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Improving Amendment

Jonathan L. Marshfield
University of Florida Levin College of Law, marshfield@law.ufl.edu

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I. INTRODUCTION

State constitutional amendment rules are often criticized for their poor design.[1] The most common criticism is that the frequent use of direct democracy bypasses the virtues of representative decision making and effectively surrenders constitutional politics to well-financed special interests.[2] There is much evidence to support this view. Research suggests that citizens usually give little thought to how they vote on initiatives, rely on only one source of information, and rarely discuss ballot initiates with more than one person.[3] Consequently, citizen-initiative amendments are often ill-considered, poorly vetted, and even discriminatory.[4] The initiative has also been "industrialized" in many states.[5] Professional signature-gathering firms exert significant influence on the ballot agenda, and special-

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* Assistant Professor, University of Arkansas School of Law. I am grateful to Taylor Bish for helpful research assistance in preparing this essay.

1. *See* Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1291-92 (1995).

2. Eighteen states permit citizens to amend the state constitution by using the citizen initiative. *See* John Dinan, *State Constitutional Developments in 2014*, *in* 47 THE BOOK OF THE STATES: 2015 EDITION 3, 3 (2015). For a helpful summary of the many criticisms of the citizen initiative to amend state constitutions, see Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CALIF. L. REV. 1191, 1202-12 (2005).

3. *See* Gais & Benjamin, *supra* note 1, at 1301 (summarizing empirical research regarding voter decision-making on ballot measures).

4. *See id.* at 1301-02 (describing shortcomings of the initiative process); Hoesly, *supra* note 2, at 1209-12 (describing "discriminatory capture" of constitutional initiative).

5. *See* Hoesly, *supra* note 2, at 1202 (describing how the initiative process has been commoditized by private initiative firms that exert significant influence in the process).

interest firms often spend significant money on mass-media campaigns that affect referenda outcomes.[6] Thus, to the extent constitutional amendment should involve a more deliberate and inclusive democratic process, the initiative seems to be performing poorly in many states.[7]

One solution might be to give the legislature greater control over the amendment process.[8] But this approach comes with its own costs. Because of self interest in retaining the political status quo, state legislators often resist popular constitutional reform on important issues such as legislative term limits, redistricting, and campaign finance.[9] In addition to these troubling agency costs, citizens have very few opportunities for meaningful participation and deliberation when the legislature controls the amendment process. Although legislatures submit proposed amendments to a public vote,[10] referenda are often ineffective at fostering meaningful citizen deliberation and participation. In fact, voters often skip referenda questions

6. Reid Wilson, *Initiative Spending Booms Past $1 Billion as Corporations Sponsor Their Own Proposals*, WASH. POST (Nov. 8, 2013), https://www.washingtonpost.com/blogs/govbeat/wp/2013/11/08/initiative-spending-booms-past-1-billion-as-corporations-sponsor-their-own-proposals/ [https://perma.cc/7U96-98G6] (stating that corporations spent "more than $1 billion" on ballot initiatives in eleven states between 2012-2013).

7. *See* Gais & Benjamin, *supra* note 1, at 1302 ("[I]nitiatives are much less successful in producing deliberate, comprehensive, and representative change.") (emphasis omitted); *see also* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 198-99 (1984) (concluding that initiatives are dominated by special-interest groups).

8. *See* Eric Lane, *Men are not Angels: The Realpolitik of Direct Democracy and What We Can do About It*, 34 WILLAMETTE L. REV. 579, 580-81 (1998) (arguing that direct democracy in any form should be opposed in states in favor of representative lawmaking processes).

9. *See, e.g.*, Anne G. Campbell, *Direct Democracy and Constitutional Reform: Campaign Finance Initiatives in Colorado*, *in* 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 175, 191-92 (G. Alan Tarr & Robert F. Williams eds., 2006) (explaining that Colorado General Assembly stalled campaign finance reform); *see also* Gais & Benjamin, *supra* note 1, at 1298 ("Legislatures resist fundamental revisions because many of the demands for reform are in fact aimed at state legislatures and threaten the interests of their members.") (emphasis omitted); Heather K. Gerken, *Getting From Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL'Y 1, 1-2 (2010) (noting that political reform regarding state districting is unlikely to come from state legislatures because "foxes are guarding the henhouse").

10. This is true for all states except Delaware, which allows the legislature to adopt amendments without a public referendum. *See* Dinan, *supra* note 2, at 4-5.

entirely,[11] and research on voter turnout suggests that candidate elections, rather than ballot issues, truly drive voter turnout.[12]

It seems, therefore, that many states need to improve the democratic quality of their amendment procedures. States need effective ways to foster constructive public deliberation, incentivize meaningful citizen participation, and provide checks on the influence of special interests.[13] In this essay, I consider whether states might achieve some of those improvements if they changed the process for ratifying citizen-initiative amendments to require debate and approval by locally elected governing bodies rather than a public referendum.[14] Sending amendment ratification decisions to locally elected bodies could have the beneficial effect of keeping constitutional decision-making close to citizens while at the same time retaining many of the virtues associated with representative decision-making. It might also help undermine special-interest capture by dividing amendment power across numerous independently elected bodies rather than centralizing it within a state legislature or popular majority vote.

To explore the costs and benefits of this proposal, I focus my analysis on the sixteen states that currently allow

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11. *See* Martin P. Wattenberg et al., *How Voting Is Like Taking an SAT Test: An Analysis of American Voter Rolloff*, 28 AM. POL. Q. 234, 247-48 (2000) (explaining that voters tend to skip many ballot questions); *see also* MAGLEBY, *supra* note 7, at 105.

12. *See* Gais & Benjamin, *supra* note 1, at 1302.

13. *Id.* at 1303 ("What we need . . . are constitutional revision procedures that are deliberative as well as legitimate—procedures that command legitimacy by providing for direct citizen participation and control, but that also generate and assess alternative proposals, take into account the best available information about their likely effects, consider the interactions between the proposed changes and the rest of the constitutional structure, and afford opportunities for discussion and accommodation among significant political interests.").

14. Although Congress has required new states to include a referendum as part of their amendment processes, there is no legal requirement that admitted states retain the referendum. Indeed, Delaware's current amendment rules allow the legislature to amend the constitution without a referendum, and several states have utilized amendment procedures in the past that did not require a referendum. Jennie Drage Bowser, *Constitutions: Amend with Care*, ST. LEGISLATURES, Sept. 2015, at 16, http://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx [https://perma.cc/ KBM9-T9RL].

for constitutional amendment by both legislative referral (where the legislature proposes amendments to be ratified by a referendum) and citizen-initiative (where citizens can bypass the legislature and propose amendments to be ratified by a referendum).[15] The specific proposal that I explore is whether those sixteen states could improve their amendment processes by changing amendment rules to require ratification of citizen-initiatives by some majority of existing county governing bodies rather than a statewide referendum.[16]

I conclude that a "county-ratification" model has the potential to improve amendment processes in at least three ways. First, it could improve the quality of citizen participation by reducing the size of the jurisdiction where amendment decisions are debated and decided.[17] Second, it could increase the quality of public deliberation regarding constitutional change by taking amendment decisions from the secrecy and isolation of the voting booth and placing them in the proverbial "town square" where locally elected officials must publicly justify and debate their decision.[18] A county-ratification model might also increase the quality of public deliberation by ensuring that minority communities have a voice in the process.[19] Third, a county-ratification

15. States allowing the citizen initiative include: Arizona, Arkansas, California, Colorado, Florida, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *See* Dinan, *supra* note 2, at 15 (listing state amendment processes). Although Illinois and Massachusetts also allow for amendment by initiative, I do not include them in my analysis because both states place significant limitations on the citizen initiative. Illinois allows citizen-initiative amendments regarding changes to only the legislative article of the Illinois constitution. *See* ILL. CONST. art. XIV, § 3. Massachusetts has an "indirect initiative" process, whereby the legislature must approve all citizen initiatives before they can be placed on the ballot. *See* MASS. CONST. art. XLVIII, pt. 4, § 5. Massachusetts also allows a supermajority of the legislature to amend initiative proposals. *See* MASS. CONST. art. XLVIII, pt. 4 § 3. Because of these limitations, the initiative is an infrequent method of constitutional change in both states. Indeed, neither state has adopted an amendment by initiative in the last decade.

16. As explained in more detail below, all sixteen states already have functioning county governing bodies that could take up proposed amendments. *See infra* text accompanying note 167.

17. *See infra* Section IV.C.1.

18. *See infra* Section IV.C.2.

19. *Id.*

model might limit the influence of special interests by dividing the amendment power between multiple county governing bodies that have incentives to monitor each other and are generally more responsive and accountable to local constituencies.[20]

Of course, the county-ratification model is not a panacea. There are many difficulties and costs associated with this approach. It might, for example, make the citizen-initiative too difficult to use, which would effectively shift all amendment power to the legislature.[21] County representatives might also be ill-suited to decide statewide constitutional issues because of mismatched expertise and limited resources.[22] A county-ratification model could also result in unconstitutional voter dilution because of significant population differences between counties.[23] These issues, among others, represent serious difficulties with the county-ratification model that cannot be overlooked. My goal in this essay is only to suggest that the county-ratification model deserves serious consideration as states struggle with how they might improve their amendment processes.

Part II provides a brief summary of state constitutional amendment rules and practices with an emphasis on the states' tradition of assessing and redesigning amendment rules from time-to-time. Part III explores the major problems with the two dominant amendment methods: the legislative-referral and citizen-initiative methods. Part IV presents my county-ratification model and argues that it has the potential to improve the democratic quality of state amendment practices. Part V addresses some important difficulties and likely costs associated with the county-ratification model.

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20. *See infra* Section IV.C.3.
21. *See infra* Section V.B.
22. *Id.*
23. *See infra* Section V.A.

II. STATE CONSTITUTIONAL AMENDMENT METHODS AND DESIGN

Because Article V of the United States Constitution has remained unchanged since 1788 and seems immune to redesign, it is easy to overlook the states' long tradition of experimenting with amendment procedures.[24] This Part provides a very general overview of the dominant amendment methods that the states have considered and developed over time. As others have noted, "no catalogue of the mechanisms for state constitutional change can fully capture the richness or the variety of the approaches that have been used."[25] Thus, the purpose of this Part is not to chronicle all developments in state amendment design, but only to demonstrate that the states have a strong tradition of reevaluating and redesigning their amendment procedures. This Part also provides an original tabulation of recent amendment-rate data, which suggest that despite variety in amendment processes, the vast majority of state amendments occur through two processes: (1) legislative proposals ratified by referenda, and (2) citizen initiatives ratified by referenda.

A. The State Tradition of Redesigning Amendment Processes

The whole idea of incremental constitutional change through textual amendment originated in state constitutions.[26] Following John Locke's 1669 Fundamental Constitutions of Carolina, which famously declared that

24. *See generally* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 29-63 (2006) (describing the many revisions to state amendment procedures over time).

25. G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1077 (2005).

26. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 136-42 (Rita Kimber & Robert Kimber trans., 1980) (discussing how early state constitutional theory broke from thinking of the time regarding supremacy and inalterability of constitutional law); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 614 (1969).

"these fundamental constitutions... shall... remain... unalterable,"[27] the states began to recognize the need for an ordered process of constitutional change.[28]

As the states began to experiment with how best to design an amendment process, they were generally weary of amendment procedures that empowered the legislature or other representatives to amend the constitution without direct popular involvement.[29] Only three of the twenty-six state constitutions adopted before 1800 authorized the legislature to amend the constitution.[30]

The dominant early approach to amendment was to require a popularly elected constitutional convention for all amendments.[31] Those conventions were elected separately from the legislature and convened to consider specific, predetermined issues.[32] This "convention model" of amendment was intended to preserve popular sovereignty by ensuring that elected representatives could not abuse the amendment power.[33] Generally, conventions were authorized to adopt amendments without any further ratification or a popular referendum.[34] The deliberation and

27. Sanford Levinson, *Introduction: Imperfection and Amendability, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 3, 4 (Sanford Levinson ed., 1995) (quoting and discussing the 1669 Fundamental Constitutions of Carolina).

28. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 70-75 (1998) (discussing development of early state amendment procedures). Six of the original sixteen state constitutions did not contain any rules for amendment or revision. *See id.* at 62-63 (listing early states without amendment rules).

29. *See* ADAMS, *supra* note 26, at 142 ("The point at issue clearly was the relationship between the sovereign people and their elected rulers.").

30. *See* TARR, *supra* note 28, at 61, 73-74 (summarizing development of early state amendment procedures).

31. *See* DINAN, *supra* note 24, at 41; TARR, *supra* note 28, at 73-74.

32. *See* WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 28-29 (1910).

33. *See* TARR, *supra* note 28, at 70-71.

34. *Id.* The 1784 New Hampshire constitution was the first to adopt a referendum requirement stating that all amendments adopted by the convention must be approved by a majority of the "qualified voters." DODD, *supra* note 32; James A. Henretta, *Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 826-31 (1991) (noting "[o]nly two of the twenty-eight state constitutions adopted before 1800... were sent to the people for ratification," and that amendment rules "placed control of that process in the hands of the legislature").

approval of a convention was considered sufficient democratic process to legitimate amendments.[35]

By the mid-1800s, most states recognized that the convention process was too inflexible.[36] Rapidly changing circumstances put pressure on state constitutional texts to change, and the convention model was too cumbersome and rigid to accommodate those needs.[37] Thus, states began to debate alternative designs for the amendment power.[38] The dominant design concern during this period was to make amendment easier and more responsive to changing circumstances while retaining appropriate constitutional stability.[39]

The states experimented with a variety of approaches that authorized legislatures to adopt amendments.[40] Some states, for example, authorized the legislature to adopt amendments with a supermajority in two successive legislative sessions.[41] This design was intended to facilitate deliberation within the legislature and ensure public accountability with an intervening legislative election.[42] Other states required amendments to be separately approved by supermajorities in both houses and submitted to a public referendum.[43] As states debated and deployed these varying designs, the dominant approach that emerged was to require supermajority approval by the legislature, followed by a popular referendum.[44]

The next major development in state amendment design was the product of the Progressive movement of the early twentieth century.[45] As a result of state legislatures

35. TARR, *supra* note 28, at 70.
36. DINAN, *supra* note 24, at 32-37, 41.
37. *Id.*
38. *Id.* at 41-47.
39. *Id.* at 42-44; DODD, *supra* note 32, at 120.
40. DINAN, *supra* note 24, at 43-44; *see also* DODD, *supra* note 32, at 118-20 (recounting the origins of legislative amendments).
41. DINAN, *supra* note 24, at 43.
42. *Id.*; DODD, *supra* note 32, at 122.
43. DINAN, *supra* note 24, at 43.
44. *Id.* at 44-45.
45. *Id.* at 47-48.

and judges blocking popular Progressive social reform legislation, there was a growing populist movement to further "liberalize" amendment procedures.[46] The most significant design change during this period was the adoption of the constitutional-initiative as an entirely new mechanism for amendment.[47] The general structure of the constitutional-initiative was to allow citizens to propose and ratify constitutional amendments without any involvement by the legislature.[48] The initiative was intended to address concerns regarding special-interest capture in state legislatures and facilitate greater citizen participation in constitutional politics.[49] Oregon was the first state to adopt the constitutional-initiative in 1902, followed by seventeen other states by the end of the twentieth century.[50]

The modern constitutional commission is a further development (or perhaps refinement) in state amendment design.[51] In general, commissions are independent bodies that provide recommendations for constitutional change to the legislature, a constitutional convention, or the people directly.[52] Commissions are generally established to provide expert consideration of constitutional reform, but they do not have a mandate to adopt constitutional changes on their own.[53] Florida's Constitutional Revision Commission, constitu- tionalized in 1968, is the one exception to this structure.[54] The Florida Commission is convened

46. *Id.* at 47-50.

47. *Id.* at 59.

48. DINAN, *supra* note 24, at 59.

49. *Id.* at 59-60.

50. *Id.* at 62, 313 n.132 (listing the eighteen states and dates of adoption).

51. *See generally* Tarr & Williams, *supra* note 25, at 1094-1100 (describing the various forms of constitutional commissions).

52. *See* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 4 (1996).

53. *Id.* at 5. Commission members are usually appointed rather than elected, but appointees can be already-elected officials, citizens, experts, stakeholders, or any combination of these. *Id.* at 2 (characterizing state constitutional commissions as "appointed").

54. *See generally* Tarr & Williams, *supra* note 25, at 1097-99 (describing the Florida commission process).

automatically every twenty years, and its recommendations are automatically placed on the ballot for ratification by referendum.[55] Florida's variation on the constitutional commission is significant from the perspective of constitutional design because it was intended to operate as a check on legislative capture and to allow an independent body to propose necessary amendments directly to citizens.[56]

Current state amendment procedures represent variations on and combinations of these core components. Forty-nine states currently permit amendments by legislative approval, followed by a public referendum for ratification.[57] Eighteen of those states also permit amendments by constitutional-initiative, although some of those states limit the use of the initiative to certain subjects.[58] Delaware is somewhat unique in that it does not allow for amendment by public initiative and is the only state that permits amendment by the legislature without a ratifying referendum.[59] At least three states still allow for amendments to be made by calling a limited constitutional convention to consider specific reforms.[60] And, as noted above, Florida's amendment rules require a constitutional commission to be formed every twenty years and authorizes the commission to put proposed amendments directly to a referendum.[61]

A few states have experimented with integrating the constitutional-initiative and legislative-referral methods of amendment. Massachusetts, for example, requires that all

55. *Id.* at 1097.

56. *Id.* at 1098 n.122.

57. *See* Dinan, *supra* note 2, at 13 tbl.1.2.

58. *See id.* at 15 tbl.1.3; *see also, e.g.*, MASS. CONST. art. XLVII, § 2 (excluding certain subjects from amendment by initiative).

59. *See id.* at 13-15 tbls.1.2 & 1.3. The Delaware Legislature must approve amendments by two-thirds majorities in two successive legislative sessions. *Id.* at 13 tbl.1.2.

60. *See* Tarr & Williams, *supra* note 25, at 1086 (discussing Kansas, North Carolina, and Tennessee).

61. *Id.* at 1097. Rhode Island has a hybrid approach that requires a periodic commission to consider presenting specific constitutional questions to the electorate and whether the electorate should call a constitutional convention. *Id.* at 1099-1100.

constitutional initiatives be approved by one-fourth of the legislature sitting jointly in two successive legislative sessions.[62] Similarly, Mississippi allows the legislature to submit an amended or alternative proposal to voters alongside any initiative proposals.[63] These refinements on the amendment process seem designed to provide a check on direct democracy by subjecting the initiative to review by elected representatives.

In sum, the states have a tradition of revising and experimenting with amendment processes. It is important, therefore, that scholars assess existing amendment processes and provide useful guidance as to how amendment processes might be improved in the future.

B. Contemporary State Practice of Formal Amendment

Despite the various amendment methods available under state constitutions,[64] data regarding the actual use of amendment procedures are helpful in focusing recommendations for design reform. Two points are particularly important for present purposes: (1) states amend their constitutions relatively frequently on a variety of important issues, and (2) despite the various state amendment processes, 99.5% of amendments in the last decade occurred through either the legislative-referral or the citizen-initiative method,[65] making these two approaches the dominant methods of state constitutional change.

62. *See* Dinan, *supra* note 2, at 15 tbl.1.3. Massachusetts also limited the use of the initiative by excluding certain subjects from amendment by initiative. MASS. CONST. art. XLVII, § 2.

63. Dinan, *supra* note 2, at 15 tbl.1.3. Illinois limits the use of the initiative to only amendments regarding the structure of the legislative branch. *Id.*

64. *See* Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 334-35 (2010) (noting there are currently four dominant methods of amendment: "(1) voter adoption of legislatively-referred proposals, (2) voter adoption of citizen-initiated proposals, (3) voter adoption of commission-referred proposals, or (4) through constitutional conventions") (footnotes omitted).

65. *See infra* text accompanying notes 71-73.

First, as many others have noted, state constitutional amendment has become very frequent in most states.[66] Although there is great variety, states revise their constitutions every three years on average.[67] Additionally, those amendments touch on a variety of important structural and rights issues.[68] Amendment practice is thus a significant aspect of constitutional practice in the states. Unlike the United States Constitution, where constitutional change occurs primarily through judicial review of an infrequently amended text, state constitutional change is much more institutionally interactive, with democratic institutions playing a significant role in the development of constitutional rules.[69] It is therefore important that amendment processes be critically examined and refined when necessary.

Another important observation from state amendment data relates to the relative use of the various methods of amendment. Although the states have experimented with a variety of different amendment approaches, amendments seem to occur primarily through legislative referral to referenda or citizen initiatives.[70] There have been a few amendments by the convention or commission methods, but just over 91% of the 575 state constitutional amendments adopted over the last decade occurred through the

66. *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1672-75 (2014).

67. *Id.* at 1674.

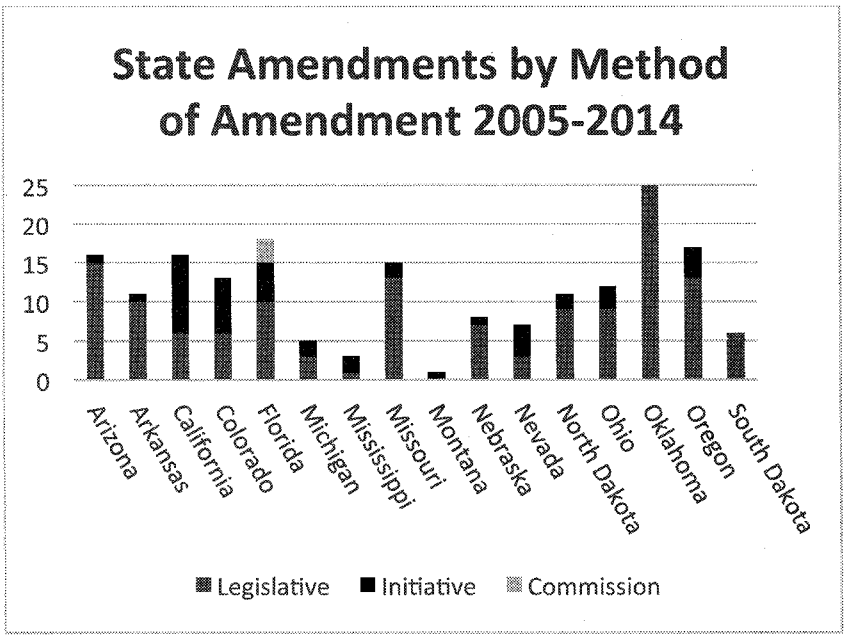
68. There were 603 proposed amendments to state constitutions (excluding local amendments) between 2002 and 2008. *See* John Dinan, *State Constitutional Developments in 2008*, *in* 41 THE BOOK OF THE STATES: 2009 EDITION 3, 6 tbl.B (2009); John Dinan, *State Constitutional Developments in 2007*, *in* 40 THE BOOK OF THE STATES: 2008 EDITION 3, 5 tbl.B (2008). Of these, 242 related to issues of government structure, and 110 related to rights issues. This means that more than fifty-eight percent of all proposed amendments to during this period concerned issues of government structure or rights. Of the proposed amendments that were actually adopted, an even higher percentage related to structural or rights issues.

69. Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217 (2016).

70. TARR, *supra* note 28, at 139; Dinan, *supra* note 2, at 4 tbl.A.

legislative referral and referendum method.[71] Approximately 7.5% of amendments in the last decade occurred through citizen initiatives,[72] and less than 1% occurred through commissions.[73]

The data are interesting on a state-by-state level for states with at least two methods of amendment.[74] The chart below illustrates the relative use of the methods of amendment in these states.[75]



71. This percentage is calculated based on my original tabulation of amendment data as reported in the annual *Book of the States* from 2005-2015. Of the 575 amendments adopted, 527 of them were through the legislative-referral method.

72. Forty-five of the 575 amendments were adopted through the initiative process.

73. Only three of the 575 amendments were adopted through the commission process.

74. I did not include Illinois or Massachusetts in this chart because of the significant limitations on the initiative discussed. *Supra* note 15.

75. These data are from my tabulation of amendment data from the *Book of the States*. *See supra* note 71 (explaining data tabulation). All tabulations are on file with the author and are available upon request.

As the data show, the legislative-referral method remains relevant even in states where citizens are active in using the initiative. In California, for example, thirty-eight percent of all amendments over the last decade were initiated by the legislature.[76] Oklahoma is also interesting because it has adopted the most amendments in the last decade of any of these states (twenty-five amendments), but all of those amendments were by legislative referral.[77] Finally, it is interesting to note that the average amendment rate between states with the initiative and states without the initiative is very similar. The average amendment rate for states without the initiative is 11.5 amendments over the last ten years.[78] For states with both the initiative and the legislative-referral process, the average amendment rate is 11.3.[79] Thus, it appears the contemporary amendment practice in the states is dominated by these two methods. It is now appropriate to consider existing criticisms of these methods and how they might be improved.

III. PREVAILING CRITICISMS OF STATE AMENDMENT METHODS

This Part provides a brief summary of the prevailing criticisms of the two dominant methods of state constitutional amendment: the legislative referral and the citizen initiative.

A. Criticisms of the Legislative-Referral Method

As noted above, the legislative-referral method is the dominant method of amendment in most states. Each state has its own important history with adopting and

76. This percentage is calculated based on my original tabulation of amendment data as reported in the annual *Book of the States* from 2005-2015.

77. This percentage is calculated based on my original tabulation of amendment data as reported in the annual *Book of the States* from 2005-2015.

78. This includes Massachusetts and Illinois. The average amendment rate is simply the total number of amendments between 2004 and 2015, divided by the total number of states.

79. In the past decade, there were only three amendments adopted based on a commission's referral. Those were in Florida in 2008.

implementing this approach, but the legislative-referral method is generally intended to ensure that proposed amendments are deliberated by representatives with incentives to "foster compromise, continuity, and consensus"[80] before submitting vetted proposals to a popular vote. Notwithstanding its dominance in current state constitutional amendment practice, there are real problems with the legislative-referral method of amendment. This Section briefly describes the method's general shortcomings.

1. *Legislative Self-Interest As Undermining Democratic Process*

The legislative-referral method gives state legislators the power to initiate amendments as representatives of the people.[81] In this capacity, legislators are expected to act in the interests of their constituents and the polity as whole rather than their own self-interest.[82] However, many constitutional reforms create a significant conflict between legislator- and constituent-interests that can undermine the democratic quality of the legislative-referral method.[83]

This is primarily because elected legislators have a vested personal interest in retaining the political status quo that resulted in their election.[84] Constitutional amendments related to issues such as redistricting, campaign finance, legislative term limits, and voter registration and identification often create an incongruence between popular collective preferences and representative decision making.[85]

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80. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 43 (1995).

81. *See* Matthew Robinson, Note, *Deferring to Congressional Interpretations of Ambiguous Statutory Provisions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 565, 569 (2013).

82. *See id.* at 590.

83. Gais & Benjamin, *supra* note 1, at 1298; *see also* Gerken, *supra* note 9.

84. *See* Gerald Benjamin, *Constitutional Amendment and Revision*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 178 (G. Alan Tarr & Robert F. Williams eds., 2006); *see also* Gais & Benjamin, *supra* note 1, at 1298; Gerken, *supra* note 9, at 1-2.

85. *See* Campbell, *supra* note 9, at 176, 179-93 (discussing the legislature's conflict of interest regarding campaign-finance reform); Gerken, *supra* note 9 (same

This can result in representatives using the amendment power to serve their own interests by introducing amendments that would preserve the political status quo or resisting amendments that would change the status quo.[86]

Thus, a major issue surrounding the legislative-referral method is the legislature's ability to misuse the amendment power in ways that further the self-interest of individual legislators or political parties and fail to respect the people's preferences. Improving the democratic quality of the amendment process would suggest the need for a more direct method of amendment that is not entirely dependent on the legislature.

2. *Capture and Agency Costs As Undermining Popular Sovereignty*

A related problem with the legislative-referral method is its vulnerability to "capture" by special interests. Capture occurs when groups or people with a personal interest in lawmaking gain a disproportionate influence in

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regarding redistricting reform); David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713, 763-64 (2002) (same regarding legislative term limits); Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 331-32 (2007) (same regarding redistricting); Mark Thomas Quinlivan, Comment, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2386 (1989) (same regarding voter-registration laws). Voter-identification laws are an interesting example of this phenomenon because they can present a clear conflict of interest between citizens and representatives, but recently they have involved action (rather than inaction) by state legislatures to preserve the status quo. *See* Bob von Sternberg & Rachel E. Stassen-Berger, *GOP Proposing Amendments to Avert Possible Veto on Legislation*, STAR TRIBUNE (Apr. 27, 2011, 11:05 PM), http://www.startribune.com/gop-proposing-amendments-to-avert-possible-veto-on-legislation/120831589/ [https://perma.cc/6PQA-DHCL] (discussing a proposed Minnesota amendment to require voter identification as a way to entrench Republican political power). Interestingly, the amendment was placed on the ballot in Minnesota, but rejected by voters. Martin Moylan et al., *Voter ID amendment defeated*, MPR NEWS (Nov. 7, 2012, 1:46 AM), http://www.mprnews.org/story/2012/11/06/politics/voter-id-amendment [https://perma.cc/QG7G-GY5L].

86. Gerken, *supra* note 9.

the lawmaking process.[87] When this occurs, the lawmaking process is used in a manner that benefits a small group of interested stakeholders and is incongruent with popular political preferences.[88]

Unfortunately, state legislatures have a history of being captured (or "corrupted") by special interests from time to time.[89] If the legislature also controls the amendment power through the legislative-referral method, special interests can entrench favorable policies in the state constitution even though the public does not support them.[90] Additionally, if special interests control the legislature, the people have limited means of taking back control of their constitution.[91] Thus, from a design perspective, if the amendment power is to provide a check on elected representatives, it must be available to the public in a more direct manner than that provided by the legislative-referral method.[92]

3. *Limited Citizen Deliberation or Involvement*

A further limitation on the legislative-referral method is that it provides very few opportunities for meaningful

87. *See* Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 632 (1998) (providing a general definition of government capture).

88. *Id.* at 584-85.

89. TARR, *supra* note 28, at 110-13 (describing historical corruption of state legislatures by special interest); *see also* State v. Miller, 45 Mo. 495, 498 (1870) (claiming that there was a "most vicious and corrupt system which prevailed in our legislative bodies"). The influence of special interests on state legislatures persists today. *See* Editorial Board, *Post's Endorsement: Vote No on Ballot Question 1 in Va.*, WASH. POST (Nov. 1, 2012), https://www.washingtonpost.com/opinions/posts-endorsement-vote-no-on-ballot-question-1-in-va/2012/11/01/62636726-1c8e-11e2-ba31-3083ca97c314_story.html [https://perma.cc/6VCK-PRGV] (describing eminent-domain amendment to Virginia constitution that was the product of legislators "in thrall to special interests").

90. *See* Gais & Benjamin, *supra* note 1, at 1298, 1314.

91. *See* Ora Fred Harris, Jr., *Complex Product Design Litigation: A Need for More Capable Fact-Finders*, 79 KY. L.J. 477, 486 n.52 (1991) ("Because of political compromising with and influence peddling by special interest groups, the state constitutional amendment process is particularly vulnerable to dilution.").

92. *See* DINAN *supra* note 24, at 47-51, 53 (describing this debate in various state constitutional conventions).

citizen involvement in the amendment process.[93] The legislative-referral method permits citizen involvement only at the ratification stage, and then only by casting an "up-or-down" vote on the legislature's proposal.[94] Because of the size and geographical dispersity of state populations, most citizens find state government too remote for them to get involved in "thick" forms of citizen participation, such as attending legislative debates and contacting state representatives regarding proposed amendments.[95]

Additionally, even "thin" forms of participation, like voting on amendment referenda, seem very poor methods for fostering citizen involvement and participation. Empirical research into voter choice suggests that citizens are generally more attentive to candidate elections at the state level than ballot questions, and that many voters skip ballot questions altogether.[96]

Thus, the legislative-referral method appears to provide few opportunities for direct citizen involvement and deliberation regarding proposed constitutional changes.

B. Criticisms of the Citizen-Initiative Method

The citizen-initiative method of state constitutional amendment is a relatively recent innovation. As noted above, Oregon was the first state to adopt the constitutional-initiative process in 1902.[97] There are now eighteen states

93. *See id.* at 52 (discussing need for greater citizen involvement in amendment process).

94. *See* Tarr & Williams, *supra* note 25, at 1092-94 (describing legislative referral method of amendment).

95. I have argued elsewhere that citizens are more likely to engage in this type of political activity at the state level than at the federal level. *See* Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1187-88 (2011). However, empirical research suggests that even within state jurisdictions, most citizens are unlikely to participate in this way when jurisdictions have more than 1 million people. *See* J. ERIC OLIVER, DEMOCRACY IN SUBURBIA 42 (2001) (finding that only twenty-five percent of citizens in cities of one million people or more contact local representatives).

96. *See generally* MAGLEBY, *supra* note 7, at 77-99 (comparing voter turnout in ballot-question-only elections to candidate elections); Gais & Benjamin, *supra* note 1, at 1302 (summarizing empirical research regarding voter decision-making on ballot measures).

97. *Supra* note 50 and accompanying text.

that permit citizens to amend their constitutions to some degree through this method.[98] Although each state has its own history in adopting the constitutional initiative, states generally adopted the initiative as a mechanism for restoring popular sovereignty to constitutional law.[99] However, after more than a century of use in several states, significant problems have developed in the use of the citizen-initiative method.

1. *Circumventing Deliberation and Lawmaking Expertise*

Perhaps the most common and persistent criticism of the citizen-initiative method of state constitutional amendment is that it circumvents constructive political deliberation regarding fundamental political issues. This critique echoes Madison's famous argument in favor of representative decision making.[100] Madison argued that direct democracy can result in near-sighted decision making void of administrative expertise and lacking relevant information.[101] Madison also feared that direct democracy was more likely to be misused by interest groups in furtherance of goals that were not in the best interest of society as a whole.[102] For Madison, representative decision making was preferable because it involved informed debate by professional lawmakers who were best situated to evaluate a proposal's broad impact on society as a whole.[103]

From a design perspective, this process can be fostered by submitting proposals to an open deliberation by elected representatives. As Hans Linde noted, "Deliberation in representative bodies does not often achieve its ideal of

98. *See supra* note 15 and accompanying text (discussing these states and limitations on initiative).

99. *See* DINAN *supra* note 24, at 60 (discussing historical reasons for adoption of the initiative); Magleby, *supra* note 80 (stating the initiative was a check on state legislatures and courts and served to promote "widespread participation, open access to the political agenda, and political equality").

100. *See* THE FEDERALIST NO. 10 (James Madison).

101. *Id.*

102. *Id.*; *see* Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L. Q. 159, 166 (1989).

103. *See* THE FEDERALIST NO. 10, *supra* note 100.

dispassionate debate and logical persuasion, but it does institutionalize" decision making in a way that facilitates discussion regarding society's interests as a whole rather than the particular preferences of individual citizens or groups.[104] Representatives are publically accountable to broad-based constituencies that likely have varied interests. They also deal repeatedly with fellow representatives regarding many different issues. Thus, representatives must evaluate their votes in a broader context. They must identify and rank public priorities, and make decisions about how best to allocate limited public resources as a whole. All of these factors can facilitate a more holistic and informed decision-making process.

Many commentators have argued that amendment by initiative circumvents this deliberative process.[105] This method allows any citizen to bypass representative decision making and place constitutional changes on the ballot simply by obtaining a set number of signatures from fellow citizens.[106] Citizens then vote on the proposal by casting an independent and private ballot.[107] Although this process brings decision making directly to individual citizens, it does not provide a forum for deliberation between decision-makers and it assumes that citizens will independently gather relevant information and obtain the expertise necessary to decide an issue.[108] The secrecy of the voter ratification process also makes it susceptible to short-sighted, narrow, and discriminatory choice.

Empirical research into the initiative process suggests that these criticisms are well founded.[109] Voter choice on initiatives seems to be heavily affected by general

104. Linde, *supra* note 102, at 169.

105. *See, e.g.*, Gais & Benjamin, *supra* note 1, at 1301-02 (describing shortcomings of initiative process).

106. *See* M. DANE WATERS, THE INITIATIVE AND REFERENDUM ALMANAC 2-29 (2003) (describing initiative process in all initiative states).

107. ARK. CONST. art. V, § 1.

108. Gais & Benjamin, *supra* note 1, at 1292.

109. *Id.* at 1301-02 ("[R]esearch on citizen initiatives suggest that they hardly resemble a deliberative process.").

discontent with bureaucracy and government officials' perceived inefficiencies rather than the specific merits of a particular proposal.[110] This may be in part because voters succumb to significant information difficulties that impede critical decision making and constructive deliberation.[111] One study found that many initiative voters learn about the initiative only days before the vote, consult only one source of information regarding the initiative, and very rarely discuss the initiative with anyone.[112] Initiative campaign material also suggests "little evidence of real learning about the issues."[113]

These findings suggest significant problems with the contemporary constitutional-initiative. The initiative process seems generally ineffective at producing informed, high-quality collective decisions that serve the interests of society as a whole.

2. *Capture by Well-Funded Special Interests*

The citizen initiative was initially envisioned as a populist check on government.[114] Ideally, citizens would mobilize and use the initiative to correct government corruption or capture and restore power to the people. However, a recurring criticism of the contemporary initiative process is that it is has become more susceptible to capture by special interest groups than state legislatures.[115]

There is compelling empirical evidence that special interests often control the initiative process.[116] A niche

110. *Id.* at 1301.

111. *Id.*

112. *See id.* This means that many initiatives are decided based on off-the-cuff visceral reactions by voters rather than sustained deliberation between decision makers.

113. *See* Gais & Benjamin, *supra* note 1, at 1302.

114. *See* Hoesly, *supra* note 2, at 1193 ("Originally, backers of direct democracy believed that it would be 'the medicine of the constitution'....") (quoting JAMES D. BARNETT, THE OPERATION OF THE INITIATIVE REFERENDUM, AND RECALL IN OREGON 78 (1915)).

115. *See id.* at 1202.

116. A compelling anecdotal example is a recent amendment to the Ohio constitution that would have legalized marijuana and granted a production monopoly to any supporter of the initiative that contributed at least $2 million to the campaign.

industry has developed around the initiative in many states.[117] Initiative firms will guarantee the required number of signatures for an initiative "on a money back basis," and promise to collect valid signatures in as little as forty-five days.[118] The going rate for a guaranteed ballot initiative in California, for example, was approximately $1 million in 1998.[119]

Ballot industrialization has resulted in a massive influx of special-interest financing, making it increasingly difficult for volunteer-only initiatives to succeed.[120] Indeed, between May 2012 and November 2013, corporations spent more than $1 billion in ballot initiatives in only eleven states,[121] and the number of ballot initiatives using only citizen volunteers is very small compared to initiatives run by firms.[122] In Oregon, for example, ninety-four percent of initiatives on the ballot between 1996 and 2002 were handled by paid signature-gathering firms, and eighty percent of initiatives on the ballot in Washington between 1992 and 2000 were by paid gathering firms.[123] In the words of a signature-gathering firm in Washington, "there isn't a chance in the world a volunteer effort is going to make

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See Noah Feldman, *Ohio Rejects Pot, but its Constitution Gets Weird*, BLOOMBERG VIEW (Nov. 4, 2015, 1:32 PM), http://www.bloombergview.com/articles/2015-11-04/ohio-rejects-pot-but-its-constitution-gets-weird [https://perma.cc/9RCB-35SY]. Another particularly egregious example was Proposal 6 in Michigan regarding the construction of a new bridge into Canada. *See Michigan Proposal 6 Results: Voters Reject Ballot Proposal Requiring Public Vote on International Bridges*, HUFFINGTON POST (Nov. 7, 2012, 1:03 AM), http://www.huffingtonpost.com/2012/11/07/michigan-proposal-6-results-bridge_n_2084608.html [https://perma.cc/VB5F-ZMPY]. Proposal 6 would have amended the Michigan constitution to require a public referendum before the state could spend any money to construct any new international bridges. *Id.* The proposal was sponsored almost entirely by the owner of the only existing bridge between Detroit and Canada. *Id.*

117. *See* Hoesly, *supra* note 2, at 1202 (describing this "industrialization" of the initiative process).

118. *See id.*

119. *Id.* at 1202-03.

120. *Id.*

121. *See* Wilson, *supra* note 6.

122. *See* Hoesly, *supra* note 2, at 1203.

123. *Id.*; *see also* Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 53, 55 (2003).

it."[124] Additionally, special interests spend significant capital successfully opposing volunteer amendments that might negatively affect them.[125] One study found that this strategy is particularly effective: "[O]pponents of an initiative win 80% of the time when they outspend proponents."[126]

Consequently, the initiative process is often dominated by well-funded special interest groups rather than genuine populist movements.[127] This has led some observers to conclude that although the initiative was intended to foster "grassroots democracy," it has instead become a haven for "greenback democracy."[128] Because "anybody can buy their way on the ballot,"[129] the initiative often "[a]llow[s] rich individuals or well-financed special interests to qualify measures for the ballot almost regardless of either the depth or intensity of popular support."[130]

There have been efforts to reform the initiative process by imposing restrictions on paid signature gatherers and other requirements for signature gathering.[131] These measures have had some impact, but they have not fully addressed the problem, and the Supreme Court has limited the type of restrictions states can place on signature gathering.[132] Indeed, most states with the initiative still allow paid signature gatherers without significant limitations, and the process still seems too easily dominated by well-funded interest groups.

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124. Ellis, *supra* note 123, at 54.

125. *See* Hoesly, *supra* note 2, at 1204-05.

126. *Id.* at 1205.

127. *See id.* at 1202 ("Professional signature gatherers and political strategy firms have long dominated the process."); *see also id.* at 1206-09 (noting that this problem involves more than corporate interest groups; it also involves ideologues with funding from national sources). *But see* Ellis, *supra* note 123, at 54 (discussing unfunded volunteer amendments that are successful).

128. *See* Ellis, *supra* note 123, at 58.

129. *See id.*

130. *See id.*

131. *See* Hoesly, *supra* note 2, at 1212-13 (discussing reform efforts).

132. *See* Meyer v. Grant, 486 U.S. 414, 416, 428 (1988) (holding that states cannot criminalize paid signature gathering).

3. *Exasperating the Problem of Abusive Majorities*

Another criticism of the initiative is that it exasperates majoritarian abuses. This critique is particularly relevant to the use of the initiative in the constitutional context.

Contemporary constitutional theory posits that one function of a constitution is to protect minorities from majorities who might use democratic institutions in a discriminatory manner.[133] To do this, constitutions must be entrenched beyond the realm of ordinary politics and should be subject to lawmaking processes that protect against simple aggregation of majoritarian preferences. If constitutions are easily amended by a private vote of the majority, they are more likely to be used as instruments of discrimination rather than minority protection.[134]

Critics of the initiative process note that the initiative is particularly vulnerable to majoritarian abuses for at least three related reasons. First, the initiative bypasses any meaningful public deliberation regarding constitutional changes that might affect minorities.[135] Public deliberation by elected officials can foster understanding and tolerance for the needs and vulnerabilities of minorities and expose private prejudices that have no place in public law.[136] To be sure, representative bodies are capable of discriminatory action, but transparent public deliberation can sometimes mitigate animus by making it public and requiring reasoned justifications.

Second, the initiative process allows for constitutional change by simple aggregation of confidential citizen preferences.[137] An amendment is ratified when a majority of citizens, acting alone and in private, register their

133. Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1179-80 (1977).

134. This, of course, is a simplification of many deep and complicated issues in constitutional theory.

135. Hoesly, *supra* note 2, at 1203.

136. *See* Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 343-45 (2009).

137. DINAN, *supra* note 24, 59-60.

support for the amendment.[138] This process bypasses many of the procedural safeguards that protect minorities from abuses by other democratic institutions. Legislators, for example, are subject to public transparency for their votes. They cannot privately vote on explicitly discriminatory legislation to pursue their own animus without public exposure. Additionally, legislators must interact with constituents and other legislators on a recurring basis. Their voting track record can impact their relationships with their constituents and colleagues, and, consequently, can affect their voting behavior on discriminatory legislation. In a referendum, on the other hand, proposals are decided entirely on the confidential preferences of individual voters.[139] This suggests that the initiative is more susceptible to discriminatory uses because voters need not discuss or even reveal their decision with anyone. Empirical studies confirm that the initiative is often used to enact discriminatory measures.[140]

Third, referenda votes on initiatives seem to marginalize minority voters. Empirical studies show that "[v]oting on ballot propositions only amplifies the social class bias in participation, because those with lower incomes or less education tend to skip voting on ballot questions at much higher rates."[141] The referendum also seems to be a particularly poor method of including minority viewpoints because the simple aggregation of votes means that minority voting blocs will be canceled out by majorities without any formal opportunities for discussion or debate between majority and minority groups. Consequently, "initiatives are often decided by a minority of voters whose preferences frequently differ from state citizens as a whole."[142]

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138. Magleby, *supra* note 80, at 13.

139. Avigail Eisenberg, *When (if Ever) Are Referendums on Minority Rights Fair?*, *in* REPRESENTATION AND DEMOCRATIC THEORY 3, 8 (David Laycock ed., 2004).

140. *See* Hoesly, *supra* note 2, at 1209-12 (listing examples).

141. *See* Magleby, *supra* note 80, at 33-34.

142. *See* Gais & Benjamin, *supra* note 1, at 1302.

IV. WHY INCLUDING COUNTY LEGISLATIVE BODIES MIGHT IMPROVE THE AMENDMENT PROCESSES

Despite the serious problems with existing amendment procedures, there has been very little attention given to creative alternatives. In this Part, I explore whether including county legislative bodies in the amendment process could improve the democratic quality of amendment. I first describe the basic structure of county government. I then provide a sketch of my proposal for including county legislative bodies in the initiative process. I conclude by explaining why my proposal might improve the democratic quality of the initiative process.

A. The General Structure and Function of County Governing Bodies

Counties are an intermediate level of government between state government and municipal/city government.[143] With the exceptions of Connecticut, Rhode Island, and Virginia, every state establishes functioning county governments that collectively cover the entire state territory.[144] The primary role of county government is to provide basic government services to citizens within the county.[145] Counties are also an important administrative arm of the state because they bridge the gap between state policy and local service delivery.[146] County governments have also taken on an increasingly important role in the delivery and administration of federal services.[147]

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143. *See* NAT'L ASS'N OF COUNTIES, COUNTY GOVERNMENT STRUCTURE: A STATE BY STATE REPORT 6-8 (2009); OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 24-25 (4th ed. 2015).

144. *See* REYNOLDS, *supra* note 143.

145. *Id.* at 25.

146. *See* NAT'L ASS'N OF COUNTIES, *supra* note 143, at 6; Tanis J. Salant, *County Governments: An Overview*, INTERGOVERNMENTAL PERSPECTIVE, Winter 1991, at 7 (providing a helpful summary of county government functions).

147. *See* Linda Lobao & David S. Kraybill, *The Emerging Roles of County Governments in Metropolitan and Nonmetropolitan Areas: Findings From a National Survey*, 19 ECON. DEV. Q. 245, 246 (2005).

County governments generally have jurisdiction over incorporated municipalities within their territories, although state law often grants incorporated municipalities independence from counties regarding certain policies and services.[148] In large metropolitan areas, city governments will often "consolidate" with county government to create one body that governs the entire metropolitan area.[149] Despite these jurisdictional complexities, all citizens living within states other than Connecticut, Rhode Island, and Virginia have representation in some kind of county governance, even if only within a consolidated city-county structure.[150]

The structure of county government varies from state to state, and in a few instances, within a state.[151] The most common structure is the "commission form," which usually consists of a governing body of between three and five elected representatives.[152] These bodies often have executive and legislative authority, and they sometimes share responsibility for county administration with other constitutionally protected county officials such as county clerks, auditors, sheriffs, and treasurers called "row officers."[153]

Variations in county governance focus mostly on the structure of executive authority.[154] Some states, such as Arkansas and Florida, vest executive authority in a county administrator, separate from but appointed by the governing body.[155] Other counties have separately elected

148. *See* REYNOLDS, *supra* note 143, at 75 (Virginia is only exception to this; counties have no jurisdiction over territory covered by incorporated areas in Virginia).

149. *See* NAT'L ASS'N OF COUNTIES, *supra* note 143, at 8; *see also* J. Edwin Benton, *An Assessment of Research on American Counties*, 65 PUB. ADMIN. REV. 462, 462 (2005) (describing research into county consolidation).

150. *See* REYNOLDS, *supra* note 143 and accompanying text.

151. *See* NAT'L ASS'N OF COUNTIES, *supra* note 143, at 9-20 tbl.II (summarizing forms of county governance in all fifty states).

152. *See id.* at 7.

153. *See id.*

154. *See id.* (describing these variations).

155. *See id.*; *see also, e.g.*, ARK. CODE ANN. § 14-14-801(a) (Repl. 2013) ("[C]ounty government, acting through its county quorum court, may exercise local legislative

executives.[156] Many states allow counties to alter the structure of their executive authority or increase the size of the governing body.[157]

In addition to administrative responsibility, county governing bodies have legislative authority whereby they can debate and adopt county ordinances.[158] Some states allow counties to pass ordinances on any issue not specifically excluded from county authority by state law.[159] Other states, such as Colorado, give counties limited, enumerated powers.[160]

The process for adopting county ordinances generally follows the usual process for public lawmaking.[161] The process begins at a public meeting of the governing body when a representative or citizen initiative introduces an ordinance for consideration.[162] Subject to multiple-reading requirements in some states, the governing body then reads and publicly debates the proposed ordinance.[163] The proposed ordinance may also be subject to committee review or investigation.[164] Significantly, all states permit (and some require) the governing body to allow for public comment regarding proposed ordinances.[165] Once the governing body and the public have discussed the proposed ordinance, members of the governing body publicly vote on

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authority not expressly prohibited by the Arkansas Constitution or by law for the affairs of the county.").

156. NAT'L ASS'N OF COUNTIES, *supra* note 143, at 7.

157. *See id.* at 7-8 (discussing county home-rule authority).

158. *See generally id.* at 9-20 (describing legislative authority of counties in all fifty states).

159. *See, e.g.*, ARK. CODE ANN. § 14-14-801(a) ("[C]ounty government, acting through its county quorum court, may exercise local legislative authority not expressly prohibited by the Arkansas Constitution or by law for the affairs of the county.").

160. *See* COLO. REV. STAT. ANN. § 30-11-101 (West 2016).

161. *See, e.g.*, TONY E. WINDHAM, UNIV. OF ARK. DIV. OF AGRIC., PROCEDURAL GUIDE FOR ARKANSAS COUNTY QUORUM COURT MEETINGS 12-14 (rev. ed. 2006) (describing Arkansas's procedures).

162. *Id.* at 12.

163. *Id.* at 13-14.

164. *Id.* at 17-18.

165. *See, e.g.*, ARK. CODE ANN. § 14-17-207(b)(1)-(2) (Repl. 2013).

the ordinance, and a majority vote is usually sufficient for the ordinance to pass.[166]

Significant for present purposes, all sixteen states that allow for constitutional amendment by citizen initiative have functioning county governing bodies with at least some legislative authority.[167]

B. An Overview of the County-Ratification Model

States with the citizen initiative already in place could perhaps improve the democratic quality of their amendment processes by requiring a majority (or a proportionally weighted majority)[168] of the state's county governing bodies to approve all citizen-initiated amendments rather than submitting those amendments to a statewide referendum.

To focus my analysis and qualify my arguments, it is helpful to identify the key features of my proposal. First, it would not affect the legislative-referral method of amendment. My suggestion is limited to only the citizen-initiative method in the sixteen states that allow for amendment by both legislative referral and citizen initiative.[169] This is because, as others have noted, allowing amendments to be initiated by either the legislature or directly by citizens provides a useful check on abuse of the amendment power.[170] There are, however, serious flaws in the citizen-initiative process that must be addressed in order to improve state amendment procedures. Thus, reform to the initiative process is the most appropriate inquiry.

Second, my proposal does not offer any reforms to the signature-gathering phase of the citizen initiative. This is not to suggest that reform in that area is unwarranted, but

166. HENRY M. ROBERT, ROBERT'S RULES OF ORDER 339 (rev. 1970).

167. *See* NAT'L ASS'N OF COUNTIES, *supra* note 143, at 28-64.

168. As discussed in more detail below, the ratification threshold might be adjusted to address Equal Protection concerns related to voter equality. *See infra* Section V.A.

169. *See supra* note 15 (listing states included in my study).

170. *See* Benjamin, *supra* note 84. The county-ratification model could be applied to ratification of legislatively referred amendments, but I focus only on the citizen-initiative process to narrow my analysis.

my focus here is on the ratification portion of the citizen initiative because it has received very little scholarly attention. Under my county-ratification model, citizens would initiate amendments in the same manner as currently permitted in initiative states. In most states, this requires obtaining a specified number of signatures in support of the proposal, and then submitting the text of the proposed amendment and proof of signatures to the state attorney general for certification.[171] After the attorney general certifies a citizen initiative, he or she would then send the proposed amendment to all county governing bodies for consideration. The attorney general would likely need to set a deadline for counties to return an "up-or-down" response to the proposed amendment, but the attorney general would not otherwise interfere with counties' procedures for deciding on the amendment.

Third, once the attorney general certifies citizen initiatives, county governing bodies would review them in a manner very similar to how they review ordinances. The proposed amendment would be placed on the agenda for a public meeting of the governing body. The body members would discuss the amendment, solicit citizen feedback, and could even refer the amendment to a committee for further investigation. After the governing body's deliberations, it would publically vote on whether to approve or reject the amendment. Each county would report its collective decision back to the attorney general, who would determine whether the required number of counties approved the amendment.

Obviously, this is a very general sketch of how a county-ratification model might work. Deploying a model like this for any particular state would require consideration of myriad other important design issues.[172] However, it provides a sufficient framework to begin an assessment of

171. *See, e.g.*, ARK. CODE ANN. § 7-9-107 (Supp. 2015).

172. *See infra* Section V.E (discussing "implementation complexity" as a counter argument to the county-ratification model).

how a county-ratification process might improve the initiative process.

C. How a County-Ratification Model Might Improve the Democratic Quality of State Amendment Processes

This Section provides a preliminary analysis of how a county-ratification model might improve the democratic quality of state amendment processes. To do this, I draw on existing theoretical and empirical scholarship regarding decentralization and democratic theory to explore how the model might affect amendment decision making in my sixteen-state sample. I advance three arguments in this regard: (1) channeling amendment debates into county governing bodies might improve citizen participation in amendment politics; (2) channeling amendment debates into county governing bodies might improve the quality of public deliberation; and (3) dividing the amendment power between county governing bodies rather than consolidating it in the legislature or a statewide referendum might reduce special-interest influence in amendment politics and more effectively empower "the people."[173]

1. *Improved Citizen Involvement in Amendment Decisions*

As noted above, citizens are increasingly alienated from the initiative process by well-financed special interest groups that pay top dollar to signature-gathering firms and run expensive statewide advertising campaigns. Additionally, many citizen voters learn about the proposal only days before the vote, consult only one source of information regarding the initiative, and very rarely discuss the initiative with anyone.[174] This represents a very thin,

173. My theoretical approach to citizen participation in amendment practice generally follows the model of localism and political participation set out by Gerald E. Frug in *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068-70 (1980). *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 393-95 (1990) (describing Frug's argument regarding the democratic virtues of localism).

174. *See* Gais & Benjamin, *supra* note 1, at 1301.

suboptimal level of political involvement by citizens. The county-ratification model might help improve citizen involvement in amendment politics by reducing democratic scale to provide real opportunities for citizen engagement.

It is a truism in democratic theory that citizen participation tends to increase as jurisdiction size decreases.[175] All things being equal, citizens are more likely to engage with small, local democratic institutions because the costs of participation are lower and the likelihood of affecting the outcome is greater. As a result, local democracies tend to be more responsive and accountable to their constituents' preferences than larger democracies.[176]

The empirical research testing these premises is vast and somewhat contested.[177] However, a few important themes have surfaced. First, as jurisdiction size decreases, the primary effect on citizen participation seems to be an increase in the quality of citizen participation.[178] For example, voter turnout for local elections is notoriously low,[179] but citizen involvement in "thick" forms of political participation—such as contacting officials, attending hearings, and even running for public office—is remarkably high.[180] In smaller jurisdictions, citizens are much more likely to personally engage in these forms of political participation.[181]

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175. *See* Roderick M. Hills, Jr., *Federalism and Public Choice, in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); Frug, *supra* note 173, at 1069. This intuition was at the heart of Jefferson's Ward Republic. *See* Michael Hardt, *Jefferson and Democracy*, 59 AM. Q. 41, 69-72 (2007).

176. *See* J. ERIC OLIVER, LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 16 (2012) ("[G]overnmental accountability and access is lower in a large democracy than a small one.").

177. *See generally* David Karlsson, *A Democracy of Scale, Size and Representative Democracy in Swedish Local Government*, 17 SCANDINAVIAN J. PUB. ADMIN. 7 (2013) (summarizing scale literature).

178. *See* Hills, *supra* note 175.

179. *See* OLIVER, *supra* note 176, at 55 (stating voter turnout in most local elections is below twenty-five percent).

180. *See* Hills, *supra* note 175.

181. *See* OLIVER, *supra* note 176, at 55-56; Hills, *supra* note 175.

Identifying the population "tipping point" for "thick" forms of citizen participation is complicated and involves many variables.[182] Empiricists have nevertheless identified some benchmarks. Eric Oliver's 2001 seminal study found that thick citizen participation is highest in jurisdictions of 5000 or less, but also found that thick citizen participation remains meaningful in jurisdictions between 50,000 to 250,000 and even in jurisdictions between 250,000 to one million.[183] In local jurisdictions of more than one million, thick citizen participation is less likely.[184]

Oliver's benchmarks are interesting when compared to county and state populations across the sixteen states that have the citizen initiative.[185] Table 1 below shows the number of counties in each state that fall within Oliver's population benchmarks, as well as the overall state population for each state.[186]

182. *See* Karlsson, *supra* note 177, at 8-10.

183. *See* OLIVER, *supra* note 95, at 42-45 (quantifying "nonelectoral civic participation" in jurisdictions of varying sizes); *see also* ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY 63-64 (1973) (discussing voter participation in Swedish communes).

184. *See* OLIVER, *supra* note 95, at 47.

185. There are significant limitations on this comparison. Oliver primarily studied municipalities and other incorporated local governments that covered less territory and were perhaps more visible to citizens. Nevertheless, Oliver's benchmarks provide a helpful starting point in assessing the virtues of a county-ratification model.

186. I compiled this table from the Census Bureau's 2014 population projections, which are based on the 2010 Census data. *See Estimates of Resident Population Change For Counties and County Rankings: July 1, 2013 to July 1, 2014*, U.S. CENSUS BUREAU, [hereinafter 2014 Population Projections], https://www.census.gov/popest/data/counties/totals/2014/CO-EST2014-03.html [https://perma.cc/B3PE-VCCT] (last visited Mar. 31, 2016).

Table 1

State	State Population	Number of Counties with Populations Between: 0 - 5,000	5,000 - 50,000	50,000 - 250,000	250,000 - 1 mil.	Over 1 mil.
AZ	6,731,484	0	4	8	1	2
AR	2,966,369	0	62	12	1	0
CA	38,802,500	2	13	17	17	9
CO	5,355,866	14	35	6	9	0
FL	19,893,297	0	26	18	18	5
MI	9,909,877	1	47	26	7	2
MS	2,994,079	2	66	14	0	0
MO	6,063,589	7	86	17	4	1
MT	1,023,579	21	29	6	0	0
NE	1,881,503	37	52	2	2	0
NV	2,839,099	4	8	3	1	1
ND	739,482	29	20	4	0	0
OH	11,594,163	0	39	40	7	2
OK	3,878,051	7	56	11	3	0
OR	3,970,239	3	17	11	5	0
SD	853,175	30	33	3	0	0

Looking only at jurisdiction size, county populations across these states seem to fit nicely within the preferred sizes for thick citizen participation.[187] State populations, on the other hand, seem much less likely to foster thick participation. Indeed, every state has a majority of its county populations under one million people, but only North and South Dakota have a statewide population under one million people.[188]

187. Another factor that affects citizen participation is the significance of the issues at stake. Marshfield, *supra* note 95, at 1189. The greater the significance of the issue, the more likely citizens are to get involved in the decision-making process. *Id.* This variable also suggests that a county-ratification model might facilitate better citizen participation because it would put constitutional issues in the hands of local governing bodies.

188. *See* 2014 Population Projections, *supra* note 186 (follow "North Dakota" hyperlink); *id.* (follow "South Dakota" hyperlink).

Counties therefore seem to be preferable jurisdictions within which to foster more direct and meaningful citizen participation. If amendment decisions were put on the agenda for resolution by county governing bodies, it seems that citizens would be more willing and able to engage the process in meaningful ways, such as by attending hearings, contacting local representatives, and even running for county office themselves. All of these forms of participation become realistic (and even more likely) when amendment decisions are moved from a statewide referendum to local jurisdictions.

There are, of course, some extraordinarily large counties. Los Angeles County, for example, is the largest in the country with more than ten million residents, comprising approximately twenty-six percent of California's overall population.[189] Sending amendment decisions to Los Angeles County might not enhance citizen participation within the county because of its large size. However, California has thirty-two other counties with populations below 250,000 people.[190] Citizens in those counties are likely to engage with amendment decisions in more meaningful ways than in a statewide referendum, which may make a county-ratification model valuable nonetheless.

2. *Improved Public Deliberation Regarding Amendment Decisions*

In addition to "thickening" citizen participation, a county-ratification model might also strengthen the deliberative quality of amendment decisions. As noted above, one of the major problems with the citizen initiative is that it circumvents meaningful deliberation regarding constitutional changes, and can even enable collective prejudices by allowing amendment decisions to be decided in the secrecy of the ballot booth.

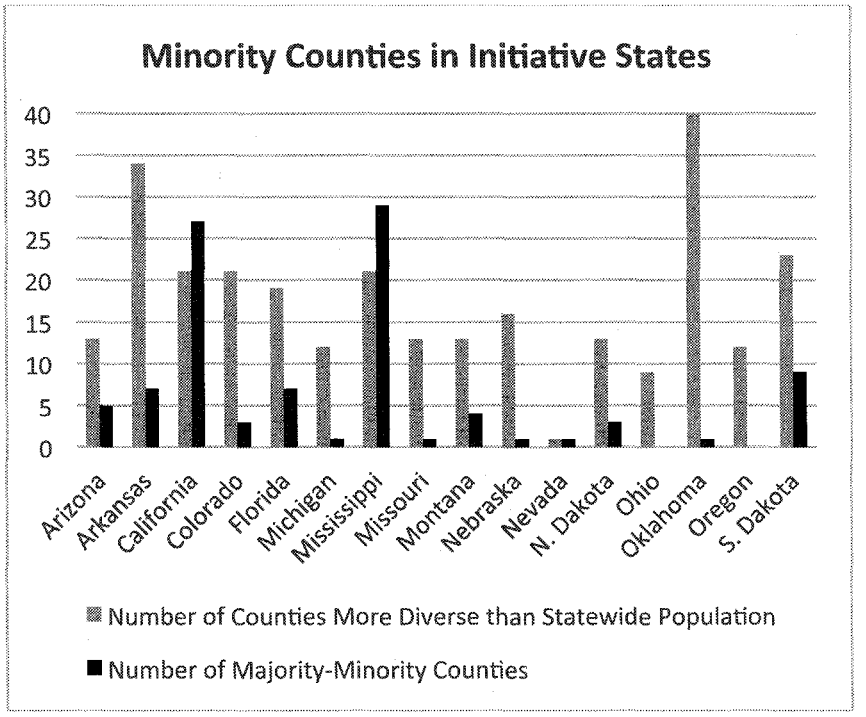
189. *See id.* (follow "California" hyperlink).
190. *Id.*

These problems might be mitigated by requiring county governing bodies to debate and transparently vote on proposed amendments. The county-ratification model envisions a county governing body voting on proposed amendments pursuant to similar processes and procedures for adopting county ordinances in many states. The process usually includes review by body members, reasonable opportunities for committee investigations and reports, and a public hearing. The process would culminate with a transparent vote by locally elected representatives on whether to ratify or reject proposed amendments. This process is dramatically different than the current initiative-ratification process because it would subject amendment decisions to public review and discussion by locally accountable representatives. There are at least two likely benefits to this more deliberate and transparent ratification process.

First, it can help mitigate majoritarian abuses. Allowing amendments to be ratified by aggregating secret individual preferences seems to invite expressions of prejudice. However, when discriminatory viewpoints are subject to public exposure and discussion, they are more likely to be moderated, vetted, and even rejected. Representative decision making is especially effective at mitigating majoritarian abuses when minority viewpoints have at least some voice in the process. To be sure, discrimination can occur even in representative decision-making bodies—especially in homogenous bodies where minority viewpoints are not expressed or taken seriously—but representative decision making seems a vast improvement on the aggregation of secret private preferences.

Regarding minority viewpoint representation, counties have the promise of being effective political subdivisions for giving voice to minority viewpoints in the amendment process. Using race as a proxy for diversity, the chart below shows the number of counties with populations that are more racially diverse than the state's population as a

whole as well as the number of majority-minority counties.[191]



As these data show, every state has several counties with greater minority representation than in the state population as a whole, and every state except Ohio and Oregon have at least one majority-minority county. This is significant for deliberative purposes because it means that unlike a statewide referendum where minority viewpoints are likely washed out by simple aggregation of private votes, a county-ratification model would give minority viewpoints a formal, public structure for voicing opinions regarding

191. I compiled this chart from Census Bureau Data on racial diversity from the 2010 census. In classifying minority and majority populations, I followed the definitions and classifications used by the Census Bureau. *See* LINDSAY HIXSON ET AL., U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010, at 16-17 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf [https://perma.cc/DWB4-UYRT] (the minority population includes "people who reported their race and ethnicity as something other than non-Hispanic White alone").

proposed amendments.[192] Minority representatives on county governing bodies will have an opportunity to express minority viewpoints during the body's deliberations. Additionally, governing bodies in majority-minority counties will have an opportunity to publically decide on proposed amendments from a minority viewpoint and provide justifications for their decisions that other governing bodies may then consider. A transparent public forum that gives voice to minority communities can facilitate accountability between counties, promote inclusive deliberation, and help mitigate majoritarian abuses.

In addition to mitigating majoritarian abuses, a county-ratification model might improve the accuracy and dissemination of information regarding an amendment proposal. One of the primary benefits of representative decision making is that it provides a public forum for the exchange and vetting of viewpoints on a proposal. As citizens and representatives discuss a proposal, collective knowledge regarding the proposal presumably grows and the overall quality of the decision-making process consequently improves. A county-ratification model can facilitate this process by giving citizens a forum at public hearings to express viewpoints on proposed amendments and by forcing representatives to discuss amendments with each other and the public.[193]

In sum, ratifying amendments by public referendum seems to result in under-inclusive and limited deliberation. A county-ratification model might improve the process by

192. Empiricists have found that diversity tends to decrease as jurisdiction size decreases. *See* OLIVER, *supra* note 176, at 17 (charting racial diversity but noting that "[t]he same trend occurs with nearly every other social category").

193. County governments appear to have a strong tradition of gathering information regarding public opinion before making decisions. *See* Maureen Berner, *Citizen Participation in Local Government Budgeting*, POPULAR GOV'T, Spring 2001, at 23-24 (discussing North Carolina public budget hearings). A 2001 study of citizen participation in county budging approval found that counties use a variety of different methods to solicit citizen feedback, such as informal "[c]offeehouse conversations", "[v]isits to local civic groups", and the formation of "[c]itizen advisory boards." *Id.* at 27 tbl.6.

providing a voice for minority viewpoints and facilitating more robust discussion regarding proposed amendments.

3. *Reduced Special Interest Influence in Amendment Decisions*

As noted above, a major problem with the initiative process is the influence of well-financed special interests.[194] These groups have undermined the initiative as a grassroots, populist institution. Instead, the initiative often involves reforms with limited popular support, but with significant financial backing from corporate or ideological interest groups.

A county-ratification model might help reduce special interest influence and restore the initiative to its popular sovereignty roots. From a democratic theory perspective, this might seem counter-intuitive. The traditional Madisonian assumption is that lower levels of government are more susceptible to capture by special interests because of, among other things, greater cohesiveness of interest groups and smaller population sizes.[195]

However, this assumption has come under criticism by recent theoretical investigation.[196] The susceptibility to capture of low-level governing institutions depends on a variety of variables such as the relative extent of political competition and differences in electoral systems.[197] It is not clear, therefore, that county governments are always more prone to capture than state institutions.[198] The "relative

194. Hoesly, *supra* note 2, at 1202-03.

195. THE FEDERALIST NO. 10, *supra* note 100; *see also* Pranab Bardhan & Dilip Mookherjee, *Capture and Governance at Local and National Levels*, 90 AM. ECON. REV. 135, 135, 139 (2000) (describing the Madisonian view).

196. *See* Bardhan & Mookherjee, *supra* note 195, at 135 (explaining that "[d]espite the importance of this issue, not much systematic research appears to have been devoted to assessing the relative susceptibility of national and local governments to interest-group capture").

197. *Id.* at 139 ("[T]he relative proneness to capture of local governments depends on a multitude of diverse factors.").

198. *Id.*

capture at the local level may... be context- and system-specific."[199]

More importantly, however, the county-ratification model would not centralize the amendment power in the hands of one particular county governing body that could be easily captured. Instead, it would divide the amendment power between the various counties within a state. My hypothesis is that this design arguably involves a more effective check on capture and abuse than centralizing the amendment power in a statewide referendum.[200] It is based on Madison's checks-and-balances argument in Federalist No. 51, where Madison argued that the tyranny of the majority can be managed by dividing society "into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."[201]

Statewide referenda represent an absolute consolidation of the amendment power with a majority of voters who will decide the issue in secret and without any deliberation. Referenda are therefore relatively easy to capture through mechanisms such as mass media.[202] A county-ratification model, on the other hand, divides the amendment power between myriad multi-member county governing bodies. This division and separation of power within the amendment process could help protect against capture and majoritarian abuses in several ways.

First, it would seem much more difficult to capture a majority of the county governing bodies in a state than to aggregate public opinion.[203] Voter decision making on

199. *Id.*

200. *See* Jonathan L. Marshfield, *Decentralizing the Amendment Power*, 19 LEWIS & CLARK L. REV. 963 (2016) (making the same suggestion regarding decentralization of national amendment processes to include subnational units such as states).

201. THE FEDERALIST NO. 51, at 121 (James Madison) (Michael A. Genovese ed., 2009).

202. *See* OLIVER, *supra* note 176, at 20-21 (discussing the role of media in large jurisdictional politics).

203. *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 693 (1991) ("One may posit that it is more difficult to capture fifty state legislatures and bureaucracies than to master one in Washington.").

statewide referenda is generally simplistic and ideological, which means that interest groups can impact referenda outcomes by running mass media campaigns that play on simplistic ideological associations. Decision making and accountability regarding local governing bodies are considerably more personal, deliberative, and transparent.[204] Under a county-ratification model, local representatives would have a personal interest in amendment decisions because they would be openly accountable to constituents for their vote.[205] This suggests that they would have greater personal incentives to study and discuss proposed amendments than citizens voting in a referenda, which could create a check on capture and an incentive for reducing agency costs.

Second, a county-ratification model would create a competitive environment between counties, which could help limit capture. By giving each county a role in the amendment process, counties have an incentive to monitor each other. Capturing the process would require overcoming a complicated coordination problem. One "captured" county would likely be exposed by the other counties as acting under the disproportionate influence of special interests. To capture the process as a whole, special interests would therefore have to obtain a degree of coordination between counties. This would likely make capture more difficult than in a statewide referenda.

Third, a county-ratification model has the promise of restoring a degree of popular sovereignty to the amendment process. Although the referenda was intended as a mechanism for restoring popular sovereignty,[206] its susceptibility to capture has significantly undermined its popular legitimacy. Local democratic institutions, on the other hand, are generally considered to be very responsive

204. *See* OLIVER, *supra* note 176, at 20-21 (discussing how political activism and accountability in smaller jurisdictions is often less mediated, more personal, and less ideological).

205. *See id.*

206. Magleby, *supra* note 80, at 13-15.

and accountable to constituents.[207] This is because representatives are "closer" to constituents in small democracies, which means that political life tends to be more interpersonal and less mediated through devices like media and political parties.[208] To the extent county representatives are more accessible and responsive to local communities in any given state, delegating the amendment authority to county governing bodies might be an effective means of taking the amendment power back from special interests that control the referendum and restoring it to the people.

V. PROBLEMS WITH INCLUDING COUNTY LEGISLATIVE BODIES IN STATE AMENDMENT PROCESSES

The county-ratification model will not solve all problems related to state constitutional amendment process. In fact, it surely comes with its own costs. In this Part, I identify some of the major problems and likely counter-arguments to a county-ratification model.

A. Equal Protection

A significant issue with a county-ratification model is compliance with the one-person, one-vote principle under the Fourteenth Amendment's Equal Protection Clause.[209] The Fourteenth Amendment requires equality in the population of legislative districts so that an individual's vote in one district does not count substantially less than an individual's vote in another district.[210] The Supreme Court has applied this principle to state and local elections, but

207. *See* OLIVER, *supra* note 176, at 17-18; Karlsson, *supra* note 177, at 8-9; Russel M. Lazega & Charles R. Fletcher, *The Politics of Municipal Incorporation in South Florida*, 12 J. LAND USE & ENVTL. L. 215, 225 (1997).

208. *See* OLIVER, *supra* note 176, at 17-18.

209. *See* Baker v. Carr, 369 U.S. 186, 187-88 (1962); REYNOLDS, *supra* note 143, at 67-75 (discussing one-person, one-vote in relation to local government).

210. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

never directly to state constitutional amendment procedures.[211]

The few lower courts that have addressed the issue have held that there is "no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments."[212] Thus, although not definitively decided by the Supreme Court, the dominant position is that amendment ratification must comply with the one-person, one-vote requirement.[213]

Assuming that the one-person, one-vote requirement would apply to the county-ratification model,[214] the model raises some equality concerns that would likely need to be addressed. Although county representatives must already be elected consistent with the one-person, one-vote requirement within each county,[215] the county-ratification model would decide a statewide proposal by adding up the number of counties that approve the proposal. If there is great disparity in populations between counties (which is usually true), there could be significant under-representation for voters in populous counties and over-representation for voters in desolate counties.

Arizona provides a helpful example. Arizona is divided into fifteen counties, but sixty-one percent of the overall population lives in one county (Maricopa County).[216] The smallest county, Greenlee County, contains an estimated

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211. *See* Peter Suber, *Population Changes and Constitutional Amendments: Versus Democracy*, 20 U. MICH. J.L. REFORM 409, 420 n.19 (1987).

212. *See, e.g.*, State *ex rel.* Witt v. State Canvassing Bd., 437 P.2d 143, 150, 155 (N.M. 1968) (holding that New Mexico's amendment rules violated Equal Protection because they required amendments to be ratified by majorities in a majority of counties).

213. *See* West v. Carr, 370 S.W.2d 469 (Tenn. 1963) (discussing the one-person, one-vote principle in the context of a constitutional convention process).

214. There are perhaps arguments that conventional Equal Protection principles should not apply to a county-ratification model, but I leave those arguments for another time.

215. *Reynolds*, 377 U.S. at 568.

216. *Annual Estimates of the Resident Population for Counties: April 1, 2010 to July 1, 2015*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/counties/totals/2015/CO-EST2015-01.html [https://perma.cc/BZ74-YPVC] (follow "Arizona" hyperlink).

9529 people, or approximately 0.14% of the overall state population.[217] Clearly, giving each county an equal say in the ratification process under those circumstances would result in significant inequalities for voters.

The equality problem could possibly be addressed by giving each county a weighted vote in the ratification decision that is proportional to its share of the overall state population.[218] However, this could affect the dynamics of the model. In Arizona, for example, a weighted-majority rule that required only a simple majority of the population to approve an amendment would mean that the governing body for Maricopa County would control the outcome for the whole state.[219] To ensure that all counties have some representation in the process, Arizona would likely need to adopt a super-majority requirement that would necessarily include other counties in the process and preserve many of the procedural virtues of the county-ratification model.[220]

It is not possible to fully analyze the Equal Protection issue here. This is a complex issue that deserves more attention if the county-ratification model is considered for any particular state. My purpose is only to raise the issue and its potential effects on the lawful design of the county-ratification model.

B. Mismatched Expertise and Limited Resources

An important objection to the county-ratification model is that county representatives are not well suited to deciding important statewide issues. County representatives are usually elected based on their managerial capacity or performance, and not their ideological viewpoints or statesmanship.[221] This is because

217. *Id.* (providing estimated 2015 Arizona county populations); *id.* (follow "All States" hyperlink) (providing total estimated 2015 state populations).

218. Another solution might be to make county ratification "advisory," followed by a binding public referendum. Thanks to Justin Long for suggesting this.

219. *See supra* text accompanying note 216.

220. The Supreme Court has upheld super-majority requirements. *See, e.g.*, Gordon v. Lance, 403 U.S. 1, 7-8 (1971).

221. OLIVER, *supra* note 176, at 6-7.

the primary business of county government relates to the provision of basic government services rather than the resolution of ideological conflicts.[222] County governing bodies also lack the breadth of perspective on state government that a state legislature might possess.[223] This might make county governing bodies a poor forum for debating constitutional amendments, which often touch on broad ideological issues that have myriad complex implications for a state and its government.[224] Additionally, county governments are notoriously under-resourced.[225] Adding controversial amendment decisions to the county agenda could further exhaust county government and detract from the effective provision of local services.

This critique raises important considerations regarding the county-ratification model. However, it is easy to overstate these concerns and lose sight of the current state of amendment practice in initiative states. The county-ratification model is not a perfect system for deciding amendment issues. There are surely limitations and costs for enlisting county governing bodies in the amendment process, but those costs must be compared to the existing process and weighed against possible improvements to that process.

For example, although county representatives might be less qualified to debate many amendment issues than state representatives, they are perhaps better situated than citizens voting in private, based on thin sources of information. County representatives are increasingly sophisticated administrators because of the increasing role of county government.[226] Counties manage large budgets, adopt and implement complicated economic development

222. *Id.*

223. *See id.*

224. *See id.* at 10 (stating that local government is not an ideal venue for resolving deep social and economic issues).

225. *See* Salant, *supra* note 146, at 9; Lobao & Kraybill, *supra* note 147, at 253-54.

226. *See* Lobao & Kraybill, *supra* note 147 (explaining that county officials have significant responsibilities).

policies, administer federal and state assistance programs, coordinate regional planning, and act as intermediaries between citizens, municipalities, state government, and federal agencies.[227] Thus, county representatives are becoming increasingly skilled at public administration and likely have the ability to engage in a constructive public debate regarding many amendment issues.

The point regarding county resources might also be overstated. Over the last decade, initiative states have averaged about 1.5 proposed amendments by initiative every two years.[228] If California is removed from that sample, initiative states have averaged only one amendment every two years.[229] This means that, on average, counties would have had to consider only one amendment every two years.[230] Although a county-ratification model will surely detract some county resources from other activities, this does not seem like a significant imposition on counties.

C. The People Rarely Give Up the Initiative

A further criticism of the county-ratification model is that it is the equivalent of a constitutional "pipe dream" because states very rarely dispose of the initiative despite a tradition of redesigning amendment procedures.[231]

It is true that it is politically very difficult for states to eliminate the initiative. Once citizens have the right to amend their constitutions directly, they are very reluctant to give that up.[232] However, as John Dinan has noted, the twenty-first century is characterized by a trend in amendment design towards limiting the initiative process.[233]

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227. *See id.*

228. *See supra* note 75 and accompanying chart.

229. *See id.*

230. *See id.*

231. *See* Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299, 310 (2007) ("Although one response to the problems in the initiative process is to eliminate direct democracy, we do not advocate that path.... [W]e do not believe it is realistic.").

232. *Id.*

233. John Dinan, *Twenty-First Century Debates and Developments Regarding the Design of State Amendment Processes*, 69 ARK. L. REV. 283, 292 (2016).

Thus, it is possible that "tides" are changing and state constitutional designers would be more receptive to an amendment process that significantly reforms the initiative.

Additionally, the county-ratification model has the benefit of retaining a grassroots form of constitutional ratification. Thus, voters might be more inclined to consider it even if they would reject proposals to categorically eliminate the initiative. In light of the real problems in current initiative practice, the county-ratification model deserves consideration and discussion.

D. Making the Constitution Too Hard to Amend

Another objection to the county-ratification model is that it would make state constitutions practically impossible to amend through the initiative process. Because amendments would be subject to debate and approval in county governing bodies across the state, there is reason to believe that amendment processes might become very protracted and difficult to navigate. Practically, this might mean that state constitutions would become too stagnant and outdated or that the legislature's power in the amendment process would grow too great and unchecked.

This criticism raises important concerns, but there are countervailing considerations. First, it assumes that the constitutional flexibility provided by current initiative practice is normatively desirable. There are, however, many who argue that the special-interest-driven flexibility of the initiative process is dysfunctional, and that greater stability is required. In that case, the county-ratification model might be desirable to amendment reformers.[234]

It is also hard to predict what effect the county-ratification model will have on constitutional flexibility. The model would likely make amendment by initiative more difficult than a referendum model, but there is no reason to believe that it would make the initiative unusable. I recently

234. Again, this seems to be the trend in contemporary debates by constitutional designers about how to reform the initiative process. *See id.*

concluded a study of decentralization in national constitutional amendment rules and found countries that require subnational units to participate in amendment processes often do not experience lower overall amendment rates.[235]

Constitutional flexibility is a very important consideration in designing amendment rules. A county-ratification model would likely make amendment by initiative more difficult than a referendum model, but this may be a desirable outcome or an acceptable cost for some states in reforming their amendment procedures.

E. Implementation Complexity

Finally, the county-ratification model would be relatively complex to implement in any given state. It would require constitutional amendments and probably legislation on a variety of ancillary issues. Constitutional amendments might have to change provisions besides the amendment rules. The legislative article under California's constitution, for example, would likely have to be amended because it states that "the people reserve to themselves the powers of initiative and referendum."[236] This sort of constitutional "house cleaning" can be complex when significant structural changes are made.

Additionally, many states would have to change local government legislation to accommodate the county-ratification model. States that allow county executives to veto county ordinances and resolutions might want to eliminate that veto authority for amendment decisions.[237] There are likely many other legal complexities. In Arkansas, for example, the legislature would likely need to consider whether to change the County Government Code so that

235. *See* Marshfield, *supra* note 200.

236. *See* CAL. CONST. art. IV, § 1.

237. *See* WINDHAM, *supra* note 161, at 15-16 (discussing executive veto authority in Arkansas county governance).

amendment decisions are not subject to county referenda like ordinary county ordinances.[238]

There is no denying that the legal aspects of adopting the county-ratification model are complex. Any jurisdiction considering the model would have to weigh whether the implementation complexity outweighs the other likely benefits. My purpose here is only to acknowledge the legal complexity associated with my proposal.

VI. CONCLUSION

State constitutional amendments contribute greatly to constitutional life in the United States. As of January 1, 2015, voters have considered 11,369 amendments to currently operative state constitutions.[239] Voters ratified 7481 of those amendments.[240] This represents a significant corpus of positive constitutional law created through state amendment processes. It is important, therefore, that scholars give more attention to understanding how these processes are functioning and can be improved. My goal in this essay is to encourage creative thinking regarding the design of state amendment processes, and also suggest that a county-ratification model of some kind might be an improvement on the citizen-initiative process.

238. *See* WINDHAM, *supra* note 161, at 13 (describing the rules for local referenda in Arkansas).

239. *See* Dinan, *supra* note 2, at 11 tbl.1.1. Delaware's 145 amendments are included in this number even though they were not submitted to the voters directly.

240. *See id.*

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