

CONSTITUTIONAL CHANGE AND DIRECT DEMOCRACY

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At the state level, unlike the federal level, the American people have long had a direct and determinative role to play in altering their constitutions.¹ In forty-nine states, any constitutional amendment proposed by the legislature must be submitted to the People and approved by at least a majority of those voting.² Only in seventeen (thirty-five percent) of these states, however, can the People also propose and adopt constitutional amendments without any legislative participation.³

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1. As Article V makes clear, the only role granted the People in amending the U.S. Constitution is electing their representatives to Congress and to their state legislatures. U.S. CONST. art. V. Some scholars contend, however, that our federal Constitution may be—and, indeed, has already been—legitimately amended through procedures other than those set out in Article V. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter *Consent of the Governed*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

2. See *THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES*, 1994-95, at 21-22 tbl. 1.2 (1994) [hereinafter *THE BOOK OF THE STATES*]. Delaware is the exception. An amendment to the Delaware constitution is adopted if approved by two-thirds of each house of the legislature in two consecutive sessions; no popular vote is required for ratification. *Id.*

3. *Id.* at 24 tbl. 1.3. The 17 states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *Id.* Massachusetts also permits initiative amendments to its constitution, but no amendment may be submitted to the electorate for ratification without prior approval at two sessions of a successively elected legislature by not less than one-fourth of all members elected, sitting in joint session. *Id.*

Often heralded as the purest and highest form of democracy,⁴ procedures for direct state constitutional change have come under increased scrutiny and attack since the passage of Colorado's Amendment Two. In November 1992, by a vote of 53.4% to 46.6%, the people of Colorado adopted an initiative amendment to their constitution, which prohibits the state, its agents, and its subdivisions from:

[E]nact[ing], adopt[ing] or enforc[ing] any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.⁵

Whatever one's views of the morality or constitutionality of this amendment to Colorado's constitution,⁶ its passage by a

4. See, e.g., THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 7-20 (1989); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 2-34 (1984); DAVID B. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 3-40 (1989). Opinion polls recently conducted in a wide range of states reveal that direct democracy is enormously popular in the states that currently permit it and is much desired in the states that do not. CRONIN, *supra*, at 203 n.10; PHILIP L. DUBOIS & FLOYD F. FEENEY, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 8 n.5 (1992). Indeed, during the past 20 years, 12 states that do not currently provide for plebiscites considered direct democracy devices at constitutional conventions or in legislative debates and hearings, while no state has seriously considered the abolition of plebiscites. CRONIN, *supra*, at 51 tbl. 3.1. In 1992, Mississippi amended its constitution to permit initiative amendments, although with certain subject matter exceptions. MISS. CONST. art. 15, § 273.

5. *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994), *petition for cert. filed*, 63 U.S.L.W. 3477 (U.S. Dec. 12, 1994) (No. 94-1039).

6. For a sampling of views reported in the local and national press, see, e.g., Louis Aguilar, *Boycotts Beget Boycott Over Colorado Gay Issue*, PHOENIX GAZETTE, Jan. 6, 1993, at A2; *Colorado Anti-Gay Law Dead?*, SACRAMENTO BEE, Dec. 15, 1993, at A7; George de Lama, *Colorado Springs Showdown: Gays Facing Fundamentalists*, CHI. TRIB., Apr. 27, 1993, at 1; *Gay-Bashing, Democracy-Bashing*, N.Y. TIMES, Dec. 18, 1993, at 22; Molly Ivins, *Colorado Loses Its Balance on the Slippery Slope of Intolerance*, SACRAMENTO BEE, Aug. 1, 1993, at F03; Dirk Johnson, *Colorado Judge Overturns Initiative Banning Gay Rights Laws*, N.Y. TIMES, Dec. 15, 1993, at A22; Sue Lindsay, *Amendment 2 Gets Another Day in Court; State's Attorney Argues that Gays Haven't Shown Need for Protection*, ROCKY MTN. NEWS (Denver), July 1, 1994, at 4A; Sue Lindsay, *State Appeals Ruling; Colorado Solicitor to Ask Court to Bring Back Amendment 2*, ROCKY MTN. NEWS (Denver), June 30, 1994, at 25A; Pacy Markman, *Famous Victories, but Nothing Won, Rights: The Defeat of Oregon's Measure Nine and Others of Its ilk Only Keeps Homosexuals from Losing Ground*, L.A. TIMES, Nov. 13, 1992, at B7; Sue Anne Pressley, *Hearing Opens on Challenge to Colorado Gay Rights Ban*;

relatively slim majority, and the presence of a related initiative amendment on the Oregon ballot this fall,⁷ provoke thought on a more general, procedural question: should the same simple majority of the popular vote that is required to enact a statute by initiative continue to be all that is required to adopt an initiative amendment to a state constitution?⁸ In its investigation, this essay takes the perspective of those seeking to maximize the constitutional protection of individual rights.⁹ This normative premise was chosen because it embodies a central issue in the recent debates over Colorado's Amendment

Trial May Become Forum on Status of U.S. Homosexuals, WASH. POST, Oct. 13, 1993, at A2; Louis Sahagun, *Judge Hears Challenge to Law on Gays; Colorado: An Initiative that Bans Protected Status for Homosexuals Will Take Effect Friday if Not Overturned*, L.A. TIMES, Jan. 12, 1993, at A3; David Tuller, *Gays Win Some, Lose Some; More Homosexuals Elected, but Colorado Restricts Rights Laws*, S.F. CHRON., Nov. 5, 1992, at A12.

7. The proposed Oregon initiative stated in part: "Children, students and employees shall not be advised, instructed or taught by any government agency, department or political unit . . . that homosexuality is the legal or social equivalent of race, color, religion, gender, age or national origin." Bettina Boxall, *Social Issues; Anti-Gay-Rights Measures Ignite Aggressive Battles in 7 States; Proposed Ballot Initiatives in Washington, Oregon, Nevada, Arizona, Idaho, Missouri and Michigan Have Rallied Forces on Both Sides*, L.A. TIMES, June 9, 1994, at A5. See also *Gay Rights Groups "Relieved" but Wary as 8 Initiatives Fail*, ARIZ. REPUBLIC, July 17, 1994, at A19.

The Oregon measure was defeated on November 8, 1994, by a 52% majority. Bettina Boxall, *California Elections; Key Victories Hearten Gay Activists; Politics: First Openly Gay Legislator is Elected in California; Oregon and Idaho Anti-Rights Initiatives Lose*, L.A. TIMES, Nov. 10, 1994, at A37. On the same day, a similar statutory initiative lost in Idaho "by only a few thousand votes." *Id.*; *Anti-Gay Rights Measures Appear to be Defeated in Idaho, Oregon*, BNA Management Briefing, Nov. 10, 1994, available in LEXIS, BNA Library, BNAMB File.

8. These facts may also provoke thought on two questions that I have previously discussed at substantial length: Are plebiscites more likely than representative processes to produce laws that disadvantage numerical minorities, such as homosexuals? And should the courts, which have not historically varied their analyses because of a law's popular origin, begin to employ different standards when reviewing the enactments of plebiscites and legislatures? Although scholars have largely agreed that the answer to both questions is "yes," I have argued that the answer to both questions is, in fact, "no." Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991).

9. It is, of course, not always obvious when a constitutional change increases rather than decreases the protection accorded individual rights. Some changes, for example, may be viewed as increasing the constitutional protection of certain individuals' rights at the expense of others'. Happily, this essay need not first resolve this timeless difficulty of political theory: the analysis that follows is unaffected by one's preferred definition of "maximizing the constitutional protection accorded individual rights," so long as that definition remains constant throughout.

Two¹⁰ as well as in the ongoing academic discussion of the costs and benefits of lawmaking by plebiscite.¹¹ Thus, the central inquiry of this essay is whether the states that currently provide for initiative amendments would be more likely to maximize the constitutional protection accorded individual rights if the number of votes required for adoption were increased from a simple majority to a super-majority, perhaps two-thirds.

I. SIGNATURE GATHERING VS. VOTE GATHERING

Intuition suggests that it *should* be significantly more difficult to adopt a constitutional amendment than a statute. A state constitution is, after all, a fundamental law, which we therefore expect—and want—to be more permanent than the ever-changing, ordinary, statutory law. In the fifteen states that permit use of the initiative for both statutes and constitutional amendments, however, none requires more votes to adopt an amendment than to enact a statute. Although thirteen of these fifteen states have different procedures for enacting initiative statutes and amendments, those differences lie not in the number of votes necessary for adoption, but in the number of signatures necessary to place the proposed law on the ballot.¹² Five states currently require about twice as many

10. See *supra* note 6.

11. Compare Baker, *supra* note 8, at 710 (demonstrating that “a rationally self-interested racial minority’s preference between representative and direct lawmaking processes is a difficult empirical question and cannot confidently be resolved on the strength of *a priori* reasoning”); Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965 (1979) (evaluating the potential contributions and risks of a national initiative procedure, and observing that “[t]he history of the initiative is remarkably free of the enactment of abusive legislation”); and Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988) (arguing that “popular votes on issues that share certain salient characteristics can be constrained in ways that minimize deviation from public interest”) with Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (contending that, from the perspective of racial minorities, representative democracy has many important advantages over direct democracy); and Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (making similar contentions and arguing for heightened judicial scrutiny of plebiscitary enactments).

12. DUBOIS & FEENEY, *supra* note 4, at 20-21 tbl. 5. The thirteen states are Arizona, Arkansas, California, Massachusetts, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *Id.* Colorado and Nevada require the same number of signatures to put a statute or a constitutional amendment on the ballot. *Id.* Florida and Illinois permit

signatures for constitutional amendments as for statutes, and seven states require from one-third to one-half more signatures.¹³

Although it is obviously harder to gather more rather than fewer signatures, this means only that it will be somewhat more difficult to *place* an amendment than a statute on the ballot. This difference in signature requirements, however, does not necessarily mean that it will also be significantly more difficult to *adopt* a constitutional amendment than a statute. Because the existing empirical evidence suggests that money plays very different and significant roles in the signature-gathering and vote-gathering processes, even the largest differences in the number of signatures necessary to place a constitutional amendment and a statute on the ballot are not likely to pose a barrier to *adoption* comparable to that of requiring a super-majority of the popular vote.¹⁴

The widespread use of paid signature gatherers¹⁵ as well as the prevalence of voters who "are willing to sign petitions without evaluating or even paying much attention to the proposals that they concern,"¹⁶ has yielded a consensus that "the signature-gathering process today is more a test of how much money the proponent has than of citizen support for the proponent's legislative ideas."¹⁷ Some scholars have gone so far as to conclude that "anyone willing to put up the funds can buy a place on the ballot."¹⁸

Although well-financed interests have been found to have a clear advantage in *qualifying* measures for the ballot, much empirical evidence suggests that heavy campaign spending alone cannot "buy" the subsequent election.¹⁹ One-sided

initiative amendments but not statutory initiatives. *Id.*

13. *Id.*

14. See *infra* notes 15-22 and accompanying text.

15. See, e.g., CRONIN, *supra* note 4, at 62-66; MAGLEBY, *supra* note 4, at 61-64; DUBOIS & FEENEY, *supra* note 4, at 74, 164; Daniel H. Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 194-200 (1989).

16. DUBOIS & FEENEY, *supra* note 4, at 164. See also CRONIN, *supra* note 4, at 62-66; MAGLEBY, *supra* note 4, at 61-64; Lowenstein & Stern, *supra* note 15, at 198-200.

17. DUBOIS & FEENEY, *supra* note 4, at 164.

18. Lowenstein & Stern, *supra* note 15, at 200.

19. Allen, *supra* note 11, at 1036. See also DUBOIS & FEENEY, *supra* note 4, at 147-51. In the words of one author:

spending has been successful in persuading people to vote *against* an initiative, but has had a negligible effect on obtaining affirmative votes.²⁰ Even when spending is more equalized, those seeking to block an initiative are much more likely to succeed than its proponents.²¹ And there is no demonstrated relationship between the amount of money spent on a successful initiative campaign and the margin of victory.²²

Thus, if one believes that it *ought* to be significantly more difficult to *adopt* a constitutional amendment than a statute, further increasing the number of signatures necessary to place an initiative amendment on the ballot is not likely to accomplish this end. A more promising alternative may be to increase the number of votes required for the adoption of an initiative amendment from a simple majority to a supermajority, perhaps two-thirds.

II. VIRTUES AND VICIES OF A SUPER-MAJORITY REQUIREMENT

It would surely be more difficult to adopt initiative amendments if the seventeen states that currently provide for them required two-thirds of the popular vote, rather than a

[T]here does not appear to be a consistent relationship between spending and voter behavior. Most heavily contested measures were voted up or down by large majorities and, while bigger expenditures might have narrowed the margins of victory or defeat in some instances, the end result would almost certainly have been the same.

DUBOIS & FEENEY, *supra* note 4, at 151 (quoting MICHAEL D. MEYERS, A STUDY OF CALIFORNIA INITIATIVES, 1976-1986, at 33 (1988)); John R. Owens & Larry L. Wade, *Campaign Spending on California Ballot Propositions, 1924-1984: Trends and Voting Effects*, 39 W. POL. Q. 675, 687 (1986) ("It is obvious that other undefined, unspecified factors are much more important than money in shaping electoral outcomes in direct legislation campaigns."). One must be careful when evaluating these empirical studies, however, to note that they typically do not distinguish statutory initiatives from initiative amendments. Nonetheless, there seems little reason to expect that the findings would be significantly different if only initiative amendments were considered. More problematic for purposes of the present analysis is the fact that these studies do not always separate signature-gathering expenses and vote-gathering (*i.e.*, post-petition) expenses, perhaps because the two categories are not clearly distinguishable.

20. See, *e.g.*, DUBOIS & FEENEY, *supra* note 4, at 147-49; MAGLEBY, *supra* note 4, at 147-48; SCHMIDT, *supra* note 4, at 35-37; Allen, *supra* note 11, at 1034-36; Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 518-43, 545, 609-32 (1982); Owens & Wade, *supra* note 19, at 684.

21. Owens & Wade, *supra* note 19, at 684, 686-87; DUBOIS & FEENEY, *supra* note 4, at 149-50 (citing ABT ASSOCIATES, INC., FACTORS AFFECTING POLLUTION REFERENDA 5, 61, 72 (1971)).

22. DUBOIS & FEENEY, *supra* note 4, at 150.

simple majority for adoption.²³ Under such a requirement, Colorado's Amendment Two, for example, would not have passed. Indeed, of the 100 initiative amendments that appeared on state ballots between 1978 and 1988, only nine would have been adopted under a two-thirds rule as opposed to the thirty-six that were in fact adopted under the prevailing simple majority rules.²⁴ To begin, then, a super-majority requirement might well be attractive to those disappointed by the outcome of the popular vote on Amendment Two or on any of the other initiative amendments that have been adopted over the years by a slim majority.

A super-majority requirement might also be attractive to those who believe that initiative amendments are (unjustifiably) easier to adopt than *legislatively proposed* amendments.²⁵ Although legislatively proposed amendments, in all but one state, similarly require no more than a simple majority of the popular vote for ratification,²⁶ they must be approved by a

23. See THE BOOK OF THE STATES, *supra* note 2, at 23 tbl. 1.3. Thirteen of the 17 states unambiguously require a simple majority of the popular vote for adoption. Massachusetts and Nebraska further require that the majority vote on the amendment be at least 30% and 35%, respectively, of the total vote at the election. Nevada requires a majority vote on the amendment in two consecutive general elections, and Illinois requires a majority voting in the election or three-fifths of those voting on the amendment. Although the Illinois requirement could be construed as a mild super-majority requirement, it is better understood, I believe, as a simple majority requirement that, in an attempt to reduce voter "drop off," simply counts as "no" votes the non-votes of those who come to the polls but fail to express a preference on the proposed initiative amendment.

24. See DUBOIS & FEENEY, *supra* note 4, app. at 1-32.

25. An examination of the voter approval rates for initiative amendments and legislatively proposed amendments suggests that this concern is unfounded. Indeed, a study of eight states from 1898 to 1978 revealed that the approval rates for legislatively proposed amendments ranged from 47% to 69%, while those for initiative amendments ranged from 21% to 48%. Only in Arkansas did the approval rate for initiative amendments (48%) even begin to approximate that for legislatively proposed amendments (47%). MAGLEBY, *supra* note 4, at 73. Magleby posits three explanations for these findings. First, in the case of initiatives, "voters may believe that the 'burden of proof is on the advocate,'" and may be much less willing to vote yes when an initiative "is met by an organized and powerful opposition." *Id.* at 72. Second, because "legislative referendums have arisen from compromise and bargaining," they may be less likely to face strong opposition. *Id.* Finally, voters may be "more trusting of elected representatives than of the special-interest or public-interest groups that generally propose initiative amendments." *Id.* at 72-73.

26. New Hampshire requires two-thirds of the vote on the amendment for ratification. See THE BOOK OF THE STATES, *supra* note 2, at 21-22 tbl. 1.2. Forty-three of the remaining 49 states unambiguously require a simple majority of the popular vote for adoption. Tennessee requires a majority of those voting for

majority to two-thirds of each house of the legislature before being placed on the ballot.²⁷ There is no comparable requirement in the case of initiative amendments.²⁸

It is important to note, however, that even where the approval of two-thirds of each chamber is required for legislatively proposed amendments,²⁹ this requirement will not necessarily be equivalent to approval by a super-majority of voters. As an illustration, imagine the hypothetical state portrayed in Diagram One. The state legislature consists of three senators (A, B, and C) and three representatives (1, 2, and 3), each of whom represents forty-eight voters.³⁰ Further assume that: (1) all state legislators are elected on a geographical basis; (2) each voter gets to elect a representative in both the House and the Senate; (3) Senators A and B (exactly two-thirds of the Senate) and Representatives 1 and 2 (exactly two-thirds of the House) support a proposed amendment while Senator C and Representative 3 do not; (4) exactly fifty-percent-plus-one (25 of 48) of the constituents of Senators A and B and of Representatives 1 and 2 support the proposed amendment (the shaded area of squares A1, A2, B1, and B2 in Diagram One); and (5) none of the constituents of Senator C or Represen-

governor. Hawaii and Nebraska require that the majority vote on the amendment must be at least 50% of the total votes cast at the election; or, in the case of a special election, a majority of the votes counted, which must be at least 30% of the total number of registered voters. Illinois requires a majority of those voting in the election or three-fifths of those voting on the amendment. Louisiana requires a majority of votes in the state as a whole and also in affected subdivisions if the amendment affects five or fewer political subdivisions of the state. And, for amendments concerning certain elective franchise and education matters, New Mexico requires ratification by three-fourths of electors voting in the state and two-thirds of those voting in each county. *Id.*

27. *Id.* Sixteen states require two-thirds of *each* house, 2 require two-thirds of *both* houses, 17 require a simple majority, 9 require three-fifths, and 6 states have some other requirement. *Id.*

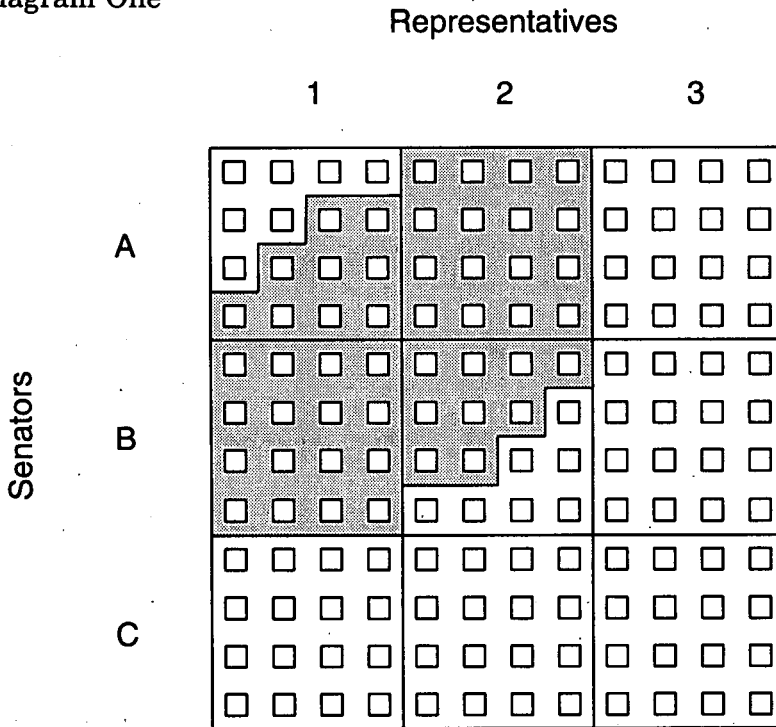
28. As the discussion in Part I above shows, the existing signature requirements for placing an initiative amendment on the ballot are not a comparable substitute. See *supra* notes 12-22 and accompanying text.

29. THE BOOK OF THE STATES, *supra* note 2, at 21 tbl. 1.2. The 16 states are Alaska, California, Colorado, Delaware, Georgia, Idaho, Kansas, Louisiana, Michigan, Mississippi, South Carolina, Texas, Utah, Washington, West Virginia, and Wyoming. In Maine and Montana, two-thirds of both houses, rather than of each house, is required. *Id.*

30. The Senate districts are drawn horizontally and the House districts vertically such that Senator A, for example, represents the voters in squares A1, A2, and A3, while Representative 1 represents the voters in squares A1, B1, and C1.

tative 3 support the proposed amendment. *If all of these conditions are met*, an amendment proposed by two-thirds of each chamber of the legislature theoretically could have the support of as few as 34.7% (50 of 144) of the state's voters.

Diagram One



In any of the existing fifty American states, of course, only the first two of these conditions will always be met. And as the relevant numbers of representatives, senators, and voters increase from the theoretical minimums stated in assumptions three through five above, the *actual* number of voters that support an amendment proposed by the required two-thirds of each chamber also increases from the theoretical minimum (34.7%) portrayed in Diagram One.

Nonetheless, the requirement that a majority of those voting ratify any proposed amendments to the state constitution is, perhaps surprisingly, the *only* guarantee that even amendments approved by *two-thirds* of each house of the legislature in fact represent the will of the majority. And, far from having the desired equalizing effect, a requirement that initiative amendments be ratified by two-thirds of those voting may well

make them much more difficult to adopt than legislatively proposed amendments.

The reality of the constitutional amendment process in the states indicates that advocates of a super-majority requirement take their inspiration from some other source, perhaps the federal government. For both the text of Article V and the history of successful amendments to our federal Constitution suggest that a "good" constitution should be insulated from, or somehow "above," everyday majoritarian politics.³¹ And in the case of the *federal* Constitution in a federal structure of government this may indeed be desirable.³² But even in the federal context, the attractiveness of a super-majority requirement for adopting constitutional amendments cannot rest on the notion that it provides greater protection for individual rights than a simple majority requirement would. To be sure, it would be more difficult to repeal the U.S. Constitution's guarantee of freedom of speech, for example, under the existing requirements of Article V than it would be under a simple majority ratification rule. On the other hand, we would today have an Equal Rights Amendment to the U.S. Constitution if the approval of only a majority, sixty percent, or even seventy percent of the states were necessary for ratification rather than three-fourths.³³ In brief, at both the federal and state levels,

31. U.S. CONST. art. V states in relevant part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

A reading of the 27 amendments to the U.S. Constitution reveals the continued expansion of protection for individual rights.

32. Akhil Amar, however, has argued at substantial length that "[w]e the People of the United States—more specifically, a majority of voters—retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V." Amar, *Consent of the Governed*, *supra* note 1, at 458-59 (arguing that, via a petition of a majority of American voters, Congress could be required to call a constitutional convention, and that a simple majority of the electorate could ratify an amendment or a new constitution).

33. Only 35 of the required 38 states had ratified the Equal Rights Amendment by the June 30, 1982 deadline, even though from 1972 to 1982 "a majority of Americans consistently told interviewers that they favored this amendment to the Constitution." JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 1 (1986).

any change in the constitutional amendment procedure that makes it more difficult to repeal or constrain existing individual rights simultaneously makes it more difficult to adopt new rights and expand existing ones.³⁴ Especially at the federal level, this crucial symmetry of effect is all too easily and frequently overlooked.

Thus, one might rationally prefer that initiative amendments to a state's constitution be adopted by a simple majority if one is eager *either* to add new rights *or* to repeal existing ones. If, however, one is reasonably satisfied with the state constitution's current bill of rights or is simply fearful of change, one would likely prefer that the constitution be more difficult to amend. Although a super-majority requirement would make it more difficult to add new rights, it would also—and, from this perspective, more importantly—make it more difficult to repeal or otherwise constrain existing individual rights.

There is another variable to consider in the case of state constitutions, however: amendments that violate the federal Constitution will not be enforced. That is, the individual rights guaranteed each state's citizens by the U.S. Constitution cannot be constrained or diminished by any state's constitution.³⁵ And this fact importantly affects one's assessment of whether a super-majority of the popular vote should be required for the adoption of initiative amendments.

To the extent that the protection for individual rights provided by a state constitution is *no greater* than that afforded by the federal Constitution, either because a state constitution is silent or because it mirrors the federal Constitution on an issue, a super-majority requirement for the adoption of initiative amendments will have some economic benefits but seemingly greater non-economic costs. To be sure, a super-majority requirement makes it more difficult to enact state constitutional

34. For a discussion of this reciprocity of effect in the context of blocking and passing proposed statutory initiatives, see Baker, *supra* note 8, at 712-15.

35. Under the Due Process Clause of the 14th Amendment, virtually all of the rights guaranteed by the first eight Amendments have been selectively absorbed into the 14th Amendment and, therefore, applied to the states. The U.S. Supreme Court has justified this incorporation by holding the rights involved to be "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 148-49, *reh'g denied*, 392 U.S. 947 (1968). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 772-73 (2d ed. 1988).

amendments that constrain or repeal individual rights *in violation of federal constitutional guarantees*. But even if such amendments pass, they are likely to be invalidated if challenged under the federal Constitution,³⁶ rendering the entire enactment process a deadweight social loss.³⁷ Because it poses a higher barrier to the adoption of such amendments, a super-majority requirement is likely to reduce the number that are proposed and therefore also the resulting deadweight social loss. An additional, related benefit of a super-majority requirement may be some reduction in litigation costs: since fewer amendments, including amendments that would be invalidated under the federal Constitution, will be adopted under a super-majority requirement, there is likely to be less litigation concerning the constitutionality of adopted amendments.

Against these economic benefits of a super-majority requirement, however, must be weighed the non-economic costs. Most significantly, a super-majority requirement increases the difficulty of adopting state constitutional amendments that would *expand* the protection of individual rights beyond that provided by the federal Constitution, and fewer such amendments are therefore likely to be enacted. For those seeking to maximize the protection of individual rights, then, these costs of a super-majority requirement are likely to outweigh the economic benefits.

To the extent that the state constitution, explicitly or as interpreted, may provide *greater* protection for individual rights than that afforded by the federal Constitution,³⁸ the benefits

36. Colorado's Amendment Two appears to be taking this route. See *Evans v. Romer*, 854 P.2d 1270, 1285-86 (Colo. 1993) (finding that "Amendment Two singles out and prohibits [homosexuals, lesbians, and those of bisexual orientation] from seeking governmental action favorable to [them] and thus, from participating equally in the political process In short, Amendment Two, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution."); *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753 (Dec. 14, 1993) (concluding that Amendment Two is unconstitutional under the 14th Amendment because it is "violative of the fundamental right of an identifiable group to participate in the political process without being supported by a compelling state interest."); *Evans v. Romer*, 882 P.2d 1335, 1349 (Colo. 1994) (applying strict scrutiny under the 14th Amendment and finding that "[n]one of the interests identified by the state is a necessary, compelling governmental interest which Amendment 2 is narrowly tailored to advance").

37. In some cases, it might be argued that the enactment process, although constitutionally doomed, had "symbolic value."

38. "Examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the

of a super-majority rule appear, if only marginally, to exceed the costs. Insofar as a super-majority requirement makes it more difficult to adopt amendments that constrain or repeal state constitutional protections for individual rights which exceed the federal Constitution's guarantees, it provides a significant benefit to persons seeking to maximize these protections. So long as such amendments do not seek to reduce below the federal minimums the protection provided individual rights, they are unlikely to be invalidated if challenged under the federal Constitution.

Against this substantial benefit, however, must be weighed the most obvious and significant cost of a super-majority requirement: proposed amendments that would expand existing individual rights or add new ones are less likely to be adopted. Although these corollary costs and benefits might well be expected to balance out over time, we have seen above that a super-majority rule provides the additional benefit of a reduction in litigation costs.

In summary, to the extent that the state constitution provides protection for individual rights no greater than that afforded by the federal Constitution, the non-economic costs of a super-majority requirement are likely to outweigh the economic benefits—at least from the perspective of those seeking to maximize the constitutional protection accorded individual rights. But insofar as the state constitution already provides protection for individual rights which exceeds the federal Constitution's guarantees, the benefits of a super-major-

United States Supreme Court they find unconvincing even where the state and federal constitutions are similarly or identically phrased." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977).

Among the individual rights explicitly contained in some state constitutions but not the U.S. Constitution are: "open courts" or "right to remedy" provisions, see, e.g., FLA. CONST. art. V, § 3(b); David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197 (1992); prisoners' rights, see, e.g., OR. CONST. art. I, §§ 13, 15, 16, 23; Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987); the right of privacy, see, e.g., ALASKA CONST. art. I, § 22; Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (1977); the right to education, see, e.g., N.J. CONST. art. IV, § 7; Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985); the right to public assistance, see, e.g., N.Y. CONST. art. XVII, § 1; Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989). See ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 423-477, 857-884 (2d ed. 1993).

ity requirement could reasonably be expected to outweigh, however marginally, the costs. Thus, if at least half of the time a state constitution provides protection for individual rights no greater than that afforded by the federal Constitution, a simple majority requirement is likely to have benefits that exceed its economic costs, and therefore would be preferable to any super-majority requirement. And, in fact, state constitutions only rarely provide protection for individual rights which exceeds that guaranteed by the federal Constitution.³⁹

One more consideration remains: the ability to amend a constitution enables the People to "overrule" judicial decisions, including those interpreting constitutional provisions.⁴⁰ This historically has been an important function of our federal amendment process.⁴¹ A super-majority requirement would clearly make it more difficult to amend a state constitution in order to invalidate a judicial decision interpreting a constitutional provision. Would this be an improvement?

To the extent that a state constitution provides protection for individual rights no greater than that afforded by the federal Constitution, persons desiring to maximize that protection need not fear that the courts will "dilute" it through their interpretations. For any judicial decision that would reduce the state constitutional protections for individual rights below the minimum guaranteed by the federal Constitution would likely be overturned on appeal,⁴² and no amendment to the state constitution would therefore be necessary to "overrule" such a decision. In this regard, then, the requirements for adopting initiative amendments are simply irrelevant. Nonetheless, a super-majority requirement has the benefit in this

39. See *supra* note 38.

40. "Where the judges are carrying out the function of constitutional review, the final responsibility of the people is appropriately guaranteed by the provisions for amending the Constitution itself . . ." Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952). Of course, no constitutional amendment is necessary to "overrule" a judicial decision interpreting a statute: one need simply enact a corrective statute.

41. Four of the 27 amendments to the U.S. Constitution were adopted to overturn U.S. Supreme Court decisions: the 11th Amendment, ratified in 1795, overturned *Chisholm v. Georgia*, 2 U.S. 419 (1793); Section One of the 14th Amendment, ratified in 1868, overruled *Scott v. Sandford*, 60 U.S. 393 (1856); the 16th Amendment, ratified in 1913, overturned *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); and the 26th Amendment, ratified in 1971, overturned *Oregon v. Mitchell*, 400 U.S. 112 (1970).

42. See *supra* note 36.

context of making it more difficult to adopt an amendment that overrules a decision *expanding* the state constitution's protection of individual rights.

To the extent that a state constitution provides protection for individual rights which *exceeds* that afforded by the federal Constitution, some might fear that the courts, through their interpretations, will reduce those guarantees to the federal minimums. Thus, one obvious and significant cost of a super-majority requirement is the increased difficulty of adopting a constitutional amendment to "overrule" such decisions and thereby reinstate, or even expand, the original constitutional guarantees. Against this cost, however, must be weighed the corollary benefit: a super-majority requirement also makes it more difficult to adopt an amendment that overrules a decision in which a court *expands* the state constitution's protection of individual rights. If these costs and benefits can be expected to balance out over time, those desiring to maximize the protection of individual rights have no reason to prefer *either* a simple majority *or* a super-majority requirement for the adoption of initiative amendments.

In summary, when the initiative amendment process is used to overrule judicial interpretations of a state constitution, a super-majority requirement has substantial benefits and no obvious costs to the extent that the state constitution provides protection for individual rights no greater than that afforded by the federal Constitution. And, insofar as a state constitution provides protection for individual rights which exceeds the federal Constitution's guarantees, a super-majority requirement has costs and benefits that, in this context, are likely to balance out. Thus, those seeking to maximize the protection of individual rights should prefer a super-majority requirement to the extent that it increases the difficulty of adopting amendments intended to overrule specific judicial decisions interpreting the state constitution.

So what are we now to conclude given our earlier, seemingly contradictory determination that a simple majority requirement is preferable to any super-majority requirement in the *general* context of initiative amendments?⁴³ Because initiative amendments intended to overrule specific judicial decisions will be proposed less frequently than other types of initiative

43. See *supra* text accompanying notes 25-37.

amendments, the answer is clear: persons desiring to maximize the constitutional protection of individual rights should expect the benefits of a simple majority requirement greatly to exceed the costs more often than not.

III. CONCLUSION

Given the advantages that a simple majority requirement has over any super-majority requirement, it is scarcely surprising that none of the states that provide for initiative amendments has ever required a super-majority of the popular vote for adoption. More startling is the implication of the above discussion for those concerned about the passage of Colorado's Amendment Two and, more generally, the constitutional protection of individual rights. For this analysis ironically suggests that those most distraught about Amendment Two's success at the polls should be the most vigorous defenders of a simple majority requirement for the adoption of initiative amendments—a requirement without which Amendment Two would not have passed.