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The People: The Least Accountable Branch

MARCI A. HAMILTON†

Representation guards against “rashness, precipitancy and misguided zeal.”

The United States is at a critical juncture in its constitutional history. Many forces have called into question the vitality and even validity of our representative form of democracy. Despite the Founders’ appreciation for and deference to representative decision-making as a bulwark against tyranny, the growing use and influence of the Internet and initiative lawmaking combined with an overly willing subscription to the primacy of self-rule have clouded our respect for the vital importance of representative democracy.

The advent of a global communication structure has posed an obvious attack. At first a self-consciously and intentionally anarchical world of computer hackers, the Internet premised its anti-authoritarian ethos on an absolute right to have access to information. The Internet has matured to the point, however, that it is no longer solely the property of the fringe. Rather, we now have a sophisticated information infrastructure that is viewed as a tool for the various power centers in society and has become the darling of governments, politicians, and citizens around the world. According to some politicians, this so-called Information Era could enable the United States to effect a system of

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1. Rice v Foster, 4 Del (4 Harr) 479, 487 (1847) (quoting Federalist 51 (Madison)).
massive self-rule. Technological capacities make a town-meeting style of democracy more attractive than ever, or so the argument goes.

The second, more subtle, attack on representative democracy takes the form of state initiatives. Most popular in the western states, the initiative ballot process permits individual voters to make the law directly from the voting booth. California, for example, now regularly makes statutory and constitutional law by shifting difficult policy choices away from accountable legislators to individual citizens.

The logical conclusion of possessivism individualism, a belief that self-rule is the most legitimate form of government, constitutes the third threat to representative democracy. Possessivism individualism is an implicit cultural presupposition that stands behind the creation and promotion of the Internet as a political tool, behind state initiatives, and behind the seemingly self-proving value of self-rule. Owing at least part of its force to laissez-faire economics, some versions of which presuppose that self-interest drives every human decision, such a deceptively easy stance glosses over the important distinctions between an individual reaching a decision in private and a legislator making a decision in public. Structurally, the two methods of decision-making...

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4. Id. See also 141 Cong Rec S10484-01 (July 21, 1995) (statement of Senator Patrick J. Leahy (D-Vt)) ("I believe I was probably the first Senator to actively hold town meetings on the Internet.").


On-line advocates united to express their displeasure with congressional efforts to censor "indecent" material on the Internet by taking part in an "Internet Day of Protest." It is reported that approximately 20,000 people communicated their opinion to the committee via e-mail, fax or telephone. See P.J. Huffstutter, Lawmakers, Internet Fail to Click, San Diego Union-Trib A1 (Jan 1, 1996). Although there has been some skepticism expressing doubt of the rise of an "electronic democracy," its popularity is destined to grow as government officials at local, state, and federal levels get on-line, establish e-mail addresses, and invite comments from their constituents. See id at A20.


7. Id at 1508, 1509 n 22.

making could not be more different, and the Framers of the Constitution fundamentally understood this vital point.

In the midst of these attacks, the reasons for choosing representative democracy over self-rule have been buried or ignored. As a frank apologist for representative democracy, I offer the following criticisms of direct democracy. In a nutshell, the clarion call of self-rule has duped us into misreading history and into misunderstanding the advantages of a representative system.

I. The Framers Chose Representative Democracy and Rejected Direct Democracy

A product of its time, the Constitution reflects two concrete, vivid, and mechanistic images prevalent in writings at the time of the Framing—a clock and a solar system. Intending to set in motion a machine with internal mechanisms that would ensure its efficient operation, the Framers created a mechanistic contraption, known as the Constitution of the United States.

Reflecting on images of a clock and a solar system offers a wealth of information on what qualities the Framers hoped to instill into their new experiment with democracy. These images portray three qualities: independence, interdependence, and balance. The Framers intended to capture each of these three qualities simultaneously in the design of the federal government.

Powerfully depicting the concept of independence, both the clock and the solar system have discrete elements assigned particular tasks and spheres. Each cog has its own function, each planet its own path. The independence inherent in the constitutional equation is similarly evident on the face of the Constitu-

9. James Madison stated that, like the check between the two branches of the National Government, the General Government would “controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order and harmony of the political system.” James Madison, Notes of Debates in the Federal Convention of 1787 89 (Adrienne Koch, ed, Norton 1966). See also id at 85 (statement of James Wilson); id at 84-85 (statement of John Dickinson); Catherine Drinker Bowen, Miracle at Philadelphia 79 (H. Hamilton 1966) (stating that Solar System image would dominate the Convention’s thinking of the Constitution); James H. Smylie, Presbyterian Clergy and Problems of “Dominion” in the Revolutionary Generation, 48 J Presbyterian Hist 161, 167 (1970) (referring to the “interrelated checks and balances which may be found in a clock or watch” as a “favorite image of the eighteenth century.”).

10. Many have recognized the mechanistic intention of the Founders. It has been assumed in the past that a Lockean individualism and Adam Smith competitiveness explain the mechanics of our Constitution as expounded in the Federalist papers. But Smith believed in competing systems (formed by a co-operative division of labor) rather than individualism. And moral sympathy drove society’s whole machinery in his theory. Social mechanics were developed in a subtle and thorough way by the Scots, who taught a whole generation of the founding fathers. Dr. Witherspoon at Princeton especially loved the principle of social “overpoise,” as he called it; and his student James Madison drew on Hume’s essays in writing Federalist 10, the classic exposition of social mechanics.

tion. Each of the three federal branches are described in individual Articles, and each Article assigns each branch distinguishable powers and obligations.\textsuperscript{11}

The discrete elements of a clock or a solar system, however, are not individual islands. Although the elements composing a clock or a solar system are discrete and individually identifiable, each element's function is inter-linked with the function of all the other elements within the clock or solar system. Not one element is an outlier in either image. While each and every element has its own task, neither the clock nor the solar system can realize its full capacity unless the disparate elements work in conjunction toward the same goal. No one clock gear can go on strike without ruining the entire operation and no planet may leave its path without throwing the others' paths into disarray.

For the same reasons, the work of the federal government cannot go forward unless the three federal branches, as well as the federal government and the state governments, operate in tandem toward mutually agreeable goals. To state the principle at its most basic level, Congress' law making capacity is meaningless, or at least severely restricted, without the President to enforce the law or the courts to interpret it. As the Supreme Court recently observed, our federal "system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence, the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'"\textsuperscript{12}

Finally, neither a watch nor a solar system will hold together unless its independent, yet interdependent elements achieve a certain all-important balance. No clock cog and no single planet completely dominates. Each has its distinctive potential and contribution, while all share equally in the attainment of the system's purpose. Each element is indispensable and if any element deviates from its designated role, the whole suffers.

Experienced as a palpable danger by the Framers, for whom the Revolution against Britain was a fresh event, tyranny was an ever-present threat to democracy. Thus, one of the Framers' overriding goals in crafting the constitutional machine was to avoid tyranny in its many forms.\textsuperscript{13} The Framers rea-

\textsuperscript{11} US Const, Art I, II, and III.
\textsuperscript{13} See Federalist 47 (Madison), in Garry Wills, ed, The Federalist Papers by Alexander Hamilton, James Madison, and John Jay 244 (Bantam 1982) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."). See also Marci A. Hamilton, The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence, 29 Ga L Rev 81, 85-90 (1994); Marci A. Hamilton, Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation, 69 NYU L Rev 477, 540 (1994).
sioned that power must be limited and exercised responsibly if democracy was to succeed.14

As depicted in the images of the clock and the solar system, decentralization of power was one of the primary mechanical means employed by the Framers towards the end of avoiding tyranny. While attempting to strengthen the federal government after the failure of the Articles of Confederation, the Framers chose both to buttress the powers of the federal branches and to distribute power among the three branches in an attempt to decentralize and cabin what they feared could become overweening power.

Consciously choosing to divide power, the Framers chose to spread power between the organs of social control with many creative devices. First, they created three independent, interdependent, and balanced federal branches.15 Second, they structured a system of dual sovereignty in which the federal government would coexist with a significant number of state governments, many of which were quite powerful at the time.16 Third, the decentralization drive is even evident in particular clauses, such as the Copyright Clause where the Framers followed England’s Statute of Anne by vesting copyright in authors rather than publishers.18 Granting copyright to authors was motivated by the understanding that publishers are more likely to become holders of concentrated power than are authors. Finally, with the addition of the Bill of

14. According to Montesquieu, “[p]olitical liberty is to be found only in moderate governments. . . . It is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits. Who would think it! Even virtue has need of limits. So that one cannot abuse power, power must check power by the arrangement of things.” Montesquieu, The Spirit of the Laws, Book XI, ch 4, at 155 (Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, trans) (Cambridge 1989). As similarly envisioned by the Framers, “[t]he different [branches of] government[] will control each other; at the same time that each will be controlled by itself.” Federalist 51 (Madison), in Wills, ed, Federalist Papers at 264 (cited in note 13).

15. Compare US Const Art I, § 1 with Art II, § 1 and Art III, § 1. See also, for example, Federalist 47 (Madison), in Wills, ed, Federalist Papers at 244 (cited in note 13) (“the three great departments of power should be separate and distinct”).

16. For example, US Const, Amend X. See, for example, Federalist 9 (Hamilton), in Wills, ed, Federalist Papers at 41 (cited in note 13) (“The proposed Constitution, so far from implying an abolition of the State Governments, makes them constituent parts of the national sovereignty by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a Federal Government.”); Federalist 45 (Madison), in id at 232-37; Federalist 46 (Madison), in id at 237-43.

17. Act for the Encouragement of Learning, 1709, 8 Anne, ch 19. One purpose behind this statute’s adoption may have been reducing the monopoly power of the publishing industry and decentralizing that power by placing it in the hands of individual authors.

Rights, the Constitution explicitly divided power between the church and the state and reserved all unenumerated powers and rights to the states and the people. 19

The Framers believed that the distribution of power was the best insurance against tyranny because power by its very nature is propulsive. 20 Without mechanisms automatically checking its exercise, the Framers experienced firsthand that the holder of power is likely to overstep appropriate bounds. The People, with a capital "P," get no more deference in the Constitution on this score than any other institution within the society.

Like every other social organ examined by the Framers, the people are equally capable of overstepping their authority. 21 They are the invisible fourth branch, a branch that is just as important as any of the other three federal branches and, most relevant to this essay, just as in need of checks on the exercise of its powers. The possibility of mob rule, of the tyranny of the majority, and of the passing passions of mobilized interest groups was as real and acutely threatening to the Framers as was the remembered tyranny of Britain's crown. 22

The siren song of direct democracy or self-rule, however, paints the People as the one structure within the polity not in need of checks and balances. If we listen carefully and heed the Framers' warnings, we cannot help but hear how dangerous a song this can be.

The Constitution's deeply pragmatic message is clear. A collection of individuals, each voting for his own preferences without reference to the greater good, is decidedly less desirable than a system of representation wherein representatives are held accountable to the public good for every substantive decision reached. The structure of the Constitution forces representatives to be trustees of the people's interest. Granted, individual performances often disappoint, but the Constitution's structure forces every decision into the


21. See James Madison, Notes of Debates at 75-77 (cited in note 9). See also Federalist 10 (Madison) in Wills, ed, Federalist Papers at 46 (cited in note 13) ("the majority, having such co-existent passion or interest, must be rendered . . . unable to concert and carry into effect schemes of oppression").

22. See Federalist 10 (Madison), in Wills, ed, Federalist Papers at 42-43 (cited in note 13) ("Complaints are every where heard . . . that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority."); Milner S. Ball, The Promise of American Law: A Theological, Humanistic View of Legal Process 32 (Georgia 1981), quoting Federalist 14 (Madison) ("The private no less than the public requires limitation. . . . Accordingly, the Bill of Rights draws bounded ranges for both 'private rights and public happiness.'"); Federalist 15 (Hamilton), in Wills, ed, Federalist Papers at 72 ("[T]he passions of men will not conform to the dictates of reason without constraint.").
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crucible of public scrutiny, thereby forcing accountability. The combined forces of the press, the voting booth, and the natural human tendency to shrink from public disapprobation create a constitutional structure designed to hold representatives accountable and force their decisions to take into account many views including the larger public good. Moreover, representatives' decisions, unlike those made through direct democracy, are traceable. Once decisions are made and go awry, there is no question in a representative system where to place the blame—it rests squarely on the representatives' shoulders. Secret ballot voting by the people does not admit of the same advantage.

Contrary to the assertions of possessivism individualism, the truth is that the Constitution places no lawmaking power in the hands of the people. Even though the town-meeting style of democracy was plainly visible to the Framers in many of the colonies, as well as in the Greek system of democracy referred to more than once during the Convention, the Framers made no provisions for such lawmaking. While the Ninth and Tenth Amendments state that the people get the Constitution's "leftovers," the powers and rights not mentioned in the Constitution, the Constitution plainly structured the process of lawmaking to "filter[]" the people's views.

The Framers did not simply have a distaste for popular lawmaking, but rather theorized within a distinctly Calvinist and Presbyterian framework which elevates representation over both monarchy and direct democracy. John Calvin's history-changing ideas about reforming the Christian church, he believed and later Calvinists believed, were equally applicable to government. Calvinist views are reflected in the Framer's discussion of the dangers of direct democracy and their concerns about the propulsive quality of power within the hands of any social entity or government official.

Although Calvin believed that if he were "to go over the faults of ecclesiastical government in detail, [he] should never have done," he delineated two chief evils in the pre-Reformation Church: (1) the shirking of responsibility by church leaders and (2) the failure to serve the people. He accused church leaders of "cruel tyranny" and "lawless, unrestricted domination."

The American Presbyterian Church's Constitution reflects the preference for representation over direct democracy and for responsible leaders: "Presbyters

23. Madison, Notes of Debates at 83-84 (cited in note 9).
26. Even if the Presbyterian system in the United States was not the only model for federalism and representation available to the Framers, the Presbyterian Synod was the best example of representative popular government at that time. See generally Frederick W. Loetscher, 200th Anniversary of the Adopting Act 10 (1814).
27. John Calvin, 1 Tracts and Treatises on the Reformation of the Church 140 (Eerdmans 1958) (The Necessity of Reforming the Church).
28. Id at 140-41.
29. Id at 143.
[representatives within the church] are not simply to reflect the will of the people, but rather to seek together to find and represent the will of Christ. Decisions shall be reached in governing bodies by vote, following opportunity for discussion, and a majority shall govern. 30 When translated into the context of government, this means that representatives are to do what is best for the people. 31

The Framers were not content to require representative democracy solely for the federal government. The Guarantee Clause requires the states as well as the federal government to institute a system of representation rather than direct democracy. 32 Apparently, direct democracy was no more valuable in the states than it was at the federal level. In fact, the Guarantee Clause makes plain the importance placed on representation over direct democracy. The Framers relied on representative democracy at all levels, instituting structural and essential limitations on the power of the people, in order to keep the constitutional clock running and the governmental solar system revolving.

The Framers’ ultimate preference for representative government was not reached in the absence of deliberation. The Framers identified three primary options for governing society: monarchy, which they flatly and righteously rejected; direct democracy, which they also rejected; and representative democracy, which they chose. 33 A proposal that representatives would be subject to a right to instruct from their constituents, which would have created a representative system much closer to direct democracy was also rejected. 34

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31. James Wilson made this point most eloquently.
   He considered himself as acting & responsible for the welfare of millions not immediately represented in this house. He had also asked himself the serious question what he should say to his constituents in case they should call upon him to tell them why he sacrificed his own Judgment in a case where they authorized him to exercise it? Were he to own to them that he sacrificed it in order to flatter their prejudices, he should dread the retort: did you suppose the people of Penn[sylvania] has not good sense enough to receive a good Government?


33. Madison, Notes of Debates at 46 (cited in note 9) (Wilson rejects the British monarchy as a model for establishing Executive powers); id at 74 (Wilson states that “[r]epresentation is made necessary only because it is impossible for the people to act collectively”); id at 193-95 (Madison discusses that representatives are entrusted by the people to secure the public happiness).

34. The Constitutional Convention definitively defeated a proposal that legislators should be subject to a right to instruct. See Joseph Gales, ed, 1 Annals of Congress 757-
Highlighting the Framers' unmistakable rejection of direct democracy is not
to suggest that the people were not, and are not, a potent presence within the
constitutional scheme. The people's power lies in the voting booth and in the
public square. Voting in elections for representatives and vigorous political
discussion and debate curb the excesses of politicians and make elected
representatives accountable to their constituents. Yet, during the tenure of their
representation, they are given decision-making power that is independent of the
people. In what surely presages the Framers' belief in the necessity of an
educated polity and of free speech rights that make it possible to challenge
government hegemony, the means of reducing tyranny for Calvin were a
representative and accountable church structure, which requires members who
can read Scripture in order to prevent their being duped by their leaders.\(^{35}\)

The Constitution frees representatives from direct control by the people
during the term of representation so that they may make the decisions that are
in the country's best interest. During the term of representation, they are given
decisionmaking power that is independent of the people.\(^{36}\)

Article V is a good example of the Constitution's rejection of the people
as a lawmaking entity. Popular sovereignty is limited to the concept that the
people are the *source* of social power.\(^{37}\) Article V does not permit the people
to easily amend their Constitution; indeed, it contains no provision that
empowers the people, *per se*, to make any change in the Constitution. Article
V discourages those intent on amending the agreed-upon Constitution by
requiring that they act only through Congress or state conventions and allows
them to prevail only with a super-majority of states.\(^{38}\)

Wilson, who strongly favored representatives to maintain close communication with their
constituents yet were to exercise independent judgment for the common good, came closest
to an agency notion. His commitment to direct election of both houses of Congress and
the President by the people was unequalled among the Framers. See Robert G. McCloskey,
*James Wilson*, in 1 Leon Friedman and Fred L. Israel, eds, *The Justices of the United
States Supreme Court 1789-1969: Their Lives and Major Opinions* 79, 88 (Chelsea House
1969).

During the Constitutional Convention, some believed that indirect election of the
President and the Senate would appropriately shield representatives from factional and
constituent pressure. See Madison, *Notes of Debates* at 190-01 (cited in note 9) (statement
of George Mason of Virginia). A constitutional amendment changes the election of
senators to direct election. See US Const, Art I, §3, clause 1 (election of senators by state
legislatures), amended by US Const, Amend XVII, § 1 (direct election of senators). The
one vestige of the Convention's attempt to mediate the effects of popular voting, the elec-
torial college, has not been the political power that is was assumed it would be and has
been repeatedly criticized because it "undemocratically separates people from the presiden-
tial election process." Michael J. O'Sullivan, *Artificial Unit Voting and the Electoral

35. Calvin, 1 *Tracts and Treatises* at 144 (cited in note 27).


37. See Robert Green McCloskey, ed, 1 *The Works of James Wilson* 177 (Belknap
1967) (Representatives "act, not by their own power, but by the power of those whom
they represent."); Hamilton, 69 NYU L Rev at 530 (cited in note 13).

38. US Const, Art V. The plain language of Article V belies Professor Akhil Reed
The force of the self-rule myth proves the necessity of checks on direct democracy. The Framers set into motion a clock, a solar system of social powers in which the people were to hold a privileged, but limited, place. Two hundred years later, some seem to be persuaded they are the government. This exaggerated sense of the people's power is not surprising given power's propulsive propensities. Power has the ability to seduce the people every bit as much as the President, the Congress, or the courts.

The self-rule myth is fueled by a fundamental confusion over the meaning of sovereignty. For one example, Professor Akhil Reed Amar has even suggested that constitutional amendment need not occur through Article V of the Constitution because popular sovereignty means that the people can rule through simple majorities. Through misinterpreting the views of Framer James Wilson, Professor Amar has permitted the myth of self-rule to overcome the plain language of Article V.

Popular sovereignty means that the people are the source of all power, not that it is wise to rest direct lawmaking power in their hands. Indeed, the Constitution is devoid of any provision effecting direct popular rule on any issue. Instead, the Constitution places checks and balances on the exercise of the people's power by vesting the power to make law in representative legislatures, whether federal or state. Article V's allocation of the lawmaking power wisely slows the temptation to act hastily and on specious reasoning by placing meaningful barriers in the path of mob rule.

II. Popular Lawmaking

Despite the Framers' purposeful rejection of direct democracy, popular lawmaking initiatives have become increasingly popular, the most vivid example being the California initiative and referendum process. The idea that this process in any way promotes valuable democracy is a product of the self-rule myth. A worse decision-making process could not be imagined.

In California's initiative process, shortly before the election, voters receive a catalog of initiatives drafted in incomprehensible language and printed in tiny type. It is virtually impossible to tell whether a given measure requires a "yes"

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39. See Amar, 94 Colum L Rev at 507-08 (cited in note 38).
41. See US Const, Art I and IV.
or a "no" vote for approval. Voters surveyed have admitted that they reached their decision on the basis of commercials and then, in the voting booth, crossed their fingers in the hopes that their actual vote was accomplishing what they thought they wanted to do. Moreover, as Professor Elizabeth Garrett points out, popular lawmakers is no less subject to the coercive influence of "special interests" than is legislative lawmakers.

The recent California ballot initiative, Proposition 209, in which the people of California rejected affirmative action in state organizations, invites a reexamination of the pitfalls and the potential of direct democracy. Voters in California were asked to vote in the privacy of a voting booth on the following proposal:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The inevitable challenges to Proposition 209 have focused on the Equal Protection Clause and the Supreme Court decisions in *Hunter v Erickson* and *Washington v Seattle School District*. The Coalition for Economic Equity has challenged the law in the courts. The Coalition has argued that Proposition 209 exhibits improper "racial focus" because "the reality is that the law's impact falls on the minority" and restructures the political process to the disadvantage of women and minorities. The district court was persuaded; the Court of Appeals was not. Without taking a stand on Proposition 209's Equal Protection merits or demerits, I will use Proposition 209 as an example to illustrate the real dangers of direct democracy.

Proposition 209 encompasses two statements. First, it is a restatement of "existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act." Second,
given that affirmative action may only be employed constitutionally to battle proven historical discrimination, it is a decision by a majority of the voting public of California that affirmative action programs may not be employed in order to battle even such ingrained discrimination. To the extent that it restates existing law, it is uncontroversial. To the extent that it adds an additional bar to affirmative action as a remedy for discrimination, it raises serious and interesting constitutional questions.

Setting aside the Equal Protection concerns raised by the law, it is informative to focus upon who made the law because the law is tainted, as is any product of direct democracy, by its process. A citizen who makes the law from a voting booth votes in private, has the right not to tell anyone how he voted, and indeed can lie about his vote with impunity. As a structural matter, superstition and ignorance are as welcome participants in such a vote as is introspection and education. If there were ever a scenario when prejudice and foolishness could triumph, this would be it. As a result, the secret ballot voter can foreclose one of the few means of redressing persistent societal discrimination against minorities without having to articulate reasons to the public and, perhaps more importantly, even to himself. The scenario offers no mechanism of accountability sufficient to make the benefits of education and soul-searching outweigh their costs.

The key constitutional value missing from the direct democracy scenario is accountability. In 1977, Senator James Abourezk stated that the initiative process is “unique among our democratic rights, [and] founded on the belief that the citizens of this country are indeed as competent to enact legislation as we are to elect public officials to represent us.” He misses the point, as does so much of the rhetoric surrounding direct democracy and self-rule, that competence and respect for popular sovereignty cannot make up for the absence of accountability. Direct democracy lacks the “checks on purely selfish conduct” inherent in a system of representative democracy in which the decisionmakers are interested in reelection and subjected to a powerful and lively press. Without accountability, the incentive for deliberation experienced by representatives disappears. The absence of accountability feeds ignorance and self-deception, which in turn reduces the likelihood that any individual voter will be competent to vote on the issue.

We should not assume, as the economists would, that real-life voters automatically vote out of relatively well-informed self-interest. Where articulation and introspection are not structurally built into the voting process, the

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average voter is an unreliable decision-maker. Therefore, it is more likely that
the average vote, even on matters of paramount social importance, is a
product of self-deception and ignorance.

Such concerns are especially pronounced where minority interests are at
stake, as they were in Proposition 209. Worries about the “tyranny of the
majority” are a familiar refrain in the legal literature. Such worries, how-
ever, are almost always erroneously expressed in the context of discussing laws
that are the product of a representative system. This equation of representation
with majoritarianism is one of the cardinal errors of contemporary political
theory. Majoritarianism is not a necessary corollary to representation. To
the contrary, the cure for majoritarianism is representation. By contrast,
direct democracy is a “majoritarian tool.”

Representation mediates the problem of the tyranny of the majority
because representatives are not the people themselves but independent and
accountable decision-makers. It is direct democracy, instead, that invites
majoritarian tyranny. Indeed, the Framers’ preference for representation was
intended to mediate the problem of the unruly mob and the ill-informed ma-
jority guiding the law away from the interests of the people.

What is a court to do when faced with the product of such a dismissal of
the representative process? As I have argued vigorously before, courts should
not attempt to fix the failures of the legislative process by attempting to bring
in participants who were excluded from the process or attempt to skew the
interpretation of a statute away from special interests who were involved. Courts
are not legislators and do not have the institutional capacity to act as
stand-in legislators. Although, in certain highly publicized cases, their decisions
are subjected to the public glare, courts are structurally less accountable than
any legislator.

Two paths will lead more directly to the constitutional balance envisioned
by the Framers. First, the Guarantee Clause should be found to be justicia-

56. See generally, for example, Eule, 99 Yale L J 1503 (cited in note 6). But see
Judith F. Daar, Direct Democracy and Bioethical Choices: Voting Life and Death at the
Ballot Box, 28 U Mich J L Ref 799, 834, 841-42 (1995) (arguing that direct democracy
and citizen lawmaking can be used to stimulate legislative action).
58. One need only read the work of Mancur Olson to understand that representa-
tive systems are not as susceptible to majorities as they are to well-orchestrated messages
delivered by cohesive small groups. See Mancur Olson, The Logic of Collective Action
127-28 (Harvard 2d ed 1971). See also id at 144 (arguing that “the organized and active
interest of small groups tend to triumph over the unorganized and unprotected interests
of larger groups”).
(reviewing David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the
United States (Johns Hopkins 1984).
60. See id at 1364.
61. See Hamilton, 69 NYU L Rev at 544-50 (cited in note 13). But see Jane S.
Schacter, The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy,
ble. Professor Julian Eule makes an understandable point when he urges more rigorous review of direct democracy in light of the Guarantee Clause, but I am skeptical of any court's ability to draw such a line. What does it mean to use a nonjusticiable principle to more rigorously apply a separate constitutional principle, like equal protection? Much more straightforward and constitutionally defensible is Professor Chemerinsky's suggestion that the courts recognize the Guarantee Clause's justiciability. This is no doubt strong medicine, but strong medicine is exactly what society needs to protect itself against standardless, silent, and secret decision-makers.

Second, the tide of direct democracy should be stemmed, while the wise reasons for representative democracy are revived and recirculated. Instead of telling the courts to quietly clean up the mess, we should prevent the mess in the first place.

III. Conclusion

The Framers carefully crafted a mechanistic Constitution in which the People are the fourth branch and, like any branch of government, an important power that must be checked and balanced. The emerging popularity of popular initiatives and the attention paid to the global information structure as a tool of self-rule evidence that representative government has somehow gone awry.

Admittedly, times have changed since the time of the Framing, but have these changes made direct democracy a wise choice? A lively and powerful press has been established that is capable of informing the people of more than they ever wanted to know. Literacy has increased dramatically. Education is available to a broader segment of society. The franchise has been dramatically expanded. Despite these changes and countless others, the Framers' insights are not out of date, but retain their essential force.

64. See Harvey J. Graff, The Legacies of Literacy: Continuities and Contradictions in Western Culture and Society 353 (Indiana 1987) (From 1790 to 1840, the number of different newspapers published in the United States rose from 92 to 1,404.).
65. See id at 375-77 (From 1870 to the middle of the twentieth century, illiteracy in the United States dropped from twenty percent to under three percent.).
66. See Elchanan Cohn, The Economics of Education 85 Table 4-5 (Ballinger 1975) (Enrollment in United States institutes of higher education rose from 238,000 at the turn of this century to 6,902,000 in 1968.).
If anything, contemporary practice reinforces the Framers’ insights. The difference between the roles played by representatives making governing decisions and individuals making such decisions remains significant. Representatives are “trustee[s],” charged with making decisions not only on behalf of, but also in the interest of, the people. While they do not always do so, the constitutional structure is rigorous and provides a standard against which representatives’ performance can be critiqued.

In contrast, an individual enters a solitary voting booth with no trustee obligation. The individual typically asks only, “What’s in it for me?” Yet, the individual typically cannot accurately gauge the answer to even such a narrow question. Even if a voter’s answer to that question coincidentally serves the public’s interest, the private vote is not structured, nor generally likely, to achieve the end of societal good. Direct democracy, or the public initiative, lends itself to misguided yes/no votes, not to the scrutiny, deliberation, compromise, and horse-trading necessary to solve hard social problems with some hope of finality.

My students sometimes ask, “If the representative is not merely exercising her preferences, what is she using?” The answer, in a nutshell, is judgment. Representatives have the structural role of exercising leadership and applying wisdom to hard problems in the fishbowl of public life. This is a far cry from the exercise of simple unchecked self-interest that can attend the individual voter asked to decide matters of public import in the privacy of a voting booth.

In addition to recognizing that we have strayed from the Founders’ essential observations about representative democracy and the independence, interdependence and balance it requires, we must take a closer look to accurately determine exactly where our government today has departed from the ideals of representative democracy. Often, we have assumed that a more impassioned commitment to self-rule was necessary. However, it is unclear whether the push for direct democracy has caused the constitutional clock and governmental solar system to fall out of balance or whether such initiatives are an attempt to regain a balance already lost through failures in representation or judicial review.

68. See McCloskey, ed, 1 The Works of James Wilson at 113 (cited in note 37); Hamilton, 69 NYU L Rev at 533 (cited in note 13).


70. Pending bills in Congress reflect the public's concern that Congress has been abdicating its constitutional responsibility to make the hard policy choices and therefore ducking accountability for the nation's law. See The Congressional Responsibility Act (introduced in the Senate and the House). The structure of the Constitution demands representatives of courage. Compare Kevin Phillips, Arrogant Capital: Washington, Wall
Whatever answers we find, we must remember that the Framers were correct that the ultimate goal is a balance of powers, spread between elements that are simultaneously independent and interdependent and created for the overriding purpose of avoiding tyranny. The system has matured into a grandfather clock, a bit too large, a bit too ornate, but a clock that does keep time.

__Street, and the Frustration of American Politics__ 72 (Little Brown 1994) (discussing difficulty federal government faces in “stand[ing] up for the economic interests of ordinary Americans against the better-funded commitments of lobbyists, lawyers, investment bankers, multinational businessmen, and trade consultants”). The fact that some, or even many, individual representatives fail on this score is not necessarily an indictment of the system but rather a testimony to the high standards set by the Constitution.