Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy

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In 1994, Israeli Prime Minister Yitzhak Rabin promised that any peace agreement with the Syrians, which would return some or all of the Golan Heights to Syria, would be submitted for the people’s approval in a national referendum. During his campaign in 1999, Ehud Barak reiterated that commitment and promised that any final-status agreement with the Palestinians, which would affect the sovereignty of Jerusalem as well as resolve other controversial issues, would also be the subject of a referendum. During the Camp David summit in the summer of 2000, Barak negotiated as his government fell apart at home, and he stated frequently that any deal with Arafat would be ratified by a vote of the people. Before the recent outbreak of violence and election of a new prime minister in February 2001, peace agreements seemed possible in the relatively near future, so Israeli politicians turned their attention to the mechanics of a referendum vote. Israel is one of the few democratic countries that has never held a nationwide referendum, and therefore it has not set up a legal framework for these votes.

Ideally, a structure for a popular vote would be implemented before a government announced a decision to submit a particular issue to a referendum. Once a specific issue becomes the subject of direct democracy, the stakes become higher because one side will often be benefited by one set of implementation decisions and the other side disadvantaged. Moreover, rules that are shaped to accommodate interests in a particular ballot question may prove ill suited for referendums that are held in the future but are unanticipated at the time the framework is established. For

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example, the United Kingdom ("UK"), after a series of ad hoc referendums conducted under differing rules that appeared (and probably were) largely a result of political factors rather than of principle, appointed a commission (the "Nairne Commission") to establish a set of electoral regulations that could be used to govern all future referendums. The United Kingdom discovered, as have many countries and as Israel may, that a nationwide referendum is seldom a one-shot experience; once used, popular elections usually remain as part of a hybrid democratic system with elements of representative democracy and elements of direct democracy.

In Israel’s case, however, the framework for direct democracy will be developed in the shadow of highly emotional issues that will be its first subjects. Thus, many of the key issues of implementation will necessarily be resolved on the basis of political factors relating to the peace agreements, even if the referendum law is phrased broadly to provide rules for other popular elections. When the Knesset deliberates enacting a basic law relating to referendums, its members should consider the experience of other democracies in light of Israel’s unique political situation. In this article, I will discuss three kinds of implementation issues and suggest possible resolutions. First, rules must determine the effect of the popular vote. Is the referendum binding or advisory? Is there any real difference between the two? What sort of vote is required for a referendum to pass? Will a certain threshold of the total electorate, in addition to a threshold of those voting in the election, be required for passage?

Second, decisions affecting the information that voters receive about the referendum must be made, although they may be less important in the context of a salient, infrequent, high-profile nationwide referendum than in the United States context where a single ballot in a state with direct democracy may include several initiatives and referendums. Nevertheless, structuring the information environment surrounding the campaign and the vote is a crucial task. How will the question be worded on the ballot, and what information will appear on the ballot itself? What sort of official voter information booklet(s) will be sent to voters? Will the media be required to provide free time to both sides, and how will that be apportioned among groups?

Third, those implementing direct democracy must adopt rules regulating the conduct of all the groups interested in the referendum. How will established groups, such as the current government that proposes the referendum and other political parties, be regulated? Will rules encourage the formation of new groups, such as

1. See Report of the Commission on the Conduct of Referendums 6 (1996) (noting that "[p]revious UK referendums have been successfully held without formal guidelines; but the varied character, in particular, of possible future referendums underlines the importance of establishing guidelines, accepted by all political parties, which will ensure consistency of administration in their conduct and maximize confidence in the legitimacy of their results."); id at 10 (giving terms of reference for Nairne Commission). See also David Butler and Iain McLean, Referendums, in Bridget Taylor and Katarina Thompson, eds, Scotland and Wales: Nations Again? 1, 10–12 (Wales 1999).
umbrella organizations, to coordinate the activities of groups on both sides of the ballot question? What campaign finance regulations are appropriate? Is public funding available to registered groups? What disclosure requirements will groups and individuals active in the campaign face?

I. EFFECT OF THE POPULAR VOTE

A. BINDING OR ADVISORY

In the states in the United States that have some version of direct democracy, popular votes on initiatives and referendums result in popular lawmaking. Very few are advisory; in fact, some state constitutions disallow ballot questions that have no legal effect. Moreover, laws that are popularly enacted may be hard for representative bodies to change. Many initiatives amend state constitutions, so modifying or repealing them requires another popular vote. Constitutional amendments are immune from state constitutional challenges (although they may be struck down on federal constitutional grounds). Because they are more durable and because experience demonstrates that constitutional amendments are not harder to qualify for the ballot or to pass than statutory initiatives, activists prefer to propose constitutional amendments in states where both constitutional and statutory initiatives are available. In some states, notably California, even statutory initiatives can be protected from subsequent repeal or significant change by the legislature. Under California law, successful statutory initiatives cannot be amended by the legislature unless the initiative itself allows such change. Many initiatives provide for amendment by the legislature, however, so long as the amendment furthers the purpose of the initiative.

Some national referendums, on the other hand, are technically advisory only, but they effectively bind elected officials to the course of action garnering majority support. As Michael Gallagher writes: “Although several countries (Denmark, Finland, Italy, Norway, Sweden and the United Kingdom) have held referendums that have formally been only advisory, it is clear that in practice these develop their own momentum and become effectively binding. No parliament in Europe has explicitly disregarded the verdict delivered by the people, and were this to happen on a

4. See Cal Const Art II, § 10(c) (an initiative can be changed by the legislature only when the initiative permits legislative amendment or repeal without voter approval).
major issue, the fallout would be severe." At least two reasons explain the persistence of advisory referendums in some countries, notwithstanding the reality that even advisory votes effectively bind governments. First, formally designating a referendum as advisory preserves a governance system premised on the notion of parliamentary sovereignty. This formal distinction has been very important in the UK. As the Nairne Commission explained: “Although a Government could commit itself [to be bound by the result of a referendum vote], Parliament could not be bound by the result.” Second, lawmakers may hope to retain some flexibility not to implement the result of a popular vote if the referendum is advisory only, particularly if the turnout is low or the margin of victory very slim.

Because nationwide referendums are de facto binding on representative institutions, formally making them binding is generally the best course of action. Indeed, all the proposals made so far by members of the Israeli government or the Knesset have envisioned that the outcome of the popular vote would be binding. The formal designation does not sacrifice much, if any, flexibility (lawmakers cannot realistically ignore the result of a popular vote), and it may avoid problems that can be caused by an advisory designation. Voters may consider an advisory referendum to be merely a government-run opinion poll and therefore vote carelessly or not at all, relying on the elected politicians to make the final decision. If the democratic credentials of the popular vote render the outcome binding nonetheless, governments may find themselves forced to take a course of action that a majority of the electorate would not favor after serious reflection. Although this possibility may be vanishingly small in the Israeli context because voters tend to take infrequent national referendums on salient issues seriously regardless of the formal effect of the vote, making the outcome of the referendum binding avoids the problem entirely and sets a precedent for the future.

A question related to the effect of the popular vote is the question of what follows from a “no” vote. If the referendum fails to obtain whatever vote has been explicitly identified as required for passage (and whatever margin is implicitly necessary for the vote to be perceived as finally settling the matter), what happens next, if anything? After the proponents of Scottish devolution failed in a 1979 referendum in the UK because 40 percent of the electorate did not support the referendum although a majority of voters did, there remained a sense of unfinished business. Eighteen years later, a similar devolution referendum passed by a significant margin. No one promised the electorate that they would have a chance to reconsider after a period of time, but the contours of the first vote combined with political and

social changes paved the way for a second vote. An explicit promise of a second modified referendum in case of defeat is unlikely from either side: proponents will not want to give voters the possibility of voting in the future on an agreement that they like better, and most opponents will want to settle the matter permanently.

In the context of the Israeli peace accords, however, a second related referendum is an interesting and not entirely fanciful possibility. Assume, for example, that an agreement with the Palestinians is rejected by voters and opinion polls reveal that the provision concerning the status of Jerusalem was responsible for most of the opposition. After some time to cool off, negotiators might try to construct a different bargain, armed with better knowledge of voter preferences, and submit the new agreement to a second popular vote. Depending on the dynamics of the first negotiations, it might even be necessary to have one defeat to encourage bargainers to adopt more realistic positions and accept more difficult compromises. At the very least, it seems unwise to rule out a subsequent referendum, although it appears unrealistic to expect that the aftermath of a “no” vote will be discussed concretely or that promises about future elections will be made. Furthermore, it will be difficult to resume negotiations for some time, if at all, after a popular defeat, with the degree of a difficulty turning on the margin of the defeat, the nature of the issues pivotal to the outcome, and the changes in government leadership brought about by any defeat.

B. Thresholds

One of the most contentious issues in Israel is whether a simple majority of those voting will determine the result of the popular election or whether a supermajority or additional threshold will be required. For example, a Likud proposal would require over 50 percent of eligible voters, not just those voting in the election, to vote in favor of any peace agreement that requires Israel to give up territory. Requirements other than a simple majority of those voting occur in direct democracy, and they tend to be justified in one or more of three ways. First, thresholds and supermajority vote requirements may be justified in situations where voter turnout is low and thus passage by a simple majority of those voting can result in laws and constitutional provisions being adopted by a minority of voters with intense and outlying preferences. For example, voter turnout in the US is consistently low, relative to other democracies. Moreover, in some US states with robust systems of direct democracy, a ballot can be crowded with several, even dozens, of initiative questions. So even in elections with relatively high turnout, voter fatigue can cause a drop-off in voting on particular issues.

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7. See, for example, Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Texas L. Rev. 1845, 1869 (1999) (discussing referendum in Maine that repealed laws protecting gays and lesbians and that passed in an election with unusually low turnout dominated by conservative religious groups even though most citizens opposed the referendum).
Not surprisingly then, one can find in the United States various voting requirements beyond that of a simple majority. Some states require for passage the support of a majority of those voting in the election (which usually includes many other candidate races and ballot questions); others require a majority of those who voted in the last gubernatorial election; and others an extraordinary majority of those voting (55 to 75 percent) in the election, although these latter provisions tend to be limited to ballot questions dealing with bond indebtedness. One state requires a majority vote in two consecutive elections to pass a constitutional initiative. A few states require that a successful initiative not only receive approval by a majority of those voting on the ballot proposition, but also receive votes exceeding a specified threshold number of those voting in the election. The thresholds range from 30 to 35 percent; they are key to the voters in the particular election, rather than the total electorate, thereby avoiding problems caused when the register of electors is inaccurate or incomplete. Other countries with relatively frequent popular votes have experienced low turnout that tarnishes the democratic pedigree of the resulting laws, and they have adopted voting requirements beyond a mere simple majority.

In the context of the peace accords in Israel, any justification for special voting requirements cannot be linked to concerns about low voter turnout. Turnout in Israel is consistently high, averaging about 80 percent of eligible voters, and is likely to be higher for the votes on these peace accords. Even in the United States, where the concern mirrors reality, advocates of direct democracy argue that many of these thresholds are set merely to erect substantial hurdles in the path of initiatives and referendums. They argue that the fit between justification and special voting rule is often very loose or nonexistent. In the case of the requirement that a constitutional change win majority support in two elections, it is not clear that this requirement has produced better or more sustained public deliberation, although it has certainly made it more difficult to pass such provisions. And how do states justify a particular

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9. See, for example, Ill Const Art XIV § 3 (requiring for constitutional amendments the votes of three-fifths of those voting on the amendment or a majority of those voting in the election); Wyo Const Art III § 25(f) (requiring the votes of a majority of those voting in the general election).
10. See, for example, Neb Const Art III § 4 (requiring a majority of those voting on the measure as well as 35 percent of the votes cast in the election).
11. See, for example, Constitution of Italy Art 75 § 4 (requiring a majority of eligible voters to vote in the election and a majority of those voting to support the referendum). See also Alessandra Stanley, Referendum on 2-Party Plan in Italy Fizzles, NY Times A6 (May 22, 2000) (noting low turnout in recent Italian elections justifies some sort of threshold requirement); Mads Qvortrup, The Israeli Referendum: A Politico-Legal Assessment of Qualified Majority Requirements 6 (2000), available online at <http://www.iandrinstitute.org/international/israelart2.htm> (visited Mar 25, 2000) (discussing the Italian requirement).
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threshold of 35 or 55 percent of those voting, rather than some other percentage? Thresholds tied to the number of voters in the entire election or to the last statewide candidate election are more clearly linked to the concern of unusually low voter turnout for ballot questions.

It appears then that some thresholds justified on other grounds are chosen for political reasons; opponents of direct democracy generally or of the particular ballot question select a figure that is designed to ensure that the referendum or initiative fails. Take, for example, one of the best known threshold requirements in a nationwide referendum dealing with an aspect of sovereignty. In the 1979 Devolution Referendum for Scotland a clause was inserted into the act setting up the referendum providing that unless 40 percent of the total electorate voted in favor of the proposition, the government should not allow any devolution act to come into force. The referendum narrowly passed, but turnout was such that only 32.8 percent of the electorate voted in favor. Thus, devolution did not occur at that time. The Nairne Commission wrote that this result “produced lasting resentment; it was felt that the rules had been biased against advocates of a Scottish Assembly.” Although the subsequent Devolution Referendum did not require a similar threshold of the electorate voting in favor, the successful referendum garnered both a majority vote and the support of over 40 percent of the total electorate. Why was the 40 percent figure chosen in 1979? It is probably no coincidence that no British government since World War II had won the support of 40 percent of the electorate, although all had enjoyed the support of at least one-third, which was the other threshold discussed. Similarly, opponents of the Likud proposal to require majority support of all eligible voters observe that Barak won 56 percent of all votes cast in the 1999 election for Prime Minister, but he received only 42 percent of the votes of all eligible voters. These figures suggest that the Likud’s proposed voting threshold may have been set unrealistically high in order to preclude any possibility of passage.

Second, a special voting threshold can operate to protect geographic or ethnic groups in the jurisdiction and ensure that no change occurs without support of a distinct group or groups as well as support of the majority of the voters. Switzerland

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14. See Paula Surridge and David McCrone, The 1997 Scottish Referendum Vote, in Taylor and Thompson, Scotland and Wales 41, 42 (cited in note 1) (in 1997 both turnout and the margin of victory were greater so the vote would have exceeded the 40 percent threshold).
15. See Bogdanor, Politics and the Constitution at 229, 241 (cited in note 6) (terming the threshold as “indispensable” in the defeat of the referendum).
16. Dan Izenberg, Golan Debate Focuses on Coalition Crisis, Jerusalem Post 3 (June 21, 2000).
has a double majority requirement for passage of constitutional questions; they must be approved both by a majority of votes nationally and by a majority of votes in more than half of the cantons. The double majority requirement was adopted as a concession to the smaller cantons, and it has worked to safeguard their prerogatives. In referendums concerning territorial decisions it may be important for political stability to obtain a majority of all the relevant groups as well as a majority of those voting. For example, the public acceptance of the outcome of the Northern Ireland referendum depended on its receiving not only a majority of the votes cast, but also a majority of the Unionist vote.

There is widespread discussion in Israel whether a special voting threshold is or should be designed to require that a majority of Jewish-Israelis vote in favor of the referendum for passage; or, to put the same point more starkly, to ensure that Arab-Israelis do not provide the margin of victory. Former Justice Minister Yossi Beilin, a member of the Labor Party, attacked the Likud proposal that 50 percent of eligible voters must favor an accord giving up land as “racist” and contended that its supporters “don’t want the Arab minority to decide” the outcome. If intended to serve that objective, a special voting threshold is particularly disrespectful to a group like the Arab-Israelis, who have been systematically shut out of the political system. Nonetheless, it would be naïve to ignore the need for support from all affected groups (in Israel, both Jews and Arab-Israelis) in order to settle the dispute in a way that produces a relatively final and stable solution. Prime Minister Barak indicated that a “Jewish majority” at least in a Knesset vote would help to ensure that any agreements with Syria and the Palestinians would not prove divisive for the country. Even if political stability would be enhanced by a vote that revealed substantial support for the referendum in all the segments of Israeli society, it may be best to leave any special voting requirements informal and implicit because such a course may not seem as disrespectful to the groups whose votes are diluted. There was no formal requirement in Northern Ireland, for example, that the referendum garner majority support from the Unionists as well as in the overall vote but it was clear such support was necessary.

The third justification for special voting requirements may apply in the Israeli context, and adopting a threshold for this distinct reason may allow the resulting vote to serve the objective of stability without overtly racist overtones. Occasionally, supermajority votes are required to adopt radical changes in constitutional or other

17. See Kris W. Kobach, Switzerland, in Butler and Ranney, Referendums Around the World 103 (cited in note 2).
18. Butler and McLean, Referendums at 8–9 (cited in note 1) (52 percent of Unionists voted in favor). See also Richard Johnston, The Inverted Logroll: The Charlottetown Accord and the Referendum, 43, 46 (1995) (informal requirement that each province had to deliver majority support for the Canadian Charlottetown Accord for the government to be morally bound).
institutional arrangements. Before a country can cede territory or restructure governance institutions without risking ongoing political turmoil, substantial and settled popular support must be obtained and demonstrated through a relatively overwhelming margin of victory. If Israel decides to adopt a special voting rule to ensure widespread support for historic territorial decisions, the threshold should not be tied to the number of the electorate as a whole, but rather to a percentage of the votes cast in the referendum election. The practical difficulties associated with determining who is an eligible voter and the accuracy of the electoral rolls can undermine the legitimacy of the election results. In any country, a threshold related to the number of eligible voters raises substantial concerns about the accuracy and completeness of the electoral rolls.21 In Israel the problem is particularly acute because at least 10 percent of eligible voters are permanent overseas residents (who cannot vote by absentee ballot), causing additional difficulties for attempts to compile a correct and comprehensive list of the electorate. Thus, a proposal by the Interdisciplinary Center, a private college in Herzliya, Israel, to require a special majority of 40 percent of eligible voters22 may not erect as substantial a hurdle to a referendum’s success as the Likud draft legislation, but it would be plagued by the same practical problems.

At the least, the rules determining the voting requirements need to be announced as soon as possible. They will determine to a great extent the substance of any agreement because the negotiators will work to get as much as they can for their side and still deliver the necessary margin of victory. The compromises reached when the decision rule is a simple majority of those voting will be different from those required to assemble a two-thirds majority. Indeed, if the voting threshold is set at a very high level, continued negotiations will be fruitless because no agreement acceptable to the Syrians or Palestinians is likely to receive such overwhelming support among Israelis. In an ideal world, perhaps keeping the decision rule unclear during negotiations might reduce strategic bargaining; in the real world of politics, bargaining is inevitably strategic, and more stable outcomes are likely if all the players know the rules at the outset.

II. VOTER INFORMATION ABOUT REFERENDUMS

A. WORDING THE QUESTION ON THE BALLOT

In many cases, the information provided to voters on the ballot is the most influential and salient information because it is provided at the moment of choice and

21. Doubts about the accuracy of the elector register affected the 1979 Scottish referendum discussed above. See Bogdanor, Politics and the Constitution at 232–33 (cited in note 6) (detailing all of the difficulties with the election rolls). See also Stanley, Referendum on 2-Party Plan in Italy Fizzle, NY Times at 6A (cited in note 11) (describing efforts to update electoral rolls driven by participation-quorum).

22. See Gilbert, Likud: Barak Doesn’t Have a Majority for Reform, Jerusalem Post at 2 (cited in note 19).
through a medium that appears particularly official. Thus, salience and framing effects\(^2\) cause voters to pay close attention to the wording and tone of the ballot question. The form of the ballot precludes its use to impart substantial amounts of information (although a short preamble to the question itself is possible), but the question can be phrased to elicit particular reactions or to prompt recall of specific information. For example, a 1975 National Opinion Poll in the United Kingdom revealed that the wording of the European Community ("EC") referendum question changed the margin of victory of the "yes" votes by substantial amounts, with the most significant change occurring when the question explicitly referred to the government’s support for EC membership.\(^2\) Thus, whether the question put to Israeli voters refers to a "peace accord" or merely to an "accord" or whether it refers to the government could slightly influence voter behavior.

The concern with the wording of the question is greater in elections where voters come to the polls without having made up their minds or open to changing their minds. That occurs often in the United States, where a ballot may contain a handful of ballot questions, some of which have been the subject of little or no publicity in the campaign. In a controversial, rare, and high profile nationwide referendum, few, if any, undecided and uninformed voters exist on election day. Most will have come to a decision well before they enter the polling booth, often on the basis of pre-existing commitments or, in other cases, on the basis of the campaign. Some scholars have found that in such an environment, voters pay attention to issues raised by the election and tend to make up their minds very early in the campaign.\(^2\) The campaign in Israel was well underway early in 2000 and throughout that summer even in the absence of any final agreement; the country was full of bumper stickers, posters, pamphlets, and advertisements before movies. Although recent events have delayed resolution of negotiations and thus postponed any popular vote, many Israelis have doubtlessly already made up their minds. Even though hostilities may have unsettled some prior conclusions about the wisdom of peace accords, the violence makes the negotiations more salient and reduces the possibility that information provided in a future referendum campaign will have much effect on the electorate’s decisionmaking. In information environments that focus people’s attention on the issues related to a referendum, most voters will have securely anchored views well before they vote. Not only will new information provided by the wording on the ballot be unlikely to disturb


\(^{24}\) See Bogdanor, Politics and the Constitution at 219-220 (cited in note 6). The final question mentioned the government but did not expressly note that the government supported continued membership in the European Community.

their decisions, but people also work to fit any new data as consistently as possible with existing views and perspectives.26

A ballot question typically presents a binary choice: Do the voters approve or reject the policy proposed in the question? Thus, the issue must be framed in such a way that it fits this binary pattern. In the Israeli case, two possibilities come to mind, with the first possibility as the most likely format, particularly at this relatively late stage of the negotiations. First, the question could ask the voters to approve a peace accord that has been negotiated and finalized by the relevant parties. Thus, although the accord itself will be complex and lengthy, the ballot will merely ask if the voters approve of the agreement, assuming they have been informed about the details in some other way. In an important way, the binary nature of such a question is artificial. The agreements that the voters will be asked to ratify or reject will be the product of countless tradeoffs and compromises, a detailed treaty with dozens of provisions that are the product of logrolling and bargaining. Voters who approve of most of the particular deals reached but who object to one or a few provisions must decide whether to vote “yes” or “no” on the entire accord. Parts cannot be disaggregated; compromises cannot be renegotiated. This can lead to defeat when drafters overestimate voter support for provisions that the electorate likes and underestimate the intensity of voter distaste for provisions that the electorate opposes. For example, some have termed Canada’s Charlottetown Accord an “inverted logroll” because the complex agreement, “contrived explicitly to win pan-regional support . . . invoked [instead] pan-regional opposition.”27

A second binary format is possible. Before substantial negotiations occur, voters could approve a peace accord in principle and allow negotiators to work out the details in subsequent meetings. In this case, the ballot question might specify and resolve several issues that voters think important (at a high level of generality), but the voters will delegate to elected representatives the work of compromise and negotiation without the opportunity to ratify the final result in a popular vote.28 This option seems very unlikely in the Israeli context, where voters care deeply about a number of issues and are unwilling to delegate to others the responsibility for working certain details out (for example, the question of the status of the Golan Heights in an agreement with Syria or the status of Jerusalem in an agreement with the Palestinians). Moreover, ambiguity in the wording of this kind of preliminary ballot question may undermine the legitimacy of any deal reached under its auspices. Those who oppose the final agreement can argue that it departs from the command of the


electorate, and the ensuing debate will deteriorate into competing interpretations of a generally worded ballot question. Ambiguity may be difficult to avoid, however, if the vote occurs at an early stage in the negotiations when those drafting the treaties and accords will want to preserve maximum flexibility.

In some respects even the first kind of referendum will have characteristics of the second. Not all aspects of the agreement that are important to voters will be contained in the treaty documents. For example, it may be relevant to some voters that other countries or institutions will be involved in enforcing aspects of the agreement or in sending additional foreign aid to Israel and the Mideast. At least some of these understandings will be informal or subject to further action (perhaps by the US Congress or an international tribunal) to take effect. What happens if the referendum passes but crucial promises made by the government to voters during the campaign are not fulfilled? Typically, promises made during a political campaign are not enforceable and cannot be used to reverse the outcome of the referendum on the grounds of fraud. However, failure to follow through on such promises, particularly if exit polls showed that they influenced the outcome, could be used by opponents to resist following the popular mandate or to undermine the legitimacy of the election. Similarly, difficulties with implementation after the referendum, perhaps because of misunderstandings about boundaries, problems with land transfers, or disputes about taxes, may be portrayed as bad faith on the part of the government or other supporters of a peace accord.

The problem of broken campaign promises is likely to be a serious one. Certainly, opponents of any agreement will have incentives to make extreme statements to scare voters away from substantial change to the status quo, and they need not worry about recriminations after the vote if they succeed in defeating the referendum. It will be impossible to prove that the parade of horribles would not have occurred if the referendum had passed. Thus, the government and other proponents will also be tempted to put forth extravagant claims in favor of the proposal in order to counter such extreme claims. More modest, but perhaps more realistic promises, may not be sufficient to win the election, and supporters will discount the cost of reneging on promises in the future as they construct their campaign advertisements.

B. INFORMATION DURING THE CAMPAIGN

Voters need two kinds of information. First, particularly when direct democracy is an unfamiliar kind of lawmaking, they need information about the logistics of the process. That information is typically provided by the government before the vote, perhaps as part of a voter information booklet, through announcements in the mass media, and by mailings giving the time and date of the election as well as the location of the polling places. In this era of widespread Internet communication, a government-run web site can also provide this substantively neutral information. Second, voters need information about the issues at stake, the options and the
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arguments. I will discuss a few of the issues relevant to such voter information in section III, which focuses on campaign finance regulation. The two topics are related because most of the information that voters receive during a campaign is generated by interested groups on both sides, and their ability to provide information will depend on their financial and human resources. In this section, I raise two different concerns: voter information booklets and the allocation of free broadcast time for political advertisements.

Many countries and states in the United States mail to each voter a government-issued voter information booklet a few weeks before the popular vote on a referendum or initiative. In addition to the logistical information, the booklet often contains supposedly neutral explanations of the ballot question and its ramifications, as well as statements supporting and opposing the referendum written by the groups on either side. In some cases, these are not collated into one document but are sent out as three publications—one by the government, one by supporters, and one by opponents. The voter booklets serve as important sources of data for voters, although they are probably not as influential as advertisements through the mass media or, in a country the size of Israel, personal contact by campaign workers. In the United Kingdom’s 1975 vote on the European Community 75 percent of voters saw one or more of the three informational pamphlets, and 25 percent read at least one thoroughly. In the United States, studies find that between 30 and 60 percent of voters have looked at ballot pamphlets, but most scholars conclude that they are not a significant source of information. Rather, the most significant source of information in US states in terms of its influence on voter behavior is the mass media, both political advertisements and news stories, and many voters receive information from only one source—the electronic media.

When the government takes a side in the direct democracy campaign, as will be the case in Israel, then the appearance of neutrality of any government-drafted portion of the pamphlet is undermined. For example, in the EC referendum in the United Kingdom, the government pamphlet was appropriately viewed by the public as a document in support of the referendum, giving supporters two official publications and opponents only one. Even if the government attempts to stay neutral in its explanation of the referendum and the underlying issues and saves its advocacy for another portion of the pamphlet, the appearance of bias is hard to avoid. Thus, efforts should be taken to make neutral statements about the election seem genuinely nonpartisan. The neutral portions of voter information booklets should be set apart


from statements in favor of the government’s position and should be written by an independent commission or agency subject to civil service rules.

A second problem is determining who will write the statements supporting and opposing the referendum. If umbrella organizations are used, they can be responsible for negotiating among the various groups and drafting one statement. If instead many political parties and registered groups are active but refuse to coordinate on a statement, dividing the limited space among groups presents a problem. Voters have limited attention spans for political issues—even very important ones—so the informational pamphlets cannot be so lengthy as to discourage voters from consulting them. If space is given only to political parties (only slightly reducing the pamphlet’s length in a country of many parties), significant voices on the issue will be unheard in the official publication because referendums tend to prompt formation of temporary groups focused on the ballot question.

Similar problems are posed in allocating any free broadcast media time to the opposing sides. Again, if the campaign is structured through two large umbrella organizations, then the government and the media effectively place the allocation decisions in other hands. They merely decide how much time, and when, to make available, divide it equally, and allot it to the two sides. The umbrella organizations will either produce coordinated advertisements, or they will distribute the time among the groups and political parties that work within the larger mediating umbrella groups. If the umbrella organization structure is not used, time could be allocated equally among political parties, but that may not result in equal apportionment between both sides, and it will leave out other groups that have views on the referendum. Allocating broadcast time is particularly important if groups are not allowed to purchase additional advertising time; the publicly allocated time may be their only media exposure other than news stories. This concern is lessened in the modern world of cable and satellite television. If broadcast time is limited on the Israeli television stations, for example, groups can reach substantial numbers of voters by advertising on stations originating in other countries, such as Russia, that are available to Israeli viewers and sometimes even targeted to them.

Canada provides an example of how to apportion time in the absence of two umbrella organizations. In its 1992 Referendum Act, Canada provides free broadcasting time for a period of sixteen days before the vote; it requires every network operator to make available a total of three hours in prime time for registered

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31. See text accompanying notes 42–46 (discussing structure of umbrella organizations).
32. Restrictions on campaign expenditures may reduce access to these alternate broadcast sources. See text accompanying notes 48–52 (discussing campaign finance restrictions).
referendum committees. A Broadcasting Arbitrator (in 1992, an expert in communications law was appointed) allocates the free broadcasting time among supporting and opposing registered referendum committees. To qualify, a registered committee must indicate that it wants time, identify the network it wants time on, and summarize its position on the referendum. In addition, the committee must put up a $500 refundable deposit as “earnest money.” The Act specifies that the Broadcasting Arbitrator is to allocate time in a manner “that is fair to all the registered referendum committees entitled to be considered for the allocation” and in a way “not contrary to the public interest.” He must consider the following factors: whether the committee represents a significant regional or national interest; whether allocation to the committee would be equitable taking into consideration the different views expressed; and whether the announcements it wishes to broadcast are directly related to the referendum. The Arbitrator’s decisions are binding and unreviewable.

It is hard to imagine that a Broadcast Arbitrator will not be the subject of enormous scrutiny and criticism, particularly if the official is seen as associated with the government. Given the highly charged atmosphere of the Israeli referendum, avoiding either the appearance of arbitrariness or partisanship will be difficult; yet some mechanism will be required to allocate time if simpler umbrella organizations are not used. Any decisionmaker allocating public resources, such as a Broadcast Arbitrator, should be insulated as much as practicable from government control, perhaps by using civil service rules to govern the selection and employment.

III. REGULATING POLITICAL PARTIES AND INTEREST GROUPS IN REFERENDUM CAMPAIGNS

A. THE GOVERNMENT AND ESTABLISHED POLITICAL PARTIES

One feature that distinguishes the typical referendum from an initiative is the government’s much greater role in the former. Initiatives are put on the ballot by popular movements or organized and well-funded groups that seek to implement policies that the government or entrenched political interests oppose and have successfully blocked in the legislature. Some referendums are mandatory; a country’s constitution may require a popular vote before certain policy changes can be effective. The government has more control in the context of mandatory referendums than it has with initiatives because it can avoid triggering the mandatory provisions, but it does not have the discretion to adopt the policy and forego the popular vote. On the other hand, many referendums are optional and become the subject of direct democracy primarily because the government chooses to hold a popular vote. Not surprisingly, then, the majority of referendums pass—the government seldom chooses to hold a popular vote in circumstances that bode poorly for its policy. As the Nairne Commission reported: “The unpredictability of referendums should not be exaggerated. The majority of referendums have been sponsored by governments and have produced the voting outcomes desired by those governments. This is certainly
true for some authoritarian regimes . . . but it is also largely true for democratic
systems." The US data provides a stark illustration of the difference in success rates
for government-proposed propositions and popularly-initiated ones. From 1898-1992,
61 percent of propositions emanating from state legislatures were approved; only 36.8
percent of those proposed by petition passed.35

In Israel, not only will the government support the referendum, but most
proposals also anticipate a favorable Knesset vote, perhaps by a supermajority, before
any question is presented to the people. This framework increases the likelihood of
success appreciably, but does not guarantee it. Government-initiated referendums do
not always pass for several reasons. Occasionally, a government will send an issue to
the people without being sure that the position it advocates will receive majority
support. Perhaps the government has no choice because the policy is one of enormous
importance that requires a popular vote to legitimize, much as appears to be the case
in Israel. Many commentators argue that territorial and boundary determinations
require popular involvement and a formal expression of majority support in order to
be perceived as legitimate or, at the least, to result in a stable and lasting political
solution.36 The government will still seek to influence the outcome with all the tools it
possesses, including the timing of the vote, the various regulations governing campaign
behavior, and the official publications to provide voter information.

In some cases, the government will not have a unified position on a referendum.
Direct democracy can be used by established political entities to reach agreement on a
policy that divides the government and cuts across party lines. Often these
referendums deal with moral subjects that do not neatly follow party lines, and they
allow governments to avoid stalemate when a policy must be chosen. The Irish
referendums on abortion and divorce are examples of this kind of direct democracy
that offers established entities the chance to avoid divisive intraparty battles.37 In other
cases, the government’s position does not prevail in a popular election because it has
miscalculated. Although opinion polls are consulted extensively before a question is
sent to the people, voters will sometimes vote differently from their positions as
revealed in non-binding polls, and their opinions may change over the course of the
campaign.

34. Report of the Nairne Commission at 84 (cited in note 1). See also David Butler and Austin Ranney,
Summing Up, in David Butler and Austin Ranney, eds, Referendums: A Comparative Study of Practice and
Theory 221, 223 (AEI 1978); Mads Qvortrup, Barak’s French Lessons: The Israeli Referendum in
Comparative Perspective 3, available at <http://www.iandrinstitute.org/international/israelart.htm>
35. See Magleby, Direct Legislation in the American States at 251 (cited in note 2).
36. See, for example, Butler and Ranney, Summing Up at 225 (cited in note 34).
37. See Michael Gallagher, Ireland: The Referendum as a Conservative Device, in Gallagher and Uleri, The
Referendum Experience in Europe 86, 102–103 (cited in note 5). See also Budge, New Challenge at 85–86
(cited in note 26); Bogdanor, Politics and the Constitution at 216 (cited in note 6) (characterizing 1975
EC referendum as such).
Finally, a government can lose a referendum battle because the government is unpopular and the vote on the ballot question effectively becomes a referendum on the government. Outcomes in government-sponsored referendums are tied, sometimes closely, to the popularity of the particular government. As Clarke and Kornberg conclude after an analysis of the 1992 national referendum in Canada:

[Government leaders in democracies should beware of holding referendums if the economy is bad. Referendums, like elections, provide opportunities for the people to speak their minds. Unable, for the time being, to "throw the rascals out" for their perceived mismanagement of their nation's economy, disgruntled electorates may instead be tempted to use government-sponsored referendums to "send the rascals a message" by "throwing out" their proposals.

This connection between the referendum vote and the government's overall popularity will be weaker when the referendum presents a question seen by the voters as important in its own right. That is, voters will be less likely to be influenced by irrelevant or ancillary issues when they perceive that a great deal is at stake in the popular election. But they will invariably associate the government with its proposal to some extent, and they will be leery of voting for policies that provide an unpopular or incompetent government significant discretion in implementation.

Political parties outside the government can also play important roles as mediating institutions in referendum campaigns on issues that do not cause intra-party cleavage. Some commentators argue that direct democracy actually strengthens political parties—or at least does not undermine them as most have argued—because either it allows them to avoid making decisions on issues that would destroy them, or, in other cases, parties can serve to organize the campaign and present information to the voters. In a country like Israel with many political parties, some which are not particularly broad-based, we would expect that referendums will not tend to split parties but that their leaders will formulate a unified position on the ballot question. Not only do parties provide valuable cues for voters seeking information about a ballot proposition, but parties can work to integrate the referendum and outcome into a coherent policy agenda. One criticism of direct democracy is that citizen-legislators vote "yes" or "no" on one large policy and do not think through the implications of the policy for the entire governmental agenda. Political parties are integrative devices that represent a host of policy and ideological choices, so their position on a referendum allows voters to develop a sense of the interaction between the ballot proposition and other policies.

39. See, for example, Budge, New Challenge at 39 (cited in note 28); Richard L. Hasen, Parties Take It: Initiative (And Vice Versa), 100 Colum L Rev 731, 731 (2000).
B. INTEREST GROUPS

Political parties and governments will not be the only organized groups active in
direct democracy. Temporary groups will form focused only on the particular ballot
question, often disappearing after the popular vote, and more established interest
groups that are not political parties will also play a role in the campaign and the vote. Although some individuals will be influential, either because of their wealth or their
visibility, most meaningful and influential political activity takes place through
participation in groups. One of the most crucial implementation decisions is how
these groups, as well as political parties, will be regulated during the campaign. If
disclosure will be required, campaign expenditure limits will be imposed, or public
funding will be available, all groups active in the campaign must be registered so that
laws can be enforced and resources distributed equitably. Any law that ignores the
role of unaffiliated groups risks silencing key political players, or at least treats them
unfairly; for example, the provision in a Likud proposal that appears to restrict public
funds to political parties disadvantages other groups and individuals who wish to
bring their message to the people.

At least two structures for regulation are possible. First, as has been the case in
some UK elections, two umbrella organizations can be formed. Just as political parties
shape candidate elections, these mediating institutions can shape issue elections. The
umbrella organizations, one including all proponents of the ballot question and the
other comprising all opponents, would provide the structure for election activity. The
government would not separately register the many groups participating in the
campaign; rather, all groups would work through the umbrella organizations,
substantially simplifying the government’s supervisory role. In a sense, this kind of
organization externalizes some of the regulatory costs onto the mediating
organizations. They would oversee all raising and spending of money, they would
allocate public money, and they would allot free broadcast media time. Although
political parties could be allowed to work outside the umbrella organizations, it is
more fair to require all entities—ad hoc groups and established parties—to act
through the umbrella organization to ensure that each side of the referendum is
treated equally. Otherwise, the side that has the support of more political parties will
receive more media time or other public resources. In addition, the government

40. The definition of an interest group is a contested one. Some scholars use a broad enough definition
to include political parties; most distinguish between political parties and interest groups. See
William N. Eskridge, Jr., Philip P. Frickey and Elizabeth Garrett, Legislation and Statutory
Interpretation 82 (Foundation 2000). In a multi-party country like Israel where some political parties
have relatively narrow policy agendas, the line between parties and interest groups will be even more
blurred.

41. See Gilbert, Likud: Barak Doesn’t Have A Majority for Reform, Jerusalem Post at 2 (cited in note 19).

42. But see Supreme Court Faults Referendum Broadcasts, Irish Times 8 (Jan 27, 2000) (in dissent in the
unpublished case Coughlin, A. v Broadcasting Complaints Comm’n & Radio Telefis Eireann & the Attorney
should not act independently from the umbrella organization that supports the referendum; otherwise, proponents will have two organized voices against the opponents' one umbrella group.

Using umbrella organizations may be the ideal way to structure a campaign on a nationwide referendum, but in practice it is a problematic structure to adopt. Groups on one side of a ballot question may not be keen—to say the least—to work together and coordinate their activities. For example, in referendums about membership in the European Community, both the Greens and the far right opposed joining the Community, but they would have vehemently opposed being forced to work together in one campaign organization. Similarly, groups that oppose a peace accord with Syria or an agreement with the Palestinians may have very little in common otherwise and find the notion of working in an integrated structure unacceptable. Under these conditions, it would be unrealistically optimistic to hope that two large organizations, one on either side of the ballot question, would naturally emerge.

The government could attempt to formalize the process and create two umbrella groups notwithstanding the absence of support for such organizations from their constituent parts, but this structure is unlikely to work smoothly. The Quebec Referendum Act of 1978 (as amended in 1998) provides a model. If no committee naturally forms, the Act directs the Chief Executive to appoint between three and twenty voters who are publicly identified with each side as members of two provisional committees. Once a provisional committee selects a chair, chooses a name, adopts bylaws and other rules and regulations, and appoints local sections and leaders, it becomes an official referendum committee. Groups that do not wish to join an umbrella organization because they disagree with the national strategy (even though they agree with the ultimate objective) can still receive funding and make campaign expenditures if they formally affiliate with an umbrella organization. The bylaws of each umbrella organization must allow affiliated groups to receive a fair and reasonable portion of their funds, and groups who believe they have not been treated fairly may take their cases to the Conseil du Referendum, which is made up of judges from the Court of Quebec.

Not surprisingly, virtually no country has successfully used the umbrella organization structure. Legitimate concerns about judicial challenges that would delay the popular vote and about the paralyzing effect of inevitable dissension among the disparate members of umbrella organizations have made most governments dubious
about the utility of this structure. In 1975, the United Kingdom recognized two naturally emerging organizations, but they found it difficult to maintain unity among their membership. The Quebec Referendum Act was successfully challenged by an individual claiming that the law denied non-affiliated groups and individuals the ability to make independent expenditures during campaigns and therefore violated freedom of association and freedom of expression under the Charter of Rights and Freedoms. The Supreme Court of Canada struck these provisions down (and found them not severable from the rest of the act) because they were not reasonable limits on the rights of expression that would be allowed by Section 1 of the Charter. Interestingly, the court accepted the argument that independent spending should be strictly regulated in a referendum campaign in order to make sure “that the promotion of one of the options does not benefit from far greater financial resources. . . . In this light, the regulation of referendum spending pursues one of the objectives underlying freedom of expression, namely the ability to make informed choices.” The problem with the legislation lay in its treatment of people who could not affiliate with an umbrella organization, either because they were not part of a group (a requirement for affiliation) or because they did not support one of the options (for example, abstentionists). The court noted that the legislation could be amended to cure the constitutional problem, perhaps by allowing independents to make campaign expenditures but limiting total expenditures relatively severely. Such a provision would ensure balanced campaigns, and groups would have no incentive to splinter into many groups or individuals in order to avoid other campaign finance limitations if the total they could spend was relatively small. In 1998, the Referendum Act was amended to respond to the court’s decision.

If any campaign finance regulations will be applied (and, at the least, disclosure regulations are crucial to the electoral process), some system of registering groups and perhaps individuals active in the campaign is required. Most systems are messier than the symmetrical umbrella organization structure, but some offer workable solutions that allow sensible electoral regulation. Political parties are already registered and thus easily regulated; other groups can be required to file registration forms with an election official. For example, the 1992 Canada Referendum Act requires all “referendum committees” to file applications with information about their officers and addresses, and it defines such committees to be any person or group that intends to incur referendum expenses greater than $5000. Note that this definition requires persons who plan to be active in the campaign to file, as well as organized groups. An
C. CAMPAIGN FINANCE REGULATION

At least three types of campaign finance regulations are possible. They can be adopted separately or in combination. First, public financing can be provided. Public financing is unusual in nationwide referendums, and it does not exist in any US state with direct democracy. It may be attractive in Israel, however, because of the tradition of public funding of political parties and in candidate elections. The proposed Likud referendum law provides for party funding of referendum propaganda, which would allow some use of public funds albeit solely through the party structure. In the 1975 referendum in the United Kingdom on membership in the European Community, each umbrella organization was given an equal sum of money, £125,000, on the condition that it provide public accounts. If the umbrella organization structure is not used and groups other than political parties are eligible, it will be more difficult to apportion public funding equally between the sides and to ensure that public funds go only to legitimate groups. The election rules could require that groups demonstrate some element of public support, perhaps through obtaining signatures on petitions, before they are eligible for public funds. But it will be difficult to keep a group from forming several referendum committees so that it can qualify for multiple grants of money. Most scholars in the United States who have thought about public financing in the context of direct democracy conclude that it would be virtually impossible to implement.

Restrictions on contributions or campaign expenditures can also be adopted, and they probably should be included in any public financing proposal that seeks to impose equality along this dimension on both sides in the campaign. The United Kingdom did not adopt expenditure restrictions to accompany the public financing in 1975, and the “yes” side outspent the “no” side ten to one because of its success raising money from business interests that supported European Community membership.

48. I have written elsewhere that, at least in the US context, I favor only aggressive disclosure to regulate campaigns because such information provides voters data that they need to make competent decisions and because disclosure raises the cost of political speech only slightly compared to other restrictions. See Garrett, 77 Tex L Rev at 1849 (cited in note 7); Elizabeth Garrett and Elisabeth R. Gerber, Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform, in M. Dane Waters, ed, The Battle Over Citizen Lawmaking 73 (Carolina Academic 2001).


The Quebec Referendum Act restricts referendum expenditures through umbrella groups (including affiliated groups) to money raised from government subsidies, limited contributions by political parties, and contributions by electors that are capped at $3000 per elector per umbrella organization. In addition, there is an aggregate ceiling on expenditures that is linked to the number of electors. My concern with restrictions on expenditures and contributions is two-fold. First, because money is so integrally involved in the ability to communicate in the political realm, restrictions on contributions and expenditures will reduce the amount of public discussion. On the other hand, without restrictions, the side that raises the most money, and can therefore afford more political advertisements and legions of campaign consultants to shape an effective message, will have an advantage solely because of its wealth.

Second, money in politics has a hydraulic quality; when it is regulated in one dimension, it tends merely to move to another. Regulations change the form of the expenditure, rather than eliminate it entirely. To the extent that the regulations impose costs on political actors, they are more likely to silence smaller players who cannot afford professional assistance in complying with and legally circumventing the regulations. Moreover, restrictions may drive money into forms that are harder to discover, thereby thwarting disclosure requirements that promise the most substantial effect on voter competence and election outcomes. Certainly, the US experience with campaign finance restrictions has been disappointing; campaign finance laws are apparently incapable of reducing the amount of money spent in candidate elections and often cause strategic behavior by sophisticated players that undermines efforts to publicize the source of political expenditures and large contributions.

Nonetheless, disclosure of campaign activity is vital for voters, particularly in the context of direct democracy. The content and quality of political information is especially important for voter competence with regard to voting on initiatives and referendums because people have far fewer informational cues than they do in other political contexts. In candidate elections, voters can glean helpful information from party affiliation and incumbency status; in direct democracy, the number and saliency of these cues are reduced. The problem is not as great for voters in a popular election like the one Israel is contemplating as it is in US issue elections. The endorsement of the government, the likely involvement of political parties in Israel’s referendum process, and the voters’ longstanding interest in these rare and important ballot questions will make it less necessary for them to rely on shortcuts to vote competently. Generally, however, political scientists have found that information about the groups

delayed any final agreements, frequent promises by politicians that accords will be submitted to the people for approval make it likely that Israel will conduct referendums at some point in the future. This article has touched on some of the major implementation decisions facing Israel (or any other jurisdiction) when it embarks on its first experience with direct democracy. In the ideal case, many of these decisions will be made long before a particular referendum campaign seems likely. To avoid the appearance that regulations are adopted for purely partisan or strategic reasons, it is advisable to establish the structure of the campaign and the election as soon as possible. Although many of the decisions that the Israelis will reach in order to implement the referendum on accords with Syria and the Palestinians may be unique to these historic agreements, the interest in direct democracy may outlive these particular elections. Thus, the rules governing referendum contests should be drafted either for more general application, or they should be revised in the wake of the peace referendum in the light of international and Israeli experience.
supporting and opposing a ballot question can significantly improve voters' ability to cast their ballots competently.\(^{52}\)

To be effective, disclosure must be prominent and relatively accessible for voters and, more importantly, for media and other political entrepreneurs who will bring information to the attention of the electorate. Each campaign communication should include the source of funding and, in the case of an organization, should provide the names of the major contributors. Groups sometimes use names that obscure their ideological commitments; for example, "Americans for a Cleaner Environment" might be the name chosen by an Exxon-led group of oil companies interested in passing laws to limit their liability from oil spills and other pollution. Thus, effective disclosure must pierce the veil thrown up by strategic use of group names. Alternatively, the official who registers groups can require that names fairly reflect the membership, but voters are probably benefited by knowing the identity of the contributors rather than learning a general, albeit accurate name.

In addition, timely disclosure of contributions and expenditures should be required and made available before the election. Only pre-election disclosure can affect the outcome of the vote. With the widespread availability of the Internet, data should be available on a web site, and election officials should consider allowing groups to send disclosure forms to the government via the Internet. It is important to consider the cost of disclosure when devising campaign finance regulations. The more complex the reporting requirements, the more costly the burden placed on those who must provide information to the state. Such a burden affects grassroots groups with few monetary resources and less access to consultants more severely than it does well-funded groups and sophisticated political players. Regulations can be calibrated to require less from smaller organizations although different rules make enforcement more difficult. For example, relaxed disclosure requirements could apply to committees until they raise or spend a certain amount of money. Under such a scheme, until the committee spends the equivalent of, say, $2500, it would file fewer and less detailed reports, but exceeding that threshold would trigger more rigorous disclosure rules, which would perhaps apply retroactively. Certainly, a regime with exceptions or different rules is possible to design, although complicated regulations present enforcement and compliance challenges.

### IV. CONCLUSION

Although the renewal of violence and other political developments in the Middle East have made peace negotiations more difficult and no doubt have significantly

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