sense that it is accessible, non-retroactive and reasonably clear, and it must also be sufficiently congruent with the opinions and values of the population that most people will voluntarily obey it most of the time. It is possible to enforce unpopular laws, but doing so requires an unacceptable apparatus of coercion and denunciation.

It is easy to see why the rule of law is so essential to our way of life. Unless the law can command obedience, there is no legal system; unless those in authority abide by the rules of law laid down for the exercise of power, there is no constitution; if citizens do not generally contribute to the revenue in the manner provided by law and refrain from making fraudulent and unlawful claims upon it, there can be no government social programs; without courts that deliver judgments upholding the rights of the individual and make those judgments stick, there are no civil liberties; and unless all parties accept the results of political processes undergone in accordance with law, there is no democracy. The rule of law is not a complete formula for the good society, but there can be no good society without it.

Consequently, widespread disrespect for law is fatal not only to the rule of law itself, but also to democracy. Disrespect for law can take the form of widespread disobedience (overt or covert) or of merely simulated compliance. It can also take the form of an ideological frontal attack, such as that which has been launched by the Critical Legal Studies movement (CLS). CLS takes a strongly confrontational attitude towards the rule of law and the present legal system, which it regards as corrupt beyond redemption. The law, its proponents believe, is currently an instrument of oppression because it is in the hands of 'them', those immoral, propertied individualists, but it will become a tool of altruism and universal brotherhood when control is transferred to 'us', the neo-Marxists of CLS and their allies.⁷⁰ In its nihilism and its cultivation of feelings of hostility and superiority, CLS represents a threat both to the legal order and to popular government.

Direct Legislation and Legitimacy

If we accept that disrespect for law, whether through disobedience or ideological attack, is detrimental to the rule of law and ultimately to democracy, what difference can the initiative and referendum make? Principally, by breathing new life into the democratic ideal they can give

the law greater legitimacy and reduce the apparent justification for all kinds of disrespect for law. The present situation is a fertile breeding ground for the negativism on which CLS thrives. We have a law-making class that sees itself as a race apart and has little sympathy for the people it is supposed to represent. Legislation is perverted to the private purposes of pressure groups, lobbyists and parties. It is difficult to accept the output of modern legislative bodies as being in any real sense 'the law of the land'. Any legitimacy it has is of a purely formal nature. People have reason to be disillusioned with the law and with the current form of democracy.

But the initiative and referendum can change that. Once it becomes a demonstrable fact that the people themselves really can remove obsolete laws, block legislation that conflicts with their interests and beliefs, repel reactionary attacks on valued reforms, and generally control their legal environment, the destructive work of CLS will become more difficult. The law will ipso facto become more acceptable. It will gain a new legitimacy, the imprimatur of the sovereign people, which is the only form of legitimacy possible in a democracy. These reforms will not eliminate law breaking, but they will make it harder to justify law breaking on colourably moral grounds. They will not prevent CLS from trying to undermine the rule of law; CLS will never accept majority rule and will simply say that the people have been misled by 'false consciousness'. But assembling a receptive audience for this kind of nihilism will become harder.⁷¹ The positive will crowd out the negative.

V. INVOLVING THE PEOPLE

Direct legislation gives the people an incentive to take an interest in public issues and thereby makes the best use of their talents and experience. This contention is sometimes expressed as the need to 'educate' the electorate and inculcate in them a greater sense of responsibility. This formulation is perhaps unfortunate, in that it suggests that the people are at present the opposite — ignorant and irresponsible. Experience or observation does not bear this out in any general sense. It must be true that on particular issues, people may be ill-informed, and many are certainly apathetic, but this is itself a consequence of the present system of misrepresentative assemblies. The communications revolution has made it much easier to gain certain types of information, but the fact remains that information is not costless.⁷² At present the citizen has no incentive to seek full information on any particular issue, because he knows that when the next election comes, he will be confronted with the same political cartel offering a choice only between two inseverable packages of personalities and policies. The voter's opinion on any current issue, no matter how

well informed and thoroughly reasoned it may be, will have no real effect on legislation, which is largely the product of party policy and the activities of pressure groups. This results in the general apathy towards, and alienation from, politics and politicians that can be observed in Australia. This is not unique to Australia, but according to political scientists such as Dr Jaensch, 'there is every reason to believe that the level of apathy and alienation in Australia is unique' among Western countries.⁷³ Understandable though these attitudes may be, they are negative and do nothing to improve the quality of law and government.

The system of direct legislation calls upon the voter to express a considered opinion about a particular measure. The voter knows that his individual vote will count and that if enough people give a careless or ill-informed verdict, everyone will be saddled automatically with the consequences for years to come. Though many people will no doubt continue to vote on party lines, or will follow the recommendations of some well-known public figure with whom they identify, the incentive for independent and considered thought will be there. Most people behave responsibly when responsibility is placed upon them. As Thomas Jefferson wrote somewhere, men in whom others believe come at length to believe in themselves; men on whom others depend are in the main dependable. Further, most people are pleased to be asked for their opinion, and if given sufficient time they will endeavour to give a considered answer. It is upon this propensity, after all, that the market research industry is based; it enables researchers to recruit consumers as unpaid evaluators and judges, with no reward other than the satisfaction that comes from expressing an opinion when one knows that the listener thinks one's opinion matters. In these times of upheaval and radical change, society and government need the benefit of all the new ideas, new methods, new storehouses of personal initiative and energy that are available. The simplest way, and indeed the only way, to tap these reserves is to ask for them by allowing direct individual participation in government. They will certainly not be harnessed by tricking and bullying the people into inertia or defensive apathy.

The direct participation of the citizen in government was seen by classical democratic theory as both a prerequisite to, and the main goal of, popular self-government. The literature on initiative and referendum reflects this. One of the earlier writers declared that this stimulus to acquire information about public issues and to decide upon them in a responsible way was 'the most important result' of direct legislation: 'When the voter became a legislator and a constitution-maker he received a new stimulus to familiarize himself with the subject-matter of laws and constitutions'. He was also 'likely to feel a higher sense of responsibility and a more vital and personal interest in the state's welfare'.⁷⁴ This writer argued, with Rousseau, that in a better constituted state, citizens were active in public affairs, while under bad

government apathy reigned and people absorbed themselves in their private affairs.⁷⁵ The Progressives believed that voter apathy was a barrier to the attainment of party goals. The initiative, they thought, would break down this barrier because the way to get voters interested in measures was to ask for their opinion upon measures, rather than for their opinion upon men. In a similar vein, Ralph Nader argues that use of the initiative and referendum would politically activate 'people who would not ordinarily be part of the political process' and that 'the best antidote to cynicism in a civil sense is to endow the cynic with power'.⁷⁶

Some groups advocating particular changes in the law will promote an initiative, knowing it has poor prospects of success, but in the belief that the educational impact of the initiative debate will strengthen their position in subsequent lobbying in the legislature. The group in California that proposed the decriminalization of marijuana in 1972 did not expect to succeed at the polls, but hoped better-informed public opinion would be amenable to relaxing some of the stringency of the existing law. The initiative was in fact defeated, but subsequently the legislature did move to modify some provisions of the relevant statute. It knew, however, that public opinion would not tolerate the outright legalization of the drug.⁷⁷

Recent research shows that the level of political knowledge in the electorate is a function more of interest than of ability.⁷⁸ Thus, initiative campaigns and ballots themselves serve to remedy the very shortcomings that direct legislation's opponents put forward as reasons for withholding the right of initiative.⁷⁹ Ever since Aristotle it has been recognized that men learn by doing, and contemporary empirical evidence lends support to this observation in the political context. Recent American studies are marked by a growing recognition of the voting population's ability intelligently to distinguish between available options.⁸⁰ It seems likely that one reason for this is that direct legislation procedures seek the voters' opinions on policy options, reassert their rightful position as sovereign and give them a direct role in the job of framing the laws of society.

IV. THE POSSIBILITY OF EXPERIMENT

Unlike most other major reforms of the suffrage or of the constitution, direct legislation can be introduced on an experimental basis. Dicey pointed out that it differed in this respect from, say, proposals to give parliamentary votes to women, or to grant home rule to Ireland: 'Common-sense tells us that either of these steps, when once taken, can never be retraced'.⁸¹ It is true that the initiative and referendum, once adopted, have in practice been greatly prized by the people and have been abolished only in the single instance of pre-World War II Ireland, for the

special reasons already mentioned. But they are the kinds of institutions that can be adjusted and modified in the light of experience, and this has not infrequently happened, in California, for example.

A federal system such as Australia's makes experimentation all the easier. Initiative and referendum could be introduced initially at the state level, where it is much easier to make amendments to the constitution than is the case with the Commonwealth constitution. Different forms could be tried in different states, and the results compared.

Direct legislation has the further great advantage that it can be introduced in part, or in stages. A parliament that wishes to proceed cautiously might in the first instance introduce only the legislative petition referendum. With greater confidence, it might proceed to the legislative initiative of the indirect kind, then to the more radical direct initiative. When the ideal of direct participation becomes fully accepted, the parliament could take the final step and proceed to establish the constitutional initiative.

FOOTNOTES CHAPTER II

- 1 H.F. Pitkin, *The Concept of Representation*, Berkeley 1967, 145.
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- 3 ibid.
- 4 D. Jaensch, *Getting Our Houses in Order — Australia's Parliament: How it Works and the Need for Reform*, Ringwood, Vic. 1986, 57.
- 5 e.g. *Proceedings of the Australian Constitutional Convention, Brisbane 29 July — 1 August 1985*, Brisbane 1986, 288 (Senator Tate).
- 6 Pitkin, op. cit. supra, 146.
- 7 Madison, *The Federalist* No.10.
- 8 F. Canavan, *The Political Reason of Edmund Burke*, Durham N.C. 1960, 148-9
- 9 id., 149-51.
- 10 D. Jordan, 'Constitutional constraints on initiative and referendum' (1979) 32 *Vand. L. Rev.* 1143, 1146-7.
- 11 A.V. Dicey, *The Law of the Constitution*, 8th edn Indianapolis 1982, 34.
- 12 A. Ranney ed., *The Referendum Device*, Washington 1981 (hereinafter 'Ranney'), 38.
- 13 Jaensch, op. cit. supra, 33.
- 14 id., 43.
- 15 id., 88.
- 16 id., 89.
- 17 A.V. Dicey, 'The referendum and its critics' (1910) 212 *Quarterly Rev.* 538 (hereinafter 'Dicey QR'), 540, 544.
- 18 Jaensch, op. cit. supra, 3, 49, 90.
- 19 H. Ziegler, 'Interest groups and public policy' in R. Scott ed., *Interest Groups and Public Policy: Case Studies from the Australian States*, South Melbourne 1980, 1, 11.
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- 24 ibid.
- 25 id., 50.
- 26 id., 51.
- 27 id., 53.

- 28 Ranney, 1.
- 29 op. cit. supra, 230.
- 30 id., 230-1.
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- 58 (1916-17) 122 *Qld. Parliamentary Debates* (L.A.) 278; (1916-17) 123 *Qld. Parliamentary Debates* (L.A.) 281.
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- 61 *Canberra Times*, July 3, 1980; *Sydney Morning Herald*, June 30, 1981; 'Petrol — Discrimination or competition?', *AFCO Quarterly*, June 1980, 6.
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Chapter 3

The Case against the Initiative and the Referendum

Main Lines of Argument

The range and nature of the arguments raised against the initiative and referendum are strongly correlated with whether the critic is opposing the introduction of these institutions, or criticizing initiative and referendum procedures that are already in existence. The arguments advanced against the introduction of direct legislation fall generally into the following categories:

1. It would undermine the existing form of government.
2. The voters are not competent to judge particular legislative proposals; they would vote for populist measures.
3. A tyranny of the majority would be established.
4. Moneyed interests and the media would wield undue influence.
5. Direct legislation is costly and inconvenient.
6. Initiative measures would be badly drafted and inflexible.
7. Initiative and referendum would simply not work in this country (or state, as the case may be).

The same arguments against direct legislation are brought out each time another country or state considers its introduction, as if the continuing positive results in other countries proved nothing; it is back to square one every time. All the objections raised by Senator Gareth Evans to Senator Mason's Bill were used over a century ago in

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Switzerland by supporters of the status quo, who also put forward the further point, no longer available today, that if direct legislation were such a great democratic advance, why had it not been adopted in the United States?¹

The criticisms voiced in jurisdictions where initiative and referendum already exist are of a much narrower scope. They are directed chiefly to problems of drafting and amendment, to lingering but largely unsubstantiated fears about the position of minorities, and to the risk of abuse and undue influence in the collecting of signatures and in the financing and advertising of campaigns. Voter incompetency all but disappears as an issue,² as do the alleged threat to the existing system of government, the 'threat' of populism and the cost factor. In the United States, for example, support for the proposed national initiative has consistently been twice as strong as opposition to it.³ Fully 77 per cent of voters favour direct legislation at the state level, while Californians, who are second only to the Swiss in their use of the initiative and referendum, support these institutions by an overwhelming majority of 85 per cent. More than three-quarters of voters in all categories of party, ideology, occupation, race and education believe that having initiative propositions on the ballot is good.⁴ These figures are especially telling inasmuch as they come from places where direct legislation is in common use, where voters are aware of how it works in practice and would know about any negative aspects. Where it exists, even the sternest academic critics do not call for the abolition of all forms of direct legislation, only for restriction and 'reform'.⁵

Nor has there been any political pressure for repeal, and indeed there is every reason to believe that such a suggestion would be greeted with popular outrage. Although there has so far been little criticism in Australia of proposals such as Senator Mason's, it would appear from the opening skirmishes in federal parliament that at least Senator Gareth Evans, and perhaps his party, will raise the full conventional array of counter-arguments.

Two Persistent Fallacies

Two erroneous lines of argument appear in the attacks on the initiative and referendum so frequently that it may help to be prepared for them in advance.

The first is that many critics seem to argue as if we somehow had to choose between direct legislation and parliamentary legislation. They proceed on the basis that if the initiative and referendum are introduced, the many virtues and blessings of representative democracy will be lost. This is not the case. No one today seriously puts forward direct legislation as a substitute for parliamentary legislation, merely as a

desirable adjunct to it. Even in Switzerland, which uses the initiative and referendum more than any other country, the great bulk of enacted law emerges from the parliaments rather than the initiative process.

The second fallacy plagues most contemporary debates in which one institution or system of government is compared with another. It is this. It is perfectly permissible to compare the theoretical ideal of one institution or system of government with the theoretical ideal of another. It is equally proper to compare the practical reality of one institution or system of government with the practical reality of another. What is **not** acceptable in rational discourse is to compare the theoretical ideal of one with the practical reality of the other, or vice-versa. Thus, opponents of direct legislation point to its most debatable features and contrast them with a noble vision of the representative assembly that is pure fantasy in modern conditions of party discipline and importunate pressure groups. Such comparisons are not valid.

Let us now consider the main objections raised against the initiative and referendum.

I. INITIATIVE AND REFERENDUM WOULD UNDERMINE THE EXISTING SYSTEM OF GOVERNMENT

Direct legislation is seen as a threat to our existing constitutional structure in that it is inconsistent with, or tends to undermine, the theory of parliamentary sovereignty; that it is inconsistent with responsible government and ministerial responsibility; that it would undermine the party system and destroy informed and effective debate.

Parliamentary Sovereignty

Those politicians and lawyers who accept Dicey's earlier-described theory of absolute parliamentary sovereignty but who, unlike the Vinerian professor, believe it to form the basis of an ideal system of democratic government, tend to argue that the introduction of the initiative and referendum is both legally impossible and constitutionally undesirable. It is urged in the first place that the Australian state parliaments are essentially sovereign legislatures in the same way as the parliament at Westminster, whose power is thought to be limited only by its logical inability to bind its own successors. Consequently, any initiative and referendum legislation would be futile, for parliament could easily evade it, either by passing Acts expressed to be exempt from its procedures, or by expressly or impliedly repealing it on a moment's notice, or by reversing any measure adopted via the initiative.

Then it is argued that, quite apart from being impossible, direct legislation would strike at the heart of the Westminster type of constitution. Enoch Powell, the English member of parliament, has been prominent among those who argue that direct legislation is alien to the constitutional habits and assumptions of the United Kingdom: 'we are unique amongst the countries of the world in that we are a parliamentary monarchy and our Parliament therefore exercises the unlimited sovereignty inherent in a prescriptive monarchy'. Under such a system the will of the people could be expressed only through parliament: 'In such a parliamentary monarchy, the powers of the crown or of the people are put in commission with a particular institution'. Nor was this institution merely a mouthpiece for the numerical expression of opinions in the country at large. It was not the people as a whole who sent representatives to Westminster, but people as individuals identified with a particular locality: 'This is of the essence, of the nature, of the British Parliament, that it is rooted in locality. ... The House of Commons is not a house of the common people; it is a house of the communities who send the members there'.⁶

'The only proper role for the referendum in British politics', writes Peter Shore, another member of the House of Commons, 'is where an issue clearly affects the sovereignty of Parliament' such as when a change in the territorial authority of parliament was proposed (as in the questions of Northern Ireland, Scotland and Wales), or when there was a question of whether parliament should give up some of its powers to other authorities (as in the case of joining the European Common Market). 'We take the doctrine of parliamentary sovereignty seriously, because it expresses the sovereignty of the British people. ... The sovereignty of parliament is not something abstractly pertaining to parliament itself, but it is above all the reflection of the right of the people to vote; it is part of their sovereignty'.⁷ Other opponents argue that if a country made any concessions to the referendum principle, it would abolish the whole doctrine of parliamentary sovereignty, and all normal legislative decisions would have to be referred to the people.⁸

There is no doubt that in the United Kingdom at least, the sovereignty doctrine, or the common perceptions of it, are, as Professor Nevil Johnson declares, 'a serious obstacle to fruitful constitutional development'.⁹

This line of argument carries the most weight in the United Kingdom, where the powers of parliament, though ostensibly resting on the common law, have never actually been tested in the courts. But even in the British context, it should not be overlooked that Dicey himself, the scholar responsible for the absolute sovereignty theory, was also Britain's leading advocate of the constitutional and legislative referendum. Given the sovereignty dogma that he himself had propounded, he had to concede that the impossibility argument was

'verbally sound'. But in reality it was, he thought, largely without force: 'The electors may be trusted to resent an attempt to deprive them of legal power ensured to them by the Referendum Act. No party leader will risk this resentment. The Referendum Act will be less subject to change, except by way of extension, than any enactment in the statute book'.¹⁰

There was nothing at all to prevent its introduction in Britain: 'No vital change in either the law or the customs of the Constitution would be so easy of introduction into England as the establishment in principle of the Referendum', he declared, and went on to enumerate four different ways in which it could be done.¹¹ 'The latent sovereignty of Parliament', he concluded, 'is in truth an argument, not against, but in favour of the Referendum'.¹²

The impossibility argument has no application to the constitution of the Commonwealth of Australia. The legislative powers of the parliament that it creates are confined to those explicitly granted to it. Pursuant to s.128, the people may give it such new powers, or take away such of its existing powers, as they see fit. The introduction of direct legislation would of course require a constitutional amendment, but that would present no problems other than the challenge of rallying enough popular support for it, which on present indications would not be impossible.

The state legislatures do not have the same explicit limitations on their powers, but even they are the creations of (Imperial) statute, and do not draw their powers from accepted custom and usage as does the parliament at Westminster. Although there could be difficulty about purporting to make a direct legislation amendment (or any other provision for that matter) totally unrepeatable, the case law does make it clear that special legislative procedures may be entrenched in such a way that they cannot be repealed or modified by simple parliamentary vote. The usual method of entrenchment has been to provide that an amending or repealing Act shall be of no effect unless accepted by the voters in a referendum. This type of provision has become more widespread in recent years.¹³

The contention that initiative and referendum are inconsistent with the principle of parliamentary sovereignty has no force in relation to the federal constitution which, as we have seen, recognizes the people as being both the political and the ultimate legal sovereign. The increasing use of the constitutional referendum at the state level, together with the significant history of ad hoc non-binding legislative referendums, suggest that democratic government, rather than parliamentary sovereignty, is the dominant political principle at work in the states as well, even though it has not been allowed its full expression.

The argument that direct legislation results in the complete overthrow of parliamentary authority and the submission of even routine

matters to popular vote can be dealt with summarily. Experience has shown that it is totally unfounded. Initiative and referendum in practice operate as safeguards, not as substitutes for law making by representative assemblies, even in the countries and states where they are most used.

The lack of any evidence at all to support the fear that direct legislation would become addictive and would supplant representative government was one of the reasons why Lord Bryce, after 30 years of observing its results in Switzerland and the United States, put aside his initial objections to the initiative and referendum. He concluded that 'representative government is inferior to democratic government; that government by the people directly is superior to representative government; but the history of the principle [of initiative and referendum] where they have tried it shows that the effect is auxiliary and nothing else'.¹⁴

Finally, the High Tory view put forward by Enoch Powell, which finds only limited support in Britain,¹⁵ raises no echo at all in Australia.

Responsible Government and Ministerial Responsibility

A subsidiary and less significant objection sometimes raised is that direct legislation would compromise the system of responsible government and collective ministerial responsibility of the Westminster model. As a prediction this could be correct.¹⁶ As a criticism, it carries little or no weight. In practice it probably means two things. In the first place, a minister could remain a member of a government without remaining at least outwardly in agreement with the government's legislative policies. The original convention was that a minister had to either pretend to support the ministry's policies, or else resign his portfolio. In practice this principle is obsolete. Political journalists would have little left to write about if governments maintained a facade of unity. It is well known that the cabinet room is often the scene of violent disagreements and there is always someone present who has an interest in leaking a version of the dispute to the media. Prime ministers and premiers often publicly repudiate policy statements made by their colleagues. In recent times the departure of the prime minister overseas has become the signal for a cacophony of co-ordinated leaks, factional affrays and character assassination. Yet no one in these circumstances expects any minister to resign. These are not resigning times. During Britain's Common Market referendum the principle of collective responsibility was suspended¹⁷ with no observable ill effects.

In the second place, direct legislation would probably mean that a government could properly remain in office even though one of its main

policies was rejected by the voters. This happens regularly in Switzerland and has also been seen in Australia when government-sponsored constitutional amendments or ordinary statutes are defeated at a referendum. In such cases no one expects the government to resign or to pretend that it has changed its opinion. Of course, a succession of such defeats would compromise the government's standing and it might be defeated at an election. But that would be as a consequence of voter perception of persistently defective judgment on the part of the government, not a direct result of the referendum.

As Dicey pointed out, these changes in the workings of responsible government would be progressive. They would reduce the undue power of parties and would lead to greater candour and forthrightness in politics.

The Party System

There is no doubt that the initiative and referendum have some tendency to subvert the authority of political parties. People are encouraged to think for themselves and need not resign themselves to the party line. There is also no doubt that some party politicians feel threatened by this.¹⁸ They usually argue that a choice between parties is all the choice the people need, and that party leaders are more likely than the people to make responsible judgments.¹⁹ But behind these arguments lies a fear that if people are asked to make an independent judgment on one thing, they may start wanting to make independent judgments on other things and this will weaken party authority. Party leaders would need to be more respectful towards public opinion.

This belief is well founded, but it is not an argument against the initiative and referendum unless one places the interests of the parties above those of the public. If we conclude, with Dr Jaensch and others, that 'Parliamentary discussion, and Parliament itself, have been all but destroyed by the political parties', we should be actively seeking to loosen the political stranglehold of the parties over our legislatures. (As we have seen, direct popular legislation can, as it happens, also be used to overcome the paralysis that can result from the absence of party authority and discipline.)

In any case, initiative and referendum are not the death knell for political parties. The Swiss parliament still has strong parties, even though the possibility of a petition referendum has forced them actively to seek balance and compromise. The American political parties are relatively weak today, but this is just as true in states that do not have direct legislation. The main cause of party decline is thought to be the change to the pre-selection of candidates and delegates by direct primary election (a ballot of registered party voters) rather than by the party machine.²⁰

The Significance and Quality of Debate

Especially in intellectualist circles, it is often argued that placing a legislative measure directly before the people will lower the quality of policy debate and even exclude any true debate at all. Enoch Powell has argued that debates in the true sense — that is, debates in which people can have their minds changed — can take place only in some sort of closed or organized environment, such as a representative assembly. He sees the proceedings of parliament, with its amendments, its great debate on the floor on the general question, where all kinds and shades of implications can be exposed and taken up by others, as being of paramount importance in decision making. 'If a decision is to be taken on a basis of information or education secured by debate, then it cannot be taken by the electorate — and the sovereignty of the people can only be exercised indirectly through a debating chamber'. This contention seems to be moulded by his view that Great Britain is quite literally a parliamentary monarchy governed by the Queen with the advice and consent of the two houses of parliament, for he attaches great significance to the concept of counsel, which is 'advice that emerges from debate'. 'The characteristic of English judgment and of English sovereignty, philosophical or otherwise, is that it takes the form of counseling, that there tends to be some form of debate of which the most secret is the cabinet and the most public is the house of Commons'.²¹

He is probably right in underlining the importance of free and abundant debate in the English (and for that matter in the whole Anglo-Celtic) approach to social organization, but his portrayal of the modern Westminster-type parliament as a forum in which legislative measures are proposed, considered, and amended by debaters united in a common search for truth and justice is preposterous. As Dicey pointed out at the turn of the century, that statesman-like weighing of argument, that search for balance and agreement that Enoch Powell sees in the proceedings of the Commons, vanished with Peel and Palmerston, Disraeli and Gladstone. 'No one out of Bedlam', Dicey declared, 'supposes that the results of a division are greatly, if at all, affected by the speeches which are supposed to convince the House'. Even the outside public could conjecture, before a debate had begun, how the voting would go, and a Whip's predictions would be of far more certainty than mere conjecture.²²

The possibility of a direct appeal to the people, either as the consequence of an indirect initiative or as the result of a petition referendum, might well restore to parliamentary debate some of the reality it has lost over the past century. It is conceivable, Dicey thought, that speakers in parliament 'might address themselves to the task of convincing an unseen, but more or less dispassionate audience:

it is conceivable (wild though the idea appears) that power of reasoning might become a force of some slight moment even in practical politics'.²³

The other aspect of this objection is that the standard of debate would be lower if the whole of the state or the Commonwealth became the legislative assembly. It is true that, for the purposes of advertising, the issues would have to be simplified into short messages, but this is already true of electoral advertising, which is supposed to help voters choose between whole packages of policies. In any event, the important part of the public debate is the pamphlet setting out all the main arguments for both sides, which is circulated to all voters in advance of the poll.

Some critics of direct democracy proceed on the basis that in a referendum campaign only the crudest appeals to ignorance and prejudice will have any effect. They single out the most disreputable argument put forward in support of the successful side in a past referendum and hold it up as typifying the level of debate to be expected.

This criticism is part of a broader argument against direct democracy, based on the premise of voter incompetency, to which we will come shortly.

Echoes of the 'Führer Principle'

Side by side with Dicey's sovereignty dogma is a related objection that mention of initiative and referendum draws from many Australian politicians, irrespective of party. They will tell you that members of the legislature have a 'responsibility' to the people to make all the legislative decisions, even in opposition to the explicit wishes of the voters.

This belief is a blend of an extreme version of the independence view of the representation principle with Dicey's theory of sovereignty, plus a third element, sometimes called in the literature the 'Führer principle'. This is the notion that some person or group of persons in authority, whether elected or not, embodies the lasting values and aspirations of the nation and has a special destiny to do what is necessary for the public good. 'My pride', declared Adolf Hitler, 'is that I know no statesman in the world who with greater right than I can say that he is the representative of his people'.²⁴ Similarly, wrote H.B. Mayo, 'The Soviet definition' of democracy also involves the 'ancient error' of assuming that 'the wishes of the people can be ascertained more accurately by some mysterious methods of intuition open to an elite rather than by allowing people to discuss and vote and decide freely'.²⁵ Similar beliefs in their transcendental duty to think and act for the people were held by the nobility under the French *ancien régime*, by the Tsarist aristocracy and by English opponents of the 1832 Reform Act.

In these instances it could be seen as an aspect of the idea of *noblesse oblige*. Modern Western politicians are not immune from this delusion, though they clothe it in the more moderate language of responsibility rather than that of right or destiny. Even so, it still means that some group, by virtue of position, regards itself as having a general right or duty to override the people's wishes whenever it sees fit, not in accordance with pre-existing law, but by reason only of its allegedly higher quality of judgment or consciousness. No matter how euphemistic the terms in which this idea is expressed, it is inconsistent with any notion of self-government or popular control of government. Jefferson summed it up: 'Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others?'²⁶

II. THE VOTERS ARE NOT COMPETENT TO JUDGE PARTICULAR LEGISLATIVE PROPOSALS, AND THEY WOULD SUPPORT POPULIST MEASURES

The Record in Australia

The same objection based on voter incompetency has been raised against each successive extension of the franchise. While ultimately there must come a point at which it is true, for example if it were proposed to extend the suffrage to children, it has so far proved to be unfounded, including in the context of initiative and referendum. Nevertheless, it is enjoying a new lease of life in countries where these devices do not exist but where their introduction is proposed. It has received added impetus from the revival of political elitism referred to earlier. Nowhere is it propounded with more asperity than in Australia. It is saddening to see that in a recent international compilation of essays dealing with the referendum, the only contribution in the collection that explicitly argues voter incompetency was written by one of our own compatriots — about us. The story of the referendum in Australian politics is described as a 'dismaying one', showing little evidence 'of intelligent democracy in action'. The problem is apparently 'the lack of an informed and interested electorate', which is not helped by the compulsory voting laws, which have the effect of 'dragooning ... the uninterested and ignorant to the polls'.²⁷

These are harsh assertions to make before an international audience. No serious attempt is made to substantiate them. The only piece of evidence put forward as demonstrating our supposed ignorance, stupidity and apathy is the fact that of the 36 (since 1984, 38) proposals for amendments of the Commonwealth Constitution that had been put to referendum since federation, only eight had been approved by the voters. Let us look a little more closely at this piece of evidence.

In the first place, we see that these figures deal only with constitutional amendment referendums at the federal level. If we look at the record of state referendums the picture is reversed, for we find that 20 state referendums have been carried and only 13 defeated.²⁸ Of the 13 defeated measures, six related to liquor trading and two were rebuffs to attempts by governments to remove constitutional checks and balances by abolishing the upper house of the legislature. But voters are discriminating on constitutional matters, for in 1978 New South Wales voters approved the direct election of members of the upper house by a majority of 84 per cent. In 1981 they endorsed the extension of the legislative assembly's maximum term of office from three years to four years, and approved proposals for the compulsory disclosure of pecuniary interests, by equally overwhelming majorities.

The same sort of discernment can in fact also be seen in the federal constitutional referendums. The 1967 referendum reforming the constitution in relation to the position of aboriginals attracted a Yes vote of 90.8 per cent, one of the highest affirmative referendum votes ever recorded in a democracy.²⁹ Of the four amendments simultaneously put to the voters in 1977, three were carried by majorities averaging 3 to 1. Further, the electors displayed no tendency to vote Yes or No on the four measures en bloc, but showed a clear propensity to differentiate between them. This is striking in itself, as all political parties had campaigned for a Yes vote on all four questions.

In the second place, of the 30 constitutional amendments rejected by the people, two (the proposals for simultaneous elections) would have increased the power of the executive government of the Commonwealth. Another (the 'democratic elections' amendment) would have made it mandatory to delineate federal electorates by reference to the number of people in them, not the number of voters (this was calculated to increase the number of seats held by the Labor Party). All of the other 27 were proposals for increasing the legislative powers of the Commonwealth parliament,³⁰ which has a monopoly of the right to propose constitutional amendments. Obviously, the voters are in general reluctant to widen the scope of Commonwealth legislative power at the expense of the states.

Now respectable arguments can be put forward in favour of centralized national government as opposed to decentralization of power through a federal system. But one can hardly say in fairness that a preference for decentralization and federalism is conclusive proof of ignorance, stupidity and inertia. As we have seen, the representative principle is more likely to be distorted in larger political units than in smaller ones. In Australia, the sheer size of the nation is a further argument for decentralization; the theory of representation itself acknowledges that natural barriers such as mountain ranges, major rivers and sheer distance are obstacles to effective representation.³¹ Federalism

also allows people dissatisfied with a particular state government to 'vote with their feet' by moving interstate, thereby bringing to the political arena some of the benefits of competition. And the reality is that the shift from centralization to decentralization is a world-wide trend. In the United States at least, it ranks as a 'megatrend'.

Looking at the rest of the world, it is difficult to think of a single major or medium-sized nation with a centralized system of government that is not having to contend with separatist regional movements. The Basque people are seeking separate status in Spain. Separatist movements in France have attained such strength that the government has made some concessions towards regional devolution. Italy has been struggling for years to contain separatist pressures in South Tyrol; and the United Kingdom has on several recent occasions seemed to be on the brink of dissolution. The same is even more true of the Kingdom of Belgium. Even in totalitarian countries, it is not always possible entirely to suppress regional nationalist movements such as that in the Ukraine. Decentralization of power is itself an obstacle to totalitarian rule. This is why one of Adolf Hitler's first acts on assuming power was to abolish the German states and convert the nation from a federation to a unitary system. The rise of Nationalist authoritarianism in South Africa followed a similar centralizing path. The Soviet 'republics' are independent in name only. One cannot, therefore, dismiss federalism, an idea supported by a wealth of human experience and aspiration, as mere stupidity.

Interestingly, the author of this attack on the Australian voter has recently attenuated his views on this point.³²

The Ignorance and Prejudice Postulate

That an appeal from the legislature to the people is an appeal from knowledge and enlightenment to their opposites has long been one of the main contentions raised against direct legislation.

Sir Henry Maine argued that all that had made England famous and wealthy had been the work of minorities, sometimes very small ones. 'It seems to me quite certain that, if for four centuries there had been a very widely extended franchise and a very large electoral body in this country, there would have been no reformation of religion, no change of dynasty, no toleration of Dissent, not even an accurate Calendar. The threshing-machine, the power-loom, the spinning-jenny, and possibly the steam-engine, would have been prohibited. Even in our day [1885], vaccination is in the utmost danger...' ³³ In recent times, Senator Gareth Evans has bluntly asserted that initiative and referendum carry an inherent danger of appealing to 'ignorance and prejudice'.³⁴

Are the voters ignorant, absolutely or relatively? Dicey conceded that there was force in Maine's point about religious toleration, calendar

reform, the threshing machine and so on, but argued that circumstances had changed since Maine wrote in 1885, and went on to refer in particular to the growing tyranny of party.³⁵ He also made the point that while the Swiss have sometimes erred in rejecting referendum measures, the errors were few, and by and large Switzerland was not an unprogressive country.³⁶ One should also add that in 1885 general public education scarcely existed in England, whereas since then the general level of education has steadily risen. That particular curve may have turned down in recent years, but even so we are looking at a vastly better educated populace than existed in England at the time when religious Dissent and the threshing machine were live issues.

In the United States, experience with direct legislation is causing more and more political scientists to abandon the elitist view of the voters as a collection of selfish, apathetic, capricious simpletons. There is growing recognition of the electorate's ability intelligently to distinguish available options and to judge public interests as well as private interests. There is evidence that the voters can be remarkably well informed about initiatives and referendums, especially by the medium of the pamphlet that explains the issues in detail and is circulated to all voters. Voters seem to take a sceptical view of sweeping and unsubstantiated campaign assertions. One billboard and radio campaign that simply propagated the statement that 'Initiative 26 is a bad initiative!' was notably unsuccessful.³⁷ Scare tactics tend to rebound on their authors.³⁸ The People's Lobby, which has run a number of successful (and also some unsuccessful) initiatives in California, warns that highly emotional campaigns do not work. They give the voter an impression of extremism and paranoia, which arouses suspicion and accentuates the voter's natural caution.³⁹ Everything supports the point made earlier that the level of political knowledge in the electorate is more a function of interest than of ability — and direct legislation is a powerful method of arousing interest.

What of the allegation of prejudice? Is it fair to suggest, with Sir Robin Day, that the people cannot be trusted on questions such as capital punishment, immigration and the powers of trade unions?⁴⁰

Can we expect, for example, a return to the kind of racist legislation that some representative parliaments enacted in the past? Critics are able to point to the enactment by the California voters in 1964 of Proposition 14, which declared that the private owner of property had an absolute right to sell or lease his property, or to refuse to sell or lease it, to any person he chose. The measure was drafted with a view to repealing state legislation prohibiting racial discrimination in real property transactions. It was later overturned by the courts on constitutional grounds.⁴¹ The subsequent history of the California housing market is somewhat complex, but it does not enable one to conclude that Proposition 14 was an expression of sheer hidebound

racism. Racial attitudes have mellowed greatly in the intervening years, and measurably so in the context of housing questions.⁴² The picture is complicated somewhat by the fact that in recent years, as the black American economist Thomas Sowell points out, the building of low-income housing projects (mainly for blacks) in middle-class neighbourhoods has been bitterly opposed by blacks already living in such neighbourhoods.⁴³ This may suggest that some of the initial white resistance was based not on racial factors as such, but on the behavioural characteristics of a proportion of those who lived in the ghetto, characteristics that middle-class blacks themselves find offensive. Equally, the rejection of an anti-Japanese proposition in 1944,⁴⁴ at the time of some of the fiercest battles of the Pacific war, tells against the existence of any general, long-term racial bias in white California voters.

While there are many striking similarities between Californian and Australian society, there are also important differences. Is it safe to extrapolate these observations and draw conclusions from them about conditions in this corner of the Pacific basin? Reliable data are hard to find. One can find many assertions that Australia is a dangerously racist country,⁴⁵ but most of these come from people who have found rewarding careers in antidiscrimination agencies and who would have to change jobs if it appeared that the problem could be managed without them. It is undoubtedly true, though, that in some parts of Australia racial tensions between Aborigines and the rest of the population do exist and Aborigines are subjected to sporadic, and sometimes sustained, acts of discrimination. Whether this is a function of skin colour or of behavioural characteristics is not entirely clear, given the very different social status of Thursday Islanders. But granted that some racial discrimination does exist, can one conclude that Australian voters at large would support racist legislative initiatives? The answer is almost certainly no. We have seen that the 1967 federal referendum, which was both publicized and perceived as a pro-Aboriginal measure, was carried by one of the largest affirmative majorities ever recorded in a democracy.

The British historian Donald Denoon maintains that the understanding of race relations in Australia has been confused by failure to perceive the gulf between government policy, which often adopted an explicitly racist cast, and private reality, where attitudes have been much more flexible. 'White Australians were really not very efficient in applying the strict rules of a racially stratified society', he observes. 'On the one hand there was an appalling amount of personal violence. On the other hand there was a startling amount of "unadmitted affection"'. Thus, racist Australian government policies in Papua New Guinea were a failure: 'And the reason for the failure of repression is the flat refusal of ordinary white Australians to behave in the manner which the government prescribed'. Dr Denoon is therefore led to a paradoxical

conclusion: 'Australia is probably unique among modern societies, presenting to the outside world an image of racial exclusiveness, while behaving very humanely in most face-to-face encounters. Most other societies present a public image of equality, and behave offensively in private'.⁴⁶

A recent contribution to the debate has come from a distinguished scholar who arrived in this country as the child of a penniless Jewish refugee family from National Socialist Germany and who is married to an equally distinguished Chinese newcomer. He has had this to say:

Those, like myself, who have come here from other countries and have visited a great variety of them since, have little doubt that for everyone except Aborigines, Australia is one of the most tolerant and easy-going communities in the World. ...Even Aborigines who have been treated very badly and often still are, now have more reason to hope for the future than indigenous peoples anywhere except Canada and the Scandinavian countries. They are in [a] better political and cultural position than any minority in the Third World or in Communist countries and in most other countries.

He refers specifically to claims of widespread discrimination and spreading racism: 'My background, my social life and social contacts, my marriage, all make me a much more ready target for such discrimination than most of those very strident people, so often not members of minorities, who want to tell me how desperately urgent and serious the problem is. That is not my impression and not that of the many migrants — European and Asian — that I mix with'.⁴⁷

Opponents of direct legislation then point to the popular repeal of a homosexual rights ordinance in Dade County, Florida, in 1977 as evidence of the tendency of voters to give way to irrational prejudice in initiative ballots. The ordinance was similar in effect to the provisions of the New South Wales Anti-Discrimination Act, which prohibit discrimination, including 'indirect' discrimination, against homosexuals.⁴⁸ The singer Anita Bryant launched a petition drive that culminated in a 2 to 1 vote in favour of repeal. Shortly afterwards, the voters in two states rejected similar Bills; a California state senator launched a drive in support of Proposition 6, which would have prohibited homosexuals from teaching in public schools. But this measure was defeated in 1978. When taken with the failure of an attempt to repeal such an ordinance in Seattle in that year, this result showed, according to John Naisbitt, that 'antigay feeling had peaked'.⁴⁹

If we put aside questions about the appropriate legal approach to homosexual practices, what does this episode show us about voter behaviour under direct legislation? Does it in fact reveal a propensity to

act on prejudice? The first point to note is that while the type of legislation at issue does confer rights on homosexuals, it simultaneously reduces the rights of other people by taking away from them the liberty to make individual judgments and decisions about the suitability of a homosexual applicant for a certain task, or about the consequences of supplying accommodation or other services to persons who by definition are obvious or declared homosexuals. The official assumption is that any individual judgment that results in a decision adverse to a homosexual must be based only on irrational and bigoted thinking. But it must be at least debatable whether this is so. For example, a refusal by a restaurateur to employ a chef whose sexual practices make him a possible carrier of AIDS, infectious hepatitis and a variety of other contagious diseases of which practising homosexuals are the principal hosts could hardly be dismissed as an act of pure prejudice.⁵⁰ There would be no query raised at all if the prospective chef were a potential carrier of typhoid or some other disease not especially associated with homosexual practices.

Other cases may not be as strong as this one. But a total denial of any freedom of choice whatever in these matters would make sense only if there was evidence of widespread and unwarranted discrimination. Yet the Anti-Discrimination Board, in one of its own surveys, has found that no such general adverse attitude or ill-treatment exists. Australians were shown to favour a tolerant attitude towards private homosexual activity. They are intransigent only when it comes to activist proselytizing, especially when directed at young people, or the flaunting of what is regarded as perverted behaviour. Observation and empirical investigation suggest that public attitudes in comparable countries such as the United States and Great Britain are very similar to this. The Board disapproves of this public attitude, but whether one shares their disapproval or not, one can argue that the picture is not clear enough to justify the sweeping restrictions on individual freedom contained in this type of legislation.⁵¹

The Dade County phenomenon does not, therefore, add up to clear evidence of a general tendency of direct legislation to unleash irrational prejudices. The case is more indicative of a resistance to the general concept of privileged minority status than any desire to punish homosexual behaviour as such. This conclusion is supported by the results of California's November 1986 ballot on Proposition 64, which would have declared AIDS a class A communicable disease. This classification would have authorized health authorities to prescribe a variety of steps relating to treatment and containment, including, if judged appropriate, some form of quarantining of carriers. The proponents claimed that the measure was necessary to head off an attempt by homosexual groups to have the disease exempted from lethal disease status. Voters decisively rejected the proposition.

It is probably true, though, that initiative and referendum will sometimes delay legal change. For example, while few would describe Switzerland as a generally unprogressive country, the Swiss were decades later than most other nations when in 1971 they granted the vote to women (though the women of neighbouring France did not receive the vote until the end of World War II and Belgian women not until 1949).⁵² Such delays may involve social costs that can fairly be laid at the door of the initiative and the referendum. But there is another side to this. If legal changes, even necessary ones, are enacted before the people are ready to accept them, there will be social costs in the form of high policing costs, disrespect for law, and a build-up of resentment that may explode in genuinely irrational ways. Dicey attributed the success of Britain's enormous 19th-century legislative program to the care that was taken to avoid moving too far ahead of public opinion: 'Nothing is effected by violence; every change takes place, and every change is delayed or arrested by the influence, as it may seem irresistible influence, of an unseen power. The efforts of obstructionists or reactionists come to nothing. ...[They appear] not in reality to delay for more than periods which are mere moments in the life of nations, the progress of change. On the other hand, the violence of democrats or the fervour of enthusiasts achieves little in hurrying on innovation'.⁵³

Or, as the Swiss statesman and historian Theodor Curti put it earlier this century, 'The people may reject a progressive measure when first presented and embrace it when another opportunity presents itself. In any event it is better not to force laws — even good laws — upon the people, but to leave the decision to their own free will'.⁵⁴

Specifically with respect to female suffrage, it should be noted that in a number of American states the popular initiative was used to gain women the vote when representative assemblies failed to act.⁵⁵

The Fickleness Postulate

'The public mind is always changing', urged a Queensland parliamentarian opposing the Popular Initiative and Referendum Bill in 1916.⁵⁶ 'The people are fickle and irresponsible', echoed Edward Theodore,⁵⁷ who in 1919 withdrew the Bill from parliament.

The fact that a small but potentially significant percentage of voters will change their voting intentions at short notice (perhaps because party cartelization has reduced the scope for real voter choice) is the main reason why governments attach such importance to the timing of parliamentary elections. From this the critics conclude that public opinion, not about the competency of politicians, but about whether a given measure should become the law of the land or not, is so shifting and inconstant that direct legislation would be dangerous. The main example given in support of the fickleness hypothesis is the story of

Great Britain's Common Market referendum. It is generally believed that if a referendum had been held before Britain had actually signed the Treaty of Rome in 1972, a majority of voters would have been against entry. This is the main reason why Edward Heath's Government refused to hold one. But when in 1975 the Wilson Government did refer to the people the question whether Britain should remain in the Common Market, the vote favoured staying in. This, according to a British trade union leader, shows the 'fickleness of the whole process'.⁵⁸ But does it? The result in favour of continued membership appears to have come simply because people felt that, once Britain was already in, it would be dangerous to come out. It was thought that the nation would have looked foolish and perfidious and that it would get the worst of both worlds.⁵⁹ There is nothing fickle about that. It was just a pragmatic and perfectly defensible belief that it was better to try to make a success of membership than try to unscramble the omelet.

The charge of fickleness stems in large part from failure to perceive a fundamental distinction between the underlying tenets of public opinion and assessments of current performance or events. The former shows little movement, but the latter quite properly reflects changing conditions. The political scientist Everett Ladd illustrates the point in this way: 'If 95 percent of the public say it is "too cold" when the temperature is 20 degrees below zero, while later, when it is 103 degrees above zero, 97 percent say the weather is "too hot" — surely we do not conclude that opinion has changed. When inflation was at the double-digit level, Americans were far more inclined to describe it as the country's most pressing problem than they were when the rate had been cut in half or better'.

After five years of closely studying public opinion, he concludes that while public opinion does change, stability, not sudden lurches this way and that, is the norm: 'When shifts in underlying attitudes do occur, they do so gradually, in response to lasting transformations of social organization. ...The last five years give little evidence of the great ideological 'swings' and realigning surges so often attributed to them. ...Public opinion is likely to remain the anchor, not the sail, of American democracy'.⁶⁰

Irresponsibility

Will voters always support initiatives that promise short-term benefits, at the expense of the longer-term well-being of society? Many critics of direct legislation think so. One British member of parliament argues that the people will act irresponsibly because 'they do not have to live with the consequences of their decisions, and they are not responsible for the results of their own votes'.⁶¹ Similarly, Senator Evans believes that people will respond to crude appeals to short-term self-interest, and

points to 'the notorious' Proposition 13 in California, which also showed, he maintains, that the voter is not equipped to make responsible decisions on matters of taxation or government spending.⁶²

The first point seems particularly weak. Surely voters would have to live with the results of their decisions in a much more direct way than when they vote in a parliamentary election. Moreover, studies taken over a period of years show no general voter predilection for measures that could be called 'popular', no general tendency to give way to what are assumed to be populist prejudices, whether for or against unions or business, or against minorities.⁶³ In many cases what is commonly believed to be the popular view is not borne out by the result of the vote.⁶⁴

As to the second point, Senator Evans is essentially saying that responsible economic decisions cannot be expected from ordinary people. This was the theme that underlay many of the criticisms aimed at the Swiss by economists and political commentators during the 1960s. The stubborn refusal of Swiss voters to approve the expansion of government spending was viewed, in that far-off golden age of Keynesianism, as selfish and irresponsible obscurantism. The critics were confounded in the 1970s and 1980s, however, when the consequences of the two views became apparent: Switzerland had rates of unemployment and inflation hovering between 1 and 2 per cent (and even these caused alarm) while economies controlled by 'experts' were prostrate under the social and economic dislocations caused by uncontrolled stagflation. Such economic prudence is not particularly Swiss. In 1985 Italian voters rejected a communist-sponsored indexation initiative that would have given many people higher wages in the short term, but with long-term inflationary consequences such as we are experiencing in Australia. This gives some grounds for believing that voters display more economic responsibility than governments, whose main goal, after all, is re-election.

The portrayal of Proposition 13 as a display of irresponsible self-interest also needs to be set against the facts. This measure cut Californian property taxes for the coming year by 57 per cent and reduced tax rates to 1 per cent of a property's market value, based on its 1976 assessment. Once set, this value could be raised by only a maximum of 2 per cent per year. When the property was sold, it could be reassessed at its current market value.

The proposition was opposed by a powerful coalition of public service unions, business interests (who feared that the loss in revenue would be offset by higher taxes on business), education circles, the media and politicians. Its success in spite of this is attributed to many factors, of which perhaps the main ones are, first, that property taxes had been rising sharply in California and had in many cases trebled in a period of five years; and second, that the California government had

amassed a surplus of over five billion dollars by this means and had procrastinated for years without deciding what to do with it.⁶⁵

The success of Proposition 13 in 1978 with an affirmative majority of 2 to 1 and a record voter turnout was followed in 1979 by the even more striking success of Proposition 4, which was carried by a majority of 3 to 1. This enactment required that spending by state and local governments in California rise no more rapidly than increases in inflation or personal income, whichever was the lower, adjusted for changes in population. But the tax-cutting phenomenon came to an end a year later, when Proposition 9, which would have halved state income tax rates and permanently indexed them to prevent bracket creep, was itself defeated by a majority of 2 to 1.

The history of this phenomenon has been exhaustively canvassed by Drs Rabushka and Ryan in their book, *The Tax Revolt*. They describe how the success of Proposition 13 inspired a flurry of tax-cutting actions, many of them proposed by citizen initiative, right across the United States. But a year later, similar measures had been rejected by the voters in Oregon, Michigan, Missouri, Nebraska and Colorado, as voters realized that most states simply did not have the huge financial surpluses that had triggered the tax revolt in California. By 1979-80, a trend away from tax-cutting initiatives and towards tax limitation measures had emerged, only three out of eleven cuts being approved by the voters as against four out of six tax limitation initiatives.⁶⁶ The Reagan administration's federal income tax reductions also removed a source of voter anger that had previously added impetus to the state-level tax-cutting drives.⁶⁷ Finally, another California measure proposed by Howard Jarvis to plug perceived 'loopholes' in Proposition 13 was defeated in 1984.⁶⁸

David Schmidt of the *Initiative News Report*, giving evidence before a New Jersey Assembly Committee considering the adoption of the initiative in that state, summed up the economic effects of Proposition 13 and the Massachusetts equivalent, Proposition '2 1/2':

Since the passage of California's 'Proposition 13' in 1978 and Massachusetts' 'Proposition 2 1/2' in 1980, these two states have been among the nation's most prosperous. As of mid-1983, Massachusetts had the lowest unemployment rate in the nation, according to James Ring Adams' book *Secrets of the Tax Revolt* (p.332). In California, in the year following Proposition 13's passage, public sector employment decreased less than 1 per cent. By 1980, the number of government jobs had rebounded to pre-Proposition 13 levels, and it has continued growing since then. While some government services have been cut back or had user fees imposed, the overall level of government services in both states remains above national averages. The dire predictions made by opponents of '13' and

'2 1/2' in the months just before and after these measures passed simply have not come true. To cite just one example, opponents of '13' claimed that the measure would hurt the poor. However, as of 1984, California's per capita spending on welfare was **double** the national average. In November of that year, California voters **rejected** an initiative to cut welfare spending — by a nearly 2 to 1 margin.⁶⁹

Following Proposition 13, California's state and local tax burden, as compared with those in other states, plunged from fourth position to twenty-first. By 1984 it was fluctuating around sixteenth ranking.⁷⁰

The victory of Proposition 13 cut across party and demographic divisions; majorities of both Republicans and Democrats voted for it, as did majorities of voters in every income and education level. It was carried in 55 of California's 58 counties.⁷¹ A survey conducted three and a half years later found that voters still supported Proposition 13 overwhelmingly; 66 per cent of respondents said their impression of it remained as favourable in 1981 as it had been when the proposition passed. Asked if any of the services they personally used had been reduced as a result of Proposition 13 and if they had suffered as a result, more than three-quarters said either that their services had not been cut or that they had suffered only a little or not at all. Only 16 per cent said they had suffered somewhat or a great deal, and another 6 per cent were not sure.⁷² Rabushka and Ryan could also find no sign of the widely prophesied catastrophic cutbacks in essential services such as police, fire, education and libraries.⁷³

Viewing the episode as a whole, there is no basis for dismissing it as mere irresponsibility and self-interest on the part of voters. The people were simply reasserting their right actively to determine tax policies, but they also realized that there were practical limits to tax reduction in modern conditions, at least in the short term.

Populism

Senator Evans's condemnation of Proposition 13 should be viewed as part of a wider fear of 'populism' in certain quarters. The word itself is used as a derogatory term in political-intellectual circles; Senator Evans certainly used it as such in his attack. But as Professor Antony Allott asks in his stimulating work, *The Limits of Law*, why should 'populism' be a rude word in the mouths of the elite? 'If populism means proposing policies which the people will accept, what is wrong with that? If it means consulting people before making decisions or acts which will affect them, what is wrong with that? ... [T]hese practices are justifiable, not only on grounds of true democracy, but on the utilitarian or pragmatic ground that they are more likely to be successful'.⁷⁴ He

goes on to point out that, ironically, populism used to be a powerful argument and appeal in the mouths of revolutionaries who sought to overthrow the established order, as with the French Revolution and its destruction of the *ancien régime*. But today it is attacked because the populist argument now threatens to overthrow the new established order, the order established by this same intellectualist elite who are now in power. 'They are the Ancien Regime who resist change or the destruction of their powers and privileges; they are the reactionaries — whereas the populist programme is the radical one'.⁷⁵

The attitude described by Professor Allott joins with perceptions of limited voter capacity to give rise to the proposition that tax and spending matters are especially inappropriate for appraisal and decision by the people: 'The important issues, particularly those involving the allocation of community resources and the raising and spending of public revenue', declares Senator Evans, 'are no longer the kind of issues for which every voter will be able to find answers from within his or her personal experience. Attractive though it is maybe, for any democrat to favour the idea of the people making the decisions, the fact is that it is just no longer possible, if indeed it ever was possible, for the people to be aware of all the factors that are necessary to sensibly determine an issue'.⁷⁶ It is for the governors, then, to determine what tax burdens the nation will be called upon to bear; the opinions of the governed are of no account.

If there is a Rubicon beyond which an elite turns into an *ancien régime*, this must be it. The strength of the link between the power to tax and the power to govern is one of the great constants of history. Totally forgotten in Senator Evans's argument is the role of unpopular taxes in the constitutional upheavals of the past. Shipmoney, the stamp tax, the tithe, the taille and the gabelle all helped to bring about revolutions — the English, the American and the French. Australia's only armed rebellion, the Eureka Stockade, was a tax revolt.

Voter Apathy

A particular aspect of voter irresponsibility, the case against direct legislation continues, is that voters are apathetic towards political issues. They will not voluntarily vote in sufficient numbers to give the results legitimacy. At the turn of the century, some conservative opponents of the Progressives went so far as to argue that since the great mass of the voters was indifferent to political questions under the present system, it did not deserve the right to decide the questions directly: 'if the so-called better class of voters, because they are absorbed in their own private affairs, are too indifferent to take part in public questions and are content to leave the running of the government in the hands of

interested politicians, they have no ground for complaint. ...There is no trouble with the system. The difficulty lies with the people themselves...'⁷⁷

At the national level, however, the record of voter turnout for referendum ballots is remarkably high; few in the major democracies have dropped below 60 per cent. In Australia, in the days before compulsory federal referendum voting, the turnout varied between 50.2 and 82.7 per cent, with an average of 59.3 per cent. The exception to this pattern is Switzerland, where there are federal referendums every three months, and the average percentage of those voting has declined from 58 per cent at the turn of the century to 42 per cent in 1978.⁷⁸ The decline in participation is viewed as a problem in Switzerland, but it does not appear to have made the people challenge the authority and legitimacy of referendum decisions. Indeed, there is steadily growing interest in developing new methods of direct participation in legislative and administrative decision making.⁷⁹ It would appear that people want the right to decide and vote, but if the matter is not one on which they have strong views, they are content to delegate its exercise to their fellow-citizens,⁸⁰ knowing from experience that it safe to do so.

The delegation phenomenon is noticeable in the United States. A 1968 study showed that participation ranged from a high of 74 per cent in Utah to a low of 9 per cent in South Carolina, with a national average of 40 per cent. In 1980, a presidential election year, the national average rose to 52.1 per cent. Nevertheless, the fact remains that few, if any, measures ever receive the approval of a majority of adults. But this is also true of state candidates elected to public office. It should be noted, however, that American figures significantly understate voter participation. This is because the formula used for measuring voting and non-voting in the United States is based on the 'voting-age population', which is the Census Bureau's estimate of the number of people in the country aged 18 or over. But this figure includes non-citizens, inmates of jails and mental hospitals who are not eligible to vote, and persons not on the electoral rolls. In Australia, Europe and elsewhere the base figure consists solely of enrolled voters. It is estimated that if this measure were used American voter turnout figures would rise by 8 to 10 per cent.⁸¹

The most important variable in predicting whether a class of persons will vote or not is education. A 1974 study of voters showed that while 89 per cent of respondents with tertiary degrees reported voting on all or most of the propositions in that year, only 40 per cent of those with an eighth-grade education or less so indicated.⁸² At least in relation to less widely debated measures, referendum voters in the American states appeared on these results to be a small, well-informed, highly-politicized and in some respects elite segment of the total electorate.⁸³ On the other hand, a more extensive study undertaken

during approximately the same period, while showing the same high voting rate for those with tertiary degrees, reported that a respectable 63 per cent of respondents with less than an eighth-grade education claimed to have voted on all or most initiative propositions.⁸⁴

It is not in general true, therefore, to say that elitism, having been shown to the door by the adoption of direct legislation, is now returning through the window. On matters that are of wide popular concern and interest, voting turnouts are high. Participation in Denmark's 1972 Common Market referendum was 90.1 per cent, a national record.⁸⁵ On Proposition 13, 65 per cent of eligible voters took part in the ballot.⁸⁶ Further, despite the large number of measures on which state electors may be asked to vote at any particular ballot, voters have proved to be discerning. There is little or no evidence of 'donkey' voting, of voting for blocks of measures, or of casting all No votes.⁸⁷ Where there are many questions on the ballot, fatigue or boredom does not seem to be a factor in voting patterns. 'Some voters appear to pick and choose the propositions on which they will vote', reports Magleby, 'with popular initiatives eliciting the largest amount of participation'.⁸⁸

The results of Australia's 1977 referendum show that voters discriminated carefully between the four constitutional questions,⁸⁹ though all political parties had supported them all en bloc. The same discerning tendency appears in the results of the 1984 referendums, in which voters rejected two amendments proposed by the government but resisted by the federal opposition: the 'interchange of powers' proposal received almost half a million fewer affirmative votes than the 'terms of senators' measure. Professor Aitkin, whose denigration of Australian voters was outlined above, has recently retracted his assertion that we are apathetic and uninvolved in political questions.⁹⁰

III. INITIATIVE AND REFERENDUM WOULD INSTALL A TYRANNY OF THE MAJORITY

The objection most gravely urged against direct legislation, though perhaps mainly against the initiative rather than the referendum, is that it would subject individuals to the danger of losing their liberties by reason of the temporary caprices or the long-term prejudices of the numerical majority. The problem, as J.S. Mill pointed out, is that when we speak of democratic self-government we really mean, not the government of each by himself, but of each by all the rest. There may come a time, he argued, when the people may desire to oppress a part of their number. The rights of minorities and the cherished values of liberal democracy may thus be endangered.

Widespread though this fear is in the literature, there is scant evidence to support it. Once we move beyond the criticisms of certain periods of the ancient Athenian democracy, of which we have only a

fragmentary picture anyway, it is difficult to find an historical example of a democracy operating under the majority principle that could be generally characterized as a tyranny. Tyrannies by absolute rulers and oligarchies abound, however. One can think of cases where democratic governments have performed an isolated act that we might describe as 'tyrannical' (assuming we have overcome the difficulties of defining that term), but a striking feature of these is that they are almost invariably done immediately after an election and, in Australia at least, sometimes after an election campaign in which the winning party has specifically denied any intention of committing the act in question. In these instances the victorious party is implicitly acknowledging a belief that democracy is not favourable to tyranny: the government can act tyrannically only when it knows there is a long gap until the next election. By this time the voters' anger may have cooled. In any case, an election is about the choice of a government for the future, not a judgment on its misdeeds of the past.

True it is that Adolf Hitler was elected in 1933 by democratic means. But he was elected as Chancellor, not as dictator, and most historians believe that if an election had been held at any time during or after the northern summer of 1933, the German electorate would have turned him out of office for his assumption of absolute power alone. One must also bear in mind that the German people had little experience of democracy and had undergone unbelievable hardships through hyperinflation at the hands of their first democratic government. They also had good reason to fear a communist takeover which, as the Soviet terror already showed, would have signalled the end of democracy for all time and the start of a holocaust of at least Hitlerian dimensions. Even so, the vote for Hitler fell well short of a majority and he came to power only with the assistance of a minor party.

As H.B. Mayo explained, much of the fear of majority tyranny is based on two misunderstandings or tricks of definition. First, no democracy theory advocates simple majoritarianism alone, without the other principles of democracy as a continuing system. These include, notably, the political liberties that enable the minority to work at all times towards the creating of a new majority. Yet the majority tyranny argument defines democracy as the majority principle by itself, without the other democratic principles, and then points to Hitler's rise to power. Where the political liberties have been abolished and the government cannot be turned out of office at a future election to be held within a reasonable and defined time, democracy in any real sense of the word has ceased to exist.

Second, there is a tendency to assume that the majority, simply because it is the majority and therefore a sort of common herd, must in fact always be wrong or foolish. 'It is even worse', Mayo pointed out, 'to perpetrate the trick of defining the majority as *ipso facto* wrong or

immoral, and the minorities as *ipso facto* right or virtuous, or to assume that all do not stand on much common ground'.⁹¹

But if we accept that there may be times when a majority (like a minority) may act foolishly or unjustly, we may agree with Mill that in constructing the ideal constitution there is much to be said for 'obtaining a recognition of certain immunities, called political liberties or rights, which it was to be regarded as breach of duty in the ruler to infringe...'⁹² In so far as this is an argument for an entrenched Bill of Rights and for judges with the courage to enforce it, there is a good case to be made here. But this kind of protection is already needed even in the absence of direct legislation. Bigotry and intolerant ideology find expression under the present system of elected assemblies. To entrust the protection of fundamental liberties to parliaments is to place them in uncertain hands indeed. The record shows, among other things, that left-of-centre governments tend to restrict freedom of speech, while governments of the right restrict freedom of assembly.⁹³ Property rights are not safe from either side of the political spectrum. The Queensland government attempted at one stage to restrict the right of Aboriginal groups to buy large grazing properties.⁹⁴ The New South Wales parliament in 1981 legislated to expropriate all privately-owned coal in the state while explicitly excluding the normal common law right to just compensation;⁹⁵ to date none of the tens of thousands of citizens affected has received a cent of compensation.

Unfortunately, the notorious excesses and biases of the federal Human Rights Commission, together with the obvious shortcomings of the Australian Bill of Rights Bill 1986, have discredited, for the time being at least, the idea of Commonwealth protection for basic rights and freedoms in Australia. But assuming for present purposes that some form of Bill of Rights is needed in any event, we should still consider whether the danger to fundamental values and minority rights is greater under direct legislation than under the present system. It can be argued that because voters do not have to publicly proclaim their position on an issue, they are more likely to support measures that oppress a minority. It is also said that a popular ballot provides no way of measuring the intensity of belief. In every referendum, each recorded vote counts for the same as every other. If most votes in favour of an issue represent only unenthusiastic marginal preference, the proposition succeeds even if most votes against it represent passionate opposition. But elected representatives, it is argued, must assess not only how many of their constituents approve or oppose a measure, but also how intensely. If 60 per cent are mildly in favour but 40 per cent bitterly oppose it as a rank injustice, then the representative may vote against the measure if only because an angry 40 per cent is harder to deal with than an unenthusiastic 60 per cent.⁹⁶ Finally, there is the general 'mob rule' argument against direct democracy which draws an analogy with the

phenomenon of lynching. A lynch mob, after all, can be viewed as the ultimate expression of direct democracy in all three of its legislative, executive and judicial functions.

Let us consider the last point first. Episodes such as lynchings in the American South or the race riots in times past at Kalgoorlie and Captain's Flat are not the result of direct legislation. They are impetuous acts fuelled by local tensions and passions. Violent intolerance tends to occur in pockets. That is why the present essay does not advocate the adoption of a general initiative and referendum procedure at the local level — this could harness precisely those sectional pressures that direct legislation procedures seek to subordinate to the general will. Antagonism against minorities is not likely to be translated into law via initiative and referendum unless the hostile attitude covers the whole of the state, or of the Commonwealth, as the case may be. Observation suggests that this is unlikely to happen, especially in the long run. Over time, most people will come to recognize, if they do not already, that ultimately everyone in our pluralistic society is a member of some minority. In any event, there is not much scope for impetuous crowd psychology in the lengthy process of gathering signatures, of debating and drafting, and of voting by secret ballot in scattered polling places.

There appears to be no instance of a national initiative or referendum in a democratic country that has discriminated against a minority. There have been no general antibusiness, anti-union or antiproperty measures passed in this way either. There appear to be no examples of a mildly favourable majority imposing its will on an intensely opposed minority. If there are not a goodly number of people seriously interested in a measure, it is unlikely to qualify for the ballot in the first place. Further, the same reasons that impel elected legislators to accommodate intensity of feeling also appear to motivate voters.⁹⁷

Thus, Australian voters rejected a referendum proposal to give the federal parliament power to legislate against the Communist Party. This was in 1951, when Stalin's terror was at its height in Russia and newly conquered Eastern Europe, when tens of millions were being put to death by the new communist régime in China, when South Korea was struggling to repel a communist invasion and armed communist minorities were on the march in Malaya, the Philippines and Indo-China and had narrowly been defeated in Greece and Turkey. No sign of panicky antimorality voting there.

As was pointed out earlier, there have been instances of initiative or referendum measures in some American states that can be seen as working against minorities, not by discriminating against them, but by denying them special protection, as in the case of open housing laws and 'gay rights'. As to the latter issue, it is difficult to say what the longer-

term trend of opinion will be. In relation to the prohibition of discrimination in housing, and for that matter the vote for women in Switzerland, direct legislation could be responsible for delaying the legal recognition of new ideas for perhaps a decade or even for several decades. But it cannot permanently obstruct measures or changes that have general support, and in any case the delay does avoid the social and other costs incurred by imposing a new law on an unwilling populace. So even in these cases, it is debatable whether delayed legal change is more costly than parliamentary legislation that is in advance of popular opinion.

The existence of the right to petition for a ballot should itself be a safety valve that will lessen the fear and resentment that can build up if parliaments refrain from dealing with contentious issues or if they move too far away from popular opinion. It is such fears and resentments that can spark the search for a minority scapegoat. The right of direct legislation is thus in the long-term interests of all minorities.

None of these arguments can amount to a guarantee that initiative and referendum can never be used in a tyrannical way, any more than the theory of representative democracy ensures the same for elected assemblies. Ultimately the strength and permanency of any system of democratic government depends on the wisdom and self-restraint of the people. These are qualities that can only be encouraged by direct participation in government.

If it is nevertheless thought that the tyranny of the majority remains a serious risk, special safeguards can be adopted. One is the exclusion from the ambit of initiative and referendum procedures of matters that are administrative rather than legislative in nature, such as land-use permissions, occupational licences and the like. Popular rulings on specific applications of government power are one of the spheres of governmental activity most feared by those who believe that the initiative is prone to abuse by the majority. This distinction is an important restriction on the use of initiative power from the point of view of minority groups. In cases where they would fear overreaching or oppression by the majority, the administrative-legislative distinction ensures that an independent or specialized decision-making body will not be deprived of its role. This has been advanced as an argument for adopting only the indirect initiative process, which requires that proposed measures be submitted to the legislature, to be put to the ballot only if not enacted by the legislature within a specified time.⁹⁸ It may be thought that giving parliament the opportunity to debate all initiative proposals would give the maximum airing for the positions of minority groups. On the other hand, parliament is already free to debate anything it likes and can enact an alternative measure or place it on the ballot alongside the initiative measure.

IV. MONEY AND MEDIA

Any kind of political campaigning, whether for a general election or for a referendum, is an exercise in communication. In general, the wider the communication, the greater the chance that people will be aware of the message. Media coverage and access to advertising become significant factors. It has been argued that what the media choose to print or televise in connection with a referendum campaign has a great, perhaps an excessive, influence on how the choice is perceived.⁹⁹ Critics argue that the side with the most money will be able to allocate the largest amount of resources to persuading voters to support its views and in this sense will have a good chance of buying the result. To introduce initiative and referendum, according to Senator Evans, 'would be to change the system and deliver it into the hands of those with financial and communication resources to spare'.¹⁰⁰ He argues that the tobacco industry was able to defeat a California initiative measure for a ban on smoking in public places by spending some five million dollars on an advertising campaign against it.¹⁰¹

The smoking in public places measure should be seen in perspective, however. Its defeat would certainly have served the interests of the tobacco industry, but likewise also the interests of smokers, a group who represent a large proportion of the population and whose ranks are still being swelled, notably by the continuing increase in the number of young women taking up the habit. There must also have been many non-smokers who thought the measure too radical and intolerant. Since then, a more moderate antismoking measure has been carried in San Francisco, despite opposition from the tobacco industry, which spent ten times as much on its campaign as the successful advocates of the measure.¹⁰²

An examination of the overall pattern of expenditures and referendum results shows no necessary correlation between expenditure of money and the success or failure of an initiative. In California from 1972 to 1976, six of the eight measures on which advocates spent more than opponents were defeated. For all 16 measures from 1972 to 1976, the side spending the most money was successful in only eight instances. Those who successfully promoted California's Clean Environment Act 1972 spent only \$9000 on the campaign. Opponents of the coastal conservation Bill in 1972 outspent its supporters by more than 3 to 1, yet the initiative succeeded. On the other hand, the opponents of liberalizing marijuana laws spent only \$5000 but prevailed over supporters who outlaid \$214 000.¹⁰³ In Britain's referendum on Common Market membership, the pro-marketeers commanded more resources than their opponents and their cause succeeded at the polls. But it is notable that the pro-market case made no headway at all over the last weeks of the campaign. 'Despite their enormous superiority in

money and organizational skill, despite the popularity of their leading figures and the support of the press, and despite the prestige of having the government on their side, the opinion polls suggested that pro-marketeers gained no additional votes. Anti-Common Market strength seems, if anything, to have increased in the final days of the campaign'.¹⁰⁴

Proposition 13 is another interesting instance. Opponents of the property tax reduction measure outspent its supporters by \$1.6 million to \$1.4 million. The sources of the financial support are more interesting than the dollar amounts, however. The largest contribution to the Yes case came from an apartment owners' association with which Howard Jarvis, the author of the measure, was affiliated. The only other two sizable donations were \$5000 from Host International, Inc., of Santa Monica and Lassen Land Company of Chico, which gave \$2500. No other large corporation or firm made any contribution over \$200, and the bulk of the support came from individual donors contributing between \$10 and \$100. Signature gathering was an all-volunteer effort.

On the other hand, the No case received \$225 000 from a teachers' union (though a high proportion of teachers and other public servants voted for the proposition),¹⁰⁵ together with other six-figure amounts from unions and business interests. Seventeen corporations contributed \$10 000 or more and five gave \$25 000 each. The No case comprised virtually California's entire political, business, trade union and educational establishments. Its numbers included the AFL-CIO, public service unions, the Bank of America and the Standard Oil Company of California; among political groupings, Common Cause, the League of Women Voters and the Democratic Party; among politicians, the state's Governor and the vast majority of the members of the state legislature. Every major newspaper except one also joined the ranks of the opposition. Radio advertisements repeated that seven past presidents of the American Economic Association and 450 economics teachers from California's tertiary education institutions opposed Proposition 13 on the ground that it would severely disrupt the state's economy and public services.¹⁰⁶ Despite this formidable and costly campaign, the measure succeeded by a large majority.

All those who have studied the relationship between campaign spending and initiative results agree that no amount of advertising expenditure in support of an initiative measure will ensure its acceptance by the voters. It is simply not possible to spend an initiative into law. Dr Magleby, though a critic of the initiative system, concedes that 'Proponents of initiatives who outspent opponents by a two-to-one margin or larger were more likely to fail than to succeed in getting their initiatives adopted. In such cases 48 per cent of the initiatives were adopted. While this percentage is higher than the overall success rate of 31 per cent, it demonstrates that proponents cannot spend an initiative

into law, especially if there is organized opposition'.¹⁰⁷ This conclusion is confirmed by the research of Lowenstein, Shockley, Lydenberg, *The Initiative News Report*¹⁰⁸ and the findings of Austin Ranney already set out above.

Indeed, heavy spending on campaign advertising, especially if it seeks to make use of last-minute slogans and smears, often rebounds on its authors. The general caution of voters restricts the power of moneyed interests. Specifically, voters seem to be sceptical of a measure when a group lacking a history of interested involvement in civic affairs shows too great an affection for it.¹⁰⁹ A striking example of voter backlash against campaign spending occurred in Oregon in 1978, when an impressive 70 per cent of voters turned out to cast their ballots on a proposition allowing persons other than licensed dentists to fit false teeth. This was not an issue calculated to fire people's imaginations. But when small and poorly financed groups put the proposition forward, the Oregon dentists staged an expensive advertising campaign on television, and with speeches and billboards. Their campaign backfired. The voters became so disgusted with the dentists' obvious attempt to buy a victory that they turned out in large numbers to defeat them.¹¹⁰

There are many other documented cases in which heavy spending has backfired on initiative opponents. A lavish advertising campaign, which by its nature is impossible to conceal, will often cause campaign expenditure to become a contentious issue in itself. This occurred in a 1982 campaign over a Nebraska initiative restricting corporate farming. An opposition media campaign that broke state records for initiative contributions and spending made it appear that out-of-state corporations were trying to 'buy' the vote.¹¹¹ The same kind of voter backlash against 'a seemingly endless barrage of opposition radio, TV, and prime media advertising' saved a Montana litter control and recycling initiative from defeat.¹¹² A similar trend was observable in a California antismoking proposition in 1982, where public annoyance over expensive tobacco industry advertising against the measure arrested what seemed to be an inexorable decline in voter support for the proposition.¹¹³ Resentment over heavy opposition spending also became an important factor in the success of a 1982 Michigan initiative on electricity pricing procedures.¹¹⁴

It would appear that as long as both sides have an adequate chance to present their case, it does not much matter if one side has more telecasts or billboards than the other.¹¹⁵ In some instances costly campaigns mounted by business groupings for self-interested reasons have made possible an equal debate on a proposal. Without the advertisements purchased by large corporations, the issue in such cases would have been presented in a purely one-sided fashion. One of the lessons that emerged

quite early in the life of direct legislation was that 'a negative argument is not always forthcoming when left to be supplied by volunteers'.¹¹⁶ Some observers attribute the moderation and judgment of voters in direct legislation ballots to the fact that business groups spend heavily to defeat absurd propositions, just in case they should succeed by default.¹¹⁷

This is one area where there is a correlation between advertising expenditure and the result. While no amount of spending in favour of a measure will improve its prospects of success in a decisive way, heavy advertising expenditure against a proposition can increase its chances of being defeated.

This is because a well-financed campaign against a measure may underline any doubts the voter has, or may create new ones. The voter may then, quite sensibly, resolve such doubts about the measure by voting against it. Professor Allen in his comprehensive study concedes that this may on occasion permit opponents of a measure to bring about its defeat by raising baseless fears. But he goes on to say that this is practically the only regrettable consequence of this tendency, and in any case a No vote does not prevent either the electorate or the legislature from reconsidering the issue later.¹¹⁸ (This is the case with an initiative. When a parliamentary bill is successfully challenged by a petition referendum, parliament should be precluded from passing a similar measure within a certain time. This need not preclude a citizen initiative.) Further, the tendency to vote No when in doubt will not operate unless the issue is one of some complexity and uncertainty. No amount of advertising against a measure will make any difference if the issue is clear-cut and is one on which people have strong opinions or beliefs.¹¹⁹ Further, heavy spending on the affirmative case can counteract the effect of heavy spending against.¹²⁰ A government-supplied voter pamphlet setting out the arguments for and against can also offset imbalances in paid publicity.¹²¹

A number of studies besides those already cited also suggest that spending on advertising against a measure can be effective in ensuring its defeat.¹²² Yet despite this, it would appear that money is the decisive factor in the case of only one initiative out of every eight.¹²³ Most of the studies showing a correlation between opposition spending and failure of an initiative rely, however, on data from the 1970s. Since the early 1980s there seems to have emerged a tendency for a costly advertising campaign, whether for or against the proposal, to become an issue in itself and so tend to rebound against the side that is seen to be heavily outspending the other. The examples given above of spending becoming a campaign issue are all recent ones.

Critics of direct legislation tend to overrate the impact of unpaid media coverage favouring one side or the other. It is indeed true that if

the issue is highly controversial, and one side of the argument seems to be more newsworthy than the other, the media treatment may be unbalanced.¹²⁴ Newsworthiness is to a great extent a function of the intensity with which a case is being advocated. In most instances it is either the affirmative or the negative side of the argument (rarely both) that is supported with sufficient intensity to make it news.¹²⁵ It is also true that journalists and media proprietors may have political reasons of their own for supporting one side of the debate at the expense of the other. But the effect of media bias or differential newsworthiness is by no means decisive. A striking recent instance of this is the success of President Reagan, who was elected in 1980 by what was generally termed a 'landslide', and re-elected in 1984 with an increased share of the vote in all sectors and age groups. This was in the face of intense opposition from almost all the American and international mass media. A study of American domestic media (press and electronic) by the Media Analysis Unit at George Washington University found that the amount of news coverage and comment hostile to President Reagan exceeded favourable coverage by a ratio of 22 to 1.¹²⁶

Studies over several decades have concluded that the mass media have only a limited impact on the way the public votes. This is not to say that they have no effect at all, especially in situations such as highly confusing elections for initiative or referendum measures. But in general, the view that the media play a significant part in the outcome of ballots appears to be unsubstantiated.¹²⁷ In part this is because inundating the media with propaganda is not the same thing as inundating the voter. In many cases the message does not reach its target at all, and even when it does, there is a tendency among voters not to take political propaganda very seriously.¹²⁸ One study of over 1000 actual ballot papers in Los Angeles found that no one marked the ballot paper in accordance with the *Los Angeles Times's* recommendations, and only 8 per cent of the absentee voters followed the newspaper endorsements with three or fewer deviations.¹²⁹

A source of misunderstanding on this subject seems to be a tendency to confuse information with influence. Dr Magleby attaches great weight to the fact that three-quarters of California voters learned about Proposition 13 from the newspapers or television. He admits that the assumed relationship between newspaper endorsements and voting does not exist, but nevertheless believes that the important role of the press and television in supplying information about initiative measures tends to prevent direct legislation from accurately reflecting public opinion.¹³⁰ But this belief is difficult to substantiate and Dr Magleby does not do so. It would appear that it is much harder than generally believed to change the basic attitudes of voters through the mass media, especially during the short time period of an election campaign.¹³¹ The

voter makes use of information in the press or on television, but once he has discovered which side is which, he votes in accordance with his underlying opinions, notwithstanding that the advertising and media endorsements are intended to have a persuasive effect.¹³²

An important reason for this seems to be that communications from the mass media are only a small part of the forces acting on individuals that together influence individual opinion. Far more important than media campaigns is the influence of peer groups, neighbours and friends. Consequently, an issue that can generate support at the grass roots will have a much greater chance of success than one that has a well-financed constituency but lacks general appeal. It is mainly for this reason that moneyed interests have been unsuccessful in their attempts to use the initiative; indeed, the electorate has used the process to limit the influence that moneyed interests have sometimes exercised over legislatures.¹³³

Furthermore, it appears that on the whole the most blatant efforts at manipulating the voter have been perpetrated by governments.¹³⁴ California's legislature and Governor Brown waged an extraordinary campaign of intimidation, bribery and threats against the Proposition 13 property tax reduction measure. For example, the Governor promised business that he would abolish a business inventory tax, but only if Proposition 13 were defeated. Members of the legislature suggested that the legislature would punish or reward California cities depending on how their residents voted on the issue. The elderly were sent a message from the Senior Citizens Division of the Franchise Tax Board implying that they might lose certain tax benefits if Proposition 13 passed. Governor Brown warned of drastic cuts in public services such as police, fire services and education. In this he was supported by government employees, both through their unions and directly. Fire chiefs almost unanimously predicted that up to half of the fire stations in some districts might be closed for lack of funds. Schoolteachers warned pupils that classrooms would be eliminated and playgrounds closed. None of these predicted consequences in fact occurred, but they received much publicity at the time.¹³⁵

One reason why large campaign finances, though useful, are not an absolute weapon is that there are substitutes for money. One of the best substitutes, often used by voluntary organizations, is door-to-door canvassing, which can be quite persuasive. This kind of campaigning cannot usually be procured by the expenditure of money. It results from either the existence of a structured organization such as a trade union, or the presence of an emotive issue that makes it possible to mobilize and direct campaign workers. In some locations there may exist a network of ideological activists working within a particular kind of environment, such as a large university. This kind of organization can produce formidable amounts of political force generating a great many votes with

little or no cash expenditure.¹³⁶ Such all-volunteer, grass-roots efforts are also twice as likely to succeed at the polls as other initiatives.¹³⁷ 'When people are on the move', concludes one advocate of direct legislation, 'money is insignificant'.¹³⁸

The most effective way of minimizing the role of wealth in the direct legislation process is to refrain from structuring it in ways that place a premium on ready finance. The signature requirements should not be fixed too high and should preferably set absolute numbers rather than percentages; requirements for geographic dispersal of signers should be minimal or non-existent; and if there is a time limit for the collection of signatures for an initiative petition, it should be reasonably generous, say a year or two, rather than of the order of five months as in California.¹³⁹ An intelligible voter pamphlet should be provided.

Any machinery that requires the proponents to disband their signature-gathering operation before the entire process is completed should be avoided. Ohio has an indirect initiative procedure that enables the petition to be placed before the legislature after 3 per cent of voters have signed it. But if the legislature refuses or fails to act on it, the proponents must gather the signatures of an additional 3 per cent of the electorate before the measure can be carried to the voters. It is probably not coincidental that Ohio's initiative has a low rate of usage and a markedly low rate of success.¹⁴⁰

V. COST AND INCONVENIENCE

Cost and How to Minimize It

The objection that initiative and referendum legislation would be costly to operate featured prominently in the Queensland debates of 1916, though this fear had early on been seen in Switzerland to be exaggerated.¹⁴¹ Opponents predicted that each ballot would cost the state £30 000, while supporters countered by saying that 32 such polls had cost the state of Oregon a total of only \$25 000.¹⁴² The same point has been made in the Senate in the preliminary debates on Senator Mason's Bill.

There is no doubt that in addition to the costs borne by individual proponents and opponents of a measure, the state will spend thousands of dollars checking for duplicated or fraudulent signatures on initiative or referendum petitions, producing the referendum pamphlet and conducting the poll itself. If the poll is not synchronized with a general election, or perhaps a state-wide local government election, the costs could run into millions of dollars. Such a special ballot held in California in 1973 cost the state \$20 million. Admittedly, California's population of 25 million is on the way to being double Australia's, but one can see that substantial costs can be involved.

There are structural and procedural ways of minimizing these costs. One of the most expensive parts of the process is the checking of thousands of petition signatures for genuineness, absence of duplication and voter qualifications. This item can be made more manageable if the statute authorizes the use of recognized sampling techniques, as is the case in some American states.¹⁴³ In California some 8 per cent of signatures are actually checked.¹⁴⁴ The costs of the ballot itself can be reduced by synchronizing referendum ballots with general elections or, as Senator Mason has suggested, designating one day of the year (such as the first Saturday in December) as the day for all referendum polls. Obviously, the unit cost incurred in relation to each measure will be lower if a number of proposals are voted on at the same ballot. Both for cost reasons and for the sake of preventing unnecessary political strife, it is desirable that the statute prohibit repeated petitioning for previously defeated initiative measures.¹⁴⁵ Thus, the Oklahoma constitution prevents renewed petitioning for the second measure within three years, unless by petition of 25 per cent of the voters. Wyoming places a five-year ban on renewed petitioning for the same defeated measure.

Any form of democracy, whether direct or representative, seems at first glance more costly than a less democratic option. In a sense, the more democracy the higher the cost. But this is true only in the short run. The more democratic a polity is, the less likely it is to be plagued by build-ups of resentment, sullen defiance or passive resistance. These undercurrents entail heavy costs of their own, either by exploding violently without notice, by requiring heavy expenditure for enforcement or anti-avoidance measures, or by simply undermining the will to engage in productive economic activity. Popular government frees the polity of this incubus. It is no coincidence that democratic societies have higher standards of living than undemocratic ones. The Swiss, who are called to referendum polls every three months, and whose referendum costs are inflated by the need to print everything in three languages, enjoy the highest standard of living in the world.

Inconvenience and 'Ballot Clutter'

Those opposing the introduction of direct legislation have invariably argued that the people do not desire all the elections and ballots that the system of initiative and referendum would entail. A tract published by the Swiss liberal party in 1867 so argued: 'Does anyone believe that the people desire all these elections and ballots, the heavy obligations and waste of time that are linked with these rights? There have been peoples who spent half their time in the public forum; they had their slaves at home. But our people are active and hard working...' ¹⁴⁶ Experience has falsified this paternalistic argument, for as we have seen, support for

direct legislation is highest precisely in those jurisdictions where it has operated for some time.

The media in Australia occasionally give prominence to the fact that voters in, say, California are being asked to vote on 30 or so ballot propositions at a particular election. Scare stories based on the 'ballot clutter' theme instantly appeared in the press when the Democrats in Western Australia in 1986 foreshadowed a Bill for an initiative and referendum amendment.¹⁴⁷ It seems not generally to be understood that an average of only 18 per cent of the propositions that appear on the ballot paper in American states where direct legislation exists are in fact citizen initiatives.¹⁴⁸ The remainder are all either minor amendments to the state constitution or routine approvals of bond issues, all of them initiated by the government, not by petition. Thus, Proposition 13, despite its number, was in fact the only citizen initiative at that particular election — the numbering system draws no distinction between citizen initiatives and measures placed on the ballot paper by the government.

The all-time record for the number of direct legislation measures on one ballot is held by Oregon's 1912 election, at which there were 27 initiatives on the state ballot — a total never equalled or surpassed before or since. Oregon's pre-World War I initiative explosion was subsequently used as ammunition by opponents of direct legislation in other jurisdictions, including Queensland in 1916.¹⁴⁹ The modern record is also held by Oregon, but this is only eight propositions. The average in states having the initiative and referendum is two citizen measures per election. In California, which makes more use of the initiative than most jurisdictions, the average is only 2.7 per election.¹⁵⁰ Even in the rare cases when voters are required to decide on more than five initiatives at a single ballot, there is no sign of any drop-off in voting for the measures that are lower down on the ballot paper. This suggests that voters really want to participate in the voting on initiatives. Thus, although Proposition 13 came at the end of the ballot paper, over 350 000 more voters marked their paper for the proposition than for the election of governor, which was in first position on the ballot paper. Fatigue is thus not an important factor in voting on initiatives, as distinguished from the government-initiated propositions.¹⁵¹ In some states voters search the ballot paper for the controversial propositions and vote on those, whether they are listed before other propositions or after.¹⁵²

VI. BAD DRAFTING AND INFLEXIBILITY

One of the beneficial consequences of the initiative is that legislation is drafted by people who want it to succeed. Parliamentary legislation may be so amended as to make it ineffective, or it may have been drafted in

the first place merely to give an appearance of activity while the real problem is actually meant to be left untouched. But the very fact that initiative proposals are drafted by people outside parliament gives rise to a fear of poorly written, clumsy legislation.¹⁵³ 'The art of ruling is surely a science', declared an opposition speaker in the Queensland Legislative Council in 1916, 'and we ought to have skilled men to carry on the work of government'.¹⁵⁴

But it is not in the interests of proponents who are investing substantial sums in an initiative to put forward badly drafted measures that will attract criticism or ridicule in the subsequent campaign. Ambiguous drafting can generate doubt over the meaning and effect of the measure and can by itself bring about its defeat at the polls.¹⁵⁵ Thus, especially in view of Australia's tradition of rather formalistic statutory interpretation in the courts, it is in the interests of proponents to obtain the best possible legal advice to help them with the task of drafting. The government could assist by encouraging parliamentary counsel to undertake such outside drafting work in their spare time, for reward. This is already done to a limited extent by bodies such as universities, which employ for a fee the part-time services of legislative draftsmen to prepare their own rules and by-laws. The statute creating initiative and referendum procedures should also permit the parliament to place an alternative proposal on the initiative ballot paper. Besides possibly being more polished, such proposals might on occasion benefit from a greater spirit of balance and compromise. In other countries alternative measures proposed by the legislature in this way have a high success ratio.¹⁵⁶ A necessary safeguard in this case is to require preferential voting, as did Queensland's Bill. Otherwise, the parliament may use this device as a trick to split the affirmative vote.

If all this is still thought insufficient protection against badly drafted legislation, the solution is to opt for the indirect initiative. This could be structured so as to give the legislature the power to make limited amendments (the exercise of that power to be reviewable by the courts) before passing the measure and thereby making a referendum ballot unnecessary. To some extent this solution is based on the assumption that members of parliament vote in accordance with their individual perceptions and wisdom, which is a myth. But as long as the amendment power is carefully limited, there could be a case for it. California is currently considering the reintroduction of the indirect initiative, on a basis that would offer proponents the incentive that 20 per cent fewer signatures would be required.

The criticism that initiative measures are rigid and difficult to amend is another aspect of the same point. The fact that direct initiatives cannot normally be amended once the petition has been accepted and certified (before signature gathering begins) is another reason for

ensuring that the legislature is able to place its own compromise measure on the ballot paper, provided that preferential voting is used.

The rigidity issue arises again once the initiative measure has passed into law. Obviously, if the parliament can amend or repeal an initiative statute in the ordinary way, the whole point of direct legislation is lost. The usual precaution against this is to require that any amendment to an initiative measure shall also be put to a popular ballot, unless the measure itself permits amendment by some easier method. The United States national initiative proposal provides that any law to amend or repeal an initiative measure during the two years immediately following its effective date must be passed by a two-thirds majority of each house of congress. Senator Mason's Commonwealth proposal would require a referendum in any case except where the initiative measure itself permitted repeal or amendment by other means.

None of these criticisms, of course, has any application to the legislative petition referendum, since by definition this procedure challenges enactments that have already been drafted, settled and passed by parliament.

VII. INITIATIVE AND REFERENDUM WOULD SIMPLY NOT WORK IN THIS COUNTRY (OR STATE, AS THE CASE MAY BE)

Finally, there is the general objection that direct legislation may be all very well in Switzerland or California, but it could never be made to work in, say, Australia (or New Zealand or Pennsylvania). First it is said that Australians always vote No in referendums; but that is not true, as we have seen, except in the case of constitutional amendments designed to increase the powers of the federal parliament or government.

Then there is a vague conservative feeling that it is an alien institution that will not thrive here. This sentiment usually finds expression in an efflorescence of horticultural metaphors about exotic plants, changes of 'sky, of climate, or political soil'¹⁵⁷ and the like. Actually, it is not alien, in the sense that Australia is one of the world's largest users of the referendum in general, though of course the citizen-initiated referendum would be a novelty for us. Dicey encountered a similar attitude among his compatriots. The essence of his remarks about it is equally applicable to contemporary Australia:

Among Englishmen of otherwise sound sense there exists a curious habit of asserting that institutions which flourish abroad cannot be made to work in England. A sensible solicitor will tell you that the sale and purchase of English land does not admit of simplification. He treats as of no importance the fact that the sale of land in France is carried out with an ease unknown to sellers or purchasers of land in England. Let

the principle of the Referendum be once accepted by Englishmen as sound and the difficulties of putting it into practice will vanish.¹⁵⁸

The notion that the referendum would never work in England gained great currency during the debate over Britain's Common Market referendum but, as we have seen, it was utterly falsified by events. The British people overwhelmingly supported the holding of the referendum and resented having been denied a direct say in the decision for so long.

Still, the success of direct legislation in Switzerland particularly is often dismissed as being due to some unidentified cultural factor, which is presumed not to exist in Australia. It is therefore useful to note outsiders' observations on the canton of Fribourg, which did not adopt the initiative and the referendum as other cantons did and continued to rely on a system of elected representatives similar to ours. The scene is described as one of political bossism, the perversion of government power to serve special interests, corruption, extravagance, the heaviest per capita cantonal debt in the country, and 'the public apathy which naturally follows widespread hopelessness'. Moves to introduce direct legislation were bitterly resisted by the political establishment.¹⁵⁹ Laura Tallian concludes, 'Apparently the Swiss have no virtues greater than any other nation, so that improvement in civic honesty must be credited to direct democracy in cantons possessing that reform'.¹⁶⁰

FOOTNOTES CHAPTER III

- 1 T. Curti, *Le Référendum: Histoire de la Législation Populaire en Suisse*, J. Ronjat Tr., Paris 1905, 287.
- 2 It has, however, been revived to some degree in the USA by D.B. Magleby's work, *Direct Legislation: Voting on Ballot Propositions in the United States*, Baltimore 1984.
- 3 id., 13.
- 4 id., 9.
- 5 id., 194-6. Magleby seems to have no quarrel with the petition referendum at all, only with the initiative.
- 6 A. Ranney ed., *The Referendum Device*, Washington 1981 (hereinafter 'Ranney'), 2, 4.
- 7 id., 85, 86.
- 8 id., 79.
- 9 'Types of referendum', in Ranney, 19, 27.
- 10 A.V. Dicey, 'The referendum and its critics' (1910) 212 *Quarterly Review* 538 (hereinafter 'Dicey QR'), 555.
- 11 A.V. Dicey, 'Ought the referendum to be introduced into England?' (1890) 57 *Contemporary Review* 489 (hereinafter 'Dicey CR'), 497.
- 12 Dicey QR, 555.
- 13 See the Constitution Acts of South Australia (Part V), Western Australia (s.73(2)(c)) and Queensland (s.53). The New South Wales Constitution Act already had its ss.7A and 7B.
- 14 (1916-17) 123 *Qld. Parliamentary Debates* (L.A.) 368.
- 15 B. Keith-Lucas, 'Summing up: Referendums for Britain?', Ranney, 171.
- 16 D. Butler, A. Ranney eds, *Referendums: A Comparative Study of Practice and Theory* (hereinafter 'Butler and Ranney'), 218.
- 17 id., 214.
- 18 Ranney, 81; Senator G. Evans, *Senate Debates*, 1 March 1979, 411.
- 19 ibid.
- 20 Magleby, op. cit. supra, 199.
- 21 Ranney, 69-70.
- 22 Dicey CR, 502-3.
- 23 id., 503.
- 24 H.B. Mayo, *An Introduction to Democratic Theory*, New York 1960, 97.
- 25 id., 217. This passage and the one above are quoted in J. Ely, *Democracy and Distrust*, Cambridge, Mass. 1980, 68.
- 26 Quoted in S. Padover, *Thomas Jefferson on Democracy*, New York 1939, 6.

- 27 D. Aitkin, 'Australia', Butler and Ranney, 123, 136, 137, 124, 132.
- 28 The figures up to 1978 are given in Aitkin at 125. For the results up to 1985, see p. 108 below.
- 29 Butler and Ranney, 9.
- 30 The 1984 interchange of powers proposal would have permitted the Commonwealth to refer powers to the states (the reverse was already possible under s.51(xxxvii) of the Commonwealth Constitution). However, it would have enabled state governments to make deals surrendering powers to Canberra without further reference to the people. See Current Topics (1985), 59 *A.L.J.* 195.
- 31 These factors become relevant under the 'community of interest' principle applied in the representation process: *A.-G. (Cth) ex rel. McKinlay v. Commonwealth* (1975) 135 C.L.R. 1, 25, 37, 59; *Wesberry v. Sanders* (1964) 376 U.S. 1, 21n, 25.
- 32 D. Aitkin, 'The changing Australian electorate', in H. Penniman ed., *Australia at the Polls: The National Elections of 1980 and 1983*, Washington 1984, 11. He now says there is evidence of greater political involvement, that the voters are not apathetic after all, and that non-Labor voters particularly are willing to switch their support from one party to another: 18, 27.
- 33 Maine, *Popular Government*, Indianapolis 1976, 112.
- 34 op. cit. supra, 410.
- 35 Dicey QR, 543-5.
- 36 id., 545.
- 37 Ranney, 66; also Ranney, 68; R. Allen, 'The national initiative proposal: A preliminary analysis' (1979) 58 *Nebraska L. Rev.* 965, 1019, 1021.
- 38 (1980) 1 *Initiative News Report* ('INR') No. 8, pp.3, 6.
- 39 L. Tallian, *Direct Democracy*, Los Angeles 1977, 123-4.
- 40 Ranney, 8-9.
- 41 *Reitman v. Mulkey* (1967) 387 U.S. 369
- 42 Allen, op. cit. supra, 1026-7; T. Smith, P. Sheatley, 'American attitudes towards race relations', *Public Opinion*, Oct.-Nov. 1984, 14.
- 43 T. Sowell, *Knowledge and Decisions*, New York 1980, 88-9.
- 44 M. Radin, 'Popular legislation in California: 1936-1946' (1947) 35 *Cal. L. Rev.* 171, 183.
- 45 Some of these statements are explicitly racist in themselves. Mr Philip Toyne, legal adviser to the Central Aboriginal Land Council, maintains that racism is 'innate' in Australians (presumably he means white Australians). 'Given that we have

the same sort of heritage and genes as the British who went to South Africa, I suspect it's circumstantial that our racism isn't more apparent': *Weekend Australian*, August 25-26, 1984, my emphasis. On that line of reasoning one can charge with racism people who never commit or utter any racist act or statement whatever. This simplifies proof considerably.

For a further example of this viewpoint, see 'Racism on the rise — Grassby', *Human Rights* (newsletter of the Human Rights Commission), Dec. 1983, 1.

- 46 D. Denoon, 'The three Australias: Australian experience with race in the twentieth century' (1985) 4 *Australian Society*, 5. For a more impressionistic study to the same effect, see *The Bulletin*, October 9, 1984, 80-6.

- 47 *Canberra Times*, August 16, 1984.

- 48 Repealed Dade County Ordinance No. 77-4 had added the words 'affectional or sexual preference' to s.11A of the Dade County Code, which prohibited discrimination 'based on race, creed, sex, color, national origin or ancestry'. The comparable New South Wales provision is s.49ZG of the Anti-Discrimination Act 1977, as amended in 1982.

- 49 J. Naisbitt, *Megatrends: Ten New Directions Transforming Our Lives*, New York 1982, 171.

- 50 The New South Wales Anti-Discrimination Board still refuses to admit the existence of any genuine disease issue connected with homosexuality. Its annual reports contain no reference to the problem. It blames public concern about AIDS on 'poorly informed and irresponsible media coverage' and sees its sole task as being 'overcoming prejudice and discrimination based on uninformed fear and myth': *ADB-Ink, Newsletter of the Anti-Discrimination Board*, Jan. 1985, 3. The Board has adopted a policy of treating refusals to employ or to supply accommodation or other services to persons with AIDS as being discrimination on grounds of physical impairment and will take court or other proceedings accordingly. The Board believes that 'discrimination against people with AIDS creates conditions which are inimical to public health and safety': *ADB-Ink*, Feb. 1986.

- 51 Anti-Discrimination Board, *Third Annual Report*, Sydney 1980, 43; W. Schneider, I. Lewis, 'The straight story on homosexuality and gay rights', *Public Opinion*, Feb.-Mar. 1984, 16.

- 52 Observers identify three reasons for this: first, until the late 1960s there was little or no demand for the vote from Swiss women themselves, who were at least as conservative as the men. Second, there was the observation that in neighbouring

- Germany the nation's women and girls had been particularly fervent supporters of Adolf Hitler, and there was a belief, well founded or not, that he would not have come to power without their votes and support. Third, there was a conservative attitude that the existing system had worked well for seven centuries, so why change it?
- 53 A.V. Dicey, *Law and Public Opinion in England During the Nineteenth Century*, 2nd edn, London 1914, 1962, 209-10.
- 54 Quoted in Tallian, op. cit. supra, 18.
- 55 id., 43.
- 56 (1916-17) 123 *Qld. Parliamentary Debates* (L.A.), 322.
- 57 This remark was penned well after the debates on the Bill: D. Murphy, R. Joyce, *Queensland Political Portraits 1859-1952*, St. Lucia 1978, 295, 319.
- 58 Ranney, 16 (D.E. Lea).
- 59 D. Lea, R. Butt in Ranney, 15-16, 12.
- 60 E.C. Ladd, 'Questions at the quinquennial', *Public Opinion*, April-May 1983, 20, 41.
- 61 P. Shore in Ranney, 83
- 62 *Senate Debates*, March 1, 1979, 409.
- 63 Radin, op. cit. supra, 184; R. Allen, 'The national initiative proposal: A preliminary analysis (1979) 58 *Nebraska L. Rev.* 965, 1023-4.
- 64 Radin, loc. cit. The defeat of Ireland's 1986 divorce proposition by a 2 to 1 majority after opinion polls said it might be passed is another example. See *Time*, July 7, 1986.
- 65 A. Rabushka, P. Ryan, *The Tax Revolt*, Stanford 1982, 10, 23.
- 66 (1980) 1 *INR* No.8, p.7.
- 67 (1984) 5 *INR* No.22, p.1.
- 68 Proposition 36 was to a great extent designed to overcome a number of court decisions that had narrowed the operation of Proposition 13, notably *Los Angeles County Transportation Commission v. Richmond* (1982) 31 Cal.3d. 197, 643 P.2d 941 and *Carman v. Alvord* (1982) 31 Cal.3d. 318, 644 P.2d 192. But the voters rejected the 'meat cleaver' approach of the measure: (1985) 6 *INR* No.10, pp.2-9.
- 69 (1985) 6 *INR* No.11, p.6.
- 70 (1985) 6 *INR* No.10, p.3.
- 71 (1985) 6 *INR* No.9, p.7.
- 72 (1981) 2 *INR* No.23, p.3.
- 73 op. cit. supra, Ch. 5. Some modest cuts did occur, but the authors, like the respondents in the opinion polls cited above, found them 'not significant'.

- 74 A.N. Allott, *The Limits of Law*, London 1980, 289.
- 75 *ibid.*
- 76 *Senate Debates*, March 1, 1979, 409.
- 77 H. Campbell, 'The initiative and referendum' (1912) 10 *Mich. L. Rev.* 427, 434.
- 78 D. Butler, 'The world experience' in Ranney, 74, 75; J.-F. Aubert, 'Switzerland' in Butler and Ranney, 39, 45.
- 79 P. Saladin, 'Le référendum populaire en Suisse' [1976] *Revue internationale de droit comparé* 331, 344; Butler, *op. cit. supra*, 75.
- 80 E. Lee, 'The American experience, 1778-1978' in Ranney, 46, 57; (1916-17) 123 *Qld. Parliamentary Debates*, 330.
- 81 Lee, *op. cit. supra*, 55; A. Ranney, 'Referendums, 1980 style', *Public Opinion*, Feb.-Mar. 1981, 40. As to the participation formula, see A. Ranney, 'Nonvoting is not a social disease', *Public Opinion*, Oct.-Nov. 1983, 16, 19.
- 82 Lee, *op. cit. supra*, 55.
- 83 *id.*, 57.
- 84 Magleby, *op. cit. supra*, 104.
- 85 Butler and Ranney, 228; G. Bacot, 'Remarques sur le rôle du référendum dans la ratification des traités' (1978) 82 *Revue générale de droit international public* 1024, 1049.
- 86 Ryan and Rubushka, *op. cit. supra*, 30.
- 87 W. Crouch, D. McHenry, *California Government: Politics and Administration*, Berkeley 1949, 119.
- 88 Magleby, *op. cit. supra*, 90.
- 89 Aitkin, *op. cit. supra*, 128.
- 90 D. Aitkin, in Penniman, *op. cit. supra*, 27.
- 91 Mayo, *op. cit. supra*, 186.
- 92 *id.*, 187.
- 93 The Whitlam Government in 1975 put forward a proposal for government control of the press. The absence of any federal legislative power to do so was to be overcome by using the Commonwealth's customs power to control imports of newsprint: *Sydney Morning Herald*, August 9, 11-16, 19, 21, 22, 1975. Since then other political figures of similar leanings have advanced similar proposals, e.g. Mr Don Dunstan, *Sydney Morning Herald*, July 4, 1978. Subsequently the Wran government in New South Wales withdrew all its advertising from the Fairfax press, apparently in retaliation for its criticism of the government's performance, and in particular the investigation by some of the group's papers of allegations of corruption: *Sydney Morning Herald*, *Australian Financial Review*, September 7, 1984.

As to freedom of assembly, the stringent requirements for police permits for street demonstrations under non-Labor governments in Queensland and Western Australia are well known.

- 94 Koowarta v. Bjelke-Petersen (1982) 39 A.L.R. 417.
- 95 Coal Acquisition Act 1981 (N.S.W.). After several years of protests and occasional demonstrations the government offered in 1985 to pay compensation assessed at approximately one-third of market value: *Australian*, Nov. 23, 1984; Feb. 12, 13, 1985. But to date nothing has been paid.
- 96 Butler and Ranney, 35; Ranney, 163.
- 97 Allen, op. cit. supra, 1042.
- 98 J. Snyder, 'The proposed national initiative amendment' (1981) 18 *Harv. J. on Legislation* 429, 440-1.
- 99 Butler and Ranney, 36.
- 100 *Senate Debates*, 1 March 1979, 410-11.
- 101 id., 410; H. Graham, 'The direct initiative process' (1979) 27 *UCLA L. Rev.* 433, 437n.
- 102 L. White, 'Telling the tobacco companies to butt out — A profile of the Proposition P campaign' 5 *ACSH News & Views* (American Council on Science and Health) Jan.-Feb. 1984, 3, 11.
- 103 Butler and Ranney, 101-6.
- 104 id., 215.
- 105 (1980) 1 *INR* No.8, p.5.
- 106 Rabushka and Ryan, op. cit. supra, 22-3.
- 107 Magleby, op. cit. supra, 147.
- 108 D. Lowenstein, 'Campaign spending and ballot propositions: Recent experience, public choice theory and the First Amendment' (1982) 29 *UCLA L. Rev.* 505, 542-3. The work of Shockley and Lydenberg, unavailable in Australia at the time of writing, is summarized in an appendix to Lowenstein, op. cit. supra, 635-41; (1985) 6 *INR* No.8, pp.1-8.
- 109 Allen, op. cit. supra, 1036, 1038; N. Brestoff, 'The California initiative process: A suggestion for reform' (1975) 48 *So. Cal. L. Rev.* 922, 936n.
- 110 Ranney, 100.
- 111 (1982) 3 *INR* No.23, p.6.
- 112 (1980) 1 *INR* No.6, p.7.
- 113 (1980) 1 *INR* No.6, p.8.
- 114 D. Schmidt, *Ballot Initiatives: History, Research, and Analysis of Recent Initiative and Referendum Campaigns*, Washington 1983, 101.
- 115 Ranney, 100.

- 116 id., 110. The quoted passage is from L.J. Johnson, 'Direct
legislation as an ally of representative government', in W.
Munro ed., *The Initiative Referendum and Recall*, New York
1912, 139, 146.
- 117 Brestoff, op. cit. supra, 936n.
- 118 Allen, op. cit. supra, 1036.
- 119 Butler and Ranney, 105.
- 120 Lowenstein, op. cit. supra, 554-6.
- 121 id., 604-5.
- 122 (1983) 4 *INR* No.23, p.1; Lowenstein, op. cit. supra, 544-57,
also Shockley and Lydenberg findings in the appendix 635-41.
- 123 (1985) 6 *INR* No.8, passim; the Lowenstein findings, supra,
though based on a smaller sample, are consistent with this
conclusion.
- 124 Graham, op. cit. supra, 455.
- 125 Radin, op. cit. supra, 173.
- 126 M. Robinson, M. Clancey, L. Grand, 'With friends like these
...', *Public Opinion*, June-July 1983, 2.
- 127 Radin, op. cit. supra, 174; Allen, op. cit. supra, 1031-3.
- 128 Allen, *ibid*.
- 129 Magleby, op. cit. supra, 151.
- 130 id., 130-6.
- 131 Lowenstein, op. cit. supra, 564.
- 132 id., 565.
- 133 Allen, op. cit. supra, 1028.
- 134 Butler and Ranney, 20.
- 135 Rabushka and Ryan, op. cit. supra, 25-6.
- 136 Ranney, 109.
- 137 (1981) 2 *INR* No.7, pp.6-7; (1983) 4 *INR* No.3, pp.2-6.
- 138 Tallian, op. cit. supra, 113.
- 139 id., Chs. 10, 11.
- 140 J. Fordham, J. Leach, 'The initiative and referendum in Ohio'
(1950) 11 *Ohio St. L.J.* 495, 497.
- 141 Curti, op. cit. supra, 265.
- 142 (1916-17) 123 *Qld. Parliamentary Debates* (L.A.) 328, 331.
- 143 Brestoff, op. cit. supra, 928n, 951.
- 144 Magleby, op. cit. supra.
- 145 Snyder, op. cit. supra, 450.
- 146 Curti, op. cit. supra, 224.
- 147 *Australian*, January 29, 1986.
- 148 (1985) 6 *INR* No.3, pp.3-4.
- 149 (1916) 123 *Qld. Parliamentary Debates* (L.A.) 325.
- 150 (1984) 5 *INR* No.3, p.10; (1985) 6 *INR* No.3, pp.3-4.
- 151 Magleby, op. cit. supra, 90-2.
- 152 id., 94

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- 153 Brestoff, op. cit. supra, 930-4; (1916-17) 123 *Qld. Parliamentary Debates* (L.A.) 323.
- 154 id., (L.C.) 644.
- 155 (1980) 1 *INR* No.8, pp.4-5.
- 156 Saladin, op. cit. supra, 333-4; Aubert, op. cit. supra, 45; Butler and Ranney, 81. Saladin specifically considers measures proposed by the government as alternatives to an initiative measure, whereas the other two references here given relate to the success rate of all government-proposed measures.
- 157 P. Goodhart, *Referendum*, London 1971, 67, quoting Lord Morley.
- 158 Dicey QR, 557.
- 159 L.J. Johnson, op. cit. supra, 156-7.
- 160 Tallian, op. cit. supra, 20.

Conservative or Radical?

I. THE ISSUE

Do the initiative and the referendum favour the political left or the right, or neither? This question should not even be relevant if we are genuinely concerned with democracy, but it is the first, and often the only, question that politicians ask. Many politicians and political writers also tend to regard a referendum as 'successful' only if it produces a Yes vote. Referendums that result in a No vote are seen as being not only conservative but also failures, whereas in principle they are just as successful as affirmative results in obtaining the people's verdict.

As matters stand, the politicians are the ones who will decide whether the initiative and the referendum are introduced in Australia, so this question should be faced. The general trend of referendum results in Australia has already been noted. The majority of referendums held in the Australian states have been carried. As most of the measures in question provided for change of some sort, this would lead one to conclude that the referendum does not favour the conservative side. On the other hand, most Commonwealth-wide referendums have been defeated. Except for the two conscription referendums in 1916 and 1917, all of these were constitutional amendment proposals designed to increase the powers of the federal government and parliament in Canberra.

A similar picture can be seen in Switzerland, where most of the attempts to extend the powers of the Bern federal government have failed. In a literal sense, therefore, one can say that this kind of referendum produces a conservative outcome, in as much as it tends to result in a vote against constitutional change.

In the past, given the then prevalence of political ideas favouring centralization of government, these results could have been viewed as conservative in a political as well as in a purely formal sense. But since the 1960s there has been a perceptible change in political philosophies, at least at the grassroots level. Whereas formerly federalism was generally seen as a cumbersome concession to archaic particularism, now it is increasingly defended as an efficient means of decentralizing the decision-making process and a valuable bulwark against tyranny. As we have already seen, John Naisbitt and his co-researchers have found that the trend from centralized to decentralized decision making is one of the most striking trends of our age, and a reflection of the parallel development of the participatory ethic. Arguably, therefore, all those poll results rejecting further centralization of power in Canberra can no longer be viewed as conservative in any but a formal sense.

II. THE AUSTRALASIAN EXPERIENCE

If we put aside the special case of the referendum calculated to increase central government powers, what can we expect from popular initiative and referendum procedures in Australia? A useful starting point is to consider the results of referendums in the Australian states. We have already seen that, since 1901, 20 state referendums have been carried and 13 defeated. Set out below is a more detailed breakdown of state referendum results, which is confined to measures voted upon since the end of World War II so as to avoid giving undue weight to the behaviour of voter generations that have passed from the scene. This list identifies the measures that have been carried by referendum, then those that have been defeated, and in each case gives the year and the jurisdiction.¹

Australian State Referendums since 1945

Carried:

- * 6.00 p.m. closing for bars (NSW 1947)
- * 10.00 p.m. closing for bars (NSW 1954)
- * Establish state lottery (SA 1965)
- * Establish gambling casino (Tas. 1968)
- * Daylight-saving time (NSW 1976)
- * Direct election of upper house of legislature (NSW 1978)
- * Extend life of legislative assembly from three to four years (NSW 1981)
- * Members of legislature to disclose pecuniary interests (NSW 1981)

- * Gordon River Dams (Tas. 1981) (vote against all dams was not available)
- * Daylight-saving time (SA 1982)

Total carried: 10

Defeated:

- * Prohibition of liquor sales (WA 1950)
- * 10.00 p.m. closing for bars (Vic. 1956)
- * Abolish upper house of legislature (NSW 1961)
- * Establish new state in New England district (vote only in new state area) (NSW 1967)
- * Open bars on Sundays (NSW 1969)
- * Daylight-saving time (WA 1975)

Total defeated: 6

These measures could not in themselves be called conservative or reactionary in nature, except perhaps 6.00 p.m. closing for bars and the loaded Tasmanian measure on the Gordon River dams. Since the great majority were carried, one can therefore say that on balance the referendum in Australia tends to favour change rather than the status quo, except for the special category of federal referendums designed to increase the powers of the Commonwealth government and parliament.

All five of the referendums held in New Zealand since the end of World War II have been carried. They related to continuing 6.00 p.m. closing of bars, maintaining conscription, shortening parliamentary terms from four to three years, and extending drinking hours.²

III. EVEN-HANDEDNESS ELSEWHERE

If we look at the experience of other countries, no clear pattern emerges that would permit us to say that the initiative and referendum favour one side or the other of the political spectrum. The belief of A.V. Dicey and of Australian political writers that the referendum is inherently conservative finds little support.³ It would appear that public opinion is not consistently left or right on all issues. Assumptions about what the public believes on a particular issue have often been falsified by ballot results.⁴ In 1978, 50.5 per cent of Austrians voted to prevent the country's first nuclear power plant from becoming operational. In 1980, 58 per cent of Swedish voters decided to continue the limited use of nuclear power plants.⁵ Initiatives proposing to ban nuclear energy succeeded in the states of Washington, Montana and Oregon, and failed in California, South Dakota, Maine and Missouri. Measures restricting

the disposal of nuclear wastes are usually carried.⁶ Though a number of states introduced female suffrage by citizen initiative, radical feminist measures have fared less well. In 1980 Iowa voters defeated an equal rights constitutional amendment modelled on the proposed national Equal Rights Amendment by 55.8 per cent. A similar measure in Maine was rejected in 1984 by a No vote of 63.1 per cent. A New Hampshire initiative to amend the state's Bill of Rights by expunging all references to 'man', 'men' and 'men's' and substituting 'person', 'people' and 'people's' was rejected by 83.6 per cent of voters.⁷

The use of the referendum in the French fifth republic founded by General de Gaulle is a striking illustration of the even-handedness of the referendum device. De Gaulle believed that the referendum could reveal the existence of a national consensus, which was hidden by the rivalries and dealings of French political parties. He envisaged its use as a means of correcting what he specifically described as the 'distortion of the representative principle', which he saw as the inevitable result of giving parliament excessively wide powers and a monopoly of political sovereignty.⁸

Some observers have been perplexed by the way in which he wished it to be an instrument both of revolution and of conservation.⁹ But there is no inconsistency between the two: both applications reflected his goal of weakening the power of the established elites, whether the conservative elites of the army and the provincial notables, or the radical political intellectual elite in and around parliament. His referendums over the ending of the Algerian war in January 1961 and April 1962 were chiefly directed against entrenched conservative power. So was the October 1962 referendum to take the election of the president out of the hands of the 80 000 local notables who then were the presidential electoral college and to substitute direct popular election. The constitutional referendum of 1958 was a weapon against the left-wing political-intellectual establishment, while the 1969 referendum designed to downgrade the senate was probably directed at both entrenched elites.

General de Gaulle has been justly criticized over some aspects of his use of direct popular consultation, especially manipulative timing and the use of loaded and intertwined questions. This might not have mattered if French voters had the right to formulate and initiate a referendum, but they do not. Nevertheless, it seems that he was right in believing that it would unleash and harness new and positive political forces in the nation, forces that up until then had been denied effective expression and representation. He was also right in believing that the successful October 1962 referendum on the direct election of the president would confer 'a profound legitimacy' on that office by giving it clear roots in the will of the sovereign people. The system he bequeathed to France, despite occasional upheavals, so far shows every sign of being the most workable and stable constitution that the French

nation has had since the revolution. This happy result is at least partly due to de Gaulle's understanding that the referendum could give the nation both necessary change and necessary stability.

Professor Saladin of the University of Basel notes that the Swiss type of legislative petition referendum has traditionally been regarded as a conservative institution, animated by a spirit of opposition that sometimes brings together bizarre coalitions of opponents who, for different reasons, manage to bring down a proposed legislative change. But with the passing of time, predicting the outcome of a particular referendum has become increasingly risky. The very function of the referendum, originally granted as a people's veto on unwanted changes, has been transformed, as alignments seeking social change and those seeking stability have come to enjoy approximately equal chances of succeeding in referendum contests.¹⁰ Apart from these more recent developments, compilations of the results of direct legislation over the past century show that referendums have approved both measures favoured by the left (such as compulsory unemployment insurance, wage and price controls) and measures favoured by the right (such as mandatory balanced federal budgets) and have also defeated measures favoured by both sides.¹¹

Great Britain's comparatively recent experience with participatory legislation does not disturb these conclusions. The 67 per cent affirmative vote on the issue of Britain's remaining in the Common Market ratified one of the most momentous changes in Britain's constitutional and political history. On the other hand, the vote in Wales on Welsh devolution produced an 80 per cent No vote. The ballot on Scottish devolution fell somewhere in between, since although 51.6 per cent of the votes cast favoured autonomy, the total affirmative vote fell short of the government's pre-announced requirement that no less than 40 per cent of qualified voters should favour the proposed Act before the government would consider itself bound to proceed with the proposal.¹²

It was pointed out earlier that if the government alone has the power to call the voters to the polls, the referendum can be used in a manipulative way for ultimately anti-democratic purposes, especially when the government controls the media and is able to regulate or stifle debate. A further reason why the public should be able to force the holding of a referendum appears from the Norwegian vote in 1972, when by a narrow majority a proposal that the country should join the European Economic Community was defeated. This result has been seen as a case of democratic contrariness, as a rebuff for establishment authority. The vote repudiated the coalition of interests that had long dominated Norwegian politics and led to the transformation of party alignments.¹³ The lesson here seems to be that unless the people have the power to initiate a referendum, resentments and grievances may build

up to the extent that citizens will vote Yes or No out of a desire to register a general protest at the establishment's disregard of their views, rather than for reasons connected with the specific proposal before them. This may be a useful safety-valve, but it may also give aberrant results on particular proposals.

The remainder of the Scandinavian experience shows the same mixed pattern as elsewhere. A conservative tendency appeared in the 1963 referendum that rejected a set of laws limiting property rights by extending governmental regulation. But whether the result on a particular ballot will be a vote for stability or for change seems to depend to a large degree on the particular issue and on how the referendum procedure is structured. In Denmark the constitution formerly required that a favourable majority had to include no less than 45 per cent of the entire electorate if the measure were to come in to force. Voting was not compulsory. This meant that the strong human tendency towards inertia was harnessed to the No vote, since the easiest way of voting No was to stay at home on polling day. Securing an affirmative result was difficult with this structure. Other systems did not have this effect, as is illustrated by the Swedish and Norwegian polls introducing pension schemes and abolishing liquor prohibition.¹⁴ The 1905 referendum in which the people of Norway voted by a majority of 99.9 per cent to separate themselves from Sweden — a country of which they had formed part for centuries — was also a vote for radical change.¹⁵

Looking at Italy, which has a nationwide indirect initiative system, one would have to say that direct legislation has in general favoured change. The modern Italian state was, after all, created by a series of referendums. The monarchy was abolished after World War II by the same means. The initiative procedure adopted in Italy's post-war republican constitution was not used until the 1970s, when it was invoked three times. In 1974, the Catholic Church launched an initiative to repeal Italy's first divorce law, which had been adopted by the nation's parliament shortly before. This appeal was rejected by the voters, thereby giving the new law a degree of legitimacy it might not otherwise have enjoyed. The initiative was also used to bring about a relaxation of the abortion laws. A petition for a referendum on the issue was successfully put together and presented to parliament. The Italian initiative being of the indirect kind, parliament then had the opportunity to forestall a ballot by enacting the proposed law itself. It did so, and the matter therefore did not go to a popular vote.

An initiative ballot was held in Italy in 1978 on two measures, the proposed repeal of state financing for political parties, and the proposed repeal of antiterrorist legislation. Broadly one might say that the former measure would appeal to the political right, and the latter to the left.

Both measures were defeated, and the antiterrorist law repeal decisively so.¹⁶

Some studies of the results in the American states have led observers to conclude that the outcome of an appeal to the voters is more likely to favour the left in the case of economic measures, and more likely to favour the right on social measures. In relation to proposed environmental legislation the outcomes have been evenly split. The eminent political scientist Austin Ranney has made a useful study of the outcomes of all state referendums on popular initiatives from 1945 to 1976 on six issues that involved clear choices between left and right. It is worth reproducing verbatim:

*Of the twelve referendums on right-to-work laws, six supported the conservative position by approving such laws and six supported the liberal position by defeating them.

*Of the thirteen referendums on proposals to limit the level of taxation or abolish the graduated income tax or both, only three won and ten lost — a clear victory for liberals.

*There were five referendums on measures to prohibit racial discrimination in the sale of housing, assignment of school pupils, and the like. All five lost — a clear victory for conservative values.

*Six referendums were held in 1974 and 1976 on measures to restrict or prohibit development of nuclear power-generating plants. Three won and three lost — another standoff.

*Four measures for restoring the death penalty for major crimes were voted on, and all four won — more victories for the conservatives.

*Three proposals to allow abortion on demand were voted on, and all three lost as most conservatives believed they should.¹⁷

These results give a rough score of 36 victories for the right and 19 for the left.

In 1980 the ballots favoured the left point of view by a majority of 12 to 9, by contrast with the results in that year's presidential and congressional elections, in which most observers saw a conservative trend. But the ballots held in 1982 veered in the opposite direction again, most outcomes favouring the right (a majority of 33 to 22). The 1984 results saw the left regain the lead with a score of 15 over the right's 11. As elsewhere, therefore, the picture is mixed. Austin

Ranney concludes that 'most voters and most referendum measures are much less concerned about what is the "liberal" or the "conservative" position than with what is the right or wrong position'.¹⁸

These findings are confirmed by a 1984 *Initiative News Report* study of initiative and referendum ballots over the previous eight years. The analysis found a nearly identical number of initiatives sponsored by the left (79) and the right (74). More strikingly, there was an almost identical voter approval rate for both sides: 44 per cent for the left and 45 per cent for the right. Of a third category of 46 initiatives that could not be classified as left or right, exactly half were approved by voters. *INR* concluded that the initiative and the referendum 'are truly the tools of all citizens, from the ideological left to the right, from the grassroots to the corporate suites'.¹⁹ This was consistent with another observation repeatedly made by *INR* in its studies of initiative ballot results, that most voters stay in the middle of the road and tend to reject extreme propositions from either left or right.²⁰ The more moderate and reasonable the approach of the initiative measure, the more likely it is to succeed, whether the subject matter be nuclear waste disposal, tax reductions or business regulation.²¹ David Magleby's study of the vote on 20 California propositions between 1971 and 1980 showed that on most propositions voters from both parties came down on the same side of the issue, but with differing levels of support or opposition.²²

It should be added that there have been few initiated measures placing restrictive conditions on abortion or enacting stringent obscenity legislation, or modifying liberalized drug or sexual misconduct laws.²³ Workers' compensation laws and a wide variety of political reform statutes have been adopted through the initiative process.²⁴ On the other hand, there have been no measures designed to effect massive transfers of wealth, for example through inordinately high death or gift duties.²⁵ The conservative outcome of some polls on fluoridation has attracted criticism from a number of commentators, but these have all been at the local, not the statewide, level.²⁶

Both American and Swiss voters have generally approved measures proposed by legislatures and constitutional conventions far more readily than those initiated by popular petitions. Of statutory proposals, 60.1 per cent of those proposed by legislatures have been approved, as against only 38.1 per cent for those moved by popular petition.²⁷ In California, the odds against the success of any particular direct initiative were until recently better than 3 to 1. This was a reversal of the earlier American pattern, for in the years before World War I the affirmative side of any proposal enjoyed a marked advantage.²⁸ In the 1980s, however, the success ratio has risen markedly again. All eight initiative and referendum proposals on California's 1982 ballot were approved by the voters. Nationally, the approval rate has risen from 38.3 per cent in

1979-80 to 44.3 per cent in 1981-82 and approximately 50 per cent in 1984.²⁹

A notable development has been the decline in all jurisdictions in the use of the legislative petition referendum, despite its high success rate in vetoing unwanted acts of the legislature (and thereby showing that legislatures do not reflect public opinion). In Switzerland between 1874 and 1899, 12 per cent of acts of parliament were challenged by referendum, and two out of three of these challenges succeeded. But for the period 1950 to 1972, this figure sank to 4 per cent.³⁰ The same trend appears in the American states. In Washington state, the referendum had an even greater success rate than in Switzerland and was used frequently as a corrective to what was seen as reactionary legislation. But in the period since 1943 only half as many referendum petitions have been submitted as previously.³¹ In other states it has generally fallen into disuse;³² in California, no referendum petition qualified for the ballot between 1942 and 1982, when there were challenges to four legislative enactments on electoral redistribution and a proposed peripheral canal.³³

The way the referendum is structured has had something to do with this. The normal 90-day deadline to gather signatures has defeated a number of proponents, especially where the absolute number of signatures required is large, as in California, where it is over 360 000. Overuse of the 'emergency legislation' exemption to disqualify a statute from referral to the voters has played a significant role in California. In Switzerland this tactic was taken to such lengths that in 1949 the people abolished the exemption altogether. But the main reason for the referendum's disuse appears to be greater voter satisfaction with the output of legislative assemblies. Legislators in states where the referendum is available have become more respectful towards public opinion. They have learned to give more thought and care to legislative proposals and to avoid passing any bill that is vehemently opposed by a substantial portion of the population.³⁴ In Switzerland the referendum in fact accomplished a political revolution. This single institution led to the development of what has come to be called 'consensus democracy', in which the ranks of the government are opened to members of the opposition parties by a proportional allocation.³⁵ This is the basis for the extraordinary stability of Swiss governments and the long tenure of elected representatives in that country.

IV. WHO WOULD USE THE INITIATIVE AND THE REFERENDUM?

The orientation and background of the bodies that make use of direct legislation procedures could logically be expected to give some

indication of whether these procedures will on balance tend to favour change or stability.

One obvious user would be the opposition party in the relevant parliament, which might seek to put its own policies before the voters, or overturn controversial bills passed by the government. This would especially be the case if some equivalent to the Danish provision, whereby one-third of the members of the parliament can place a measure on the ballot, were adopted. (It will be recalled that Lord Balfour's 1911 bill in England incorporated a procedure of this kind.)

Apart from that, the same kinds of groups as currently lobby before the legislature could be expected to make use of these procedures, except that they would have to use persuasion only, and not campaign contributions or blackmail as at present. Some of these groups would have significant economic means, but experience abroad shows that many would not. They have included such groups as the American League of Women Voters, public employees, consumers, pensioners and sportsmen. Educational interests have been active in many campaigns but have initiated relatively few proposals.³⁶ Small groups with modest means have promoted initiatives on environmental protection, marijuana decriminalization, nuclear safety, political reform and antismoking proposals.³⁷ The initiative process is used almost equally by left and right.³⁸ A group in California called People's Lobby was established in 1969 to put forward a continuing series of initiatives at the expected rate of one per year. It has had a significant degree of success but complains that the ever-growing number of signatures needed to satisfy the 5 per cent requirement runs a risk of restricting the use of the initiative to well-financed groups.³⁹

Business interests could also be expected to use direct legislation, but it is significant that in California since 1964, no major economic group has been able to enact an initiative measure.⁴⁰ Real estate agents, land developers, government employees, agribusiness, farm labour and greyhound racing interests have all failed in their attempts to bypass the legislature.⁴¹ The natural caution of the electorate tends to restrict the potential role of organized, moneyed interests in direct legislation.⁴²

The groupings mentioned above are for the most part established or continuing interest groups. But it would seem that about a quarter of legislative initiatives are promoted by 'anomic', or short-term, groups that form spontaneously to advocate or combat some particular policy proposal. The enactment of California's anti-usury laws is a spectacular story of a successful initiative launched on a wave of spontaneous indignation over a particular case of injustice.⁴³ In general, however, anomic groups are most likely to form in the areas of public morality, revenue and taxation, and political reform.⁴⁴

Dr Magleby is critical of the role of interest groups in direct legislation. 'Citizens do not sponsor initiatives', he argues, 'groups do'.⁴⁵ In his view direct legislation is thus not really citizen participation at all. But as was said earlier, pressure groups are not inherently bad; it is hard to think of a single lasting and worthwhile reform that has not been promoted by an action group of some sort. They become dangerous when they are able to use blackmail or bribery on governments in order to procure legislation not wanted by the majority, as they can now. Under initiative and referendum these tactics cease to be effective. Given, too, the already-noted propensity of 'anomic' grassroots organizations to form themselves when enough citizens wish to pursue an issue, this objection appears to be without substance.

V. CONCLUSIONS

The evidence from all over the world supports Austin Ranney's conclusion that direct legislation 'is neither an unfailing friend nor an implacable enemy of either left or right. ... [T]he policies that referendums produce depend on the state of public opinion at the time the vote is taken, and in a democratic polity the voters observably lean right on some occasions and left on others'.⁴⁶ If it were otherwise, it is unlikely that the United States national initiative proposal would have found support from all shades of political opinion in the way that it has. Conservatives support it because they know that, although it will result in some legislation they do not like, the people are basically cautious about sweeping changes to institutions such as the family and property. Radicals campaign for direct legislation because they know that, even though many initiatives are unsuccessful and good ideas are sometimes rejected at first, subsequent attempts (perhaps with modified proposals) often succeed;⁴⁷ for the people as a whole cannot be bribed and will consider a proposal on its own merits.

The evidence also adds weight to the view that the main role of the initiative and the referendum is to break the power of elites and lobby groups that are able to prevent the laws of the land from reflecting popular opinion. Sometimes these elites are conservative, as were those challenged by the Italian initiatives; sometimes they are radical, as in the case of the political-intellectual class tackled by General de Gaulle in his 1958 referendum. The use of the referendum by de Gaulle under the fifth republic is particularly striking since it was directed against elites of both the left and the right in rapid succession. (It also warns of the danger of manipulation if there is no right of voter initiative.)

The petition referendum has been successfully invoked in Switzerland and the American states both against Acts that voters consider reactionary and against those they find too radical. The fact that

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it is tending to fall into disuse shows that it has served its purpose of making representative assemblies more representative. But the simultaneous growth in the use of the initiative suggests that while legislative sins of commission have, through the referendum, been brought under control, sins of omission have not entirely succumbed to the threat of the initiative, though the threat is often effective.⁴⁸ In time, no doubt, the message will fully sink in.

In Australia and New Zealand, the outcomes of most referendums have favoured change rather than the status quo, with the exception of constitutional measures designed to increase the powers of the federal government and legislature at the expense of the states. Australian voters, like the Swiss, have consistently been sceptical about the promised benefits of greater centralization and seem likely to remain so.

FOOTNOTES CHAPTER IV

- 1 Particulars of referendums up to 1978 are from D. Aitkin, 'Australia', in D. Butler, A. Ranney eds, *Referendums: A Comparative Study of Practice and Theory*, Washington 1978 (hereinafter cited 'Butler and Ranney'), 123, 125.
- 2 id., 236.
- 3 M. Rutherford, in A. Ranney ed., *The Referendum Device*, Washington 1981 (hereinafter 'Ranney'), 166; Butler and Ranney, 224.
- 4 M. Radin, 'Popular legislation in California: 1936-1946' (1947) 35 *Cal. L. Rev.* 171, 184.
- 5 Ranney, xii.
- 6 A. Ranney, 'Referendums, 1980 style', *Public Opinion*, Feb.-Mar. 1981, 40; A. Ranney, 'The year of the referendum', *Public Opinion*, Dec.-Jan. 1983, 12.
- 7 id. (1981), 41; A. Ranney, 'Referendums and initiatives 1984', *Public Opinion*, Dec.-Jan. 1985, 15.
- 8 V. Wright, 'France', in Butler and Ranney, 139, 146.
- 9 id., 165.
- 10 P. Saladin, 'Le référendum populaire en Suisse' [1976] *Revue internationale de droit comparé* 331, 335-6.
- 11 Butler and Ranney, 224, 50-65.
- 12 Ranney, xii-xiii.
- 13 Butler and Ranney, 16.
- 14 S.S. Nilson, 'Scandinavia', in Butler and Ranney, 189, 172.
- 15 Ranney, 14.
- 16 Butler and Ranney, 230.
- 17 Butler and Ranney, 84.
- 18 Ranney, 'Referendums, 1980 style', op. cit. supra, 41. As to the comparative scores in 1980, 1982, 1984 and 1986, see Ranney, op. cit. supra, n.6, also 'Referendums and initiatives 1984', *Public Opinion* Dec.-Jan. 1985, 15; 'Referendums and Initiatives 1986', *Public Opinion*, Jan.-Feb. 1987, 44.
- 19 (1984) 5 *Initiative News Report* ('INR') No.23, p.1.
- 20 (1980) 1 *INR* No.7, p.5; (1984) 5 *INR* No.22, pp.1,2.
- 21 (1980) 1 *INR* No.7, p.5.
- 22 D. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States*, Baltimore 1984, 174-5.
- 23 R. Allen, 'The national initiative proposal: A preliminary analysis' (1979) 58 *Nebraska L. Rev.* 965, 1023-4.
- 24 id., 1023-5; Butler and Ranney, 78-9; L. Tallian, *Direct Democracy*, Los Angeles 1977, 43.
- 25 Allen, op. cit. supra, 1023.
- 26 id., 1025n.

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- 27 Butler and Ranney, 45, 81.
28 id., 90; W. Munro ed., *The Initiative Referendum and Recall*, New York 1912, 36.
29 D. Schmidt, *Ballot Initiatives: History, Research, and Analysis of Recent Initiative & Referendum Campaigns*, Washington 1983, 84; (1984) 5 *INR* No.22, p.2.
30 Saladin, op. cit. supra, 334.
31 H. Bone, R. Benedict, 'Perspectives on direct legislation: Washington state's experience 1914-1973' (1975) 28 *Western Pol. Q.* 330, 337.
32 C. Price, 'The initiative: A comparative state analysis and reassessment of a Western phenomenon' (1975) 28 *Western Pol. Q.* 243, 245.
33 ibid.; (1982) 3 *INR* No.3, pp.1-2.
34 Price, loc. cit.
35 Saladin, op. cit. supra, 334-5.
36 Bone and Benedict, op. cit. supra, 333.
37 E. Lee, 'California', in Butler and Ranney, 87, 97.
38 Schmidt, op. cit. supra, 52.
39 L. Tallian, *Direct Democracy*, Los Angeles 1977, 78-9, 82.
40 Lee, op. cit. supra, 106. Lee's figures go only up to 1976, but no later case that would disturb his statement comes to mind. Howard Jarvis's Proposition 13 campaign was supported (though not launched) by a property-owners' association, but their total contribution of \$16 000 to the campaign suggests that they were not a large or powerful group.
41 ibid.
42 Allen, op. cit. supra, 1038.
43 Tallian, op. cit. supra, 42-3.
44 Bone and Benedict, op. cit. supra, 333.
45 Magleby, op. cit. supra, 197.
46 Butler and Ranney, 85.
47 Tallian, op. cit. supra, 16, 18.
48 id., 43; Lee, op. cit. supra, 98.

Chapter 5

Structuring and Regulating Direct Legislation

For the purposes of this chapter we assume that the initiative and the referendum have been accepted in principle. We turn therefore to the issues that will arise when it is sought to translate the idea into actual legislative and constitutional provisions.

I. CONSTITUTIONAL AMENDMENTS REQUIRED

As the Constitution of the Commonwealth of Australia entrusts the Commonwealth's law-making power to the parliament, the introduction of an alternative law-making procedure such as initiative and referendum would require a constitutional amendment. Consistently with the democratic origins of that instrument, any amendment must be ratified by the voters in accordance with the procedures and majority requirements set out in s.128. At the state level and in New Zealand, however, the necessary constitutional changes could be made by ordinary statute. This is one instance in which the undemocratic antecedents of those constitutions would advance democratic ends.

It could be argued that a referendum would be required in the case of New South Wales, because s.7A of the state's Constitution Act requires that any statute abolishing the state's upper house or altering its powers should be submitted to a referendum. Direct legislation, it could be argued, would mean that some statutes would not need to be considered by the Legislative Council and that consequently its powers would have been reduced. As against that, s.5 of the Constitution Act, which declares that it is the legislature that shall 'have power to make laws',

does not declare that power to be exclusive to the legislature, and s.5 itself can be amended by an ordinary statute.

Some thought would need to be given to the decision of the Judicial Committee of the Privy Council in *Re Initiative and Referendum Act*, the case in which the Privy Council struck down the province of Manitoba's venture into this field. While the decision is not binding on Australian courts, it cannot be ignored. The only ground for the decision that might be relevant in Australia today was the Committee's objection to the fact that the legislation gave the provincial lieutenant-governor, who was an integral part of the legislature, no role, even a formal one, in direct legislation. Initiative measures were to take effect without the assent of the lieutenant-governor. The Act was invalid because it detracted from his powers, even if his power to refuse assent was largely theoretical. Today the necessary legislation could without difficulty be drafted in such a way as to overcome this objection. There is no reason why initiative legislation should not be required to be submitted for the governor's assent. Queensland's Bill so provided — but it was amended to guard against the possibility that the government might fail to present the initiative measure for his signature, by the stipulation that the responsible minister 'shall present' the measure for assent. For more abundant caution, the provision could quite properly direct that the responsible minister 'shall advise the governor to assent' to the measure.¹

It has been argued that *Re Initiative and Referendum Act*² holds that direct legislation would be invalid under state constitutions as being an inadmissible delegation of the powers of the representative legislature, an objection similar to one that has been raised unsuccessfully in the United States.³ But the Privy Council made it clear that it was not relying on this ground⁴ and expressly distinguished the constitution of Manitoba from constitutions that give the relevant legislature of a state in a federation the residuary law-making power: 'Had the Provinces possessed the residuary capacity, as in the case with the States under the Constitutions of the United States and Australia, this might have affected the question of the power of their Legislatures to set up new legislative bodies'.⁵ Problems would arise if parliament were to legislate for the complete abolition of the representative legislature, but that is not suggested in any quarter.⁶

In any event, three years after its decision in *Re Initiative and Referendum Act*, the Privy Council reversed its stance on the validity of initiative and referendum legislation, when considering a case involving (but not directly challenging) the Alberta Direct Legislation Act 1913, *R. v. Nat Bell Liquors Ltd.*⁷ The Alberta statute provided for legislative initiative petitions in the ordinary way, but a favourable ballot result did not transform the measure into law automatically. It had to be returned to the parliament, which was required to pass it by the normal method,

whether it wished to or not. Since the legislature had no choice in the matter, this difference between the Alberta statute and the Manitoba Initiative and Referendum Act was a purely formal one.

Though it was not required by the issues to decide the question, the Privy Council made a point of indicating that it thought the Direct Legislation Act valid. It added some wry words for the opponents of direct legislation:

It is impossible to say that it [the challenged liquor statute passed by the popular initiative process] was not an Act of the Legislature and it was none the less a statute because it was the statutory duty of the Legislature to pass it. If the deference to the will of the people, which is involved in adopting without material alteration a measure of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the Legislature would only be truly competent to legislate either in defiance of popular will or on subjects upon which the people is either wholly ignorant or wholly indifferent.⁸

It would be possible also to provide that the legislation establishing the initiative and the referendum could not be amended or repealed unless the amendment or repeal were itself approved by the voters. This might be a useful safeguard, but it would be preferable not to entrench the provisions in this way at the outset. Experience might show that procedural or other adjustments were required and it would be inconvenient to put all of these to a popular vote.

II. STATUS OF DIRECT LEGISLATION

A statute adopted by initiative would repeal any prior inconsistent legislation either expressly or by implication, in the same way as ordinary statutes do now. But the whole process would be made nugatory if the legislature could immediately repeal any initiative legislation by means of an ordinary act. One early solution to this problem was to require that any amending or repealing legislation should itself be the subject of an appeal to the electors. This was too cumbersome. The present California law requires amending or repealing statutes to be 'approved by the electors unless the initiative statute permits amendment or repeal without their approval'.⁹ The proposed national initiative amendment in the United States would prevent amendment or repeal of initiative measures during the first two years after their effective date except by a two-thirds majority of each house of congress. After the two-year period, the ordinary methods of amendment or repeal could be used. Several American states permit repeal or amendment by the legislature after an interval of between two and seven years or subject to a two-thirds or three-quarters majority.¹⁰ All these

approaches, with their different degrees of flexibility, have their advantages. If the proposers of an initiative could have the option of requiring a two-thirds majority in both houses, they might be more inclined to permit parliamentary amendment. A two-thirds majority in both houses would normally suffice to prevent action on purely partisan grounds.

It is conceivable that, at a given ballot, two inconsistent initiative measures could receive an affirmative vote. This possibility might be forestalled by requiring preferential voting where there are two or more initiatives dealing with the same subject matter. This would be especially desirable if parliaments were to be given the right, as seems desirable, to place a measure on the ballot paper as an alternative to an initiative measure. Another approach is the California solution, whereby if there are two or more conflicting measures, the measure receiving the highest affirmative vote prevails.¹¹ There has never been a case, however, where the voters have adopted directly opposing measures.¹²

When an initiative is defeated at the polls, the question could arise whether the parliament could itself subsequently enact essentially the same law. The problem does not seem to have arisen in practice, but there seems to be no good reason why the legislature should not be free to do this. To provide otherwise would be an unwarranted restriction on the legislature and might attribute too much significance to the negative popular vote.¹³ It would be otherwise, however, in the case of a parliamentary enactment defeated at a legislative petition referendum, as we shall see shortly.

The legislative petition referendum requires for its effective operation that ordinary legislation that passes through parliament should not take effect for (usually) 90 days after it receives the governor's assent. This time delay is provided by the constitutions of Switzerland and most of the American states where the referendum exists in order to give opponents of the enactment an opportunity to organize a petition for a referendum. A number of variations exist. California accommodates the referendum process by providing that all statutes other than urgency statutes (of which more in a moment) take effect on the January 1st next following a 90-day period from the date of enactment, which is the date of the governor's assent. Acts of the Arizona legislature (other than emergency measures) do not take effect until 90 days after the close of the legislative session at which they were enacted.¹⁴ In each case petitioners have until the end of the 90 days to gather the necessary signatures.

California exempts from this 90-day postponement of operation statutes calling elections, those providing for tax levies or appropriations for the usual current expenses of government, and statutes declared by a two-thirds majority of both houses to be 'urgency

statutes'.¹⁵ Oregon exempts only emergency legislation.¹⁶ Switzerland repealed its emergency legislation exemption in 1949 after it had been widely abused by the parliament during the period between the world wars.¹⁷

Some states exempt only appropriation measures, not statutes imposing new taxes.¹⁸ An exception for appropriation for the ordinary expenses of government would prevent day-to-day administration from being disrupted, but an exception for tax measures is another matter. In other times one might have said that these, too, should not be liable to suspension; but we have seen that in recent years there has emerged a view among politicians and political intellectuals that the voters are not competent to decide questions of tax policy and should have no direct say in them. In view of this attitude it may be unwise to allow parliaments any opportunity of presenting the voters with a *fait accompli* in this respect.

In some jurisdictions, the presentation of a valid referendum petition continues the suspension of a challenged act of parliament until it is considered by the voters.¹⁹ In others, the act comes into operation and remains in effect unless rejected by the electorate.²⁰ The suspension option seems preferable except in the case of emergency legislation. Otherwise, if the referendum were successful, anomalous legal consequences could be created in relation to the period when the challenged statute was in operation.

If an act of parliament is successfully challenged by a petition referendum, the consequence should be not only that the act is automatically repealed, but also that parliament should not have the power to enact a similar measure for a given period, say three or five years. Any other rule would make a mockery of the referendum. It might also be appropriate to prevent any initiative measures on the same subject from being presented for a similar period. There do not appear to be any instances in which parliaments have attempted to subvert a referendum result within a short period in this way, at the national or state level, though some cases have occurred at the local level in the United States. California in fact has a specific provision protecting against this danger as regards municipal ordinances.²¹ This would be a wise precaution at the state and federal levels also.

III. SUBJECT MATTER

Constitutional Amendments

A referendum is already compulsory for amendments to the Commonwealth of Australia Constitution, and in respect of some provisions of state constitutions. Switzerland, as well as California and a number of other American states, also permit popular initiatives for

the purpose of amending the constitution, and the 1985 Commonwealth Constitutional Convention considered the idea.²² In principle this can be supported on the same grounds as the initiative generally, but it has had the undesirable result of cluttering the relevant constitutions with a great deal of material that would more appropriately be dealt with by ordinary statute. This is notably true in Switzerland, where there is no general legislative initiative at the federal level.

This does not mean that governments and parliaments should retain their monopoly over the initiation of constitutional amendments, but it does suggest that if a state constitution is to be made capable of amendment by citizen initiative, then in the case of constitutional amendments the indirect initiative might be more appropriate than the direct type. The indirect initiative would enable better use to be made of the parliamentary research and drafting services, as well as the contributions of individual members of the legislature whose experience in politics and government may give them special insight. If parliament refused to act on the initiative, the people would still have their say at the polls. But the proposal might benefit from the parliamentary scrutiny and debate, especially if the proposers are permitted to amend the measure in ways that do not affect its main substance, as is the case under the Massachusetts constitution.

At the Commonwealth level, problems of constitutional drafting become especially sensitive. The constitution of a federation is not merely a constating instrument. It is also a kind of compact between semi-sovereign entities. Its provisions are subjected to minute analysis and exegesis by lawyers and by the courts, especially the High Court of Australia. The case for having amendments drafted by parliaments or by a regular constitutional convention here becomes more persuasive. While the case for a citizen initiative remains, a case exists for making the procedure even more indirect than that of the indirect initiative. Thus, for example, it might be thought desirable to give the right of initiative not to the voters directly, but to, say, a majority of the states. This position would be a compromise between the view taken by Senator Mason's Commonwealth proposal, which would treat the constitutional initiative in the same way as the ordinary legislative initiative, and the United States national initiative proposal, which totally excludes constitutional amendment.

Statutes and Regulations

By definition, direct legislation should apply to the making and unmaking of statutes. Regulations and other forms of delegated legislation are not normally specifically mentioned, because at the time when most initiative and referendum provisions were drafted, their authors did not foresee the inexhaustible proliferation of delegated

legislation that has swamped the legal scene this century. There seems to be no reason why delegated legislation should not specifically be made the subject of these procedures. Normally it might be safer to amend the regulation-making power in the principal statute, but there might be occasions on which the people would be satisfied to strike down particular regulations while leaving the general power intact. Thus, the customs regulations on the importation of aeroplanes,²³ which the government uses to prevent competition among the domestic airlines to the detriment of the consumer, could be removed without impairing a general regulation-making power that might seem desirable in other respects.

The rationale behind direct legislation should cause us to lean against any restrictions on possible subject matter. Nevertheless, there is a good deal to be said for the American national initiative proposal's exclusion of laws relating to national security. Defence from foreign invasion, subversion or internal warfare is the primary function of government, and it seems appropriate to allow the authorities a wide discretion in the lawful means they may employ in discharging it. This is one area in which governments may have to act on information not available to the general public. Speed and the implementation of unified plans can also be vital. The ordinary processes of judicial review should be available if any tendency to overextend the proper boundaries of this sphere should emerge.

While 14 of the American state constitutions impose no express limits on the subject matter of the initiative, the American courts have developed a distinction between administrative and legislative matters and have held that no initiative may be brought on an administrative question. This distinction is the product of an attempt to balance two opposing principles: the maintenance of maximum power in the people on the one hand, and the maintenance of the fair and efficient operation of essential government functions on the other. The legal basis for the distinction is usually the fact that direct legislation is expressed to be a power to make 'laws', rather than a power to direct what the decision should be on particular matters. While the administrative-legislative distinction has usually been discussed in terms of local government, it appears to apply also at the state level. Thus, a routine appropriation for continuing a long-term project might be treated as administrative under the applicable tests. Perhaps the reason why the problem has so seldom arisen other than at the local level is that it is difficult to interest the electorate at large in measures concerning particular decisions. There would seem to be no adequate grounds for writing in an express administrative-legislative distinction. Unless experience indicates the contrary, it would seem sufficient to leave the matter to the electorate and to rely, if necessary, on the accepted meaning of the word 'laws'.²⁴

Some other explicit restrictions have been adopted in a number of jurisdictions as a result of unpleasant practical experiences. They include amendments that require any government agencies created by the initiative to be subject to normal appropriation legislation, that limit initiative measures to a single subject each, and that prohibit the naming of individuals to public office.²⁵ The adoption of some or all of these limitations might be prudent.

Treaties

Recent decisions of the High Court of Australia have brought the treaty-making activities of the Commonwealth pursuant to the external affairs power in the Constitution to the very forefront of political and legal debate.²⁶ It has been argued that the wide, formalistic interpretation that the court has given to this power in effect enables the executive branch of the Commonwealth government to amend the Commonwealth constitution unilaterally. Treaty ratification in Australia is a purely executive act in which parliament plays no part.²⁷ If the making of international treaties is going to have sweeping and hitherto unforeseen effects on the domestic affairs of the nation, a particularly strong argument can be made for extending the people's right to petition for a referendum to the ratification of international treaties.²⁸

The earlier theorists of direct legislation did not especially favour popular participation in external affairs. Rousseau himself was against the idea. The 1793 French constitution, though heavily influenced by his *Du contrat social*, and while granting such an important place to the expression of the popular will, gave it no place at all in the ratification of treaties. This distinction was defended on the ground that people had neither the necessary knowledge of nor interest in such matters, and that secrecy and dispatch were often essential.

While this could be true today of some aspects of external relations, there appears to be no ground for totally excluding the people from the scope of direct legislation, at least in relation to matters affecting the vital interests of their country. At present the constitutions of some 40 nations provide for obtaining the approval of the voters for international treaties, and of these 15 countries provide for a popular vote as a substitute for the normal process of parliamentary ratification.²⁹

It is a sign of the rapid spread of the participatory ethic that referendums relating to treaties have become much more common since the beginning of the 1970s. They have even become the norm in cases where a treaty involves some cession of national sovereignty. Such were the ballots held in Ireland, the United Kingdom, Denmark and Norway on the adherence of those countries to the Common Market treaties.

Most of the constitutions that provide for referendums in these cases leave it to the government to initiate the referendum. This is the case, for example, under article 11 of the French constitution of 1958, pursuant to which referendums have been held on the expansion of the Common Market (1972) and on the ratification of the Evian agreements, which put an end to the Algerian war (1962). There is some doubt about the status of the latter, since at the time of the agreements Algeria was not yet an independent nation. Article 11 has been reproduced in the constitutions of other countries in the French-speaking world, such as Cameroon (1972), Mauritania (1961), Togo (1961), Tunisia (1976) and Upper Volta (1970, 1977).

The constitution of Panama contains a unique requirement of a referendum in the case of a treaty with the United States on the subject of the Panama Canal, and in that case only. In 1977 Panamanians duly went to the polls and indicated their approval of the new agreement.³⁰ Another automatic requirement for popular ratification is in article 20 of the 1953 constitution of Denmark, which compels the holding of a referendum on any treaty whereby the nation becomes a member of a supranational organization, unless the treaty has been ratified by a five-sixths majority in parliament. Denmark's Common Market referendum resulted from the operation of this section.

The referendum at the option of the government, and the referendum that is made compulsory by the constitution for certain types of treaties, are the most common. Only Switzerland and Liechtenstein have a petition referendum for treaties. The Swiss constitution was amended by referendum in 1921 to require that international treaties of indeterminate duration or with a duration of more than 15 years should be submitted for popular adoption or rejection on the demand of 30 000 citizens or eight cantons. Experience showed that duration by itself was not a satisfactory criterion, and in 1977 the referendum was made compulsory for all treaties that involve joining a collective security organization such as the United Nations, or a supranational community such as the European Communities. If the treaty involves joining an ordinary international organization or subscribing to a multipartite treaty standardizing legal provisions, or if the treaty is of long duration, the referendum is optional, though the right to petition for a referendum remains.³¹

Practice has shown that international relations referendums do not suffer from any specific vices that would warrant their total exclusion from initiative and referendum processes. Participation has been high, and often higher than at ordinary ballots. The 90.1 per cent turnout of Danish voters for the 1972 Common Market referendum was the highest ever recorded in that country.³² Nor have any of the recent treaty referendums caused any unmanageable strains in international relations. The exception is Britain's Common Market referendum of 1975, but the

problems surrounding it stemmed not so much from the referendum itself as from the efforts of the Wilson Government to resolve its internal problems in this way, regardless of the effects on its international obligations.³³

The capacity of direct voter participation to resolve questions that paralyse the traditional representative system has proved to be of particular benefit in the international sphere. Questions that arise in foreign affairs raise issues that often do not fit with the traditional divisions between political parties and cannot be satisfactorily resolved by parliamentary politicking.³⁴

The general arguments in favour of direct legislation apply with at least equal force to the ratification of international agreements. The danger that governments will conclude treaties of which the people do not approve is quite possibly greater than the comparable problem with legislation. Part of the danger in Australia lies in the nature of the treaty-making bureaucracy. An influential proportion of Australia's foreign affairs establishment is so patronizingly elitist, so openly contemptuous of the people it is paid to represent, that in Canberra it is cordially disliked even by other elitists. The main goal of the people in this group seems to be to gain the approval of their peer group, which consists of their opposite numbers in other countries, not least those with the most elitist forms of government. This goal has obvious dangers in a world where most governments range from the authoritarian to the tyrannical to the totalitarian. Such countries regard the rights and freedoms enjoyed by people in countries like Australia as an impediment to harmonious international relations; in the case of totalitarian governments, the existence of these liberties is viewed as immoral and 'unscientific',³⁵ an intolerable provocation and a threat to peace. For the sake of international 'harmony', therefore, Australia's representatives at UNESCO have given active support to that organization's idea of a draft international agreement restricting the freedom of the news media.³⁶

A majority of the High Court held in the *Dams* case that the Commonwealth government could give the parliament new legislative powers simply by entering into a treaty, or by addressing any subject that affects our relations with other countries. It is easy to see the consequences to which this interpretation may lead, given that Australia's survival as a free and democratic society is itself an irritant in our dealings with many foreign governments. And the damage could be done without the direct consent of the people. For that matter, it could occur without even the consent of parliament, since treaty ratification is a matter for the executive government alone.

The fact that the elected parliament does not have even a theoretical right to refuse to ratify a treaty means that the legitimacy argument applies with even greater strength here than it does in relation to ordinary legislation. If, for example, a treaty undertaking mutual defence

obligations can be the subject of a direct popular vote, governments will need to be ready to present convincing arguments in favour of participation. On the other hand, if the popular vote favours the treaty, it becomes more difficult for political agitators to argue that the government has drawn the people into unwanted foreign entanglements.

Advisory Referendums and Popular Motions

In California and several other jurisdictions the voters may require the holding of a referendum on a subject on which the state has no legislative power, such as matters of foreign affairs. These 'advisory referendums' have no legal force but are seen as a way of bringing public opinion to the attention of the federal government more forcefully and reliably than do the results of opinion surveys. They are in effect a policy recommendation from the electorate to the government.

A somewhat different procedure has been suggested in Switzerland, to meet the criticism that existing structures give the voters a right to accept or reject only settled legislative proposals, not to express their choice of broad policy options at an earlier stage in the legislative process. This suggested 'popular motion'³⁷ would also be a direction on policy rather than on an actual bill or statute, but unlike the advisory referendum, it would be binding on the government and parliament, in deference to the preference of the Swiss for decisive ballots with direct consequences. This proposal is worthy of consideration. So is the advisory referendum idea, although there is a danger that the expenditure of taxpayer's money on issues that lie outside (state) constitutional power could cause some dissatisfaction with the whole idea of direct participation. In general, however, as there is something to be said for modest beginnings, it might be better to defer these proposals until the standard types of initiative and referendum had proved themselves in the Australian context.

IV. METHOD OF INITIATION AND SIGNATURE REQUIREMENTS

It is of the very essence of direct legislation that the people themselves should be able to set the process in motion. Where only the government has the right to launch a reference to the voters, the referendum can be, and often has been, used in a manipulative and cynical way, particularly under dictatorships but also in generally democratic conditions.

An intermediate case between government initiative and popular initiative is provided by article 42 of the Danish constitution, which gives one-third of the members of Denmark's unicameral parliament the power to seek a referendum on a bill that has been passed by the

house and is awaiting royal assent. The petition must be lodged no later than three working days after the successful parliamentary vote. A similar system is provided in article 27 of the Irish constitution. This procedure enables a referendum to be held much more speedily and at less cost than under the usual legislative petition referendum, and it could be a useful adjunct to the standard procedure. But for the reasons given above, it is no substitute for reserving the right to the people themselves.

Some jurisdictions require a copy of the petition and proposal to be lodged with the government before signature collection begins.³⁸ A small number of voters must sign the petition at this initial stage (e.g. ten voters in the case of Massachusetts) and sometimes a money deposit is required, which is refunded if the petition attracts the necessary number of signatures and otherwise qualifies for the ballot. In order to protect prospective signers of petitions and save them from being misled or imposed upon by circulators, California requires the proponents to apply to the state attorney-general's office for a title and summary of not more than 100 words, which is placed at the head of each section of the petition on which signatures will be collected. On occasion the courts have invalidated a petition because the short title did not adequately convey the nature of the petition and the subject matter to which it related.³⁹ Placing the contents of the petition on the public record in this way also helps to ensure that voters will have a better understanding of the measure before they have to decide whether or not to sign the petition. Many petitions are newsworthy and will attract media coverage, which will also enhance voter understanding.

Some jurisdictions specify a fixed number of signatures to qualify the measure for the ballot. In Switzerland a legislative referendum must be held if 50 000 citizens sign the petition. For the initiative (always a constitutional initiative except in the cantons), 100 000 signatures (about 4 per cent of the voting population) are required. Senator Mason's proposals would likewise lay down a fixed number, in this case 250 000.

In the United States the practice is to define the required number of signatures as a percentage, either of those eligible to vote, or, more commonly, of the number of people who actually voted at the immediately preceding election for governor. (Where voting is not compulsory, these figures can be significantly different.) The North Dakota figure is now 2 per cent of the voting-age population; before 1980 a fixed number was prescribed in that state. In California, the requirement is 5 per cent of the number of votes cast at the last gubernatorial election (reduced from 8 per cent), and 5 per cent for the legislative referendum also. Queensland's Popular Initiative and Referendum Bill called for a high 10 per cent of those eligible to vote.

Some American states follow the Swiss practice of requiring a smaller number of signatures for the referendum than for the initiative, in view of the greater time constraints under which signatures for a legislative referendum must be gathered. Massachusetts stipulates 3 per cent of the number of votes at the previous election for governor in the case of an initiative; a referendum petition that does not seek suspension of the relevant statute requires 2 per cent, while only 1.5 per cent will suffice if no suspension of the relevant statute is sought or the statute has been certified by the legislature as an emergency statute.⁴⁰ Oregon requires 6 per cent for an initiative and 4 per cent for a referendum, and Oklahoma 8 per cent for an initiative and 5 per cent for a referendum (though constitutional initiatives require 15 per cent). The United States national initiative proposal stipulates for 3 per cent of the votes cast at the preceding presidential election. Seven states also require a degree of geographic spread in the residence of the signatories, ostensibly in order to reduce the risk that purely local questions will be submitted to the state's voters.⁴¹

Fixing the number of signatures required entails balancing competing values: on the one hand the considerations of cost saving and of the quality of initiative and referendum proposals, and on the other hand the need to keep the process open to minorities who are not adequately represented in parliament or government. Fixing the percentage relatively high, as in the case of Oklahoma, may help to ensure that impetuous or eccentric proposals unsupported by any significant body of opinion will not have to be voted upon. On the other hand, Alberta's requirement of 10 per cent for a referendum and a staggering 20 per cent for an initiative ensured that the province's citizens were seldom able to make their own laws. High percentages defeat one of the main purposes of the system, which is to provide a safety-valve for intensely disaffected minorities. Further, the more signatures that are required, the more difficult it becomes to collect the necessary total by means of unpaid solicitation. It could hardly be desirable to place the procedures effectively out of the reach of all except those with substantial resources. Better therefore to err on the side of accessibility, for there is little reason to believe that this would significantly increase the number of unacceptable measures proposed: 'Experience has indicated', according to one Californian study, 'that measures are not capriciously initiated or referred. The task of conducting a state-wide campaign after a measure is on the ballot is of such proportions that utilization of the direct legislative procedures has not been taken lightly'.⁴² At the same time, it does appear that there is a direct and significant correlation between the number of signatures required and the frequency of initiatives and petition referendums. American figures show that high signature thresholds will generally limit the number of measures qualifying for the ballot, and low

thresholds generally mean that more measures will qualify. A threshold higher than 8 per cent seems effectively to restrict ballot access.⁴³

The ballot can also be made more readily available by prescribing a fixed number of signatures rather than a proportion of the eligible population. Any such fixed figure should of course be adjusted from time to time, but automatic indexation underestimates the organizational problems of scale. Collecting the 360 000 signatures which now represent 5 per cent of the California electorate presents problems of a qualitatively different character from those involved in gathering the 30 000 that were needed when direct legislation was first adopted in that state. The continual growth in the number of signatures required has been pinpointed as a main reason for the eclipse in California of the legislative petition referendum, which requires 5 per cent of voters to sign within the short period of 90 days. The referendum was not used in California between 1942 and 1982, whereas in nearby Washington state, where the absolute numbers required are smaller, the referendum has retained its vigour.⁴⁴

The Progressives originally wanted to prescribe upper limits for the number of signatures, anticipating population growth and the problems it would present, but this idea was rejected or overlooked by most legislatures.⁴⁵ The Swiss tackled this problem in the 1970s, for the prescribed number of signatures had remained unchanged since 1874 despite population growth and the doubling of the number of voters consequent on the grant of women's suffrage. The prescribed numbers were increased, but not by as much as the expansion in the number of eligible voters. The constitutional initiative now requires 100 000 voters rather than 50 000, but for the referendum the figure has risen from 30 000 to only 50 000.

Changing the number of signatures required, or the qualifications for signing, or placing restrictions on the time, place or manner in which petitions may be signed is a favourite rearguard tactic for those opposed to the idea of popular participation in law making. Once the principle of the initiative and the referendum is accepted, schemes obviously designed to hinder its use must be rejected.⁴⁶

Litigants have occasionally attempted to persuade American courts that signers have a right to withdraw their signatures after the petition has been filed. The courts have denied the existence of a right to withdraw after filing on the ground that it would make the system unworkable.⁴⁷

As an alternative to the citizen petition, the Swiss constitution provides for the holding of a legislative referendum on the request of eight of the 26 cantons. This avenue is not often used, but it could have merit as an option in any Commonwealth direct legislation amendment. If, say, a majority of the state parliaments could require the holding of a

referendum, there could be considerable cost savings if the states correctly judged the public mood.

V. SIGNATURE GATHERING AND ITS ABUSES

Once the petition has been lodged and the official title and summary obtained, the proponents have then to raise the necessary number of signatures within the specified time. The usual period allowed is five months; Queensland's proposed 90-day collection period would have been almost impossibly short, given the high signature requirement and the quality of communications at that time, especially during the monsoon season.

Even in the earliest days of direct legislation in Switzerland, proponents of initiative or referendum proposals would make use of the services of paid signature-gatherers, and this appears still to be the case. But in California (and apparently only in California), because of the large absolute numbers of signatures required in a relatively short time, professional signature-gathering organizations have come into existence. From time to time bills have been introduced in the state's legislature to prohibit payment for the services of petition circulators. Even voluntary groups oppose this, on the ground that signature collection would become even more difficult if volunteers could not be compensated for their travel expenses.⁴⁸ 'Most of these proposals', agree V.O. Key and W.W. Crouch, 'come from that idyllic school of political thought which holds that the political wheels should go round, like the perpetual motion machine, without money'.⁴⁹ But, as they go on to point out, if one wishes to influence legislation, properly or improperly, and whether through the parliament or directly through the electorate, a certain amount of money is required. There seems to be no ethical difference between contributions to the campaign expenditures of parliamentary parties and payments to signature-gatherers.

But whatever one thinks of the principle, it is evident that abuses have occurred in practice. Professional signature-gatherers have on occasions used false or misleading summaries, illegally employed children, and even outright forgery. At the same time, volunteer signature-gatherers may also abuse the process. Volunteers are often instructed to work in teams, with one person directing people to the petition table, and the other making sure the signature is properly executed. This is unobjectionable in itself, but in some instances volunteers have been instructed to avoid explaining the proposal or answering questions in order to keep people moving rapidly towards and past the petition table.⁵⁰

It has been observed that some voters will sign a petition for a measure with which they do not agree, simply because they believe that the idea should be debated and put before the voters for their decision.⁵¹

That motivation may be quite compatible with the purposes of direct legislation. What is more disturbing, though, is that some people, when stopped by signature-gatherers, seem to be willing to sign almost any petition presented to them, either because they are in a hurry and do not wish to take the time to think about the issue, or because of a lack of the moral courage required to say no.⁵²

The likelihood of objectionable behaviour would presumably be less in the case of a referendum petition because the challenged statute would already have been debated in parliament and, if at all controversial, would have been publicized in the media. But in relation to the initiative, one writer argues that these abuses, among others, make up a case for not having the direct initiative at all, and instead adopting a modified indirect system under which the legislature would hold hearings on the proposal before signature gathering begins in earnest. This, it is argued, would ensure that people were better informed about the measure when the time came for them to decide whether or not to sign the petition.⁵³ But this is a minority view; most observers do not consider these problems sufficiently grave or widespread to undermine the entire direct initiative system.

Nevertheless, it might be wise to keep these dangers in mind. They are an argument for not setting the required number of signatures too high, for not adopting a percentage formula, and for erring on the side of generosity when fixing the time period during which signatures must be gathered, or for not having a time limit at all.⁵⁴ Every effort should be made to facilitate and encourage publicity for initiative and referendum petitions after their lodgment and before the proponents begin gathering signatures. Collecting signatures by direct mail should be permitted, because this method, although costly, does not place the voter under any social or peer-group pressure to sign. Going to the extent of prohibiting professional signature gathering does not seem desirable. Overenthusiastic amateurs are not, as we have seen, immune from the temptations to which the professionals sometimes succumb. Further, this would give an undue advantage to disciplined associations such as trade unions, who are in a position to call upon the unpaid services of numerous 'volunteers'.

It may be, in any event, that signature gathering abuses will prove to be mainly an American (indeed, a Californian) phenomenon resulting from the narrow time limits for signature gathering. The problem seems not to have arisen in Switzerland, where the regulations covering the conduct of initiative and referendum campaigns are minimal.⁵⁵

During the period allowed for signature gathering, the proponents endeavour to collect the requisite number of signatures, plus a margin of up to one-third as insurance against the possibility that a proportion will be found to be fraudulent, duplicated or to be affixed by persons not qualified as voters. The petition and the signatures are then lodged with

the designated public official, who has the task of checking the signatures, names and addresses against the electoral roll and the records of enrolment. This is an onerous and costly task and a strong case can be made for permitting the use of sampling techniques and other speedy methods of verification, as California and Washington do. California currently checks between 8 and 8.5 per cent of signatures.⁵⁶

The official's certification of the signatures is usually final and cannot be reviewed in a court.⁵⁷ This finality rule is quite appropriate since what is being checked is not the ultimate outcome of the poll but the regularity of a step that leads to a poll. Indeed, in Colorado, where direct legislation is used frequently, no verification of signatures is required except a scanning to check for suspicious similarities of handwriting.⁵⁸ In Nevada officials simply count the signatures and assume they are valid unless there is evidence to the contrary.⁵⁹

It is not desirable to require, as has been done in California, that all sections of the petition (and therefore all the signatures) be filed with the authorities on the same date. If sections can be filed separately, circulators are able to form a reliable estimate of the number of signatures that are being rejected for irregularity and can more accurately estimate the number they will require; otherwise they will tend to collect far more signatures than necessary.⁶⁰

Any procedure that interposes delays in the initiative process will tend to make successful initiative legislation unlikely. The state of Ohio has the direct initiative only for constitutional amendment. For ordinary legislation it uses, as we have seen, an indirect initiative system under which the measure is submitted to the legislature upon the petition of 3 per cent of voters; if it is amended or not passed by the legislature, the measure is submitted to the ballot on the petition of an additional 3 per cent of voters, in its original form or incorporating any amendments suggested by the legislature.⁶¹ This means in practice that the proponents must dismantle their organization while the legislature is considering the measure. As a result, in Ohio a constitutional initiative is three times as likely to be passed as a legislative initiative.⁶²

This consideration is also an argument against the indirect initiative generally, which requires the proponents to await the outcome of the legislature's deliberations before proceeding to a ballot. It may be that parliamentary legislation has advantages, such as better drafting and a more active search for compromise. But that does not mean that parliament should be able to interpose itself in the middle of the initiative process. It is enough to ensure that it has the power to place an alternative measure on the ballot. For that matter, there is nothing to prevent the legislature from enacting the measure itself and forestalling a direct initiative ballot. A parliament needs no special authorization to enact legislation.

VI. DRAFTING AND AMENDMENT

The Proposal

Drafting the proposed statute is the responsibility of the initiative's proponents, who may use such legal assistance as they think desirable. As was suggested earlier, it would be helpful if governments indicated that parliamentary counsel were at liberty to accept commissions to draft, in their own time and for reward, proposed legislative initiatives. If not, professional legal drafting assistance could be obtained from a wide variety of other sources such as practitioners, academics or retired judges. Drawing on a wider range of legal drafting skills might in fact improve the quality of legislative drafting, especially its intelligibility. Quite frankly, in most Australian jurisdictions this would not be hard. Long subsections could be broken up into several sentences, as used to be done until recent decades; active verbs could be used instead of present participles; decimal numbering of sections and subsections could be introduced and preambles could be used to indicate the general objective of the statute. At present it is often necessary to consult an expert in a particular field in order to find out what a new statute is trying to do; one's chances of making sense of it otherwise may be slight.

When an initiative proposal has been lodged with the appropriate government agency before signature gathering begins, its text becomes final and is not subject to review or amendment. The purpose of this rule is to prevent proponents from obtaining signatures for a particular proposal and then amending it in ways that might be unacceptable to signatories. But it is also inevitable that while signatures are being gathered, or subsequently, drafting defects will be found in the proposed law. One such error was discovered in a proposed tax-cutting measure in Dade County, Florida, where because of a drafting slip voters were asked to approve a tax reduction of 90 per cent instead of the intended 9 per cent; in this instance the relevant procedures did not permit amendment and the measure had to go to the ballot as it stood. (It was rejected.)⁶³ A draft law may also contain internal inconsistencies, unexpected consequences for existing law, or impracticable procedures. Possibilities for compromise or simplification may emerge that were not apparent at the time of drafting.

There are several ways of attacking this problem of amendment. It is always possible for the voters to suggest an alternative measure aiming to achieve the same general policy goals but drafted in a more efficient or more conciliatory manner. But a more efficient approach is for the legislature to be given the power to place an alternative counterproposal on the ballot. This course is available in Switzerland and in all American states that have the initiative. Not only may it result in better-drafted legislation, but it also gives the voters a range of

solutions from which to choose. This would remove one of the most frustrating elements of direct legislation, the limitation of choice to that between simple acclamation and utter reprobation. In such cases preferential voting should be used, however, to prevent the legislature from putting forward an alternative proposal as a mere tactic to split the affirmative vote.

Measures placed on the ballot by the legislature have an approval rate of approximately 60 per cent, which is higher than the success rate of popular initiatives. Voters appear to have more confidence in legislation drafted by their parliament than that which is drafted by pressure groups, even when the legislature was moved to act only by the threat of an initiative ballot.⁶⁴

A further approach to the problem of amendment deserves attention. This is to be found in article 81 of the constitution of Massachusetts, which allows to the proponents of an initiative a limited right of amendment. The amendment must be certified by the attorney-general as being 'in his opinion perfecting in its nature' and as 'not materially chang[ing] the substance of the measure'. Once the amendment is so certified, the proponents must then raise an additional number of signatures representing 0.5 per cent of the voting electorate, this requirement being additional to the number originally needed to qualify the petition for the ballot. Massachusetts has only the indirect initiative, but there seems to be no reason why the same amendment procedure would not work with the direct initiative also. Presumably judicial review should be available to challenge an erroneous certification given by the attorney-general.

No questions of drafting or amendment can arise under the legislative petition referendum, of course. The statute being challenged has already been formulated, settled and passed by the parliament when the petition for its repeal is launched.

The Ballot Question

In countries such as Britain where there is no tradition of direct legislation, lively debate can arise over the wording of the question to be placed on the ballot paper. An opinion poll conducted in Britain before the Common Market referendum in 1975 tested seven possible wordings for the question and found that the majority varied between 0 per cent and 16 per cent.⁶⁵

Although it is quite possible that different wordings might produce different answers if one tests people's responses well before the ballot, it does appear that fears about question wording are groundless.⁶⁶ By the time polling day arrives, voters will have heard and read a good deal of argument on the general issue and will make up their minds on the basis of that debate. They do not look at the ballot paper for guidance on how

to vote. If there is any ground for believing that the question is loaded, that fact is more likely to rebound against those responsible for the wording. This was the case with the Tasmanian dams referendum of 1981, when the ballot paper gave voters a choice between two different dam proposals but did not give the option to vote against all the proposed dams. A very high informal vote was recorded as people wrote in 'no dams' or otherwise defaced their ballot papers. Even allowing for the informal vote, the Gordon-below-Franklin proposal received a large majority, but the restriction of choice in the ballot questions did much to undermine the perceived legitimacy of the result.

Any unintended difficulties about the ballot question are also likely to be thrashed out in debate before polling day. Before Italy's referendum on divorce, it became clear that a person wishing to vote in favour of divorce law had to vote No and an opponent of divorce had to vote Yes. This was not the result of skulduggery but of the fact that the poll was more akin to a legislative referendum. It was an initiative, but its object was the repeal of the recently passed divorce statute, not the enactment of a new law. Consequently, the question put to voters had to be in effect, 'Do you favour the repeal of parliament's new divorce statute?'. By voting day virtually everyone understood the question, although a few still believed that there had been an attempt to mislead the public.

General de Gaulle was on occasion deservedly criticized for putting unfair referendum questions to the voters. But here the main problem was not so much the wording of the question, as his attempt to link separate subjects in the one question, chiefly in order to use a vote on some pressing specific issue as a vote of confidence in the government. That problem can be avoided by confining each individual ballot question to one subject.

VII. THE VOTER PAMPHLET

Australians are acquainted with the pamphlet that is circulated in connection with each Commonwealth referendum. It contains a summary of the proposal and the arguments for and against it, prepared by a parliamentary committee made up of representatives of both sides of the issue. This is sent by mail to each enrolled voter. Voter pamphlets are not normally prepared in connection with state referendums. In the United Kingdom, a pamphlet was prepared and circulated before the 1975 Common Market referendum, but not on the devolution polls.

It is highly desirable that such a pamphlet be prepared and circulated to each voter, especially if the measure in question is of any complexity. As we have seen, in the absence of a pamphlet there may be no effective presentation of the negative case. Further, few voters take the time to

read the actual text of the law in question, and for many people the pamphlet is their primary choice for information on ballot propositions.⁶⁷ Voters mentioning the pamphlet as their first choice display markedly better knowledge of the issues.⁶⁸ The pamphlet is also an effective counter to imbalances in funding or other extraneous advantages one side may have over the other.

Many people believe that little notice is taken of such pamphlets, but a poll taken shortly before the Common Market referendum in Britain found that 75 per cent of the electorate claimed to have looked through the pamphlets from cover to cover and 27 per cent to have read them from cover to cover.⁶⁹ The existence of this kind of information about a referendum may have a significant effect on voter turnout if voting is not compulsory.⁷⁰ If only for that reason, the official pamphlet may have an important effect on the outcome of the poll.

Who prepares the voter pamphlet? In Australian federal constitutional referendums, it is parliament. Pursuant to s.11 of the Referendum (Machinery Provisions) Act 1984, two statements of up to 2000 words each are authorized by a majority of the members who voted for and against the measure respectively and transmitted to the Electoral Commissioner for circulation to the voters. For the purpose of the Common Market referendum, the British government nominated two 'umbrella organizations' to argue the case for each side and to be the recipients of subsidies and media access. The voter pamphlet was prepared by these organizations jointly. The principle of umbrella organizations seemed to work tolerably well on that occasion, but presented difficulties at the later Scottish referendum when there were groups supporting or opposing devolution for violently different reasons.

The Quebec legislature in 1978 passed general referendum legislation providing that only these umbrella organizations could spend any significant sums of money on a campaign or have access to media time. When the Quebec separatist referendum was held, other bodies did manage to have a voice in the debate by various indirect means, but the monopoly given to umbrella organizations by this legislation remains vulnerable to serious abuse.⁷¹

In about four American states, including California, the voter pamphlet is prepared by the office of the secretary of state (chief secretary). Other states permit the contending sides to write the materials for the handbook.⁷² This seems to be the better approach. Pamphlets prepared by government officials, as in California, are described as '50 or 60 pages of absolutely impenetrable prose'.⁷³ For this reason, it appears that few people read them except to discover who is for and who is against the proposal.⁷⁴ But if the proponents and

opponents of the measure prepare the pamphlet, there is an incentive for them to make their remarks as clear and intelligible as possible.

The procedure in Oregon has been put forward as a model in this respect. In that state the committee preparing the official summaries includes two proponents and two opponents of the initiatives. These four then appoint a fifth member. A draft of the pamphlet must be prepared at least 110 days before the poll so that if necessary public hearings may be held to review it. At these hearings members of the public may suggest matter for inclusion in the pamphlet. The final draft must be filed no less than 95 days before the poll. If there is an objection to this final official pamphlet, a voter may approach the state supreme court, on a summons for an expedited hearing, for a ruling on the propriety of the language.

Any Oregon voter may, and is invited to, submit an argument to the secretary of state. Each argument is to be no more than one page long, and it is assured of being printed in the pamphlet if it is accompanied by a petition signed by 1000 voters or if a fee of \$300 is paid.⁷⁵

VIII. THE CAMPAIGN

The problems of campaign expenditure and access to the media have already been discussed. There is no correlation between advertising expenditure in support of an initiative or referendum measure and the outcome of the ballot, but there is some relationship between expenditure against a measure and the size of the No vote. The reason for this is that persuasive advertising can underline any doubts the voter may entertain or can raise new ones; and doubts tend to be resolved against the measure. But even here, substantially disproportionate expenditure against a measure can rebound on those supporting the No case if it appears to be an attempt to buy a negative vote. The Oregon dentists case is one striking illustration of this. Other instances have also been cited earlier.

An important factor in the campaign is the activity of the government of the day. Governments are continually making news and have a large publicity machine at their continuous disposal.⁷⁶ They are in a position to make headlines every day if they decide to support or oppose a direct legislation proposition, as the California government did with its menacing campaign against Proposition 13.

Governments in Australia have always taken a public stance one way or the other on referendum questions. It is hard to see how it could be otherwise, especially if, as we suggest, the parliament should have the power to submit an alternative proposal for inclusion on the ballot paper in an initiative contest.

Although the main influence on voter behaviour in initiative ballots seems to be the opinions expressed by friends, neighbours, family and peer groups,⁷⁷ the most visible aspects of a direct legislation ballot campaign are the slogan and the political line-up.⁷⁸ It is useful for the purposes of a campaign to be able to summarize one's case in a short slogan that will have impact when used in radio or television advertising or on billboards, where there are stringent time or space constraints.

The political line-up is important for two reasons. First, it enables each side to increase its access to the media at little or no cost. Politicians or celebrities who endorse one side or the other will attract free media coverage to it. Second, from the voter's point of view, it helps to overcome the information problem that stems from the fact that initiative or referendum proposals originate from outside the normal political arena. The proponents may have no past political record on which voters can base an estimate of the *prima facie* merit of the proposal. The line-up is not an entirely satisfactory solution to this problem, however. It directs voter attention away from the proposed legislation to what preferred opinion-makers think of it, because the voter can reduce his information costs by ascertaining the identity of proponents and opponents.⁷⁹

Both of these techniques have thus been criticized, either as inviting oversimplification or as focusing attention away from the main issue. However, both have traditionally been used in ordinary election advertising. The slogan 'It's Time' greatly helped the successful campaign of the Australian Labor Party in 1972 at a time when it had been in opposition for 22 years and the federal government had obviously lost its sense of direction. The Labor Party also made extensive use of the line-up technique in the 1972 and 1974 elections. It bought full-page advertisements in the daily press setting out long lists of academics, media personalities and artists who had indicated their intention to support the party. This technique fell from favour, however. There were complaints from some academics that threats or promises had been made to induce them to sign; there was also the condescension implicit in the idea that associate professors of English were particularly qualified to tell people what to think on political matters. It seems unlikely that either of these techniques is decisive: certainly the overwhelming line-up against Proposition 13 proved insufficient to carry the day.

The weightiest criticism of campaign tactics has been directed at false or misleading campaign advertising, especially slogans. Governor (as he then was) Ronald Reagan, among others, urged that legislation was needed to stop false advertising in initiative campaigns.⁸⁰ But the best course for a state or country proposing to adopt indirect legislation would probably be to wait and see what experience tells about this problem. It is hard to see how legislation could prohibit anything more

than actual misstatements of fact, for to go any further than that would be to incur the risk of prohibiting the expression of opinion. But most of the more controversial campaign statements are likely to be in this realm of opinion, such as the assertion that a particular measure, though not particularly objectionable in itself, will lead to more dangerous enactments of a similar nature, or will have unforeseen effects in other parts of society. Extravagant though some such claims may seem, experience shows that it is not possible to know in advance which extravagant predictions will be realized and which will not. One thing does tend to lead to another; and actions do sometimes have the most improbable consequences. Further, if ordinary electoral advertising practice is any guide, the most objectionable advertising is likely to be reserved for the last days of the campaign, when it is impracticable to do anything about neutralizing its effects.

It is not surprising, therefore, that existing Commonwealth legislation prohibiting untrue, misleading or deceptive political advertising in connexion with federal elections and referendums was found to be unworkable and was repealed in 1984.⁸¹

The cost of conducting an initiative and referendum campaign has been another source of concern. Neither Switzerland, California nor Australia, the jurisdictions that have made the most use of the referendum in one form or another, has ever imposed outright ceilings on campaign expenditure related to them. California's Political Reform Act 1974 does, however, prohibit one side from outspending the other by more than \$500 000. But any form of ceiling, including the California type, presents difficulties. It would be improper to prohibit persons or organizations who are not formally proponents or opponents of the measure from publicly expressing a view and from buying media time or space to make that view known, for to do this would again be a serious infringement of freedom of speech. Also, last-minute smear tactics may go unanswered if the opposing side has reached its expenditure limit.⁸² Spending limits give an advantage to organized, disciplined bodies such as unions which are able to call upon the services of 'volunteer' workers. They also mean that the cleverest advertising campaign will enjoy an advantage, given equal or maximum expenditures. Consequently, such controls inherently favour professional campaigners and advertising entrepreneurs who will be recruited to make opinion guidance as cost-effective as possible.⁸³ Finally, in general less expenditure means less information available to the electorate. Any mechanism that impedes the flow of information to the electorate is liable to favour the status quo.⁸⁴

Compulsory disclosure of campaign contributions is a possible option, but this has a tendency to be retrospective and therefore to have little effect on the outcome of the ballot. Even so, the revelation of where funds actually came from could help to allay suspicion and

rumour. But a number of countries, notably Denmark and Norway, have rejected disclosure and reporting requirements on the ground that they are likely to have a 'chilling' effect on financial contributions and therefore on one important form of political activity. R.K. Winter, a professor of law at Yale, also argues that public disclosure laws in effect 'require that political acts of individuals be registered with the government and publicized. Such legislation thus might subject potential contributors to the fear that persons with different views or political affiliations, for example, clients, employers, officials who award government contracts, might retaliate. The effect, therefore, might be to "chill" or deter political activity'. In Australia, there would be grounds for fearing that persons or individuals whose contributions were disclosed might be subject to costly or violent retaliation by trade unions.⁸⁵

In general, the case for restrictive regulation of campaign finance for direct legislation ballots is weaker than the corresponding arguments in the case of normal elections of candidates. The opportunities for secret deals or corruption in initiative or referendum ballots are virtually nonexistent, whether financial contributions are disclosed or not.⁸⁶ In Switzerland there are absolutely no rules either on expenditure or public disclosure. Yet Swiss procedures have not been criticized on this ground and there is not even a movement for public disclosure.⁸⁷ The best way to minimize the influence of money is to take particular care when setting signature requirements, time limits and the like.

IX. THE BALLOT

Setting the Date

The polling for an initiative or referendum can be held in conjunction with a general election, as was the case with the Australian constitutional referendums in 1974, 1977 and 1984; or a special ballot can be held. The latter is, of course, the more costly alternative.

The Swiss go to the polls on referendum questions every three months, and this has contributed to the falling voter turnout in recent years. In California, direct legislation ballots are usually held in conjunction with the biennial November voting on federal and state elections. When an initiative measure qualifies for the ballot, it must be set down for the next general election held at least 131 days after qualification, or, in the case of a legislative petition referendum, the next general election 31 days after qualification. The constitution also gives the governor the power to order a special ballot. Californians vote on up to 30 separate propositions at their biennial elections, though only an average of 2.7 of these are citizen-initiated measures. Most are uncontroversial amendments to past initiative legislation or to the

constitution (to authorize a bond issue, for example), placed on the ballot by the government. Each measure is given an identifying number, such as 'Proposition 13', and in 1983 it was decided that in order to minimize the risk of confusing the voters, the same numbers could not be re-used for 20 years.⁸⁸ Senator Mason's Commonwealth initiative scheme contemplates the holding of initiative ballots on a set day each year, such as the first Saturday in December.⁸⁹

Holding the ballot on the same day as a general election obviously assists voter turnout if voting is not compulsory, and permits considerable savings in costs. However, where the issue is a major one, a case can be made for holding a special ballot separately from the ordinary party struggle.⁹⁰

Should Voting Be Compulsory?

Initiative and referendum voting is usually optional. In Australia there is a tradition of theoretically compulsory voting, though the penalties for failing to vote are minimal and are very seldom enforced. Queensland's Popular Initiative and Referendum Bill also provided for compulsory voting:

The case for compelling voters to cast a ballot is weaker in this context than it is in relation to general elections or constitutional amendments. An initiative or a legislative petition referendum relates to a single issue, whereas an election vote affects whole sets of policies, proposed statutes and styles of government and management for the next three or four years. A constitutional amendment can alter the framework of government for the indefinite future. In liberal democratic societies there must be some sort of presumption against using compulsion against the citizen in the absence of strong reasons for doing so. We may or may not agree with Bentham that 'every law is an evil, for every law is an infraction of liberty', but a coercive law about voting is certainly a restriction on freedom. If experience later shows that the system will not work if voting is optional, then the question can be reconsidered.

On the information available, there is no reason to believe that optional voting would result in unacceptably low participation. Before voting in federal referendums became compulsory in 1924, voter turnout ranged between a low of 50.2 per cent in 1906 and a high of 82.7 per cent in 1916 (the first conscription referendum). Most occasions show a figure in the low 70s or low 60s, and an arithmetic average of the separate voting occasions (disregarding times when multiple questions were put) gives a respectable average of 59.3 per cent. Another optional federal referendum was held in 1977 in conjunction with a federal election and compulsory constitutional referendums. This related to the choice of a new national song, and it was made clear to voters on the day

that voting on this question was not compulsory. Participation was an extremely high 92.3 per cent, which may highlight the advantages of holding referendum ballots in conjunction with general elections. Worldwide, participation rates are generally high; few national referendum turnouts have fallen below 60 per cent.⁹¹ As for those who fail to vote, some advocates of direct legislation see it as a positive advantage that people who are not interested in an issue take no part in deciding it,⁹² a point that becomes especially persuasive if there are multiple issues on the ballot paper. Professor Louis Maurin of Geneva is emphatic that all questions should be decided by a majority of the votes actually cast on the question, and that no attempt should be made to deem abstainers to have voted No. 'Any other scheme', he declares, 'is a fraud and a trick of politicians to render the initiative and referendum useless'.⁹³

It will be argued in the next chapter that participation by the individual in government is a basic human requirement and an end in itself. On that basis, voluntary failure to vote is undesirable and creates a gap between the democratic ideal and a polity's actual democratic performance. (That is not necessarily an argument for compelling people to vote, of course.) But in terms of the ability of direct legislation to produce laws that are in harmony with popular opinion and enjoy the legitimacy conferred by direct popular approval, a large abstention rate appears not to be the problem one might expect it to be. A number of empirical studies comparing voters with non-voters have found that the distributions of policy preferences among non-voters are approximately the same as those among voters.⁹⁴

In all, therefore, it is fair to conclude that non-compulsory voting at least warrants a trial.

X. THE MAJORITIES REQUIRED

In the Australian states, in California and in most other jurisdictions where referendums of various kinds are held, a bare majority of those voting is sufficient where the ballot relates to ordinary legislation. Senator Mason's Commonwealth initiative proposal also adopts this rule. There are exceptions: the referendum procedure under the New Zealand Licensing Act 1908 required, until 1914, a 60 per cent majority for its questions relating to the sale of liquor. The canton of Basel formerly required a majority of all those entitled to vote, but this rule was abandoned. The Swiss have not encountered any problems from small majorities on non-constitutional measures.⁹⁵

Professor Allen has argued that the proposed United States national initiative should require that ordinary legislative measures be passed by both an overall majority and a majority in a majority of states. Allowing an enactment by a simple majority, he argues, would give too

much power to a few heavily populated states and would give insufficient weight to the need for consensus.⁹⁶

Special majorities are sometimes required for constitutional amendments or for other legislation of fundamental importance — and in the first half of this century, the sale of liquor was seen as an issue of fundamental importance in English-speaking countries and Scandinavia; this explains the New Zealand special majority provisions just mentioned. The Swiss and Australian federal constitutions can be amended only if both an overall majority, and a majority in a majority of states or cantons, concur in the proposal. In 1979 the British parliament stipulated for a special majority in the Scottish devolution referendum. It indicated that unless 40 per cent of eligible Scottish voters expressed themselves in favour of devolution, the parliament would not embark upon the experiment. In the event, 51.6 per cent of the votes were in favour of devolution, but this represented only 32.85 per cent of the Scottish electorate. The Scotland Act was not implemented. Professor Bogdanor of Oxford attaches great significance to the special majorities stipulation: 'For the first time in British politics, it was formally accepted that a special majority was necessary to ensure passage of constitutional legislation, a landmark in our constitutional evolution and one whose consequences may well be wide-ranging'.⁹⁷

The rationale for special majorities is to be found in the question of legitimacy already referred to. When vital issues are at stake a technical majority may not demonstrate sufficiently wide public support to confer legitimacy. In 1949 the Belgian people voted on whether King Leopold III should resume the throne. A majority of 58 per cent voted in favour and the King returned to Brussels. But he then found it was not possible to function as a king in a democratic state when 42 per cent of the people had declared their opposition to him.⁹⁸ It has also been argued that if British membership of the European Communities had been confirmed by only 51 per cent of the voters and not 68 per cent as in 1975, its continuance in the Common Market would be much more uncertain than it is today.⁹⁹

A law on a fundamental matter that inspires only barely more support than opposition will be difficult to enforce. It will be denounced, resisted and flouted. Enforcement will require large-scale mobilization of resources, which will be regarded by the minority as oppressive. The particular law, and the enforcement machinery, will be brought into disrepute. This will in turn harm the rule of law, and through it democracy itself. What is needed, therefore, is not a majority but a consensus. As Alexander Bickel put it, 'although we govern by majority rule, it is with the consent of the minority. If the minority believes with sufficient intensity that the majority is wrong, the majority may find it too costly to enforce its will. This is especially

true if what the majority seeks to do requires not simply the minority's silent acquiescence but its active participation'.¹⁰⁰ For this reason, 'no measures of pervasive application can or should rest on narrow majorities';¹⁰¹ or, as Rousseau wrote, 'the more important and weighty the matter in issue, the nearer should the opinion that prevails approach unanimity'.¹⁰²

Underlying these propositions are simple considerations of principle and political prudence. These points should be borne in mind by those who attack the special majority requirements in s.128 of the Commonwealth Constitution. The whole point of having a constitution is to demarcate some areas of law as being of special gravity. In Britain these areas are, or used to be, identified informally, sometimes in the course of the parliamentary debate itself. In Australia it is done more formally, in the written constating instrument, and s.128 specifies the measure for the minimum degree of consensus that the founders thought advisable. In a 1974 referendum the people were asked by the federal government to approve a constitutional amendment that would have relaxed these special majority requirements.¹⁰³ Displaying the caution, if not outright suspicion, with which they customarily view such invitations, the people declined to do so.

FOOTNOTES CHAPTER V

- 1 There is no legal difficulty about such a provision: *Tonkin v. Brand* [1962] W.A.R. 2.
- 2 [1919] A.C. 935.
- 3 R.D. Lumb, *Australian Constitutionalism*, Sydney 1983, 135. As to the similar problem in American constitutional law, see L. Sirico, 'The constitutionality of the initiative and referendum' (1980) 65 *Iowa L. Rev.* 637.
- 4 At p. 945.
- 5 At p. 943.
- 6 *Taylor v. Attorney-General (Qld.)* (1917) 23 C.L.R. 457, 468, 474, 478.
- 7 [1922] 2 A.C. 128.
- 8 At p. 134.
- 9 Constitution of California 1879, s.10(c).
- 10 D. Schmidt, *Initiative Procedures: A Fifty-State Survey*, Washington 1983, 13.
- 11 *id.*, s.10(b).
- 12 R. Allen, 'The national initiative proposal: A preliminary analysis' (1979) 58 *Nebraska L. Rev.* 965, (hereinafter 'Allen'), 1020n.
- 13 D. Greenberg, 'The scope of the initiative and referendum in California' (1966) 54 *Cal. L. Rev.* 1717, 1745.
- 14 Constitution of California 1879, Art. IV, s.8; Constitution of Arizona 1912, Art. IV, s.1(3).
- 15 Art. II, s.9(a), Art. IV, s.8(c)-(d).
- 16 Constitution of Oregon 1859, Art. IV, s.28.
- 17 P. Saladin, 'Le référendum populaire en Suisse' [1976] *Revue internationale de droit comparé*, 331, 333.
- 18 e.g. Constitution of Montana 1972, Art. III, s.5.
- 19 e.g. Constitution of Colorado 1876, Art. V, s.1.
- 20 e.g. Constitution of Nevada 1864, Art. XIX, s.1(2).
- 21 Greenberg, *op. cit. supra*, 1745-6.
- 22 *Proceedings of the Australian Constitutional Convention, Brisbane 29 July -1 August 1985*, Brisbane 1986, 286-364.
- 23 Customs (Prohibited Imports) Regulations (Cth), reg.4N.
- 24 At the local level in California a similar doctrine has grown up excluding from the scope of the initiative matters of purely local or private concern: Greenberg, *op. cit. supra*, 1746.
- 25 *id.*, 1722.
- 26 *Koowarta v. Bjelke-Petersen* (1982) 39 A.L.R. 417, but more especially *Tasmania v. Commonwealth* ('The Dams Case') (1983) 57 A.L.J.R. 450, 46 A.L.R. 625.

- 27 N. Campbell, 'Australian treaty practice and procedure', in K. Ryan ed., *International Law in Australia*, 2nd edn., Sydney 1984, 53, 66-7. In many cases bilateral treaties are not even ratified at all: *ibid.*
- 28 See Walker, 'The citizen-initiated referendum in treaty ratification' (1985) 59 *A.L.J.* 362.
- 29 G. Bacot, 'Remarques sur le rôle du référendum dans la ratification des traités' (1978) 82 *Revue générale de droit international public* (hereinafter 'Bacot'), 1024, 1048.
- 30 Bacot, 1043-4.
- 31 Bacot, 1038; J.-F. Aubert, 'Switzerland', in D. Butler, A. Ranney eds, *Referendums: A Comparative Study of Practice and Theory*, Washington 1978 (hereinafter 'Butler and Ranney'), 39, 41.
- 32 Bacot, 1049n.
- 33 *id.*, 1049.
- 34 *ibid.*
- 35 B.D. Wolfe, *An Ideology in Power*, New York 1969, 353.
- 36 Early in 1985 I discussed this proposal with the responsible officer at the Department of Foreign Affairs in Canberra. After twice denying the existence of any such proposal or any Australian interest in it, he eventually admitted that there was such an 'ongoing concept' (as he called it) at UNESCO and that the Australian delegation had actively expressed support for it.
- 37 Saladin, *op. cit. supra*, 340, 343.
- 38 V. Key, W. Crouch, *The Initiative and Referendum in California*, Berkeley 1939, 543-5.
- 39 G. Hahn, S. Morton, 'Initiative and referendum — Do they encourage or impair better state government?' (1977) 5 *Fla. St. U. L. Rev.* 925, 927. This article contains a useful tabulation of the main procedural requirements in the various states at 928-9.
- 40 Constitution of the Commonwealth of Massachusetts 1780, amendments Arts. 48, 74, 81.
- 41 Hahn and Morton, *op. cit. supra*, 928-9.
- 42 Key and Crouch, *op. cit. supra*, 553.
- 43 D. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States*, Baltimore 1984 (hereinafter 'Magleby'), 41-2.
- 44 C. Price, 'The initiative: A comparative state analysis and reassessment of a Western phenomenon' (1975) 28 *Western Pol. Q.* 243, 245; E. Lee, 'California', in Butler and Ranney, 87, 100. As Lee also points out, the legislature's liberal use of the 'urgency' exception has had a good deal to do with the decline in use of the referendum.

- 45 Key and Crouch, op. cit. supra, 553n; L. Tallian, *Direct Democracy*, Los Angeles 1977, 80-3.
 - 46 id., Key and Crouch 554; Tallian Ch. 10.
 - 47 Uhl v. Collins (1932) 217 Cal. 1, 17 P.2d 99.
 - 48 Tallian, op. cit. supra, 88.
 - 49 op. cit. supra, 546-7.
 - 50 N. Brestoff, 'The California initiative process: A suggestion for reform' (1975) 48 *So. Cal. L. Rev.* 922, 929-30.
 - 51 id., 957.
 - 52 id., 944-5.
 - 53 id., passim.
 - 54 Tallian, op. cit. supra, Ch. 11.
 - 55 Aubert, op. cit. supra, 66; J. Steiner, in A. Ranney, *The Referendum Device*, Washington 1981 (hereinafter 'Ranney'), 106.
 - 56 Magleby 56; Schmidt, op. cit. supra, 8.
 - 57 Key and Crouch, op. cit. supra, 549. But see Wyoming In-Stream Flow C'ttee v. Thomson (1982) 651 P.2d. 778; Case Note (1983) 18 *Land and Water L. Rev.* 857.
- Sampling techniques should be used only for the purpose of validating a petition; there are strong objections to using them to invalidate a petition by in effect rejecting a proportion of the total number of signatures even though they may be valid: B. Grossman, 'The initiative and referendum process: The Michigan experience' (1981) 28 *Wayne L. Rev.* 77, 124-32.
- 58 Tallian, op. cit. supra, 84.
 - 59 Schmidt, op. cit. supra, 9.
 - 60 Tallian, op. cit. supra, 87.
 - 61 Constitution of Ohio 1851, Art. II s.1b.
 - 62 J. Fordham, J. Leach, 'The initiative and referendum in Ohio' (1950) 11 *Ohio St. L. J.* 495, 513.
 - 63 R. Scammon, in Ranney, 64.
 - 64 Lee, op. cit. supra, 50; Saladin, op. cit. supra, 337-8.
 - 65 Ranney, 190; D. Butler, in Ranney 101-2.
 - 66 ibid. For examples of Australian governments' attempts to load referendum questions, see D. Aitkin, 'Australia', in Butler and Ranney, 123, 131.
 - 67 H. Graham, 'The direct initiative process' (1979) 27 *UCLA L. Rev.* 433, 456; Lee, op. cit. supra, 112.
 - 68 Graham, ibid.
 - 69 Ranney, 187.
 - 70 ibid.
 - 71 Ranney, 183.
 - 72 id., 67.

- 73 R. Wolfinger, in Ranney, 63.
74 *ibid.*
75 Graham, *op. cit. supra*, 462-3.
76 Ranney, 184.
77 Allen, 1033.
78 Brestoff, *op. cit. supra*, 937-8.
79 *ibid.*
80 *ibid.*
81 Electoral and Referendum Amendment Act 1984 (Cth),
repealing s.329(2) of the Commonwealth Electoral Act 1918.
82 Brestoff, *op. cit. supra*, 941.
83 *id.*, 949.
84 Ranney, 93.
85 Professor Winter is quoted in Ranney, 92. The Australian
Council of Trade Unions and the unions controlling Telecom,
the government's telecommunications monopoly, in April
1985 imposed bans on businesses believed to be supporters of
the Queensland National Party: *Australian*, April 10, 16,
1985.
86 *id.*, 96.
87 J. Steiner, in Ranney, 106.
88 Ranney, 187.
89 94 *Senate Debates*, 20 May 1982, 2297.
90 Ranney, 188.
91 *id.*, 75 (D. Butler); the Australian figures are from Aitkin, *op.*
cit. supra, 126-8.
92 Tallian, *op. cit. supra*, 92.
93 Quoted in Tallian, *op. cit. supra*, *ibid.*
94 A. Ranney, 'Nonvoting is not a social disease', *Public*
Opinion, Oct.-Nov. 1983, 16.
95 J. (Viscount) Bryce, *Modern Democracies*, London 1921, Vol.I,
426, 444.
96 Allen, 1043-5.
97 V. Bogdanor, 'Referendums and separatism II', in Ranney, 143,
156.
98 Butler and Ranney, 17.
99 *ibid.*
100 A.M. Bickel, *The Morality of Consent*, London 1975, 102.
101 *id.*, 103.
102 *Du contrat social*, Book IV, Ch. II.
103 Of the 30 defeated amendment proposals, five have foundered on
the requirement of a majority of voters in a majority of
states. The figure is incorrectly given as six in Current
Topics (1985) *A.L.J.* 195, though the remainder of the article
is useful. See also Current Topics (1983) 57 *A.L.J.* 373.

Chapter 6

The Recall — The Next Phase?

I. CHARACTERISTICS AND HISTORY

The trilogy of political reforms advocated by the Progressives in the United States and the Labor Party in Australia consisted, as we have seen, of the initiative, the referendum, and the recall. The recall is the right of a specified number of voters to require the holding of a ballot on the question of whether a named public official should be removed from office. We have had little to say about this third branch of the trilogy in this work because our primary concern has been with law making. But perhaps a little more should now be said about it, because as a method of introducing direct democracy into the administration of the law, it stands logically with direct popular participation in the making of law. It could therefore constitute the next phase in the introduction of practical forms of direct democracy into modern government. The following brief discussion will not attempt to weigh all the pros and cons of the recall, but will simply seek to provide a possible starting point for further discussion and thought.

The recall is said to have had a long history in some Swiss cantons,¹ but the earliest indisputable reference to it appears in the American Articles of Confederation of 1777. Professor Munro pointed out that the principle of ministerial responsibility under the British constitution was also a form of recall, as it enabled the course of public policy to be altered at any moment by the recall of a cabinet at the hands of the House of Commons;² but, of course, party discipline has made that power of recall a purely theoretical one today. In Australia, the direct recall of public officials was incorporated into the policy platform of the Labor Party in 1924, where it remained until the 1963 party

conference, which resolved, on the motion of Mr Don Dunstan, to remove it.³ In America today the recall for state officials exists in 13 states and for local officials in all but ten states.⁴

There are a number of variations in the recall system. In some instances it applies to elected officials only (including judges in states where they are elected), or it can apply to both elected and non-elected officials except judges, or it can apply to all public officials including judges. The signature requirement for the petition is usually higher than for either an initiative or a referendum. California requires the signatures of 12 per cent of voters at the last election, or 20 per cent in the case of judges and certain other specified officers.⁵ In some jurisdictions an elected official who defeats a recall ballot is entitled to remain in office only until the end of his existing term, while in others he receives a full new term of office. Other candidates for the office may be nominated in the recall petition, or by normal nomination methods. In California the challenged official may not be a candidate for re-election in this way. In some jurisdictions the defeat of a recall ballot gives the challenged official immunity from further such attempts for the remainder of his term of office. In most cases the official's campaign expenses are paid by the government.

At the November 1986 elections Californians voted to remove Chief Justice Rose Bird and Judges Grodin and Reynoso from the state's Supreme Court. This was not a use of the recall but a rare application of Article VI, s. 16 of the California Constitution which requires Supreme Court judges, if challenged, to face an election for renewal of their appointment every 12 years. The majority for removal, according to media reports, was two to one. Some critics have attributed this result to the costly media campaign waged by the judges' opponents, but opinion polls months before the elections showed majorities of around 57 per cent for removal. The California District Attorney's Association also favoured removal, as did, according to a private unofficial poll, a majority of California judges who were prepared to express an opinion on this matter. The complaint against the three judges was essentially that they had persistently ignored the law, especially the criminal law, and had pursued their own private legislative programs.

II. UNELECTED OFFICIALS IN HIGH PLACES

Under the Westminster type of constitution (inherited in Australia, New Zealand, Canada and some other countries) there are large numbers of non-elected officials in powerful positions. This is because when this type of constitution came into being in 1688, there was no cabinet system and no responsible government as we know it. The head of the executive was the king, and it was assumed that he would wield real power, subject to parliament's control over the purse. But the sovereign

has not played an active part in government since the days of George III, and during the 19th century the notion developed that ministers chosen by parliament would be appointed by the king. They would take responsibility for the king's acts on condition that the king would do as he was told. This system was never embodied in explicit legislation, or in any constitutional instrument. It stemmed only from the power of parliament over the revenue and from the operation of certain constitutional conventions.

So although one commonly speaks of 'the elected government', the legal fact is that in the Westminster system the executive government is not directly elected at all. The governor or governor-general is appointed for a fixed term of years to be the legal head of the executive, and the prime minister or premier and other ministers are appointed to advise him on the basis that they have the numbers in the legislature to authorize the payment of money to the executive government. The parliament is thus in effect an electoral college that chooses the executive government. The prime minister or premier, although the head of government, is strictly speaking directly elected only to represent the voters of Alligator Creek, or wherever it may be, and only the voters of Alligator Creek have the power to remove him from his position as head of government without at the same time removing the entire ruling party from power. They are unlikely to do this, since the party usually ensures that ministers have safe seats. The executive government is thus not directly elected as such; this becomes quite clear when, as not infrequently happens, a prime minister or premier dies in office or resigns for health or other reasons, and for the duration of that parliament the people find themselves with a head of government for whom they might never have dreamed of voting for that position. This practice is unpopular with the voters (as witness the massive antigovernment swings in the 1986 New South Wales by-elections), but in the absence of an initiative system there is nothing they can do to reform the constitution in this respect.

Under the Anglo-Australian system judges are not elected but are nominated to their positions by the executive government. This is also true of the United States Supreme Court and other federal courts. The system of electing judges that exists in some American states has not shown itself to be so superior to the appointive system that one would wish to copy it, for it eliminates from the field of possible judges candidates who lack the talent or taste for electioneering, but who may be well qualified for judicial office. Judges in our system may be removed from office by parliament on grounds of misconduct, but this is extremely rare and in practice there is very little public accountability for the appointment and subsequent performance of judges. A government that nominates unsuitable persons for the bench will suffer politically for it, but this effect is not of long duration; whereas a judge may

continue to serve for decades, long after the government that appointed him has gone.

All administrative officials in Australia, New Zealand, Great Britain and other Westminster-style democracies are appointed, not elected. The theoretical rationale for this has traditionally been the doctrine of ministerial responsibility, according to which a minister is accountable to parliament for the acts of his departmental officials. This may have been a sufficient basis for the present practice in the days when public servants were content to work quietly behind scenes. But, as the Review of Commonwealth Administration in 1983 pointed out,⁶ that state of affairs has changed for a number of reasons. Today there are more and wider-ranging parliamentary committees and other inquiries at which administrative officials may be required to give evidence in person. There are more regular public speaking appearances by administrative officials, which break with the old principle of public servant anonymity and provide an opportunity for senior officials to express their own policy viewpoints, without being subject to effective control by the minister or the voters. Individual officials are accessible to lobbyists and other groups wishing to present their views to government, and indeed for most lobbyists today the office of the official, not of the minister, is the first stop. The fashion for 'investigative journalism' and the great expansion of administrative law that has highlighted case decision making and related matters, the unionization and consequent politicization of the public service, and the proliferation of independent government commissions and boards have all tended to shift greater and greater amounts of power into the hands of unelected bureaucrats.

In such circumstances, unelected judicial and administrative officers in particular are apt to forget that they are the servants and agents, not the masters, of the public. When the people have no effective way of protesting against their decisions and policies, such officials may overlook the fact that public offices are created for the benefit of the public, not for the benefit or glorification of the office-holder.

There is accordingly a *prima facie* case for examining the possibility of adopting a recall mechanism in at least state and federal government, especially for non-elected officials. No position should be considered too lofty or dignified for this type of control, and that includes the governor-general and the governors. Conservatives might argue that these dignitaries should be immune on the ground that they are the Queen's representatives, but the fact remains that these positions are not maintained for the benefit of the Queen, nor does Her Majesty defray the salaries and expenses attendant to them. These positions exist for, and are financed by, the people, and the people should be able to remove any incumbent whose performance they consider unsatisfactory.

If extended to elected officials as well, the recall would enable the voters to remove an unsatisfactory minister or prime minister without turning the whole governing party out of office.

III. RECALL OF JUDGES

In six of the 13 American states in which state officials are subject to the recall, an exception is made for judges. The main reasons given for this have generally been two. First, it is said that judges should not be subject to recall because they are not law-makers or administrators.

As to judges not being law-makers, there are today two opposing views. One school maintains that judges do not make law at all but simply apply pre-existing legal principles to new factual problems. The opposing belief is that judges are nothing but law-makers, and that so-called legal principles are merely a device to camouflage what would otherwise be naked legislative action. Most observers would agree that the truth lies somewhere between these two extremes, depending partly on where the particular court stands in the judicial hierarchy. A single judge of a state supreme court normally has little choice but to apply the precedents established in the higher courts. A state court of appeal has greater room to choose between competing legal principles when confronted with new facts, while the High Court of Australia regards itself as a court of authority that can give radically new interpretations to existing principles. When it is interpreting the constitution of the Commonwealth, its function becomes markedly more legislative than judicial and indeed, in cases such as the *Dams* decision,⁷ a majority of the court has come close to assuming the power to rewrite the constitutional compact itself. The proposition that judges are not legislators is therefore only relatively true, and in any case would not conclude the question of whether they should be directly accountable to the public. Similarly, while it is true that judges are not administrators, it is hard to see why that fact should determine the question whether they should be subject to recall or not.

The second objection is that the recall would impair the independence of the judiciary. This argument is a weighty one as long as we see the role of the judge as being the application and development, even the fairly creative development, of existing principles of law. Judges can be properly removed by the state parliaments for actual misconduct. But they should not be attacked and turned out of office for faithfully implementing legal principles that were there before they came onto the bench and may be there after they step down, even if their application in a particular case is highly unpopular. The core notion of the rule of law is that judges fearlessly apply the principles laid down by the common law or by parliament; and, as the history of many newly independent countries shows, without the rule of law a democratic

constitution is nothing more than a sham. The rule of law is in fact an essential precondition for all civilized life. It is only our commitment to the rule of law that enables us to condemn a lynching, for otherwise lawless self-help can be viewed as an exercise of pure democracy in the legislative, administrative and judicial realms. The argument for the recall of state or subordinate federal judges is therefore not a strong one.

But in the case of the highest tribunals such as the High Court of Australia (or the Supreme Court of the United States), of which a majority of members now see themselves as possessed of sweeping legislative and perhaps even constituent powers, the independence principle ceases to be an effective argument against accountability to the public. If any member or members of a court proceeds to restructure the law, or even more importantly, the constitution, along lines to which the people object, a remedy should be available. For example, we have seen that the people have in general consistently made it clear that they do not wish to transfer any more powers from the state governments to the Commonwealth. The voters have allowed some exceptions to this position, though they may already be regretting those. Be that as it may, despite these clear and repeated manifestations of popular opinion, the High Court for most of its history has made a practice of interpreting the constitution in such a way as steadily to enlarge the powers of the Commonwealth at the expense of the states. Its record in this respect contrasts starkly with that of the Canadian Supreme Court, which has consistently maintained the federal balance, despite the lack of such demonstrations of popular support for that approach as are provided by the Australian constitutional referendums.⁸ The High Court has been the vehicle whereby centralist ideologies, though defeated at the polls, have been built into constitutional doctrine.

In some instances the High Court's decisions in this view have been quite defensible on grounds of legal principle: thus, as the Commonwealth's power to make laws with respect to corporations is expressed in broad terms, one cannot accuse the Court of exceeding its functions by holding that the Commonwealth has power to make laws with respect to virtually any aspect of a corporation's existence or operations.⁹ In other instances, however, notably its recent interpretations of the external affairs power, the Court's decisions cannot be defended in this way and have profoundly destabilizing implications.

Similarly, the Court has gone out of its way to read down the few protected rights and liberties that the constitution does grant to the citizen. The guarantee of jury trial for indictable federal offences has been emptied of all content by an interpretation that Chief Justice Dixon described as making a mockery of the constitution;¹⁰ the Court has allowed the states to use transparently artificial devices to evade the prohibition on laws discriminating between residents of different states;¹¹ the Court has resorted to distinctions of utter triviality in order

to avoid giving effect to some aspects of the constitutional bans on legislation tending to establish a religion.¹² In recent times a majority has restricted the operation of section 92, the guarantee of free trade, commerce and intercourse between the states,¹³ even though the creation of a free national common market was, after common defence, the most important single reason for establishing the federal Commonwealth in the first place.¹⁴ A majority has attempted to circumscribe the provision that requires Commonwealth acquisitions of property to be on just terms.¹⁵ It has postulated a general rule that grants of legislative power to the Commonwealth will be construed broadly while constitutional restrictions on that power will be construed narrowly.¹⁶ Any doubts are thus to be resolved in favour of the legislature and against the people's constitutional rights.

This subservience to the federal legislative branch contrasts sharply with the High Court's current attitude toward the executive. In recent times the Court has done good work in reaffirming and strengthening the subordination of executive power to the rule of law.¹⁷ Yet towards the legislature, the Court displays this exaggerated deference despite the universally acknowledged fact that, by reason of party discipline, the legislature is today little more than the creature of the executive. The Court's attitude can perhaps be explained as reflecting an unthinking acceptance of Dicey's theory of absolute parliamentary sovereignty. But that theory has never clearly and formally, least of all democratically, been made part of our constitutional law. If the people were given the opportunity to vote on that theory they would almost certainly reject it,¹⁸ and they would probably also strongly disagree with the approach of the Court in at least some of the constitutional cases just referred to, especially those dealing with jury trial, discrimination, and compensation for acquisition of property.

The divergence between the attitudes of the Court and those of the people is likely to widen now that the Court has its permanent headquarters in Canberra, where it is physically and psychologically isolated from the people and will come under strong social pressure from the legislature, the executive government¹⁹ and the political-intellectual elite in general.

Already it is becoming difficult to resist the conclusion that a majority of the High Court will do to the law and the constitution whatever is needed to ensure the success of the causes currently favoured by this new elite.²⁰ Though this makes it easy to predict the outcome of any important case that comes before the court, it may also herald the decline of the nation's highest tribunal as a court of law and impartial justice.

At present the people have no remedy whatever if they believe that a justice or justices are failing in their obligation to uphold the law and

the constitution. Federal parliament may remove a judge, but only on grounds of proved incapacity or misconduct, a phrase that may not be wide enough to cover a general socio-ideological bias. In any event, as recent events have shown, because of the scourge of party discipline the parliament is unlikely to judge questions of misbehaviour or incapacity on their own merits but is swayed by considerations of partisan advantage.

Radical critics of the legal system such as the Critical Legal Studies movement have often attacked what they see as the undemocratic exercise of power by judges, especially those of the highest courts. But the remedies they propose are worse than the disease. CLS demands nothing less than the total politicization of the judiciary and its unswerving adherence to neo-Marxist CLS ideology. More moderate critics call for the creation of independent bodies to recommend appointments to the bench. But experience in the United States shows that this expedient removes even so much accountability to the people as now exists. At least under the present system, the government may be held responsible by the voters, for a few years at any rate, for any bad judicial appointments. But an independent judicial appointments commission is accountable to no one. It soon becomes the creature of the new elite, which, because of its excellent political skills, is able to seize control of it and use it for its own purposes.²¹

The only democratic solution, therefore, is to give the people the right of recall. It could take the form of the recall strictly so called or of the alternative requirement that exists in California (and under s.79 of the Japanese constitution) for the periodic reconfirmation of high judicial appointments if the incumbent is challenged, or both.

It is true that most citizens would not know the names of more than one or two High Court justices at the most, and would not be interested in their activities most of the time. They would therefore not be quick to sign a recall petition or vote for the recall of a judge; this may be good in itself, since it would be a barrier to the frivolous or vindictive use of the recall. By the same token, if the conduct of a justice or justices became so notorious that a majority of voters were prepared to vote for his or their recall, that in itself would be some indication that the justice or justices in question had stepped beyond the normal bounds of judicial propriety and function. Any risk of impairing the independence of the judiciary could be minimized by suitable pension arrangements, since recall would not carry the same legal or moral stigma as removal by parliament for misconduct.

Recalls of judges have been extremely rare in the United States and would be rarer still in Australia. But the mere existence of this ultimate remedy has been shown to have an influence on public officials and could provide a salutary corrective to any tendency towards arrogance, hubris, elitism or empire building. Lord Devlin and others have

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repeatedly warned against the danger of 'judicial tyranny' if judges are given, or treat themselves as holding, wide powers that are not constrained by legal principles.²² Experience in the United States in recent decades has underlined this danger, and some observers would say that in certain American jurisdictions judicial tyranny has already arrived.²³ The recall provides both a preventative and a remedy for this. It is the least dangerous of the methods so far suggested for increasing the public accountability of judges. As the adoption of the recall for High Court justices would require a constitutional amendment and therefore a referendum, the people would have the opportunity of rejecting it if they considered the idea too radical.

FOOTNOTES CHAPTER VI

- 1 W.B. Munro, *The Initiative Referendum and Recall*, New York 1912, 42.
- 2 id., 46.
- 3 L. Crisp, *The Australian Federal Parliamentary Labour Party 1901-1951*, 2nd edn, Sydney 1978, 211-12; Australian Labor Party, *Official Report of the Proceedings of the 25th Commonwealth Conference, Perth, July 1963*, 29 ff., 91-2.
- 4 L. Tallian, *Direct Democracy*, Los Angeles 1977, 45; 'Constitutional law: Recall of public officers' (1973) 48 *Wash. L. Rev.* 503, 505n.
- 5 Constitution of California 1879, Art. II. s.14.
- 6 Canberra 1983, 33-8.
- 7 Commonwealth v. Tasmania (1983) 46 A.L.R. 625.
- 8 C. Gilbert, *Australian and Canadian Federalism 1867-1984*, Melbourne 1986, 2-3.
- 9 id., per Gibbs C.J., Murphy, Mason and Deane JJ. Of these, the last three favoured the widest reading of the power.
- 10 R. v. Archdall and Roskrige (1928) 41 C.L.R. 128; Zarb v. Kennedy (1968) 121 C.L.R. 283; approach criticized in R v. Federal Court of Bankruptcy, ex parte Lowenstein (1938) 59 C.L.R. 556 per Dixon and Evatt JJ.
- 11 Henry v. Boehm (1973) 128 C.L.R. 482; Davies and Jones v. Western Australia (1904) 2 C.L.R. 29.
- 12 The Court has rejected the reasoning used by the United States Supreme Court in interpreting the First Amendment's guarantee of religious freedom on the ground that the American provision prohibits laws 'respecting the establishment' of religion, whereas s.116 of the Commonwealth Constitution proscribes any law 'for establishing any religion'. This is taking legal subtlety to extremes. Further, some members have taken the view that because s.116 prohibits the establishing of 'any religion', rather than 'the establishment of religion' as in the First Amendment, it is narrower than the US provision and would permit the establishment of all religions, provided this were done in a non-discriminatory way. Most lawyers would on the contrary read the word 'any' in this context as making s.116 stronger and more emphatic than its American counterpart. See Attorney-General (Vic.) ex rel. Black v. Commonwealth (1981) 55 A.L.J.R. 155, 158, 165, 171, 172, 187.
- 13 Clark King & Co. Ltd. v. Australian Wheat Board (1978) 140 C.L.R. 120. The Court may, however, have distanced itself

- slightly from this decision since then: see Walker, Recent cases (1981) 55 A.L.J. 96.
- 14 'It has often been observed that inter-State free trade is probably a fundamental necessity of any federal system. In the case of Australia it was a primary object of Federation': Hughes and Vale v. New South Wales (1953) 87 C.L.R. 47, 91 per Fullagar J.
- 15 Trade Practices Commission v. Tooth & Co. (1979) 142 C.L.R. 397.
- 16 Ex rel. Black, *supra*, 172, 187. Recently the court has almost casually held that the parliament can validly make retrospective 'laws', even of a penal nature: University of Wollongong v. Metwally (1984) 59 A.L.J.R. 48. Unlike most American constitutions, the Commonwealth Constitution contains no explicit prohibition on the enactment of ex post facto legislation, but there are respectable legal grounds on which the Court could have refused to give effect to such 'laws' if it wished. I have discussed these in *The Rule of Law: Foundation of Constitutional Democracy*, forthcoming.
- 17 e.g. A v. Heydon (1985) 59 A.L.J.R. 6; FAI Insurances Ltd. v. Winneke (1982) 56 A.L.J.R. 388; R. v. Toohey, ex parte Attorney-General (N.T.) (1980) 145 C.L.R. 374; Sankey v. Whitlam (1978) 142 C.L.R. 1.
- 18 The British survey findings outlined at p. 8 *supra* may be an indication of likely Australian attitudes on this point.
- 19 This has been the effect of having the US Supreme Court in Washington, D.C.: D.M. Provine, *Case Selection in the United States Supreme Court*, Chicago 1980, 86-92.
- 20 The succession of cases in which the High Court has radically altered the previous law or the interpretation of the constitution in favour of this group (of whom we have more to say in the next chapter) reads like an inventory of the political-intellectual clerisy's favourite issues and prejudices: Commonwealth v. Tasmania (1983) 46 A.L.R. 625 (Tasmanian Dams Case—environmental preservation, aboriginal artefacts); Re Toohey, ex parte A.-G. (Northern Territory) (1980) 145 C.L.R. 370, 28 A.L.R. 27; Re Toohey, ex parte Northern Land Council (1981) 151 C.L.R. 170, 56 A.L.J.R. 164, (aboriginal land rights); Ansett Transport Industries (Operations) Pty. Ltd. v. Wardley (1980) 142 C.L.R. 237, 54 A.L.J.R. 210 (sex discrimination—state law applies despite federal award); A v. Hayden (1985) 59 A.L.J.R.1 (security services—Commonwealth's contract not to disclose identity of agents unenforceable); R. v. Coldham, ex parte Australian Social Welfare Union (1983) 153 C.L.R. 297, 47 A.L.R. 225, 57 A.L.J.R.

574 (widening of constitutional power in relation to arbitration, thereby extending scope for union recruitment); *Commercial Radio Coffs Harbour Ltd. v. Fuller* (1986) 60 A.L.J.R. 542 (environmental conservation, government regulation of industry); *Cooper Brookes (Wollongong) Pty. Ltd. v. Commissioner of Taxation (Cth)* (1981) 147 C.L.R. 297, 55 A.L.J.R. 434 (court reads words into Tax Act to assist Commissioner's case—note dissent of Aickin J. at 449–50); *Hackshaw v. Shaw* (1985) 155 C.L.R. 614, 59 A.L.J.R. 156 (farmer owes duty of care to trespasser (of whose presence he is unaware) accompanying thief stealing from fuel storage tank).

The current governmental predilection for political appointments to the court should make this pattern even more marked in the future.

- 21 D. Lebedoff, *The New Elite*, New York 1981, 83–4.
- 22 P. Devlin, *The Judge*, London 1981, 201.
- 23 e.g. Lebedoff, op. cit. supra, Ch.6; M. Fleming, *The Price of Perfect Justice*, New York 1974. Nevertheless, there is still strong opposition in some quarters to the idea of the recall of judicial officers: see J. Fordham, 'The Utah recall proposal' [1976] *Utah L. Rev.* 29.

Chapter 7

Democracy, Elitism and Belief in the Common Man

Ideas have power. If we want fully to understand why direct legislation is so important, especially today, we need to follow the history and tribulations of the especially powerful idea of popular government itself. We need to see in what direction we are setting our course if we opt for direct legislation and what is the precise conceptual nature of the destination to which that bearing will take us. There is a further reason why the history of the democratic ideal is important here. As the Czech novelist Milan Kundera has written, 'The struggle of man against power is the struggle of memory against forgetting'. If we know of the progress and struggles of the democratic ideal to date, we will better understand why the introduction of the initiative and the referendum will be bitterly opposed in some quarters. We will know what fears lie behind that resistance and why all legitimate forms of argument will be needed to overcome them.

I. DEMOCRACY MADE RESPECTABLE

Western-style democracy, as we have seen, is a comparatively recent phenomenon, though some anticipations of democratic thought can be identified as far back as the Middle Ages. Later, in the writings of the French Huguenot jurist François Hotman, we find a demand for universal suffrage. From the thought of the 17th-century English Levellers, we can extract the notion of the equal dignity of all men; from that of the Quakers, a belief in the value of discussion for eliciting agreement. The Agreement of the People Bill submitted by the Council

of the Army to Oliver Cromwell in 1647 called for a form of referendum as a safeguard for the 'fundamentals of Government'.¹ In Locke, we see an insistence that individuals have rights that no government may infringe, and that governments derive their legitimacy from the consent of free men. Montesquieu propounds an institutional structure for avoiding undue concentration of power.² Immanuel Kant, whose humble origins left him with a lasting belief in the qualities of the common man, could also, to a degree, be considered an early democrat.³ The clearest sources of democratic theory, though, appear in some of the writings of Rousseau, in the works of the revolutionary philosophers Condorcet and Thomas Paine, and in the later writings of Jeremy Bentham, notably his *Constitutional Code*. In the English-speaking world it was Paine and Bentham who gave the greatest impetus to the democratic movement.

Despite the French and American revolutions, democracy at the dawn of the 19th century remained a term of abuse in most mouths. Discussion of its merits or demerits was still largely influenced by the arguments of ancient Greece.⁴ Universal male suffrage, though established in France early in the revolution, had shortly thereafter been lost and was not re-established until 1849. American republican institutions had acquired a democratic leaning, but property qualifications for voting were still the rule. The Federalist Party remained suspicious of democracy and the word itself appears nowhere in the Constitution of the United States. Madisonian political theory saw the new nation as taking the shape of a 'republic', not of a democracy as such. In Great Britain, the Reform Act of 1832, which in any case enfranchised only the middle class, was still decades away.

For all the obstacles and difficulties that it faced, democracy had its votaries. But to make democratic theory applicable to the modern emerging nation-states, they needed to enlarge its scale. The idea of government by the people had to be lifted out of the context of the city-state in which it was born.

The method for accomplishing this transition was found in the principle of representation. Previously, democracy had by definition meant direct democracy in the literal sense — the popular assembly. But now, in order to adapt popular rule to the problems of governing large populations, a distinction was drawn between direct and indirect democracy. Under indirect democracy, the people would be allowed to choose a small number of representatives to make major decisions and enact laws in their name. In this way, a somewhat elitist republican form of government such as that of the United States in the early days could be converted into something that could be regarded as democratic. In the case of Great Britain, an oligarchic constitutional monarchy was by this means converted into a democratic one.

This work of adaptation and redefinition gave the democratic philosophy a new lease of life. We can easily see why. First, it was now a workable system of government for populous nation-states. Second, and at least as importantly, the principle of representation by a small number made possible a morganatic marriage of the new principles of democracy to the old habits of elitism. One can see this with particular clarity in Chapter 7 of J.S. Mill's *Considerations on Representative Government*. Mill wants to see the people liberated from the privileges of the few, and the old hereditary aristocracy deprived of its powers. But he fears that majority rule may mean the supremacy of ignorance over knowledge, in a general trend toward mediocrity. Somehow a means must be found to enthrone a new elite of the intellectually eminent. For this reason Mill draws a distinction between two types of democracy, the 'pure' and the 'false'.

'The natural tendency of representative government, as of modern civilization', he argues, 'is towards collective mediocrity: and this tendency is increased by all reductions and extensions of the franchise, their effect being to place principal power in the hands of classes more and more below the highest level of instruction in the community'.⁵ 'The only quarter in which to look for a supplement, or completing corrective, to the instincts of a democratic majority, is the instructed minority'.⁶

'The pure idea of democracy ... is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favour of the numerical majority who alone possess practically any voice in the State'.⁷ From this he goes on to advocate the Hare system of proportional representation as a means of ensuring that the educated minority would have an effective voice in the House of Commons.

By the middle of the 19th century, the democratic idea was gaining a potency without precedent in its history. As Professor Lipson put it, 'The combined attraction of the democratic values yet to be won and the representative institutions already at work had generated the momentum for a major political revolution'.⁸ Thomas Carlyle in 1843 remarked, and deplored, its seemingly inexorable advance: 'To what extent Democracy has now reached, how it advances irresistible with ominous, increasing speed, he that will open his eyes on any province of human affairs may discern. Democracy is everywhere the inexorable demand of these ages, swiftly fulfilling itself'.⁹

The practical effects of the new view of democracy are first observable in the United States. The patrician constitution of 1789 undergoes a radical reorientation towards the democratic ideal during the

early years of the new nation, though its outward form remains substantially unaltered. The change takes place through a typically Anglo-Saxon evolutionary process, which can be said to have begun with the election of John Adams as second President in 1796 and to have reached virtual completion by the time of the election of Andrew Jackson in 1828. The political career of Thomas Jefferson personifies this intellectual evolution from republicanism (as that term was originally understood) to democracy. Over a period of 20 years, his increasing advocacy of the latter fundamentally alters the meaning that he attributes to the former. Jefferson may properly be described as the first genuine democrat to hold the highest elective office in a modern state,¹⁰ and the United States can claim to be the birthplace of modern democratic practice. It was certainly so viewed in the mid-19th century by the ruling elite of colonial Australia, who feared American ideas of democracy as likely to 'result in much mischief to the well-being and tranquility of the country' and as possibly bringing republicanism in their train.¹¹

The year 1865 marked the beginning of what has been called 'the century of the common man'. The death of Palmerston in that year made it politically practicable to usher in the second Reform Act and begin enfranchising the industrial workers. The American Civil War ended in a northern victory. The slaves had been freed and the union preserved. Throughout the world, democracy developed into one of the most sweeping movements in all recorded history. No country, no ruling group was untouched by it. No political movement could afford not to pay obeisance to it, even if it had no intention of putting its principles into practice. Such was the influence of the democratic ideal that the most antidemocratic regimes felt the need to give themselves the title of 'democracy' or 'people's democracy'. The enemies of democracy dared not attack it under its own name.

II. THE BELIEF IN THE COMMON MAN

At the core of the democratic creed is the belief in the common man. (We use that term in its androgynous sense. 'Common woman' has extraneous connotations and a 'common person' sounds an anaemic creature.) Ordinary people are to be permitted to participate in government because they can think for themselves, because their thoughts and beliefs are worthy of respect. Upon this belief, which first seems to crystallize in 18th-century ideas of human rationality, depends the principle of equality.

The idea of human equality was not new to the West; it had ancient roots in the Stoic-Christian tradition. Even in the golden age of

hereditary aristocracy, it had been obvious that some cobblers were more able and intelligent than some princes, and that no class in society had a monopoly of human ability and talents, or of human weaknesses for that matter. As we have seen, democracy is unique in that it attaches political consequences to that fact. The proposition that all are created equal occupies the supreme position in the scale of democratic values. Once again, this does not mean that all people are presumed to be of equal ability. It simply means that human ability is randomly distributed throughout the population; and that, specifically, the ability to make political decisions is widespread, and can be further developed by giving all adults an opportunity to participate in the government of their country. The common man is capable of self-government and will grow in stature under it. This was the main case for democracy, and its general acceptance between 1865 and 1965 gave the democratic ideal its enormous influence. The century of the common man was thus also the century of democracy.

But democracy was never without its critics, and they were never silent. Throughout the 19th century a succession of writers conducted a running protest against the seemingly irresistible rise of the common man. Thomas Carlyle argued that the common man was not intelligent enough to be entrusted with political power, so that government had to be in the hands of philosopher-kings like Plato's, or rather of hero-kings to Carlyle's specifications. He advocated an authoritarian state fashioned on the military pattern and to a considerable extent anticipated the fascist creed of the 20th century. Indeed, editions of translated excerpts from Carlyle enjoyed large sales in Mussolini's Italy and some of his lectures were prescribed reading in the schools of Hitler's Germany.¹² John Ruskin agreed that the common man was not competent to hold political power and looked for an aristocracy of the wisest and best to lead men out of their evil ways. He never understood that democracy developed, among other things, for the purpose of coping with abuses of power by the kind of absolutist rule that he favoured.

The jurist and administrator James Fitzjames Stephen stood for a utilitarian rather than a military brand of authoritarianism. He saw the mass of humanity as ignorant or indifferent, and often selfish or venal. Force was the keystone of the social arch; he devoted much of his time to showing the importance of coercion in life. He believed with Hobbes that life is a battle in which the strongest will always rule. An authoritarian state had to be supreme if conflict were to be avoided.¹³

Another lawyer, Sir Henry Maine, argued that the Benthamite case for democracy had been overstated and was based on excessive optimism. The common man, he thought, was not the clear-eyed, level-headed embodiment of 18th-century rationalism, but an ignorant, unintelligent being with a pronounced tendency to disorder. Democracy was therefore opposed to the rightful rule of ability and intelligence, which were the

exclusive possession of the few. He rejected the idea of rule by an intellectual aristocracy, fearing that it would become too absolute, and favoured instead an hereditary aristocracy, believing that the discoveries of biology supported the case for an aristocracy of birth. He rejected religion as a basis on which to construct an elitist philosophy, thereby breaking with the tradition of Burke, Coleridge and Stephen, and turned instead to the new scientific and historical movements as a source of premises for his arguments.

One of his charges against democracy was that it was hostile to the doctrine of survival of the fittest, which was a central tenet of the science of biology. This linking of legal and scientific interests drew from Lord Morley the percipient remark that 'scientific lawyers have seldom been very favourable to popular government'.¹⁴

With some of Maine's arguments, such as his rejection of the alleged irresistibility and inevitability of democracy, any democrat could agree. Thus, he rightly pointed out that between the accession of Augustus Caesar and the establishment of the United States, democracy had been in continual decline. Some monarchies and aristocracies had shown themselves extremely tenacious of life, but democracy was a rare occurrence in political history and seemed to be characterized by extreme fragility.¹⁵ Certainly, in the present century, the governments of representative democracies have displayed a persistent and disastrous inability to recognize and guard against external threats.¹⁶

These writers, together with many others such as Nietzsche, Burke, Matthew Arnold, Bagehot and Lecky were the voice of an intellectual protest against democracy grounded on the fear that it would give the common man too much power and would cause the disintegration of civilized society. This belief, at least in England, owed something to the puritan conception of the depravity of human nature and the appeal of force as a weapon with which to stamp out sin. The critics' education in the classical elitism of Plato and Aristotle no doubt helped; the literary man in politics has ever been a Platonist.¹⁷ Most of the critics were specialists of one kind or another, and specialists, impressed with the complexity of their own fields, tend easily to the belief that all problems are equally complex and that only a specialist can hope to understand the world. 'The specialist, then', Lippincott points out, 'from the very nature of his activity, tends to be unsympathetic to democracy, because, at bottom, he forgets that problems are simple as well as complex, else life as it is lived by the mass of man, and by intellectuals when they are not specialists, could not be lived as we know it'.¹⁸ The fact, too, that the harshest of these critics were engaged in professions more or less removed from ordinary life seems to have strengthened their belief in the assumptions that underlie the elitist creed.

III. IDEAS THAT UNDERMINED THAT BELIEF

If all the assaults upon it had been direct intellectual criticisms such as these, the democratic movement would have had little to fear. Such attacks on the assumptions of democracy could easily have been repelled. They could readily have been portrayed as a rearguard action, a hankering after rank in societies that increasingly recognized no official ranks, a rationalization of a covert wish for social and political pre-eminence.

Of much greater influence, curiously enough, were the repercussions of theories that were not directly concerned with democracy at all, but with the sciences of biology, psychology, sociology, and economics. The first of these was the work of Charles Darwin. Darwin's theory had two parts. The first was the doctrine of evolution, according to which the various forms of life had developed gradually from a common ancestry. This doctrine, which is now generally accepted, was not new, although Darwin's view of it was different from that of his predecessors, Lamarck and Erasmus Darwin (Charles's grandfather). The second part of his theory was the struggle for existence and survival of the fittest. This Darwin believed to be the cause of evolution. The innumerable genetic differences between animals and plants of the same species meant that in a given environment, some individuals were better adapted for survival, and in the competition for resources would outlive other members of the species. Thus, the chance genetic variations favourable to survival would tend to preponderate among adults in each successive generation.

This part of the theory represented an extension to the whole of life of the economic theories of the day and of Malthus's doctrine of population. Darwin's biosphere was not, however, merely a large-scale free competitive market. The competitive model of the economists presupposed the normal legal restrictions found in a civilized society; indeed, it could not work without them. It assumed that you could undercut your competitor's price, but not that you could murder him or dynamite his mill. There were ethical constraints, too, since misleading or deceptive commercial behaviour could result in a misallocation of resources. But Darwinian competition among the species was not limited in this way, since animals knew nothing of laws or ethics. Murder and war were not excluded as competitive methods. This second part of Darwin's theory has been much disputed.¹⁹

The implications of Darwin's theory for the democratic ideal also fall into two parts. The evolution part of the theory sees man as an accidental product of a random universe, created by natural forces that had nothing in mind. This view helped to discredit the idea of man as a being created by God in His own image, whose soul made him a manifested part of God. Whether ultimately true or not, the old belief had the corollary that all men were created equal on the spiritual level,

even if on no other. It meant that every life was important and had a goal. Even the life of a sinner had purpose and meaning, if only as a potential demonstration of God's mercy. But if, instead, man was accidentally assembled and accidentally grew, the product of a Nature which herself came accidentally into existence through random workings of which she was ignorant, his life had no special significance or purpose at all. The common man, therefore, was of no particular importance either.

The postulate of the struggle for existence and survival of the fittest, the second part of Darwin's theory, emphasized the role of congenital differences. Its acceptance necessarily undermined the idea of Helvétius and the other French revolutionary leaders that all men were created equal. Further, the portrayal of life as a battle for survival exalted man's basest tendencies and stigmatized his better feelings and actions as weaknesses that might jeopardize his very existence. It necessarily meant that those who attained wealth and power — the elite — were not only more successful people but were actually genetically superior beings. This thinking led in a straight line to the superman theories of Nietzsche. Its influence on Maine's call for an hereditary aristocracy who could keep the common man in order has already been noted.

The second major force from the world of ideas that undermined the belief in democracy was the work of Karl Marx. Despite efforts of his Western followers to demonstrate the contrary, Marx for most of his life was no democrat. In his 'Address to the Communist League' in March 1850, Marx described democracy as the main obstacle to be undermined and destroyed, no matter how progressive it might be. In a letter to Engels, Marx characterized that address as 'at bottom nothing but a plan of war against democracy'. Marx once wrote of his faithful follower Wilhelm Liebknecht, 'That dumb ox believes in the future democratic state'. In his *Critique of the Gotha Program*, Marx categorically rejected the call for a 'free people's state' on the ground that the state must repress its adversaries by force. In a remarkable exchange with Marx in 1875, Bakunin warned that Marx's doctrine would lead to the 'rule of the great majority of the people by a privileged minority ... of ex-workers, who, once they become only representatives or rulers of the people, cease to be workers'. To this, Marx's only reply was a patently empty quibble.²⁰

But like the direct criticisms of democracy mentioned earlier, these attacks in themselves would not have had much direct influence. The indirect effect of Marxian doctrines was great, however. Marx expounded two related views of man. On the one hand, there was the bourgeois entrepreneur, an automaton driven by irresistible economic laws. On the other hand, there was the communist elite, the intellectual leaders of the class-conscious proletariat. Between the bourgeoisie and the communist

vanguard, the common man, in thrall to 'false consciousness' and manipulated from all sides, was a sorry figure.

Sigmund Freud completed the process of stripping the human personality of any majesty, dignity or even good intent. Freud taught that the individual's deepest drives were suspect. The heights and depths of the soul were only the result of infantile training or behaviour patterns. Human feelings were standardized within a set of average parameters that left no room for any individual interpretations that mattered. Creativity became suspect as being nothing more than a form of enlightened insanity. Even individuality was potentially pathological, because when a person acts individually, when he is most himself, he displays creative behaviour. Freud gave puritanism a new basis, because man's nature was thenceforth seen as basically untrustworthy. His highest acts had the lowest motives. Altruism and greed alike were the result of purely mechanical processes. 'In such a framework', it has been observed, 'men could not take credit for their achievements or be held responsible for their blunders, and self-determination was sorely undermined. Such ideas clashed with all of democracy's stated ideals, yet were held equally with them'.²¹

The Marxist interpretation of history, Freudian psychology and evolutionism could be described as scientific hypotheses; but they were not sciences as such, with the possibility of provable results from a series of experiments. Strictly speaking they were unprovable, though subsequent observation could have elevated them to the level of working hypotheses or higher. But Darwinism, though it has silenced most of its religious adversaries, has been the subject of unceasing scientific controversy; indeed, the debate is being heated up by some recent experimental findings that tend to support the rival Lamarckian theory of inheritance of acquired characteristics. Freud's psychoanalysis has yet to produce a body of case histories in which cures can be shown definitely to result from Freudian techniques.²² Marx's predictions have been confounded at every turn and his theories are quite unable to account for the way in which Marxist governments actually behave. The three great theories remain just that — theories. Yet they captured scientific philosophy and, later, the general culture, as completely as religious orthodoxy captured the mind of the Middle Ages. Physiological and scientific theories thus took up where the old conventional religions had left off and provided a newer and more acceptable justification for political elitism. They destroyed the reputation of rational man as he emerged from the 18th-century enlightenment and Benthamite rationalism. They left him as a rather unsavoury creature tossed about on a sea of class struggles, dark emotional complexes and murderous drives for survival, without the slightest understanding of his own motives, with no control over his actions or his destiny. How could such an organism be allowed to be self-governing?

IV. THE POLITICAL JUDGMENT OF THE COMMON MAN

Bases of the Democratic Creed

Before proceeding to consider the 20th-century attacks on the classical democratic ideal, we should restate the nature and basis of the trust that democratic theory places upon the common man. This trust, or faith, reduces to essentially three propositions.

First, it is necessary to disclaim the excessive optimism of Bentham and some of the earlier democrats who seemed to be claiming that the common man was infallible. Paine and Bentham felt that if you gave the common man the facts, truth and happiness would inevitably prevail. Such exaggerations stemmed from the need to combat the lingering claims to superior wisdom earlier put forward by kings, popes and princes.

There is no need for such grandiloquent and easily refuted assertions. Democratic theory needs only the more modest belief that the mass of ordinary people are, in the long run, less likely to be wrong than any individual or self-appointed elite.²³ To let one's hopes fly higher than this is unnecessary and dangerous.

Second, this belief does not require us to accept that any individual member of the general population is as well qualified to appraise a political issue of the moment as, say, a professor of history. It means only that on matters involving common values, a group of people, no matter who they are, is less likely to make an error of judgment than one person.²⁴ This is why the common man's contribution to the administration of criminal law is made in the form of a collective effort in a jury of twelve. The larger the group, the more likely it is that individual biases and deficiencies will be cancelled out.

In matters not involving common values, other considerations come into play. We consider them next.

Third, the belief in the judgment of the common man for these purposes is confined to the making of political choices. It is necessary to eliminate from this belief all matters of exceptional or rare value, and all matters of taste.²⁵ In Australia and elsewhere, a great many elite attacks on the common man have been based on his allegedly gauche tastes in cars, beverages, decor and entertainments.²⁶ It is beyond dispute, though, that the ordinary person will not normally be equipped to assess the merits of a new discovery or theory.

But matters that become political issues do not normally involve evaluations of the extraordinary or the superlative. They deal with matters such as health, education, the family, the tax burden or defence preparedness. These are matters of which great numbers of people have some knowledge or direct experience. It is a fallacy to assume, as so

many elitists do, that all problems are complex. As Lippincott pointed out, if they were, life could scarcely be lived.

Further, most of the great issues that face society cannot be resolved by the kind of objective 'proof' of which only a trained class of specialists could be the judge. Evidence can be proffered, but the superiority of one tax, or one defence arrangement, or one environmental policy over another cannot be demonstrated by an objective process so certain as to put an end to all debate.²⁷

As David Lebedoff says, given the composition and the procreation patterns of the new elite, it may or may not still be true that measurable intelligence (or whatever is measured by IQ tests) is randomly distributed throughout the population. But it is as true as ever that ability is widely scattered, specifically the ability to make political judgments:

The eternal truth is that political wisdom is not an attribute of intelligence or education or class or gender or race. It is the response to experience. In terms of the capacity to make political choices, the most significant response to human experience is the view one comes to hold of human nature. No one person or group has the right to define what human nature is. Each view is burdened by personal experience. We cannot prove, by logic or calculation, just whose version is correct. Only the majority knows, because only the majority view approaches the aggregate of human experience. We must mine the whole vein. We must ask everyone's opinion, and let the majority prevail.²⁸

The problem of government is not only a problem of intelligence, but also a problem of experience and feeling.

The political philosopher Carl Friedrich went further than this. He argued that in the forming of political judgments, character is more important than intellect. By character he meant moral vigour or firmness, especially as acquired by self-discipline. A person of character is someone who knows his values and sticks by them. He is consistent in his actions and generally follows certain principles. Though it sometimes produces questionable results, this element of consistency is vital if the polity is to remain on a reasonably even keel and not be racked by a lurching succession of changes and reactions. This importance of character, of consistency in judgment, brought out an interesting point, in Friedrich's view: 'It shows that intellect interferes with character. The more clever you are, the less likely you are to stick by your convictions regardless. The more clever and smart you are, the more likely it is that you will see a way of escaping the consequences of a "jam". The common man is likely to stick it out. ... More apt to follow sentiment, the common man is more apt to be consistent'.²⁹

The intellectual's training and outlook make it easier for him than for the ordinary person to break away from the group consciousness in

which he was born and nurtured. His critical outlook makes him readier to reject the standards of his family, community or country. Escaping from a group-conscious mind in this way can be a step forward if it means the establishment of an autonomous world view on a higher level of consciousness, an awareness that sees ramifications and interrelations that are not apparent from a more parochial viewpoint. But it is not a step forward if it simply makes the person more volatile, more ready to accept every fashionable theory that comes along, or if it simply represents the exchanging of one consensus trance for another.

Elite Volatility and Its Legal Consequences

In most cases, in fact, the intellectual simply moves into the group consciousness of the new elite of political intellectuals (or, more precisely, intellectualists). The dominant characteristic of this group is that it rejects everyday experience and observation as a guide for decision making, preferring instead to deal in theories. This makes the whole group a volatile one, since it is continually switching from one fashionable theory to another. Its warm espousal in the 1930s, and precipitate disavowal in the late 1940s, of the eugenics movement (discussed below) is a classic example. Again, in the 1960s this class proclaimed the end of the old institution of marriage with its legal obligations and restrictions, and waged a successful campaign for the acceptance of cohabitation outside marriage, arguing that people's sexual lives were no concern of the law. Now they have turned 180 degrees and are arguing for the imposition of legal obligations, similar to those under marriage, on people who have lived together but have specifically chosen not to undertake marital obligations.³⁰ The break-up of such a relationship would create liabilities to maintenance orders, compulsory transfers of property and most of the other incidents of a divorce settlement. It is proposed, in effect, to punish extra-marital cohabitation in a way that was not done even at the height of the Victorian age.

A similar about-turn is becoming apparent in relation to pornography and other aspects of the 'permissive society'. Sexual harassment is a good example. In America and in some Australian states the intellectualist avant-garde has procured the enactment of laws prohibiting a wide range of unsolicited sexual overtures or words, including persistent staring and persistently asking someone out in New South Wales³¹ and, in South Australia, making a remark with sexual connotations pertaining to a person on more than one occasion.³² Yet in the 1960s and early 1970s, the same intellectualist group was advocating the very types of conduct against which it is now invoking the repressive power of the state. It embraced the themes expressed in Helen Gurley Brown's 1964 best-seller *Sex and the Office*, which urged men and women to break free of their buttoned-up respectability and start

to touch and feel one another in the workplace. Stuffy office conversation was to be enlivened with a stream of verbal foreplay. Women were exhorted to see office sex not as an instrument of male oppression, as we are now told it is, but as a weapon with which to outstrip male competitors in the race for promotion — to 'sneak up on the boys', as the author put it. The ambitious woman was advised to select dresses 'that look high-necked to the office manager and low-necked when you lean over'. To direct a male supervisor's thoughts into the desired channel, she should try this tactic on him when he is seated at his desk reading a letter: 'stand just behind him, very close, smelling wonderful, of course, and read along. ... You'll finish the letter, but there's no guarantee he can keep his mind on it, especially if you nudge up to him kind of close'. At lunch, 'You accidentally touch his hand or brush his knee once or twice'. This would soften up the bemused male for 'The Matinee', an after-lunch assignation. For the advanced student, there were case studies on making 'love' on the office floor or in the board room with the doors locked, and warm reminiscences of encounters with a cost accountant partial to belabouring female gluteals with a whip. We are told of the first time he produced 'this handsome, small riding crop'. 'I was horrified at the sight of it. And fascinated. And horrified. And fascinated'. Subsequently, 'I used to look at [the bruises it left] fascinated. They were pretty exotic. Women like bruises, I think'.³³

It was the publication of Mrs Brown's hugely successful book *Sex and the Single Girl* in 1962 that, more than any other single fact or event, proclaimed and let loose the great sexual 'revolution' of the 1960s.³⁴ Its sequel *Sex and the Office* was hailed by intellectualists and sophisticates, especially in the media, as a further breath of liberation and as a blueprint for the manners and mores of the workplace in the new age.

Similar acclamation greeted an endless series of British television comedies and dramas in which sexual advances and allusions were portrayed as the essence of modern conversation and social manners. Objections from ordinary men and women were laughed off as the final spasms of the Mother Grundy mentality. The old male standards of 'gentlemanly conduct', which discouraged sexual innuendo in mixed company, were denounced as patronizing to women and as a sexist device to perpetuate their sexual bondage. The new 'frankness', as it was approvingly called, was the order of the day.

After a sharp struggle, the intellectualist-sophisticates won. The old taboos were destroyed. Conversation and behaviour coarsened markedly. But lately the intellectualists have disowned their own earlier position.³⁵ What was 'frankness' in the avant-garde or in ambitious women became 'sexual harassment' when copied by the common man, a sexist device to perpetuate female sexual bondage.³⁶ History has been

rewritten, too. It is the ordinary people (in this case the men) who are now blamed for a social change to which in fact they were deeply, if ineffectually, opposed.

In the legislative agenda of the women's movement there is scarcely an issue that has not been the subject of a recent radical reversal proposed by the very same activists who fiercely advocated the original policies. The pathfinding feminist Betty Friedan, who helped to launch the movement by identifying the family as an oppressive institution, now expresses concern about 'feminist denial of the importance of family, of women's own needs to give and get love and nurture'. Ms Friedan still approves of pornography (which she prefers to call 'eroticism'), but she is one of the few feminists who still do. Most have switched from praising it as a vehicle of liberation to attacking it as a weapon of oppression. Germaine Greer originally condemned motherhood and urged women to lead a 'deliberately promiscuous' life, but now blames artificial birth control for the decline of fertility in the West and deplores family breakdown and uncommitted sex. The pioneering architect of feminist politics Susan Brownmiller has turned to assailing affirmative action and maternity leave with pay, remarking that 'I don't see why men should have to step aside and wait for women to catch up after they've taken time off to have children'. She believes that if women choose to have children, an option not open to men, they should 'accept the consequences of their choice'. Ms Brownmiller also now argues that when feminists joined forces with the homosexual cause, they failed to see where that path would lead them. 'We tried to make people proud of who they were', she writes. 'That wasn't so bad when the gays and lesbians felt a sense of self-worth. But then the sadomasochists came out of the closet and became proud of themselves'. She considers that many homosexual practices have contributed to the degradation of sex and have disrupted relations between men and women in society. The advent of AIDS lends weight to that view. Andrea Dworkin laments that 'Women who have lived through the sexual revolution have a lot of remorse', as sexual liberation has made life much harder for women. Deidre English, formerly the editor of a feminist periodical, also now believes that women did not benefit from that development. 'If a woman gets pregnant', she points out by way of example, 'the man who 20 years ago might have married her may today feel that he is gallant if he splits the cost of the abortion'. Even abortion itself, which was Article I in the feminist manifesto, is now coming under feminist attack, not least because female foetuses are being destroyed in disproportionate numbers with the development of gender-identifying technology.³⁷ Dr Bernard N. Nathanson, a leader in the fight to legalize abortion in the United States, has also changed his mind about abortion on request and now believes that terminations should be performed only in severely restricted circumstances.³⁸

This collective volte-face might be mainly of academic concern but for the fact that in each case the law has been changed by parliaments, at the insistence of the women's movement and its allies, in order to accord with the original feminist position. Legislative innovations in relation to pornography, sexual behaviour, abortion, affirmative action and divorce (and the welfare issues flowing from it) have had far-reaching effects. If one only adds a reference to drugs, they make up an inventory of most of the social upheavals with which we are contending today. Their consequences will be extremely difficult to control (assuming one wants to), by legislative or any other means.

Other oscillations can be seen in attitudes to wine and to smoking. In the 1960s the emerging new elite mocked the still widespread disapproval of wine drinking; now they are loudly advocating a total ban on all alcohol advertising. Some of the very same individuals who in the 1960s urged female students to break the old taboo against women smoking are today among the most tedious of antismoking bores. Similarly in relation to international affairs; it was amusing to see how the elite's attitude towards the military government of Argentina changed literally overnight when it became apparent that the British government would not accept the invasion of the Falkland Islands. A detested fascist regime suddenly became a valiant band of patriots struggling to protect their birthright against overwhelming odds. There was a frantic rummaging for arguments to support the proposition that the islands had 'legally' belonged to Argentina all along, or at least since 1834.

Again, Joan Baez and 80 other leading former opponents of United States participation in the Vietnam war in 1979 sponsored an open letter that was published as an advertisement in major American newspapers. The letter repudiated her earlier position, in view of the realities of communist rule in Indochina.³⁹ Susan Sontag, previously a leading figure in the Western intellectual left, avowed in 1982 that intellectuals — including herself — 'had been misunderstanding the nature of communism at least since the 1950s' and had been 'overly considerate of communism for too long and had failed to cry out at the repression of communist countries ... Communism is Fascism — successful Fascism, if you will ...'⁴⁰

The merits or demerits of any of these positions as such are not the point. The point is that such violent swings of opinion and policy are not conducive to good government, stable international relations or the maintenance of a legal system that commands general respect from most of the people most of the time. The volatility of intellectualists and intellectuals as a class (there must be many individual exceptions, quite apart from people who have attained higher levels of perception, such as Albert Einstein or A.N. Whitehead) greatly weakens their claim to rule by divine right and strengthens the case for classical democracy. The very fact that ordinary men and women tend to be slower in their

intellectual reactions actually serves to protect them against an environment that is shot through with political propaganda.⁴¹

V. THE THEORIES OF DEMOCRATIC ELITISM

We have seen how the scientific theories of the 19th century, which weakened the faith in the quality of the citizen, had the effect of undermining the democratic movement more effectively than the direct attacks from literary and legal quarters. The frontal onslaughts of Carlyle, Ruskin, Stephen and Maine were repulsed, but the scientific theories of Darwin and Freud, and the semi-scientific work of Marx, had created in the democratic camp a potential breach, which was ready and waiting for the assaults launched in the 20th century. This has been the historical pattern: no sooner is one elitist theory discredited, than another springs up to take its place. In this case the new theories that emerged in the first part of the 20th century were those of Gaetano Mosca and Vilfredo Pareto, whose elitist ideas were adapted to the current state of democracy and scientific knowledge.

Mosca

The first edition of Mosca's *The Ruling Class* appeared in 1896. Following Saint-Simon, Mosca asserts at the outset that, in all societies, two classes of people appear — a class that rules and a class that is ruled. The ruling class, always the less numerous, performs all political functions, monopolizes power and enjoys the advantages that power brings, whereas the second, the more numerous class, is directed and controlled by the first, whether by legal means or by violent means. Thus, all societies are governed by the minority, by means of force or fraud. In the enlarged edition of his work, which appeared 27 years later, Mosca softened his earlier opposition to democracy and withdrew his assertion that it invariably led to instability and tyranny. He now thought that democracy had a place, though its role was subordinated to that of the elite. Its function was to provide a structure that assured the opportunity for new elites to rise to positions of power. Popular representation, political equality and majority rule he still regarded as myths, but they were important in ensuring that the ranks of the ruling class stayed open.

Mosca looked forward to the reconstruction of the ruling class into an intellectual elite. The intellectual constituted the only class which, 'thanks to its exacting intellectual training, has what should make for nobility of character, for broad horizons and for enlarged faculties ... of foresight and prevention: that class, and that class alone will freely sacrifice a present good in order to avert a future evil'.⁴² But he did not explain why educated leaders would necessarily act in an impartial and

disinterested manner as arbitrators between other classes. This poverty of political imagination can be discerned in all variations of democratic elitism.

Pareto

Like Mosca, Pareto made the idea of elite rule the centre of his general theory of society. Taking what he thought was a 'realistic' view of history, he argued that as past societies had almost invariably been undemocratic, government by the few was an inevitable result of an unalterable law. They are not always the same few, though, and Pareto, building on Mosca and borrowing from Marx, developed a theory of the 'circulation of elites'. Unlike Mosca, Pareto never softened his opposition to democracy and ultimately became a fascist.

Despite their pretensions to scientific method, both Mosca and Pareto assume what they should be attempting to prove, namely that there necessarily exists a ruling elite in every society. Merely showing that tyranny has been the usual lot of man does not do that.⁴³ The fact that Pareto admitted in an aside that the Swiss system of government, especially the direct democracy of the cantons, was the 'best government now in existence'⁴⁴ does nothing to increase one's confidence in his theory.

Elitism and Eugenics

During the 1920s and 1930s, political elitism doctrines recombined with Darwinian theory to set off a wave of enthusiasm for the teachings of eugenics, the 'science' of selective human breeding with a view to improving the race. It is generally forgotten today that Hitler's horrendous eugenics programs amounted largely to the putting into practice of doctrines that were strongly advocated by 'progressive' intellectual circles throughout the Western world at that time. Francis Galton and his followers were eminently respectable authorities in the days before Dr Mengele and Auschwitz.⁴⁵ The only concerted opposition to this movement came from the Roman Catholic church. It was dismissed as a predictable response from a hopelessly reactionary organization.⁴⁶ After the war the intellectuals quietly dropped the eugenics line and pretended they had opposed it all along. Today one still occasionally meets these ideas in octogenarians whose political attitudes were formed during that era but who lack the political sophistication to realize that the whole episode is now officially a non-event. These are virtually the only people who openly support eugenics today.⁴⁷ The obliteration of the history of the eugenics movement must be the most striking example of successful collective amnesia in recent Western history.

In late 1984, however, the skeleton did come clattering out of the closet in Sweden, with the publication at Lund University of research on the Swedish Social Democratic government's extensive eugenics program. This scheme, launched in 1935, resulted in the compulsory sterilization or castration of 15 000 people before its termination in 1948. Most of the subjects were deemed backward. Some were described as 'sexually over-stimulated' and some as simply 'asocial'. The socialist intellectuals Gunnar and Alva Myrdal (the latter won the 1982 Nobel Peace Prize) in 1935 advocated the strengthening of the sterilization law, which had been passed in the previous year. 'Should such [retarded] individuals be prevented from breeding, it would bring significant social relief quite regardless of the effect it would have on the future improvement of the population stock', they argued in their work *Crisis and the Population Issue*. The Lund researchers, Richard Sotro and David Weston, also discovered a collection of 2000 human skulls gathered by the Institute of Racial Biology founded at Uppsala in 1921 by the Social Democrats. The collection was part of its project of investigating the 'racial degeneration' of the tall, blond Swedish type that was considered 'the purest' of the Germanic peoples. Pursuant to this project the Institute also investigated 85 000 cases of race mixing in its first two years.⁴⁸ In countries other than Sweden, however, the history of the eugenics movement still remains in oblivion,⁴⁹ a lost testimony to where democratic elitism can lead.

Schumpeter: Democracy as a Means and not an End

The principal feature and guiding value of classical democratic theory was the ideal of individual participation in government and in the development of public policies. Taking part in the affairs of his polity would cause the citizen to gain knowledge and understanding, develop a deeper sense of social responsibility and enlarge his perspectives beyond those of his private life and interests. Classical democratic theory was not primarily concerned with the policies that might be produced in a democracy. Its main focus was human development, the opportunities that existed in political activity to develop the talents and potential of individuals. John Stuart Mill stressed this point in a famous passage: 'The first element of good government, therefore, being the virtue and intelligence of the human beings composing the community, the most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves. The first question in respect to any political institutions is, how far they tend to foster in the members of the community the various desirable qualities, moral and intellectual'.⁵⁰ Thus, he saw the franchise as 'a potent instrument of mental improvement'. 'Self-government is in this sense self-sustaining', write Duncan and Lukes;

'through the possession of legal rights men become capable of properly exercising them and thus they approach that moral autonomy which is the true end of life'.⁵¹ In classical theory, therefore, democracy is more than a system of government: it is a philosophy of society.

The theories of democratic elitism at which we have been looking maintain that the masses are incapable of development or improvement in this way. This puts these theories squarely in conflict with classical democratic doctrine. Joseph Schumpeter in his famous work *Capitalism, Socialism and Democracy* (1942) showed a way out of this conflict, but it was a solution that eviscerated democratic theory. That was not his intention. If anything, he had hoped to salvage the most important elements of self-government out of what he saw as the inevitable collapse of democracy. But the effects of his endeavour have been unfortunate.

Schumpeter's main attack was on the proposition that democracy was an ideology that not only provided certain means for doing things, but was also an end in itself. Democracy could not be an end in itself, he argued, because a democratically elected government might persecute minorities and thereby infringe values that are higher than democracy. It might practise the persecution of Christians, the burning of witches and the slaughtering of Jews. A democrat who disapproves of these actions is placing some other ultimate ideals above democracy. Consequently, democracy cannot be an end in itself: 'Democracy is a political method, that is to say, a certain type of institutional arrangement for arriving at political — legislative and administrative — decisions and hence incapable of being an end in itself'.⁵² The people cannot rule in any direct or literal sense; they can only choose to vote for one group or another in a competitive market for political elites. He therefore defined the democratic method as 'that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.⁵³

The flaw in Schumpeter's argument is that he confuses crude short-term majoritarianism with democracy. Democracy presupposes majority rule, but presupposes it as a continuing system. Implicit in the concept of permanent majority rule is that any minority must have the right to work openly and at all times towards the formation of a new majority.⁵⁴ But in Schumpeter's example, the majority is proceeding to persecute or annihilate the minority; this violates the principle of majority rule itself when seen, as it must be, as a continuing system. His hypothesis is really a case of the crude majoritarianism promoted by Hitler, Allende and other dictators who manage to attain power by constitutional means but then protect their power by abolishing the constitution.

Schumpeter's redefinition thus leaves us with a democratic framework that is devoid of any overriding ideal and that now

complaisantly accommodates the 20th-century elitist theories. And since democracy is now only a means to an end, it is subordinate to supposedly higher values. This is a perfect excuse for elites to reject democracy completely if it is not producing the results required by their particular ideology. It is an opportunity that elites have not been slow to exploit.⁵⁵

The Triumph of the New Elitism

Throughout the 1950s and early 60s, the new elitism movement gathered strength and momentum. Theorists became more specific about the new elite they wanted to create. A.A. Berle urged that corporate power be made responsible to the intellectuals: the academics, the responsible journalists, the respected politicians. 'These, and men like them, are thus the real tribunal to which the American system is finally accountable'.⁵⁶ C. Wright Mills maintained that all holders of power — as he saw it, industry, the military and government — should be accountable to the intellectual elite. 'Who else but intellectuals', he asked, 'are capable of discerning the role in history of explicit history-making decisions? Who else is in a position to understand that now fate itself must be made a political issue?'⁵⁷ There is no point, in Mills's view, in making the power establishment responsible to the people, since the common man is incapable of appreciating the consequences of historic decisions. The majority should rule only when it agrees with the intellectual elite. He did not argue, though, that the existing 'power elite', ignorant and blundering though it was, should be dismantled. This was not necessary and might even be dangerous since, given his low opinion of the electorate, he feared they might put something worse in its place. It was sufficient to make their actions subject to evaluation by the 'free intellect'. One might add that this solution has the advantage of leaving the old leadership taking all the risks and doing all the hard work.

The final argument in the case for elitism was based on the American studies of voting patterns in the mid-1950s, which purported to show that the electors were poorly informed on the positions of the main parties in relation to important questions and were generally apathetic about political matters and involvement in the democratic process. These studies were subsequently criticized on the basis that the short-term questionnaire method used was too clumsy to elicit important truths about the voter. Further, it ignored a distinction drawn by Schumpeter himself between rationality in thought and rationality in action. The latter could be present without conscious deliberation and irrespective of any ability to articulate the rationale of one's action correctly. The observer, particularly the observer who uses interview

and questionnaire methods, often overlooks this and thereby acquires an exaggerated idea of the importance of irrationality in behaviour.⁵⁸

Nevertheless, these findings were used to support the proposition that the classical idea of participation was unrealistic and that voter apathy was a positive necessity for the health of democratic systems, since it gave a virtually free hand to the enlightened political elite. The procedures allowing voters to choose between competing elites would ensure that the system retained the minimum requirements of democracy.

Shortly afterwards, in the mid-1960s, the economic forces referred to earlier permitted the growth of the communicating and diploma-holding class which became today's new elite. Its political orientation, and in particular its attitude towards democracy, had already been formed by the theories we have been describing.

Professor Bachrach argues, however, that it was the rise of McCarthyism in the United States that shattered the new elite's faith in the common man.⁵⁹ This is only a convenient and flattering rationalization. The intellectual elite in Australia is if anything even more hostile to the common man than its American counterpart, yet Australia witnessed no equivalent to the McCarthy phenomenon. As we have seen, in 1951, when communist armies were on the advance in Korea, Malaya, Indochina and the Philippines and had narrowly been defeated in Greece and Turkey, when Stalin's and Mao's terror was still at its height, Australians rejected at the polls a referendum proposal that would have given the Commonwealth parliament power to legislate against the Communist Party. For all anyone knows, if a similar referendum had been held in the United States after a full debate such as occurred in Australia, it might have had a similar outcome. Even at the height of the McCarthy period, there was no general move in the United States to ban the Communist Party.

A recent study confirms that the data that can be obtained about the Australian political system are consistent with the theory of democratic elitism. In between elections, 'policy outcomes are the result of political influence processes in which elites are the primary participants', says a leading study by Higley and Deacon. Schumpeter's dictum that 'Voters do not decide issues' has been found in Australia to be true.⁶⁰ This state of affairs actually meets with the authors' full approval. In their view elite rule is desirable because, among other reasons, 'only a consensual and unified elite is able to suppress and distort issues whose open and dogmatic expression would create disastrous conflict without at the same time depriving citizens of their democratic rights. Where elites manage to do this for many years, representative political institutions guided by reasonably competitive and influential elections are possible, though not inevitable'.⁶¹ The participatory ethic is seen as a menacing trend,⁶² because only the elites are competent to cope with the new and ominous conflicts in developed

societies.⁶³ And elites will need to be more willing to use coercion to impose their solutions on the masses, the authors warn.⁶⁴ Another study agrees that 'a more self-consciously elitist frame of reference is one of the things that is needed if Western elites and their supporters are to stem internal conflicts'.⁶⁵ Such beliefs are not only circulated among a small school of writers and intellectuals but are expounded in standard teaching texts.⁶⁶

VI. BELIEF, UNBELIEF AND REFERENDUM

Ideas have power. Even wrong ideas; this century has seen what destruction can be wrought by a myth in the hands of a Goebbels or a Lenin and backed by a ruthless and dedicated elite. The recent history of ideas about the common man, democracy and elitism helps to explain the distortions of the representative principle that have been described earlier. It also helps to account for the ascendancy of the new elite and the reasons why it seeks to substitute stridency and ridicule for debate, rallies for ballots, pressure group methods for public persuasion and rigidity for compromise;⁶⁷ it shows why this elite seeks to make power less accountable to the people through such methods as the multiplication of independent commissions that it can control; why it denigrates the common man and popular culture, appoints itself uninvited as spokesman for all and rejects experience and tradition as guides for human existence. This history also underlines the particular danger of this new ascendancy, namely, that it thinks the principle of majority rule gives too much power to people who do not deserve it. It fears popular participation in government. It believes it stands to gain from the destruction of democracy.

The basis of democracy is the postulate of human equality. The origins of this postulate can be traced far back in Stoic-Christian ethics, but in the modern setting it rests on belief in the common man, on the proposition that in the long run the collective political judgment of the people will make fewer mistakes than any individual or any self-appointed elite.

The periods in history when this idea has held sway have been few, and so far brief. Only since the early 19th century has it enjoyed real influence in Western societies. Its position could be regarded as secure only between 1865 and 1965, and then almost exclusively in the English-speaking countries. Throughout that historically brief period beginning in the early 19th century, the democratic vision has been subject to repeated intellectual onslaughts. No sooner has one been beaten off than another has arisen to take its place. Each new elitist theory has been adapted both to the current state of democracy and to the current candidates for elite status — first a romantic religious elite, then the technocrats, then the romantic heroes, then the intellectuals.

The last group succeeded where the others had failed. Its rise to power cemented the theory of democratic elitism into place as the new orthodoxy. Democracy was no more to be seen as an end in itself, a radical vision towards which societies of free men could march. It became a mere technique, a standard operating procedure implicitly subordinated to other values, a procedure that could be rationalized away if it looked like producing unwanted results.

Of course, even in the most open and liberal societies, there are areas in which an authoritarian element is necessary, such as in any army battalion or aboard a man-o'-war. Even a university cannot do its job unless the administration and the teaching faculty have the power to decide courses of study and methods of assessment. Students can be given a greater voice than they were 30 years ago, but university staff, unlike political leaders today, are required to have demonstrated a specialized knowledge not required of those whom they direct; that expertise is a *sine qua non* of the institution itself, one without which it cannot perform its function. Those who have that expertise must have the final say.

Much confusion and damage have resulted from failure to keep this limitation in mind. Some of it has been deliberately fostered. "Democratisation" of un-democratisable institutions is sometimes, doubtless, the expression of a genuine Utopian ideal, as when the Jacobins by these means destroyed the French navy', observes the British historian Robert Conquest. 'But more often it is (in the minds of the leading activists at least) a conscious attempt to ruin the institutions in question, as when the Bolsheviks used the idea to destroy the old Russian army. When this (among other things) enabled them to take power themselves they were, of course, the first to insist on a discipline even more rigorous than before'. The awkward but inescapable fact is that in such cases the demand for direct participation may be a tactic employed in a broad assault on democracy itself.⁶⁸

Each generation, it seems, must fight the battle for democracy all over again. In 1939 the two great totalitarian blocs, the Axis powers and the Soviet Union, agreed to divide the world between them.⁶⁹ Eighteen months later their success seemed only a matter of time. But the heroism and steadfastness of an earlier generation of ordinary men and women, aided by the collapse of the Nazi-Soviet alliance, met the challenge of the two totalitarian regimes, destroying the one (and putting democracy in its place) and for a considerable time containing the expansion of the other.

The present generation faces external threats to the democratic ideal that are no less real. But it also faces a new internal challenge, that presented by the theories of democratic elitism as interpreted by the new class, which uses them as its weapon and shield. The initiative and referendum are potentially powerful tools with which to counter this

challenge. Studies of initiative and referendum results have caused a number of political scientists to revise their previously low opinion of voter competency.⁷⁰ Other research findings have independently called in question the 1950s voter studies that had been used to justify elite manipulation.⁷¹ Some writers, at least, have rediscovered the truth that the way to make people more responsible is to give them some responsibility.

More importantly, initiative and referendum would restore to democracy its principal guiding value, the proposition that the dignity, and indeed the growth and development, of the individual as a rounded member of a liberal society depends on having an opportunity to participate actively in decisions that effect his or her own destiny. There is a wealth of empirical evidence to support the soundness of this belief.⁷² This evidence simply confirms the truth perceived intuitively by Kant, Rousseau, Mill and others, that the chance to play a significant part in directing one's own life is the only way in which the individual can hope to live creatively. People who live creatively will progressively become more adept at meeting, or forestalling, the problems with which the human experience will present them. Both distrust of the common man and belief in the common man are ultimately self-fulfilling.

FOOTNOTES — CHAPTER VII

- 1 G. Gooch, H. Laski, *English Democratic Ideas in the Seventeenth Century*, 2nd edn, Cambridge 1927, 9-17 (as to Hotman), 128-34 (as to the Levellers and the Agreement of the People).
- 2 L. Lipson, *The Democratic Civilization*, New York 1964, 58.
- 3 F. Paulsen, *Immanuel Kant: His Life and Doctrine*, New York 1963, 335-9.
- 4 id., 57.
- 5 *On Liberty and Considerations on Representative Government*, Oxford 1946, 198.
- 6 id., 201.
- 7 id., 189.
- 8 op. cit. supra, 62.
- 9 ibid.
- 10 Lipson, op. cit. supra, 59. Professor Lipson's opinion is that Jefferson's views, rather than just his public position, shifted towards democracy over this period. My own reading is rather that he favoured popular sovereignty all along but promoted the idea cautiously until it became more widely accepted. Jefferson did, after all, propose a constitutional referendum in Virginia as early as 1776.
- 11 J.M. Ward, *James MacArthur: Colonial Conservative, 1798-1867*, Sydney 1981, 181. The quoted words are W.C. Wentworth's. The Colonial Office in London, which saw the colonies as the safety valve to the growth of democracy in Britain, believed in encouraging colonial democracy, however, and showed little favour to the pretensions of colonial elites: id., 310-11; same author, *Colonial Self-Government*, London 1976, Ch. 7.
- 12 B. Lippincott, *Victorian Critics of Democracy*, London 1938, 18, 48.
- 13 id., 136-43.
- 14 id., 176.
- 15 Maine, *Popular Government*, Indianapolis 1976, 89-90.
- 16 See generally J.-F. Revel, *How Democracies Perish*, tr W. Byron, New York 1983.
- 17 Lippincott, op. cit. supra, 258.
- 18 id., 259.
- 19 B. Russell, *A History of Western Philosophy*, New York 1972, 725-6.
- 20 R. Wesson, *Why Marxism? The Continuing Success of a Failed Theory*, London 1976, 213, 215.

- 21 J. Roberts, *The Afterdeath Journal of an American Philosopher: The World View of William James*, Englewood Cliffs, N.J. 1978, 61. The attribution to James is debatable, but the comments can stand on their own merits.
- 22 B.A. Farrell, *The Standing of Psychoanalysis*, Oxford 1981, Ch.9.
- 23 C. Friedrich, *The New Belief in the Common Man*, Boston 1942, 30-1.
- 24 id., 32.
- 25 id., 32, 33.
- 26 ibid.
- 27 D. Lebedoff, *The New Elite*, New York 1981, 51.
- 28 id., 33.
- 29 op. cit. supra, 35.
- 30 NSW Law Reform Commission, *Report on de Facto Relationships*, Sydney 1983; De Facto Relationships Act 1984 (NSW)
- 31 Anti-Discrimination Board, *Eliminating Sexual Harassment, Guidelines for Employers*, Sydney 1984. The guidelines are the Board's elaboration of the judgment of the Equal Opportunity Tribunal in O'Callaghan v. Loder [1983] 3 N.S.W.L.R. 89, in which the Tribunal held that sexual harassment was a breach of the Anti-Discrimination Act.
- 32 Equal Opportunity Act 1984 (S.A.), s.87(1)(c); see also Equal Opportunity Act 1984 (W.A.), s.24(3),(4).
- 33 Helen Gurley Brown, *Sex and the Office*, New York 1964, 3, 34, 225, 122, 209, 217.
- 34 It is often assumed that the change was brought about by the advent of the oral contraceptive, but it was in train before that. To any observer living in the United States at the time (as I was), attitudes and behaviour were shifting perceptibly in 1963. Steroid hormones were already in use, but only as a treatment for certain gynaecological disturbances. The drug companies apparently had not intended to market these substances as contraceptives at that time but were induced to do so as a result of demand pressures created by the new attitudes.
- In Great Britain the process appears to have begun some years earlier than in the United States, but it worked discreetly behind the scenes. It was the Profumo scandal of 1963 that brought the trend out into the open. In Australia it caught on in about 1966.
- 35 Even today, though, the *Sex and the Office* view is still being advanced by some feminist writers. See, e.g. Freda Garmaise, 'How to get ahead by sleeping on the job', *Australian*, 1 November 1985; Leslie Aldridge Westoff, *Corporate Romance*:

- How to Avoid It, Live Through It, or Make It Work for You*, New York 1985.
- 36 In Turkey, there are large numbers of women in managerial positions, but Moslem ethics strongly discourage the use of sexual flirtation or favours as a means of career advancement. The result seems to have been that no issue of sexual harassment has ever arisen: *Wall Street Journal*, 15 May 1985.
- 37 Dinesh D'Souza, 'The new feminist revolt', 10 *Policy Review*, No. 1, 1986, 46. Ms Friedan's opinions on pornography are taken from an interview in the Canadian documentary on pornography, 'Not a Love Story'. A revisionist general view of careers for married women is also emerging. See Carol Orsborn, *Enough Is Enough: Exploding the Myth of Having It All*, New York 1986.
- 38 W. Gavin, 'Great recantations and other second thoughts', *Public Opinion*, December-January 1986, 2.
- 39 *ibid.*
- 40 *ibid.*
- 41 Friedrich, *op. cit. supra*, 110.
- 42 Translation from Mosca's *Teorica dei governi e governo parlamentare*, in J. Meisel, *The Myth of the Ruling Class*, Ann Arbor 1958, 110.
- 43 Friedrich, *op. cit. supra*, 261-2.
- 44 *id.*, 243.
- 45 See, e.g., H. Bibby, *Heredity, Eugenics and Social Progress*, Left Book Club, London and New York 1939; S. Schiller, *Eugenics and Politics*, London 1926.
- 46 M. Canovan, *G.K. Chesterton: Radical Populist*, New York 1977, 66-70. Chesterton was one of the few individual critics of the eugenics movement. Another was Aldous Huxley, whose *Brave New World* (1932) was a protest against it.
- 47 I had to add the word 'virtually' at the last minute because in 1986 the Victorian government announced a plan to legislate for the compulsory sterilization of mental defectives, as well as for the setting up of a chillingly named 'Board of Guardians' to authorize compulsory organ transplants from such persons, conceivably while still alive. This latter proposal was dropped after a public outcry, but at this stage the fate of the remainder of the Guardianship and Administration Board Bill is not clear: *Australian*, March 18, 1986, April 15, 1986. Singapore has also flirted with eugenics in its various programs to encourage fertility among highly educated people.
- 48 *Australian*, January 4, 1985; *Canberra Times*, December 30, 1984.

- 49 Denmark and some American states also had compulsory sterilization laws. Some of the American statutes were upheld by the US Supreme Court and some were struck down: see, e.g. *Buck v. Bell* (1927) 274 U.S. 200; contra, *Skinner v. Oklahoma* (1942) 316 U.S. 535. But so far as appears, the Americans did not establish any racial purity institutes. The Swedes carried out as many sterilizations in a year as were performed over the whole eugenics period in the United States: Germaine Greer, *Sex and Destiny*, London 1984, 265. Dr Greer's book has a full chapter on the eugenics movement.
- 50 *Representative Government*, op. cit. supra, 126, 127.
- 51 G. Duncan, S. Lukes, 'The new democracy' (1963) 11 *Pol. Studies* 156, 160.
- 52 J. Schumpeter, *Capitalism, Socialism and Democracy*, 5th edn, London 1976, 242.
- 53 id., 269.
- 54 E. Mims, *The Majority of the People*, New York 1941, 33.
- 55 e.g. 80 *Senate Debates*, March 1 1979, 409-11 (Senator G. Evans). See generally on this topic J. Walker, 'A critique of the elitist theory of democracy' (1966) 60 *Am. Pol. Sci. Rev.* 285.
- 56 A.A. Berle, *Power without Property*, New York 1959, 113.
- 57 C.W. Mills, *The Causes of World War Three*, New York 1958, 26.
- 58 Duncan, Lukes, op. cit. supra, 162.
- 59 P. Bachrach, *The Theory of Democratic Elitism*, Boston 1967, 8.
- 60 J. Higley, D. Deacon, D. Smart, *Elites in Australia*, London 1979, 218.
- 61 id., 14, my emphasis.
- 62 id., 285.
- 63 id., 287.
- 64 id., 288.
- 65 G.L. Field, J. Higley, *Elitism*, London 1980, 127-8.
- 66 T. Dye, L.H. Ziegler, *The Irony of Democracy*, 2nd edn, N. Scituate, Mass. 1975, Chs. 5, 14.
- 67 Lebedoff, op. cit. supra, 32.
- 68 R. Conquest, *We and They: Civic and Despotic Cultures*, London 1980, 165.
- 69 This arrangement is implicit in the Nazi-Soviet treaty of 1939, especially in the secret protocol of August 23, 1940, dealing with the partition of Poland and the Baltic states between the USSR and Germany. The ratification of this treaty by the USSR on August 31 made possible Hitler's invasion of Poland, which commenced a few hours later. The intention to

divide the whole world between the parties is quite explicit in the Molotov – von Ribbentrop protocols of November 1940, in which the USSR laid down its conditions for becoming a full member of the alliance between Germany, Italy and Japan. See R. Sontag, J. Beddie eds, *Nazi-Soviet Relations 1939–1941: Documents from the Archives of the German Foreign Office*, Washington 1948, 78, 217-59; A. Rossi, *The Russo-German Alliance: August 1939 – June 1941*, Boston 1951, 40-1, 161-70.

- 70 R. Allen, 'The national initiative proposal' (1979) 58 *Nebraska L. Rev.* 965, 1019-20; A. Ranney ed., *The Referendum Device*, Washington 1981, 68; C. Price, 'The initiative: A comparative state analysis and reassessment of a Western phenomenon' (1975) 28 *Western Pol. Q.* 243, 244, 260-2.
- 71 G. Pomper, 'From confusion to clarity: Issues and American voters, 1956-1968' (1972) 66 *Am. Pol. Sci. Rev.* 415; Allen, *op. cit. supra*, 1017-19; Ranney, *op. cit. supra*, 187.
- 72 Bachrach, *op. cit. supra*, 98-9.

Chapter 8

Conclusions and Prospects

I. OVERVIEW OF DIRECT LEGISLATION

A century of experience in Europe and America has shown direct legislation to be a valuable supplement to the representative institutions of liberal democratic societies. It has neither replaced the elected assemblies nor degraded their functions. It has, however, improved the quality of their work by giving them an incentive to take more notice of public opinion, to be more careful to put legislation into the best possible form, and to formulate with greater clarity and care the arguments in support of it. Direct legislation greatly reduces the opportunities for secret deals with pressure groups or party factions and takes much of the point out of attempting to corrupt a government by promises of campaign funds or to blackmail it with threats of electorally damaging disruption. It has proved to be a source of new legitimacy for enacted law and a bulwark against extremism. It paves the way for a less fear-based approach to the problem of government.

The misgivings that attended its introduction have proved to be unfounded. Dire predictions of demagoguery and mob rule have proved utterly without foundation; and indeed direct legislation has made such upheavals less likely. Who, after all, has ever heard of a Swiss demagogue? The people turn to demagogues and their quack remedies only when they are frightened, confused and desperate, when they feel there is no other way they can reassert control over the direction of the state and over their lives.

Experience has shown that ordinary people, though not infallible, are eminently capable of responsible self-government and on the whole make fewer mistakes than governing elites, even elected ones.

It only needed to be tried. The ability to make sensible political choices is a creative talent that is present in most human beings and develops if allowed to. In Harman and Rheingold's work on human creativity a useful parallel can be found: 'In Europe, for thousands of years, there was no "fact" considered more well established than the innate inability of peasants to learn how to read. In the fifteenth century, the printing press was invented and the literate population jumped from a minuscule elite to a significant portion of the general population. In the time of Samuel Johnson the simple ability to perform sums in arithmetic was considered to be something of an esoteric art. Johnson's biographer, Boswell, noted how hard it was for Johnson, surely one of the most educated men of his era, to teach himself this arcane art'.¹ Today the elite has dropped the arguments about literacy and numeracy, but it still maintains that the 'peasants' lack the ability to make direct political decisions and should be made to understand that their proper role is to acclaim every three years a team of absolute rulers drawn from a cartelized political market place. Those who hold this view rely on sweeping generalizations or on isolated anecdotes, and that is all. They close their eyes to the evidence as a whole, because the evidence, first from Switzerland, then from America and most recently from Italy, refutes their position.

Swiss writers seem unanimously of the view that direct legislation has none of the undesirable consequences that writers in other countries predict for it.² In that country direct legislation laid the foundation for a radical change in the whole style of politics by ushering in the system of government by consensus. The legislative referendum led the major parties to open the ranks of the executive government and integrate into it members of minority parties so that they could play a part in the preparation of parliamentary legislation. This was done on the basis of a principle of strict proportionalism and a consciousness of 'collective rationality' in which the decisive element is the search for compromise in the legislative process.³ This civic ethos is a remarkable achievement in a country that has, on the face of it, every ingredient for political strife and instability: language differences, religious divisions, marked variations in attitudes between the main ethnic and regional groupings, and a signal lack of natural resources. In the century that has passed since the adoption of the direct legislation system, Switzerland has changed from being a poverty-stricken backwater racked by dissension and civil war (the most recent in 1847) to being the most stable and prosperous nation in the world.

Elsewhere, direct legislation has not brought about such revolutionary changes, but there seems little doubt that in the 23 American states (plus the District of Columbia) where it exists, direct legislation has largely, though not completely, fulfilled the aspirations of those who campaigned for it. The qualification 'not completely'

refers to the 'educative' factor, the function of initiative and referendum as a practical course in politics, government and civil responsibility, as an opportunity for citizens to play an active part in government without actually committing themselves to seeking elected office. While it has had this 'educative' effect to a significant degree, and in some minds this has been its greatest benefit, it has not in this respect fully realized its potential in most states simply because it is not used often enough. In high-usage states such as California one can observe, however, with some feelings of envy, a robust and indeed a growing attitude of confidence and self-reliance among the people, born of the knowledge that ultimately it is the citizens who tell the government what to do and not the other way around. This produces an enthusiasm in the discussion of current issues that contrasts strongly the cynical resignation and frustration that one detects in Australia.⁴

But even where initiative and referendum are used only infrequently, they still serve to give a new legitimacy to enacted law, to prevent the build-up of massive feelings of alienation, and to settle highly contentious issues without surrendering the field to the extremists. Italy is a good example of this, having used its indirect initiative system four times in the 1970s to resolve issues that were highly charged (such as divorce and abortion) or potentially explosive (such as antiterrorist laws). Italy's politics have become perceptibly less prone to paroxysm since the initiative came into use in 1974. The country is progressing economically and now enjoys a standard of living higher than Great Britain.

Perhaps one of the strongest testimonials for direct legislation is that neither in Switzerland, nor in Italy, nor in any of the American states has there been any serious attempt to abolish the initiative or the referendum. On the contrary, they are more popular than ever; the Swiss are debating new forms of direct participation in government policy making, while a further ten American states are closely considering adoption of the initiative and referendum. A proposal for a United States national initiative has attracted wide support from all parts of the political spectrum. It immediately found favour with a clear majority of the people and has gained further support since. Even the sternest critics of initiative and referendum argue only for modification, not abolition.

Many of the negative references to direct legislation by social scientists are a reflection of the theories of democratic elitism that began to emerge in the 1920s. But social scientists who have actually studied the working and effects of popular participation in law making in recent times have been converted to a more favourable view. This is especially striking as the new theories of democratic elitism have a particularly strong hold among the political intelligentsia in general, and practitioners of the soft sciences (such as political science) in particular.⁵

II. SPECIFIC TYPES OF DIRECT DEMOCRACY APPRAISED

One should highlight some specific conclusions about particular types of direct legislation, for the same considerations do not apply equally to each variety.

The Legislative Referendum

In the light of experience over the last 100 years, it is no longer possible to construct an argument against the legislative petition referendum or 'people's veto' that is not also an argument against democracy. It has not been shown to have any disadvantages whatever, unless one is in principle opposed to the whole idea of government of the people, by the people, for the people. The most articulate recent critic of direct legislation, David Magleby of Brigham Young University in Utah, appears to have no quarrel at all with the legislative referendum. The opposition in the Queensland parliament, when voting against the Popular Initiative Referendum Bill between 1914 and 1918, drew a clear distinction between the initiative and the referendum and indicated that it was not opposed to the latter. The record in Switzerland and the American states shows that while only a small percentage of the legislature's enactments are challenged by means of the referendum, those challenges have a high rate of success, ranging between 60 and 90 per cent or more. This is the best possible proof that in certain cases representative legislatures do not represent the opinions and wishes of those who elected them. The institution of the legislative referendum is thus completely vindicated. As time goes on, recourse to it generally becomes less and less frequent, as the legislature takes more care over the form of its legislation and its congruence with public opinion. The referendum has thus proved totally successful in remedying parliamentary sins of commission.

The case for the petition referendum in relation to Acts of parliament and delegated legislation such as regulations and rules is therefore overwhelming. The case one can make for also reserving for the people the right to approve or reject international treaties is not quite so overwhelming, but only because there is less international experience to which one can point. But as a matter of principle, it is equally strong, especially in Australia in light of the majority decision of the High Court in the *Dams* case, which gives the federal executive government almost unlimited power in effect to alter the federal-state division of powers in pursuance of international treaties (or even 'understandings'), without reference even to the Commonwealth parliament, much less to the people.⁶ This clearly threatens to undermine the whole structure of decentralized decision making through

the federal system, for which the voters over the years have repeatedly expressed their continued support.⁷

The Initiative

It is a more complex task to evaluate the initiative than the referendum, because it is much simpler to destroy the bad than to construct the good. For this reason many early observers suspended judgment on the initiative for quite some years. But in the end experience vindicated it. Massachusetts studied the record of the initiative in Switzerland and the western states with great care in 1917–1918, and came down in favour of it. Viscount Bryce, who was a strong supporter, and indeed the leading promoter, of Dicey's theory of absolute parliamentary sovereignty, after several decades of observing the initiative system changed from being a critic of it to being a mild supporter.⁸ In his later works in the 1920s, he noted that the initiative was now more generally approved, that it had had the effect of reducing sectionalism and party hostility, of giving the law greater strength and of raising the level of political capacity among the people.⁹ It was already clear to Bryce that the initiative did not consistently favour one side of the political spectrum over the other. He noted that the Swiss conservatives had had some victories, on such topics as restraint of government spending, but so had the radicals, in relation to measures such as the nationalization of main-line railways.¹⁰

Over the years since Bryce's day, mounting evidence has shown that the voters are not stupid, fickle, irresponsible or apathetic. They do not support hate legislation against minorities, crude anti-union legislation, or massive coerced transfers of property; they are neither blinded by utopian visions nor encrusted onto the status quo. Their votes cannot be bought by massive advertising or media campaigns. There is no correlation between campaign spending in support of a measure and its prospects of success. There is some correlation between spending against a measure and its prospects of failure, because it is possible in this way to play on whatever doubts the voters may already have and persuade them to resolve those doubts against it. But, as the history of the antismoking initiatives in California shows, the most that spending against initiatives can do is delay change. If people's opinions are genuinely altering, no amount of money will ultimately make any difference.

The critics are obviously right when they say that conducting initiative ballots costs money. But since the result of this expenditure is a legal system that is more in accordance with the values and opinions of the people, there are countervailing savings in the costs of evasion and policing. Switzerland must spend more than any other country on initiatives, since it holds ballots every three months and every measure and all supporting literature must be published in three languages. Yet

the Swiss enjoy the world's highest living standard (after a couple of oil sheikhdoms that will not be in the lead much longer), despite the country's lack of natural resources. The problems of the inflexibility of initiative measures once filed and of the dangers of bad drafting have also been the subject of legitimate criticism, but as we have seen, these difficulties can be and have been overcome.

There is one further general point to be made in support of citizen-initiated legislation. We noted at the start of this work John Naisbitt's finding, based on his team's analysis of millions of pieces of evidence, that genuine social trends originate from the grass roots, among the ordinary people themselves, and move upwards until they finally influence the political leadership. On the other hand, changes embraced by the elite and imposed by them on the populace tend to be mere passing fads.

Now it must be obvious to most people that we live at a time of rapid social change; indeed, that proposition is the most threadbare cliché in any speechmaker's store. But there is an abundance of social and other evidence pointing to the conclusion that the sociocultural changes we have witnessed since, say, World War I, are trivial by comparison with those that await us.¹¹ There is no sign that governments understand this, all their pretentious and costly futurology being predicated on the naive assumption that present observed trends will continue.¹²

If we accept these two premises — that social trends filter upwards, not downwards, and that enormous sociocultural changes are on the way — the conclusion inevitably follows that the popular initiative is more important today than ever before. If we leave it to parliamentary legislation to keep the law up to date, the legal system will inevitably fall further and further out of line with the popular consciousness as the elite persists in trying to drag society off in unwanted directions. Only direct legislation can introduce the kinds of legal changes that most people really want, at the time when they really want them. In an age of social and cultural transformation the people's law comes into its own.

The Recall

As our discussion of the recall in Chapter 6 is of a purely preliminary character and does not purport to canvass all the arguments for and against it, our conclusions about this device must necessarily be tentative and modest. At this stage we can say that, on the face of it, there is a good case for investigating the desirability of adopting the recall as a way of introducing into the **administration** of the law the kind of democratic control that initiative and referendum bring to the **making** of law. Just as direct legislation provides a check on

legislative excesses or a corrective for legislative inertia, so the recall introduces a deterrent to, and in the last resort a cure for, arrogance, bias, corruption or incompetence among executive and judicial officers. It seems especially appropriate that the people should have this remedy at their disposal vis-à-vis unelected officials occupying lofty and otherwise secure positions.

III. PROSPECTS

Australia has one of the strongest democratic traditions in the world. In colonial times universal manhood suffrage took root here earlier than in most other countries, as did the vote for women a few decades later. Australia pioneered the secret ballot and the use of the referendum or special elections to resolve deadlocks between the two houses of parliament. Its federal constitution is one of the most democratic national constituting instruments in the world, both in its origin and in its design and construction. Before the outbreak of World War I it seemed as if that tradition was about to find further expression in the adoption of the principle of direct legislation by the Australian people.

But, ironically, a war that was supposed to make the world safe for democracy dampened the ardour for democratic innovation and caused a falling back onto traditional, hierarchical British ideas. This waning of populist zeal was reinforced in the mid-1960s by the actively anti-populist orientation of the theories of democratic elitism, which became the creed and the source of authority for the rising new elite.

Where Direct Democracy Might Have Made the Difference: Australia 1975-1985

The history of Australia over the decade 1975 to 1985 presents some striking practical results of that retreat from democratic ideals. For the areas of Australian life that witnessed the most friction and difficulty over that decade were **precisely those that are the least subject to democratic control**. It is worth enquiring, therefore, whether the availability of direct legislation and related mechanisms might have made a difference. Let us consider these problems in rough chronological order.

Inflation 1975. For most of 1975 the dominant preoccupation of most Australians was inflation, which was running at 20 per cent as a result of the government's use of the budget deficit to pay the bills incurred by its rapid expansion of the public sector. The direction of the money supply was the root cause of this phenomenon, and the money supply is controlled by purely executive governmental act. There is no *référéndum financier*, and no ordinary legislative referendum whereby the people could, if they wished, nip in the bud any legislation that seemed

likely to result in heavy and avoidable expenditure. Nor is there an initiative system that would have enabled the voters to index tax scales to the rate of inflation and prevent the government from increasing its share of gross domestic product by means of the bracket creep which its policies had created. As we have seen, it was the firm control exerted by the Swiss voters over government spending in the 1960s that saved that country from the inflation and unemployment that have scourged the rest of the world ever since.

The Whitlam dismissal. The most controversial single event of 1975 was, of course, the Governor-General's dismissal of the Whitlam Government after the Prime Minister refused to resign or call an election when unable to obtain a vote for supply for the funds needed in the ordinary services of government. After more than a decade of controversy about the propriety of his actions, the former Governor-General has probably emerged the winner in the legal and constitutional debate. Nevertheless, there were at least two aspects of his handling of the crisis that gave rise to intense and lasting resentment and bitterness. These were, first, his failure to warn the Prime Minister of the consequences of his refusal to hold an election and his attempts to raise money outside parliament, and second, his turning to the Chief Justice of the High Court for legal advice, thereby dragging the Court into the centre of an intense political dispute. As to the first, the former Governor-General maintains he had good reason for not showing his hand, and as to the second there was certainly a precedent. But the bitterness and resentment have remained.

On one view, the landslide victory of the Fraser Government in the ensuing 1975 election might be thought to have vindicated the Governor-General's actions. But this is a classic case of intermingling of issues. The election results left it quite open to critics to argue that the people disapproved of the Governor-General's action, but since it was irreversible, they proceeded to turn out a government that had become (temporarily, in the critics' view) unpopular.

If it had been possible for the critics to launch a petition for the recall of the Governor-General, this issue would have been settled once and for all. It seems unlikely that a recall ballot would have gone against Kerr; in that event, the critics would have had to accept that they had lost the argument. Some would not have accepted that, but the feelings of resentment and indignation, expressed in ugly and violent demonstrations for the remainder of Kerr's time in office, might have been damped down considerably. On the other hand, if the electors had voted for Kerr's removal, the Governor-General would have had to be satisfied with his conviction that he had done his duty as he saw it and with the belief that history would vindicate him. The recall result would have been a clear lesson that if an action such as Kerr's were ever necessary in the future, it would need to be handled with more tact and

judgment than it was in 1975. That lesson is there to see in any event, of course, but with a clear recall vote behind it it would have assumed almost the status of a constitutional principle.

Industrial relations. The third problem is one that festered right throughout the decade. This is the area of industrial relations and the power of trade unions. At the beginning of the decade there were still many corporate managements that adhered to the old style of management, with pin-striped executives issuing commands from the supernal heights of the executive floor and wondering why their orders were misinterpreted or resisted. Better-managed companies already understood that workers would be happier and perform better if they were treated as full participants in the enterprise, not necessarily by voting for a worker-director (as most workers, too, understand the weaknesses of the representative system) but by being taken directly into management's confidence about objectives and the approaches being used, by management's actively seeking suggestions from the shop floor and giving generous advance notice of changes that might affect the workers' lives. Over the years most (by no means all) managers have at least partly learned this lesson, and it now seems that a good deal of the heat has gone out of the worker participation movement in Australia for this reason.¹³

On the other hand, for legal and historical reasons, the trade unions have remained locked in a legal structure and a mode of operation that in practice are undemocratic from start to finish. Australian industrial legislation has admittedly introduced a small number of democratic forms and procedures into the internal management of trade unions, and these have had some effect. It would not be possible, for example, for an Australian union leader to be appointed for life, as could be done in the United Kingdom until 1985. But in terms of guaranteeing a uniform minimum standard of member participation, these measures have had little practical impact.¹⁴ Union leaders and activists have found a multitude of ways around the legislative requirements, ranging from physical violence and crude ballot-rigging to somewhat more subtle methods, as one academic commentator reports: 'It has been known, for example, that the issues of union newspapers which precede union elections may make no mention of the fact that an election is imminent, but may devote the whole of the pre-election editions to extolling the exemplary virtues of the existing union leadership. In these circumstances, needless to say, the names of opposition candidates for office are never mentioned. It is also possible for incumbent officials to call union meetings, including job meetings, which are essentially political rallies for their own cause, and to use the union staff as workers in the political campaign'.¹⁵ The reluctance of union leaders to hold secret ballots when proposing major strikes is another persistent feature of union affairs.

That these and similar practices are common in Australian trade unionism is notorious. What is not generally understood, though, is that the ultimate cause of much of this is not so much the innate obduracy or the ideology of union leaders, but the thoroughly undemocratic legal structure that parliaments have established for the union organization of labour.

A comparison with the United States will illustrate the point. Under the National Labor Relations Act, an American union wishing to represent a body of workers must present a petition to the National Labor Relations Board regional office claiming to be recognized as their bargaining representative. If there is already a union recognized for that purpose, a decertification petition is also filed with a view to testing the question whether that union is still the members' preferred representative. After certain investigation procedures, these questions are put to a secret ballot of all the relevant workers at the workplace. They may choose to be represented by one union or the other, or to have no union at all.¹⁶

Australian industrial legislation, by contrast, gives the workers no say whatever on these fundamental matters. A union wishing to organize a group of workers simply applies to the relevant industrial tribunal and argues that it is the appropriate union to represent them. The application is usually successful. The only significant bar to registration is the existence of an already-registered union in the field. In this case the application will normally be refused if the existing union is one to which the workers could, in the opinion of the tribunal, 'conveniently belong'.¹⁷ All these questions are determined without the slightest reference to the wishes of the workers concerned. They are fought over and traded around like so many head of Illawarra shorthorn.

One could scarcely design a system better calculated to bring out the worst in a union leader. Arrogance, intransigence, pettiness and rigidity can only be encouraged by insulating the leadership from the opinions of the members and protecting the vested interests of existing unions. Admittedly, a more democratic system of industrial law would not end labour disputation, but it would reduce the number of inter-union disputes and other costly wranglings that are contrary to the interests of the country and of union members themselves. The political power of union leaders is such, however, that a more democratic system is unlikely to be legislated by parliament, and if it were, it would be sabotaged by the union leadership like Britain's Industrial Relations Act of 1974. But a popular initiative measure giving democratic rights to union members might well succeed. If it did, it would have a legitimacy with which the established leadership would find it difficult to argue.

Chaotic industrial relations have been one of the factors responsible for Australia's relative economic decline, to which disconcerting parallels have been drawn with the disastrous economic and political

trajectory of Argentina.¹⁸ The standard of living of the Argentine people used to be one of the highest in the world in the 1920s but is now well down the list. Similarly, at the beginning of this century Australia had the world's highest standard of living and in 1952 the third highest. Now it is 21st in the list and some time before 1990 it is due to be overtaken by a number of third-world countries such as Singapore. The increasing rigidity of labour costs; the large number of government trading monopolies imposing high costs on the economy and making wasteful use of its resources; the continuing proliferation of occupational licensing statutes designed to give monopoly privileges to private economic groupings¹⁹ — all these are contributing to the present predicament. All are the result of legislation that has outlived its usefulness or was misconceived in the first place, but that cannot be repealed or significantly amended because of the hold that vested interests can exert over parliaments. At a time when it is obvious to nearly all Australians that radical reforms are needed, existing representative institutions are virtually unable to act. Direct legislation could, however, make a difference. One would not expect it to wipe the slate clean overnight, but even one or two modest successes might encourage parliaments to stand up to those who hope to gain from undesirable legal structures.

Other issues. Other controversial issues between 1975 and 1985 included the ANZUS Treaty and defence links with the United States generally. There is no doubt that a heavy majority of Australians favour those links, but the fact remains that treaty making is still solely a matter of executive prerogative in which even the parliament has no significant say. If treaties were subject to challenge by referendum as they are in Switzerland and Denmark, they would gain a legitimacy they now lack. Conversely, questions of abandonment of treaties, such as New Zealand's effective withdrawal from ANZUS, could be decided after proper debate rather than occurring as the unwanted result of a series of actions and events of which no one was fully in control. In every respect, the scope for stirring up feelings of fear or resentment at arbitrary government action in the sphere of international relations would be much reduced.

The other controversial issues of the times, such as the environment, the uranium industry, aboriginal land rights and feminism all embody some claims that would be supported by most people, and some other claims that find favour only with extremists. Initiative and referendum would enable those two categories to be sorted out with much less rancour and stridency than is currently the case.

Political Attitudes

Even from a consideration of these few prominent issues, it is plain that countries like Australia have potentially much to gain, even in the most pragmatic and material terms, from establishing the direct legislation system. But what are the prospects for its adoption? Senator Mason, who has addressed over 100 public meetings on this subject, reports that his advocacy has never once encountered a note of dissent. My own impression gleaned from discussions with all types of people is that the only thing preventing the growth of mass support for the idea is simple lack of information. Many people have heard of California's Proposition 13 and also know that the Swiss have a great many referendums. What is not generally understood is that these measures are initiated by the people directly, if necessary against the will of the government and the legislature, and that the results are binding. The knowledge that there is such a system and that it has been a proven success for 100 years comes as a revelation to most people and sparks immediate enthusiasm for it. The only opposition I have encountered comes from people with an elitist orientation, and from those who accept the old myth about Australians always voting No on referendum questions. This proposition, as we have seen, is true only of referendums seeking to enlarge the powers of the Commonwealth government and parliament.

The attitudes of politicians are more complex. Direct legislation finds support on the political left (such as Tony Benn, Pierre Trudeau and Ralph Nader), the right (such as the American Conservative Party), and in the centre (such as Senator Mason). But many politicians fear the effect that it could have on their positions. Some politicians may be expected to oppose the idea because they are in bondage to the current theories of democratic elitism, and some others may react unfavourably because of the radical flavour of the proposal. For the case in support of direct legislation is not merely the putting forward of a policy, it is also a protest against the existing order, and particularly against the performance of elected assemblies. It is the people saying, 'We want our country back'.

Actually, the record shows that conscientious politicians have everything to gain from the introduction of direct legislation. As Dicey pointed out, it allows greater straightforwardness in politics, moderating the inflexibility of collective ministerial responsibility and permitting changes of policy without giving the appearance of backing down. It means that voters do not have to turn politicians out of office simply because they disagree with one item of their legislative program. This leads to greater security of tenure for elected representatives. Again, the right of initiative and referendum gives the representative a principled and effective way of saying 'No' to pressure groups and single-issue

lobbies who are pressing for legislation that lacks general support. The recall, too, would give public displeasure with the performance of some official an outlet other than simply turning out the government or resorting to violence. The initiative and referendum do not replace parliament or degrade its position, but give greater significance to its debates and remove the reasons for much of the hostility and resentment currently directed at it. Finally, the politicians who do introduce the initiative and the referendum are, on overseas experience, assured of an honourable citation in the history books and a warm place in the memory of a grateful people.

Convenient opportunities to raise the issue could arise in the course of debates over the powers of upper houses of parliament. New Zealand has a unicameral legislature, but all Australian parliaments except Queensland have second chambers. Today these are directly elected by the people. Many electors vote for a different party in the upper house as a way of creating a check on the lower house party of their choice, but this is resented by some governments as an obstacle to the full execution of their legislative programs. Accordingly there are from time to time moves to reduce the powers of the upper house on the basis that the will of the lower house has a special right to prevail. An upper house considering any such abridgment of its powers could and should insist on adoption of the referendum or the initiative or both as an alternative safeguard for the people against any excesses on the part of a temporary lower house majority. If the lower house's motives are genuinely democratic, it should agree to this. Direct legislation should also be insisted upon as a counterweight to any extension of the duration of parliamentary terms from three to four years.

As Jefferson observed, in every country and in every age there are two natural parties — the aristocrats and the democrats, the party of the elite and the party of the people. Under whatever names they may go at a particular time and place, they always reveal themselves:

Men by their constitution are naturally divided into two parties.

1. Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes. 2dly those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist, and in every one where they are free to think, speak, and write, they will declare themselves. Call them therefore liberals and serviles, Jacobins and Ultras, Whigs and Tories, republicans and federalists, they are the same parties still and pursue the same object. The last appellation of aristocrats and democrats is the true one expressing the essence of all.²⁰

Initiative and Referendum

From the voters' point of view, a parliamentary debate over the introduction of initiative and referendum is in itself a litmus test of their elected representatives. It separates the true democrats who trust in popular sovereignty from the opportunists who preach democracy when it suits their purposes and disparage it when it does not. It is an arena in which Jefferson's two 'natural parties' declare themselves.

An End in Itself

Adoption of the initiative, the referendum, and perhaps in due course the recall, is more than just a means to an end, however. As we saw in Chapter 7, democracy is an end in itself, an enduring principle of human evolution. The establishment of direct legislation is an opportunity to revitalize the idea of democracy in the minds of ordinary people so that they will remain fit for, and capable of, self-government. In few countries has the democratic spirit flowed as strongly as in Australia. But the events and ideologies of this century of conflict have piled so much debris into the well that not only has the stream ceased to play, but its very location has been lost.

To make it spring forth again is the task of this generation, for if it is not done by us it may never be done at all. The sand and rubble must be dug away to release the living water beneath. Australia must regain the role that 60 years ago it seemed destined to play in unfolding the democratic ideal and in pragmatically, unromantically enhancing the stature, individuality and creativeness of the common man.

FOOTNOTES CHAPTER VIII

- 1 W. Harman, H. Rheingold, *Higher Creativity: Liberating the Unconscious for Breakthrough Insights*, Los Angeles 1984, 62.
- 2 J.-F. Aubert, 'Switzerland', in D. Butler, A. Ranney, *Referendums: A Comparative Study of Practice and Theory*, Washington 1978, 39, 66.
- 3 P. Saladin, 'Le référendum populaire en Suisse', [1976] *Revue internationale de droit comparé* 331, 335.
- 4 Since 1985 this mood of alienation has grown into a full-scale middle-class protest movement under previously unknown leaders such as Ian McLachlan, John Leard and Katharine West.
- 5 C. Price, 'The initiative: A comparative state analysis and reassessment of a Western phenomenon' (1975) 28 *Western Pol. Q.* 243, 244, 261-2.
- 6 See pp.130, 159 *supra*.
- 7 See pp.68-70 *supra*.
- 8 James (Viscount) Bryce, *Modern Democracies*, London 1921, Vol.II, 463-74.
- 9 *id.*, 160.
- 10 *id.*, Vol.I, 430-2.
- 11 I have collected and briefly evaluated some of this evidence in *The Rule of Law: Foundation of Constitutional Democracy* (forthcoming), Ch.2. The best single source of this material is P.A. Sorokin's four-volume work compiled between the two world wars, *Social and Cultural Dynamics*.
- 12 This is obvious, for example, from the government statements on the occasion of the establishment of Australia's so-called Commission for the Future. See Minister for Science and Technology media release, 11 October 1984.
- 13 'The Ruthven Report', *Rydge's*, October 1984, 28, 32-3.
- 14 W. Howard, 'Democracy in trade unions', in G. Ford, J. Hearn, R. Lansbury eds, *Australian Labour Relations: Readings*, 3rd edn, Melbourne 1980, 162, 169-73.
- 15 *id.*, 173-4.
- 16 National Labor Relations Board Statements of Procedure, *Code of Federal Regulations*, Title 29, Part 101, ss.101.17-21; W. Gould, *A Primer on American Labor Law*, Cambridge, Mass. 1982, 41-3.
- 17 E. Sykes, 'Labour arbitration in Australia', in Ford et al., *op. cit. supra*, 300, 326-7.
- 18 See T. Duncan, J. Fogarty, *Australia and Argentina: On Parallel Paths*, Melbourne 1984.

Initiative and Referendum

- 19 As to the effect of pressure groups as factors contributing to Australia's low growth rate, see F.H. Gruen, 'How bad is Australia's economic performance and why?', Centre for Economic Policy Research Discussion Paper No.127, Canberra 1985.
- 20 S. Padover, *Thomas Jefferson on Democracy*, New York 1939, 42 (Letter to H. Lee, 1824).

Appendix A

Federal Constitution of the Swiss Confederation

Art. 89

1. Federal laws and federal decrees must be approved by both Councils.
2. Federal laws and generally binding federal decrees must be submitted to the people for approval or rejection if 50 000 Swiss citizens entitled to vote or eight Cantons so demand.
3. Paragraph 2 also holds for agreements of international law [treaties] that
 - (a) are of indefinite duration and irrevocable;
 - (b) provide for entry into an international organization;
 - (c) involve a multilateral unification of law.
4. By a decision of both Councils further agreements of international law may be subjected to the provisions of Paragraph 2.
5. Entry into collective security organizations or supranational entities is subject to a vote by the people and the Cantons.

Art. 89bis

1. Generally binding federal decrees the coming into force of which permits no delay may be put into effect immediately by a majority of all members of each of both Councils; the period of validity is to be limited.
2. If 50 000 Swiss citizens entitled to vote or eight Cantons request a popular vote, decrees put immediately into effect shall lose their validity one year after their adoption by the Federal Assembly if they have not been approved by the people during that period; in that case, they may not be renewed.
3. Decrees put immediately into effect which have no constitutional basis must be approved by the people and the Cantons within one year after their adoption by the Federal Assembly; failing this, they shall lose their validity after the lapse of this year and may not be renewed.

Art. 121

1. Partial revision [of the Constitution] may be brought about either by means of a popular initiative or according to the forms laid down for federal legislation.

Initiative and Referendum

2. The popular initiative consists in the request, presented by 100 000 Swiss citizens entitled to vote, aiming at the introduction, setting aside or modification of specified articles of the Federal Constitution.
3. If by means of a popular initiative several different provisions are to be modified or introduced into the Federal Constitution, each one must be the subject of a separate initiative request.
4. An initiative request may consist of a general proposal or take the form of a complete draft.
5. If such a request consists of a general proposal and if it meets with the approval of the Federal Chambers, the latter shall prepare a partial revision along the lines of the proposal and submit its draft to the people and the Cantons for adoption or rejection. If the Federal Chambers do not approve of the request, the question of partial revision shall be submitted to the decision of the people; if the majority of the Swiss citizens casting a vote decide in the affirmative, the Federal Assembly shall undertake the revision in conformity with the decision of the people.
6. If the request is in the form of a complete draft and if it meets with the approval of the Federal Assembly, the draft shall be submitted to the people and the Cantons for adoption or rejection. If the Federal Assembly disagrees, it may prepare its own draft or recommend the rejection of the proposed draft and submit its own draft or recommendation of rejection together with the draft proposed by the initiative to the decision of the people and the Cantons.

Appendix B

Constitution of the State of California 1879 as amended, Article II

[Initiative]

SEC. 8. (a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

(d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.

[Referendum]

SEC. 9. (a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

(b) A referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors.

(c) The Secretary of State shall then submit the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

[Initiative and Referendum — Vote and Effective Date — Conflicts — Legislative Repeal or Amendment — Titling]

SEC. 10. (a) An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If a referendum petition is filed against a

Initiative and Referendum

part of a statute the remainder shall not be delayed from going into effect.

(b) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

(c) The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

(d) Prior to circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.

(e) The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors.

[Initiative and Referendum — Cities or Counties]

SEC. 11. Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. This section does not affect a city having a charter.

[Naming Individual or Private Corporation to Office or Duty Prohibited]

SEC. 12. No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.

[Recall Defined]

SEC. 13. Recall is the power of the electors to remove an elective officer.

[Recall Petitions]

SEC. 14. (a) Recall of a State officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. Sufficiency of reason is not reviewable. Proponents have 160 days to file signed petitions.

(b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of 5 counties equal in number to 1 percent of the last vote for the office in the county. Signatures to recall Senators, members of the Assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office.

(c) The Secretary of State shall maintain a continuous count of the signatures certified to that office.

[Recall Elections]

SEC. 15. An election to determine whether to recall an officer and, if appropriate, to elect a successor shall be called by the Governor and held not less than 60 days nor more than 80 days from the date of certification of sufficient signatures. If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor. The officer may not be a candidate, nor shall there be any candidacy for an office filled pursuant to subdivision (d) of Section 16 of Article VI.

[Legislature to Provide for Petition, Etc.]

SEC. 16. The Legislature shall provide for circulation, filing, and certification of petitions, nomination of candidates, and the recall election.

[Recall of Governor or Secretary of State]

SEC. 17. If recall of the Governor or Secretary of State is initiated, the recall duties of that office shall be performed by the Lieutenant Governor or Controller, respectively.

[Reimbursement of Recall Election Expenses]

SEC. 18. A State officer who is not recalled shall be reimbursed by the State for the officer's recall election expenses legally and personally incurred. Another recall may not be initiated against the officer until six months after the election.

[Recall of Local Officers]

SEC. 19. The Legislature shall provide for recall of local officers. This section does not affect counties and cities whose charters provide for recall.

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