**THE QUEST FOR LEGITIMACY:
A COMPARATIVE CONSTITUTIONAL STUDY OF
THE ORIGIN AND ROLE OF DIRECT DEMOCRACY IN
SWITZERLAND, CALIFORNIA, AND NEW ZEALAND**

by

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ABSTRACT

This thesis is a comparative constitutional study of the origin and role of direct democracy in Switzerland, California, and New Zealand. It reveals that the direct democracy systems in these jurisdictions came into being as a consequence of sustained periods of economic turmoil which coincided with widespread disillusionment with the performance of elected representatives. Constitutional reformers in these jurisdictions embraced direct democracy as a means of improving, not displacing, representative democracy. Their aim was to restore the legitimacy of their constitutional systems.

The study also demonstrates that the majoritarian potential of the direct democracy devices in Switzerland, California, and New Zealand is limited. It is limited to the extent that is consistent with the constitutional principles underlying representative democracy in these jurisdictions, particularly those designed to protect minority rights. This reconciles the competing philosophical traditions on which most of the arguments for and against direct democracy are based. Provided minority rights are protected sufficiently, Jeffersonian-inspired advocates of direct democracy should not offend adherents of representative democracy, whether Burkeian or Madisonian in its conception.

This thesis concludes that the direct democracy systems in Switzerland, California, and New Zealand are not the same, nor could be, given the unique forces that contributed to the formation and practice of constitutional law in these jurisdictions. They are different primarily because direct and representative democracy coalesced differently in Switzerland, California, and New Zealand due to variations in the constitutional principles underlying representative democracy in these jurisdictions. These principles vary because constitutional law in each jurisdiction is a unique and intricate confluence of law, politics, history, economics, and cultural expectations.

This study also fills a void in the literature on direct democracy, primarily by documenting the origin of New Zealand's direct democracy system, analysing its possible role, and comparing it to the origin and role of the systems in Switzerland and California. In doing so, it provides a detailed examination of the origin and role of direct democracy in Switzerland and California, topics that have previously escaped comprehensive treatment.

DEDICATION

To Maria Gobbi, whose love, laughter, determination, beauty and brilliance are a never-ending source of inspiration. Thank you.

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I am presently serving the Minister of Justice as a Legal Adviser in the Law Reform Division of the Department of Justice. I took up the position shortly before the National Government embarked on the process that led to the enactment of the Electoral Act 1993 and the Citizens Initiated Referenda Act 1993. I had the opportunity to work on both measures, which provided rare and invaluable insights into the process of constitutional reform. This thesis draws on these insights where appropriate. I have also had the opportunity to participate in California's direct democracy system. My connection with Switzerland, while less participatory, is no less intimate. My father's parents hail from Como which borders the Ticino, a Swiss canton that a few of my relatives still consider home.

Although my experience and study have led me to believe that direct democracy will continue to become more common place, this thesis is neither an apology for nor an attack on direct democracy. There are already many works of this nature. My aim is to show why direct democracy came into being in Switzerland, California, and New Zealand, and to explain why their direct democracy systems are not the same.

I began this thesis after Dr Andrew Ladley, my thesis supervisor, pointed out that I was well-placed to do it. I am grateful for his observation. His early guidance also enriched my research. For example, he introduced me to Mr Wayne Eagleson, then Director of National Government's Parliamentary Research Unit, who gave me unrestricted access to his files on direct democracy. They contained a wealth of information, including a record of the policy decisions that determined the content of the Citizens Initiated Referenda Act 1993 and the means by which to contact the main direct democracy advocates. Dr Ladley also provided the administrative support that enabled me to complete this thesis without hindering my commitments, both personal and professional.

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Mark W Gobbi
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INTRODUCTION

Power is the essence of government. A government endowed with legitimacy has the power to determine the law and to enforce it. However constituted, governments generally use their power to distribute burdens and benefits among those they govern. At its most basic level, governmental power in a democracy based on the rule of law is legislative. Governments enact laws to tax, to spend, to coerce, and to punish. The ambitious strive and compete for this legislative power as it offers the possibility of increasing their benefits and reducing their burdens. The meek have little choice but to obey. Constitutional law is their only sanctuary. It is a shield against the nightmare of absolute legislative power.

The size and strength of the shield varies among constitutional systems. It depends on the range of institutions and devices deployed to limit legislative power. Since Montesquieu, representative democracies have, to varying degrees, generally limited this power by dividing it among three separate branches of government: the legislature, the executive, and the judiciary. By diffusing the locus of power, this approach is intended to ensure that no one group or individual can wield complete control over the functions of government.

Direct democracy is another, although less common, means by which to limit legislative power in representative democracies. It consists of two basic forms: the initiative and the referendum. The initiative allows the electors to propose or enact new laws while the referendum allows them to veto legislative enactments. By providing the electors with the power to propose, enact and veto laws, the principal direct democracy devices limit the legislative power exercised by elected representatives. Switzerland, California, and, to a far lesser extent, New Zealand, are examples of constitutional systems which have limited legislative power in this fashion. To ensure that the electors do not abuse their legislative power, these systems have, in one form or another, imposed anti-majoritarian safeguards upon their direct democracy devices.

In 1891 Simon Deploige predicted that other countries would eventually consider adopting Switzerland's direct democracy system.¹ However, with the notable

¹S Deploige *The Referendum in Switzerland* (trans. Longmans, Green & Co, London, 1898) 290.

exceptions of Albert Venn Dicey in England and John Vincent in America,² his contemporaries were less optimistic. Both Lilian Tomn and Numa Droz, for example, doubted that other countries could adopt direct democracy without importing other parts of the Swiss constitutional system.³ However, the experience of California during the Progressive Era and New Zealand during the early 1990s have proven otherwise. Not only can direct democracy take root outside of Switzerland's unique constitutional environment, but constitutional considerations peculiar to each jurisdiction have made its adaptation unavoidable.

This, in itself, explains the differences in the direct democracy systems existing in Switzerland, California, and New Zealand, which is the primary objective of this thesis. This conclusion is derived from three case studies of the origin and role of direct democracy. The first case study is Switzerland, which is a necessary example for the following reasons: direct democracy, as defined in this thesis, originated in Switzerland; Switzerland is one of the few countries that has instituted direct democracy on the national level; the Swiss system has inspired the adoption of direct democracy throughout the world; and the Swiss system is usually cited in arguments for and against direct democracy.

The second case study is California, which is pertinent for the following reasons: California is representative of the American states that adopted direct democracy during the Progressive Era; California's direct democracy system is based on the Swiss system; most of the useful literature on direct democracy is concerned with its use in California; and California's system is generally cited in arguments for and against direct democracy.

The third case study is New Zealand, which is appropriate for the following reasons: the events leading up to the introduction of the Citizens Initiated Referenda Act 1993 provide the most recent evidence of the process of constitutional reform involved in the struggle for direct democracy; New Zealanders have been debating whether to adopt direct democracy for over a century; it is the first Westminster-style constitutional system in the world to have direct democracy; and both the Swiss and California systems have influenced New Zealand's direct democracy debate.

²See A V Dicey "Ought the Referendum be Introduced into England?" (1890) 57 Contemp R 489, 497 (concluding that "[n]o vital change in either the law or the customs of the Constitution would be so easy of introduction into England as the establishment in principle of the Referendum, or of a popular veto on any amendment or alteration in the Constitution"); J Vincent *State and Federal Government in Switzerland* (John Hopkins Press, Baltimore, 1891) 126-131 (advocating the adoption of direct democracy on the state and federal levels in America).

³See Deploige, above n 1, vii.

These case studies are valuable for two additional reasons. First, the literature on the origin and role of direct democracy is inadequate. The literature on Switzerland, although relatively substantial, treats this subject in a disjointed and highly fragmentary fashion.⁴ The literature on California, despite its vastness, contains only one brief attempt to address this topic directly.⁵ The literature in New Zealand is extremely sparse, despite experience with government controlled referendums. None of it discusses the process that produced the Citizens Initiated Referenda Act 1993.⁶ Secondly, no study of direct democracy has compared the origin and role of direct democracy in Switzerland, California, and New Zealand. The following case studies redress these gaps in the literature. More importantly, they also provide the evidence that explains why the direct democracy systems in Switzerland, California, and New Zealand are not the same, nor could be.

The evidence reveals that constitutional law is an intricate confluence of law, politics, history, economics, and cultural expectations. Viable and enduring constitutional systems account for this complexity by providing the principles and mechanisms by which to regulate the interests competing in society. How well a constitutional system manages this conflict determines its legitimacy. This determination is, to a large extent, a function of perception. Those who agree with the outcomes produced by their constitutional system are more likely to support it than those who do not. Predictably, the number of those who question their system's legitimacy generally increases during periods of economic hardship, especially if their plight can be

⁴See generally eg, Deploige, above n 1, 1-123 (noting that the evolution of democracy in Switzerland is very complicated to trace because of Switzerland's highly pluralistic composition, Deploige opted for an institutional approach, with a post-1798 emphasis on the Grisons and Berne, at the expense of discussing the forces that created and shaped direct democracy in Switzerland); J Vincent, above, n 2, 3-29 (providing a succinct and useful account on the forces leading to the creation of the new Swiss Confederation in 1848, but without discussing their effect on creation and evolution of direct democracy in Switzerland); F de Salis *Switzerland and Europe: Essays and Reflections* (trans, Oswald Wolff, London, 1971) 19-37 (same). Consequently, the process in Switzerland had to be pieced together from a wide variety of sources.

⁵See generally League of Women Voters of California *Initiative and Referendum in California: A Legacy Lost? A Study of Direct Legislation in California from Progressive Hopes to Present Reality* (League of Women Voters of California, Sacramento, 1984 reprint 1987) 1-11. Consequently, the process in California also required piecing together, although the existence of a single state-wide polity simplified the task as compared to Switzerland.

⁶See generally A Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University of Wellington, Wellington, 1992) (debating the constitutional and political aspects of implementing direct democracy in New Zealand); *Report of the Electoral Law Committee: Inquiry into the Report of the Royal Commission of the Electoral System* (Government Print, Wellington, 1988) 55-62 (evaluating the Royal Commission recommendations regarding the use of direct democracy in New Zealand); *Report of the Royal Commission on the Electoral System* (Government Print, Wellington, 1986) 167-181 (discussing the extent to which direct democracy should be used in New Zealand). Throughout this work, the word "referendums" is used in preference to the word "referenda" as it is in keeping with current usage in the literature on direct democracy and the position taken by the Oxford English Dictionary scholars. See J Boyer *Lawmaking by the People: Referendums and Plebiscites in Canada* (Butterworths, Toronto, 1982) xxvi n.1.

attributed to political corruption. During these periods, new political parties spring to life and proposals for constitutional reform abound.

Paradoxically, constitutional law governs the process of constitutional reform. Short of revolution, the acceptance of any particular proposal depends on the degree to which it reconfigures the rules regulating the interests competing in society and the degree to which its proponents control the process of constitutional reform. Obtaining the necessary support and power is difficult, especially for those who do not control the exercise of governmental power. Hence, constitutional reform is usually achieved by those working within the governmental system.

In theory, direct democracy offers the means of circumventing the restrictions or safeguards of representative democracy. In practice, however, this promise or threat remains largely unfulfilled. While direct democracy can break the monopoly that representatives or parties have over the legislative agenda, its mechanisms and constitutional milieu have limited its utility as a means of by-passing the existing governmental structure. The promise or threat of direct democracy nevertheless animates both its proponents and its opponents. Its proponents are motivated by a vision of good, open, responsive, and responsible government characterised by public participation, greater civic awareness and pride, and prosperity. Its opponents are motivated by the fear of mob-rule characterised by the oppression of minorities, ill-informed decision-making, the loss of parliamentary sovereignty, and economic chaos.

The legitimacy of the constitutional system is at issue in this debate. One side sees direct democracy as a means of restoring legitimacy by correcting the problems associated with representative democracy. The other side sees it as a means of destroying legitimacy by undermining the virtues of representative democracy. The acceptance of either view depends on the prevailing theory of representative democracy underlying the debate and the extent to which representatives are perceived to have complied with it. Ironically, proposals for direct democracy cannot circumvent the existing system's process of constitutional reform. If they survive the process, they are likely to reflect the principles enshrined in that process, including those regarding representative democracy, which explains why the direct democracy devices in Switzerland, California, and New Zealand are subject to safeguards that limit the legislative power they confer on the electors.

Constitutional reformers in Switzerland, California, and New Zealand embraced direct democracy as a means of improving, not displacing, representative democracy. Their aim was to restore the legitimacy of their constitutional systems primarily by

providing the electors with the means to ensure that the exercise of governmental power conforms with their expectations. They shared the conviction that law should be made and applied in accordance with established constitutional principles, not merely to advance the interests of privileged elites. In Switzerland and California, where the electors are sovereign both legally and politically, direct democracy has become an indispensable component of their respective constitutional systems. In New Zealand, where Parliament remains the legal sovereign, direct democracy is not yet established as an essential part of its constitutional system.

These observations owe their articulation to the completion of two essential tasks: a study of the origin and role of direct democracy in Switzerland, California, and New Zealand; and a comparison of these studies. Part I lays the foundation required to complete these tasks. It defines the principal forms of direct democracy in terms of their use in Switzerland, California, and New Zealand, and outlines the main arguments for and against direct democracy. It also explains the general constitutional principles underlying direct and representative democracy and their relationship to the question of legitimacy.

Part II traces the centuries-long evolution of direct democracy in Switzerland and the factors which drove the Swiss Democrats to campaign for its inclusion in the Constitution of 1874. It then discusses the main direct democracy devices used in Switzerland and examines the role that they play in the Swiss constitutional system. Part III examines the factors that gave rise to the California Progressives and inspired them to establish direct democracy in California. It then describes the principal direct democracy devices used in California and analyses their role in the California constitutional system. Part IV documents New Zealand's long running direct democracy debate and the factors that led the National Party to enact the Citizens Initiated Referenda Act 1993. It then outlines the Act and examines its place and possible role within the New Zealand constitutional system. Part V concludes that the direct democracy systems in Switzerland, California, and New Zealand are not the same, nor could be, given the unique forces that contributed to the formation and practice of constitutional law in these jurisdictions.

PART I: THEORY

THEORY

Switzerland, California, and New Zealand adopted direct democracy as a means of improving, not displacing, representative democracy. To appreciate why direct democracy was embraced for this purpose in these jurisdictions requires an understanding of the general constitutional principles underlying direct and representative democracy and their relationship to the question of legitimacy. The origin and role of direct democracy in Switzerland, California, and New Zealand makes little sense without it. It also provides the basis for understanding why the direct democracy devices in these jurisdictions are not the same.

In addition, the literature tends to be careless in its treatment of the underlying principles, particularly in the New Zealand constitutional context.¹ Aside from redressing this complaint, definitional clarity will avoid the widespread practice of using observations peculiar to one kind of direct democracy device to support conclusions regarding direct democracy in general.² Accordingly, this chapter begins by defining the principal direct democracy devices in terms of their use in Switzerland, California, and New Zealand. It then discusses the principles involved in the direct democracy debate. It concludes that direct democracy complements rather than debases representative democracy, which would explain its appeal to constitutional reformers in Switzerland, California, and New Zealand.

I PRINCIPAL DIRECT DEMOCRACY DEVICES

In representative democracies like Switzerland and California, direct democracy transfers legislative power from elected representatives to their electors. This transference constitutes the central issue in the direct democracy debate. Proponents see the transfer as a means of revitalising representative democracy. Opponents believe it undermines representative democracy. The debate regarding the merit of direct democracy, however, is shrouded in a confusion of ill-defined terms, conceptual overlaps, and de-contextualised information. For example, those engaged in the debate often fail to realise or acknowledge that the degree to which direct

¹See eg, R Mulgan *Democracy and Power in New Zealand: A Study of New Zealand Politics* (Oxford University Press, Auckland, 1984) 9-33 (discussing the meaning of 'democracy'); see also generally G Sartori *The Theory of Democracy Revisited* (Chatham House Publishers, Chatham, 1987) (combating stipulativism by revesting meaning into concepts regarding democracy).

²For examples of this practice, see *Report of the Royal Commission on the Electoral System* (Government Print, Wellington, 1986) 172-176; NZPD, no 38, 6722, 10 March 1992 (Cullen).

democracy transfers legislative power from representatives to electors depends on the type of direct democracy device. This oversight often leads or allows them to use arguments appropriate for one device to characterise direct democracy in general. The primary purpose of this section is to eliminate this confusion by classifying the principal direct democracy devices and identifying those which are discussed further in Parts II, III, and IV. Broadly defined, the principal direct democracy devices fall into two categories: the referendum and the initiative.

A *The Referendum*

The referendum appears throughout the world in a variety of permutations. The three most common are government controlled referendums, constitutionally required referendums, and legislative referendums. In each case, the electors are asked to approve or reject a measure that the government has proposed or enacted.

1 *Government controlled referendums*

Switzerland, California, and New Zealand regularly hold government controlled referendums.³ All of the nation-wide referendums that have taken place in New Zealand are examples of government controlled referendums. The most famous one was held in conjunction with the 1993 general election when the National Government asked the electors whether Mixed Member Proportional Representation should replace the First-Past-the-Post electoral system.⁴ The 1975 United Kingdom referendum on whether Britain should stay in the European Economic Community is another example of a government controlled referendum.⁵

The government determines the timing, subject-matter, wording, and effect of government controlled referendums. They may or may not be binding on the

³See D Butler and A Ranney (eds) *Referendums: A Comparative Study of Theory and Practice* (American Enterprise Institute for Public Policy Research, Washington, DC, 1978), 39-66 (Switzerland), 87-122 (California), 236, 237 (New Zealand).

⁴For background on this referendum, see H Catt, P Harris, and N Roberts *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, Palmerston North, 1992); P Temple *Making Your Vote Count: A Guide to Electoral Reform* (John McIndoe, Dunedin, 1992); *Report of the Electoral Law Committee: Inquiry into the Report of the Royal Commission of the Electoral System* (Government Print, Wellington, 1988); *Report*, above n 2.

⁵For discussions of the constitutional issues raised by the British Labour Party's decision to hold this government controlled referendum see S George *An Awkward Partner: Britain in the European Community* (Oxford University Press, Oxford, 1990); L Robins *The Reluctant Party: Labour and the EEC, 1961-1975* (G W & A. Hesketh, Lancashire, 1979); A King *Britain Says Yes: The 1975 Referendum on the Common Market* (American Enterprise Institute for Public Policy Research, Washington, DC, 1977); D Butler and U Kitzinger *The 1975 Referendum* (Macmillan Press, London, 1976); P Goodhart *Full-Hearted Consent: The Story of the Referendum Campaign - and the Campaign for the Referendum* (London, 1976).

government.⁶ Only the government can initiate them. Although the government can set special majority requirements, generally a simple majority of the electors voting on a particular government controlled referendum decides the issue.⁷ The device is usually used to give legitimacy to constitutional changes or to sanction government policy, although New Zealand governments have consistently used it to avoid deciding controversial issues.⁸ The Swiss, for example, used it to ratify their first Swiss-authored federal constitution in 1848.

Napoleon, Hitler, and de Gaulle, however, are still notorious for using the device to legitimise policy decisions taken outside of the established legislative process. Consequently, government controlled referendums are widely perceived as being tainted, that is, subject to the manipulation of those in power.⁹ Stephen Levine and Nigel Roberts have suggested that the New Zealand electorate would reject any pro-government government controlled referendum that is held on the date of a general election if they disapprove of the government.¹⁰ Conversely, Jim Anderton, former Leader of the Alliance, has argued that any reform proposal put before New Zealanders in the early 1990s would have been approved, regardless of its merits, simply because New Zealanders had lost faith in their representatives.¹¹ Logically, an unpopular government with a vested-interest in a particular policy will avoid subjecting the policy to a referendum. If it must, the government would be expected to do its utmost to ensure that the result is interpreted favourably.¹²

⁶Butler and Ranney, above n 3, 23; see also Temple, above n 4, 4.

⁷For example, approval of the New Zealand liquor licensing (prohibition) polls conducted in 1908, 1911, and 1914 required a "yes" vote from 60 percent of those voting. Butler and Ranney, above n 3, above, 236.

⁸In addition to two referendums on proportional representation, New Zealand has had two referendums on the term of Parliament, two on drinking hours, one on betting, one on conscription, and 31 regular questions on liquor licensing since 1896. See J Wilson *New Zealand Parliamentary Record: 1840-1984* (Government Print, Wellington, 1985) 298-30 (listing referendums and voting results for them between 1896 and 1984); Department of Statistics *New Zealand Official Yearbook* (93 ed, Department of Statistics, Wellington, 1988) 74 (listing results of liquor polls between 1972 and 1987); *New Zealand Gazette* No. 209 (29 October 1990) 4505-4506 (listing the results of the second term of Parliament poll); *Report of the Select Committee on the General Election 1990* [1990] AJHR E.9 (same); *The Electoral Referendum 1992* [1993] AJHR E.9 (listing the results of the first referendum on proportional representation); *The General Election and Electoral Referendum 1993* [1994] AJHR E.9 (listing the results of the second referendum on proportional representation).

⁹See eg L Watt *The Referendum: Its Uses and Abuses* (unpublished MA thesis in political science held by Victoria University of Wellington, 1956) (discussing government controlled referendums held in New Zealand).

¹⁰N Roberts and S Levine "Electoral Reform and Referendums: The Views of Voters in New Zealand in 1987 and 1990" in A Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University of Wellington, Wellington, 1992) 119.

¹¹J Anderton "Reflections on Referendums" in Simpson, above n 10, 89.

¹²For example, members of the National Government made an abortive attempt to characterise the results of the 19 September 1992 referendum on proportional representation as inconclusive as the media initially reported that only 48.3 percent of the electorate turned out; however, the overwhelming vote for change (84.7 percent) and the choice for Mixed Member Proportional Representation (70.5 percent), as opposed to Single Transferable Vote (17.4 percent), Preferential Voting (6.6 percent), and Supplementary Member (5.5 percent), and an official turnout of 55.2 percent rendered the strategy

Government controlled referendums are not discussed in any further detail, as this thesis is concerned with those direct democracy devices that the electors can initiate. They are mentioned here simply to provide a point of reference and comparison, and to highlight their manipulative reputation as this reputation is often erroneously applied to all direct democracy devices.

2 *Constitutionally required referendums*

Switzerland and California often have constitutionally required referendums, but New Zealand does not have them.¹³ In Switzerland, if the Federal Assembly adopts a constitutional amendment, it must be submitted to the electors for approval in the form of a referendum. Although the proposal can be re-submitted to the electors at a later date, the outcome of the referendum is binding on the government. A constitutionally required referendum can only be initiated by a government proposal to amend the constitution. In Switzerland, it requires a double majority for approval, that is, a simple majority of all the electors voting plus a majority vote in more than half of the cantons.¹⁴

California's system is similar; however, approval of the government's proposal only requires a simple majority of the electors.¹⁵ In addition, two-thirds of the full membership of each house of the state legislature must approve the proposal before it is submitted to the electors for approval. The process guarantees widespread political support for the proposal and tends to produce proposals that are less controversial than most initiatives. As a result, the electors have approved nearly 300 constitutionally required referendums between 1911 and 1976. The enormous length of the California constitution is directly attributable to this direct democracy device.¹⁶

otiose as the result supported the statistical inference that MMP had the support of the majority of electors. See "Referendum Results" *National Business Review*, Auckland, New Zealand, 25 September 1992; P Luke "Don't Bet the Farm on Electoral Change Yet" *The Press*, Christchurch, New Zealand, 26 September 1992; S Upton "An Electoral System for All Seasons" *The Dominion*, Wellington, New Zealand, 28 September 1992; "Turnouts Topped 60 per cent in Some Electorates" *New Zealand Herald*, Auckland, New Zealand, 9 October 1992; *Electoral Referendum 1992*, above n 8, 170-171.

¹³See generally Butler and Ranney, above n 3, 39-66 (Switzerland), 87-122 (California). Although section 268 of New Zealand's Electoral Act 1993 states that certain changes to the electoral laws can be accomplished by referendum, this statutory option does not amount to a constitutionally required referendum as the government of the day can also accomplish such changes by winning the support of 75 percent all members of the House or by abolishing the option altogether as it is not entrenched. New Zealand's lack of constitutionally required referendums can be attributed to the absence of a written constitution embodying law superior to legislative enactments. In New Zealand, every legislative enactment constitutes the supreme law of the land. See P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co, Sydney, 1993) 12, 13, 16.

¹⁴Fed Const Swiss, art 123; J Aubert "Switzerland" in Butler and Ranney, above n 3, 41. A canton is the Swiss equivalent of a state in the United States or Australia.

¹⁵Cal Const, art 2, ss 9 and 10.

¹⁶E Lee "California" in Butler and Ranney, above n 3, 89.

In both Switzerland and California, the constitutionally required referendum is used far more frequently than any other direct democracy device. Out of 737 referendums submitted to Californians between 1912 and 1976, 543 were constitutionally required.¹⁷ From 1848 to September 1978 the Swiss voted on 297 referendum questions, 212 of which were constitutionally required.¹⁸ As in California, the relatively unwieldy nature of the Swiss Constitution is due to this device.¹⁹

When the California Progressives came to power in 1911, they used the constitutionally required referendum to amend California's constitution to provide for the constitutional initiative, the legislative initiative, and the legislative referendum.²⁰ The Swiss used it in 1874 to revise their constitution of 1848, when they institutionalised the legislative referendum. They used it again in 1891 to amend the constitution of 1874 to include the constitutional initiative.²¹

The constitutionally required referendum, like the government controlled referendum, is not analysed further, as it is not a device which the electors can initiate. Nevertheless, knowledge of its existence and function is necessary to understand those direct democracy devices which are discussed in greater detail in Parts II, III, and IV.

3 *Legislative referendums*

Switzerland and California permit legislative referendums, but New Zealand does not. The legislative referendum is a means by which the electors may veto government legislation. In Switzerland, if the Federal Assembly passes a new law or amends an old one, the Swiss can require their government to hold a referendum on the enactment if they present a petition to that effect signed by 50,000 electors or eight cantons within 90 days of the enactment. The outcome of the referendum is binding on the government. It can be initiated by the electors or the cantons. The enactment comes into force if it is approved by a simple majority of those voting on the referendum.²² Operationally, a petition with the requisite signatures has the effect of

¹⁷ Above.

¹⁸ J Aubert "Switzerland" in Butler and Ranney, above n 3, 43.

¹⁹ J Aubert "The Swiss Federal Constitution" in *Modern Switzerland* (The Society for the Promotion of Science and Scholarship, Palo Alto, 1978) 305.

²⁰ See G Mowry *The California Progressives* (Quadrangle Books, Chicago, 1963) 139.

²¹ W Martin *Switzerland: From Roman Times to the Present* (Elek Books, London, 1971) 237; G Thurer *Free and Swiss: The Story of Switzerland* (Oswald Wolff, London, 1970) 119-120; *Focus on Switzerland: The Historical Evolution; Political Institutions* (2 ed, Swiss Office for the Development of Trade, Lausanne, 1982) 72; see also W Oechsli *History of Switzerland: 1499-1914* (Cambridge University Press, Cambridge, 1922) 398; C Hughes *Switzerland* (Ernest Benn, London, 1975) 110.

²² Fed Const Swiss, art 89.

a presidential veto which can only be overridden by a majority vote in favour of the enactment.

In California, the legislative referendum trigger is set at 5 percent of the votes cast for governor in the last gubernatorial election. This amounts to more than 393,835 signatures,²³ which must be collected within 90 days of the enactment that the electors wish to subject to referendum. The outcome of the referendum is binding on the government. It can only be initiated by the electors. A simple majority of those voting on the referendum determines the fate of the enactment.²⁴

The legislative referendum is among those direct democracy devices which are considered further in Parts II, III, and IV, as it is a device which the electors can employ. It provides a means by which the electors can scrutinise and, if necessary, countermand the government's legislative program on an issue-by-issue basis between elections. Essentially, the legislative referendum gives the electors the ability to veto legislation that is inconsistent with their expectations.

B The Initiative

The initiative is a procedure by which a prescribed number of electors can compel the government to hold a binding referendum on a measure proposed and drafted by the electors. The electors can also use it to repeal law.²⁵ The initiative exists in two forms: the constitutional initiative and the legislative initiative.

1 Constitutional initiatives

California and Switzerland regularly have constitutional initiatives, but New Zealand does not provide for them. The constitutional initiative gives a prescribed number of petitioning electors the power to force the government to hold a referendum on a constitutional amendment proposed by the electors. In Switzerland, a constitutional initiative can be triggered by a petition signed by 100,000 electors. The outcome is binding on the government. Only the electors can initiate it. To be adopted, however, a constitutional initiative must be approved by both a simple majority of the

²³League of Women Voters of California *Initiative and Referendum in California: A Legacy Lost? A Study of Direct Legislation in California from Progressive Hopes to Present Reality* (League of Women Voters of California, Sacramento, 1984 reprint 1987) 21.

²⁴Cal Const, art 2, ss 9 and 10.

²⁵G Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies Ltd, St Leonards, 1987) 138. Walker, an unabashed proponent of direct democracy, is a Professor of Law and the Dean of the University of Queensland Faculty of Law. Letter from G Walker to M Gobbi (22 May 1991). As Part IV reveals, Walker, through his book, correspondence, and speaking engagements, was the intellectual force behind the call for direct democracy in New Zealand.

electors voting and a majority vote in more than half of the cantons.²⁶ Eighteen months is allowed for the collection of signatures.²⁷

In California, the trigger is set as 8 percent of the previous gubernatorial vote. In 1914 it required 30,857 signatures.²⁸ It now requires more than 630,136.²⁹ The outcome of a constitutional initiative is binding on the government. It can only be initiated by the electors. The initiative takes effect as part of the constitution if approved by a simple majority of those voting on the initiative. The required signatures must be collected within 150 days of registering the intent to initiate the petition drive.³⁰

In both jurisdictions, the government may present a counter proposal to the electorate via its power to hold a government controlled referendum. If both proposals win approval, the proposal with the greater number of affirmative votes is enacted. The same procedure is used regarding competing constitutional initiatives sponsored by rival citizen groups. If both measures win approval, the measure that received the most votes will prevail.³¹

The constitutional initiative, like the legislative referendum, is among the direct democracy devices considered further in Parts II, III, and IV. It is relevant because it gives the electors the power to propose and enact changes to their constitutional system, irrespective of the wishes of their elected representatives.

2 *Legislative initiatives*

California has the legislative initiative, but Switzerland, on the federal level,³² and New Zealand do not. The legislative initiative operates like the constitutional initiative. It gives a prescribed number of petitioning electors the power to force the government to hold a referendum on a statute proposed by the electors. Legislative initiative systems may be direct or indirect. Direct systems present measures proposed by petition directly to the electors for approval. Indirect systems, however, initially require presentation of measures proposed by petition to the legislature for its

²⁶Fed Const Swiss, art 121.

²⁷O Sigg *Switzerland's Political Institutions* (3 ed, Pro Helvetia, 1988) 30.

²⁸D Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) 41, 67.

²⁹League, above n 23, 21. The figure was 615,958 in 1991, which may be an indication of a decreasing elector turnout in gubernatorial elections. Bancroft "S.F. Lawyer's Initiative: Long Vacations - By State Law" *San Francisco Chronicle*, San Francisco, USA, 29 July 1991, 1.

³⁰Cal Const, art 2, ss 8 and 10; League, above n 23, 20.

³¹See eg Cal Const, art 2, s 10 (b) (stating that "if the provisions of 2 or more measures approved at the same election conflict, those receiving the highest affirmative vote shall prevail").

³²*Switzerland: People State Economy Culture* (Kummerly & Frey, Berne, 1989) 34.

approval. If the legislature makes amendments unacceptable to the initiative's proponents or fails to approve the initiative, its proponents may submit the original measure to the electors for approval. In some jurisdictions, a disapproving legislature may place a competing proposal on the ballot with the original measure.³³

California has a direct legislative initiative system. The trigger is set at 5 percent of the previous gubernatorial vote, which requires more than 393,835 signatures.³⁴ The signatures must be collected within 150 days of registering the intent to initiate the petition drive.³⁵ The outcome is binding on the government unless the electors specify in the initiative that the legislature may amend or repeal it. The governor may not veto a legislative initiative approved by the voters. Only the electors may initiate the legislative initiative. The proposal becomes law upon approval by a simple majority of those voting on the initiative.³⁶

As with the constitutional initiative, the government can present a counter proposal to the electors via its power to hold government controlled referendums. If both proposals win acceptance, the proposal with the highest number of affirmative votes becomes law. The same procedure is used regarding competing legislative initiatives sponsored by rival citizen groups. If both measures win approval, the measure that received the most votes will prevail.³⁷

Essentially, the legislative initiative allows the electors to propose and enact legislation, which gives them some control over the legislative agenda at the expense of their elected representatives. The legislative initiative, like the constitutional initiative and the legislative referendum, is among the direct democracy devices which are considered further in Parts II, III, and IV as it is a device which the electors can initiate.

C "Citizens Initiated Referenda"

Jack Nagal refers to the constitutional initiative, the legislative initiative, and the legislative referendum collectively as "citizens initiatives,"³⁸ which is logical as they are devices which the electors can employ. The system created by New Zealand's Citizens Initiated Referenda Act 1993 (CIR Act)³⁹ falls within this classification;

³³ Magleby, above n 28, 35-36.

³⁴ League, above n 23, 21.

³⁵ League, above n 23, 20.

³⁶ Butler and Ranney, above n 3, 24.

³⁷ See above note 31.

³⁸ J Nagal *Participation* (Prentice-Hall, Englewood Cliffs, 1987) 93.

³⁹ Merv Rusk, once the most influential proponent of direct democracy in New Zealand, coined the phrase "citizens initiated referendums", or "CIR", in an attempt to refer to the legislative referendum

however, it does not fit neatly within the definitional framework for direct democracy outlined above.

The CIR Act provides any person, legal or natural, with the means to initiate a non-binding referendum on nearly any topic if that person collects the signatures of 10 percent of all eligible electors, approximately 232,000, within a 12 month period.⁴⁰ This system, which is considered further in Part IV, is distinguishable from the constitutional initiative, the legislative initiative, and the legislative referendum in several important respects. First, it is intended to provide the electors with the means to place a "precise question" on the ballot, not a complete legislative or constitutional proposal. Second, the wording of any question is subject to the final determination of the Clerk of the House of Representatives,⁴¹ which diminishes the promoter's ability to frame a question as he or she pleases. Third, the result is non-binding, which means that neither Parliament nor the government of the day is legally required to give effect to citizens initiated referendum results.

David Magleby endorses the non-binding approach as it involves the electorate but keeps responsibility for law-making with the legislature.⁴² Although Thomas Cronin believes that jurisdictions with direct democracy are likely to reject advisory referendums on the basis that they would diminish established political rights, he suggests that they "could be a reasonable experimental alternative for states and communities that do not now provide for the initiative and referendum."⁴³ Cronin also argues that while the results would be non-binding "issues that won approval by significant majorities would place the legislature under pressure to either go along or to explain its opposition."⁴⁴ The National Government used both of these arguments to answer criticism from direct democracy advocates within its own party when it chose to introduce its non-binding citizens initiated referendum system in New Zealand.⁴⁵

without including the initiative or invoking thoughts of government controlled referendums. Letter from M Rusk to M Gobbi (15 August 1991). The phrase, however, soon began to be used indiscriminately in New Zealand to refer to any or all of the principal direct democracy devices, which is understandable as it truncates and juxtaposes the terminology used to distinguish them. See generally eg Simpson, above n 10; Submissions to the National Party Caucus Committee on Electoral and Parliamentary Reform (1990); see also Letter from Wayne Eagleson, Director National Parliamentary Research Unit, to M Gobbi (19 June 1991); FAIR Newsletter No. 13 (March 1991).

⁴⁰Citizens Initiated Referenda Act 1993, s 19.

⁴¹CIR Act, above n 40, ss 9, 10, and 11.

⁴²Magleby, above n 28, 195.

⁴³T Cronin *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, Cambridge, 1989) 241.

⁴⁴Cronin, above n 43, 240-241.

⁴⁵See eg NZPD, no 88, 17951-17954 (Graham).

With the exception of New Zealand's citizens initiated referendum system, the direct democracy devices considered further in Parts II, III, and IV transfer, to varying degrees, the power to legislate from elected representatives to the electors.⁴⁶ Initiatives, particularly those in Switzerland and California, entail the greatest transfer of legislative power. They are binding. In addition, subject to the limitations discussed in Parts II and III, their subject matter is determined by those who employ them. More importantly, they give the electors the means to legislate regardless of the disposition of their representatives or the parties to which they owe allegiance.⁴⁷ Advisory referendums transfer no legislative power, as New Zealand's citizens initiated referendum system, which is considered in Part IV, reveals. Although the system has virtually no subject matter limitations, the outcomes it produces are not binding. Whether the outcome will be given effect depends on elected representatives. The legislative referendum is between the two, since its results are binding but its subject matter is determined by elected representatives.

II STANDARD ARGUMENTS REGARDING DIRECT DEMOCRACY

The standard arguments for and against direct democracy are essentially concerned with the transfer of legislative power from elected representatives to their electors. Proponents of direct democracy see it as a means of promoting good, open, responsive, and responsible government characterised by public participation, greater civic awareness and pride, and prosperity. Its opponents see it as an invitation to mob-rule characterised by the oppression of minorities, ill-informed decision-making, the loss of parliamentary sovereignty, and economic chaos. This section simply outlines the standard arguments, as they are well-canvassed in the literature on direct democracy, as the work of David Butler and Austin Ranney, Geoffrey Q de Walker, Cronin, Magleby, Patrick Boyer, the League of Women Voters of California, and Lisa Whitehill attests.⁴⁸ Its primary purpose is to provide a brief overview of the specific concerns that have influenced the form of direct democracy in Switzerland, California, and New Zealand.

⁴⁶The transference metaphor is apt because the initiative and referendum, both in Switzerland and California, were established after experience with constitutional systems in which the electors delegated all legislative power to an assembly of elected representatives.

⁴⁷Butler and Ranney, above n 3, 29-30, 222.

⁴⁸See generally Butler and Ranney, above n 3; Walker, above n 25; Magleby, above n 28; J Boyer *Lawmaking By the People: Referendums and Plebiscites in Canada* (Butterworths, Toronto, 1982); League, above n 23; L Whitehall "Direct Legislation: A Survey of Recent Literature" (1985) 5 Legal Reference Services Q 3-45.

A *Main Arguments For*

Essentially, the main arguments in favour of direct democracy are premised on a Jeffersonian faith in the electorate at large and distrust of those in positions of power. Butler and Ranney, in a restatement of the views of the Progressives, have offered the following arguments in favour of direct democracy: ^{*}it increases the legitimacy of political decisions, promotes public interests as opposed to vested interests, allows the electorate to consider specific issues rather than an entire manifesto or platform, brings the legislative process closer to the electors and makes it less secretive, gives expression to the "general will" of the electorate, provides the means to promote participation, counteracts apathy and alienation, and maximises the human potential of the electorate.⁴⁹

Walker adds the following arguments in favour of direct democracy: ^{*}it counteracts the shortcomings of representative democracy, the decline in political debate, and political elitism, encourages bipartisanship, separates policies from personalities, loosens the grip of parties and pressure groups on the legislative process, increases the legitimacy of the law and the rule of law, and overcomes the problems of scale, distance, and isolation.⁵⁰ It also increases an elective representative's respect for public opinion.⁵¹ Cronin and Magleby cover, more or less, the same range of arguments as Walker, and Butler and Ranney.⁵²

B *Main Arguments Against*

The main arguments against direct democracy are premised on Madisonian belief in the ability of elected representatives to make wise and deliberative decisions in the best interests of the nation. In accordance with this belief, Butler and Ranney offer the following arguments against direct democracy: it weakens the power of elected representatives and representative democracy, gives governmental power to those who do not have the ability to make wise decisions, lacks any means to measure intensity of belief, forces decisions at the expense of consensus, and presents a danger to minorities.⁵³

⁴⁹Butler and Ranney, above n 3, 24-33.

⁵⁰Walker, above n 25, 29-55.

⁵¹G Walker *The People's Law: Initiative and Referendum: University of Queensland Inaugural Lecture* (delivered 3 June 1987, University of Queensland Press, St Lucis, 1988) 7.

⁵²See Cronin, above n 43, 10-11; Magleby, above n 28, 27-28.

⁵³Butler and Ranney, above n 3, 34-37.

Walker adds the following arguments against direct democracy: it is inconsistent with Westminster parliamentary democracy, it would create ballot clutter, result in poorly drafted laws, cost a great deal of money, be an administrative inconvenience,*suffer from voter apathy which would produce skewed results,*allow those with money and media access a disproportionate voice, and *install a tyranny of the majority.⁵⁴ Magleby adds that it would *benefit special interest groups, produce frivolous legislation, and fail to educate the electors or increase their interest in government.⁵⁵ Cronin, more or less, covers the same ground as Magleby, and Butler and Ranney.⁵⁶

C *Central Constitutional Concern*

As some of these scholars have noted, very little of the argumentation goes beyond the political rhetoric developed during the Progressive Era,⁵⁷ as can be seen in the New Zealand parliamentary debates on the perennially ill-fated Referendum Bill (1893-1906), the short lived Popular Initiative and Referendum Bill (1918-1919), the Popular Initiatives Bill (1983-1985), and the Citizens Initiated Referenda Act 1993 (1992-1993).⁵⁸ The reliance on rhetoric, rather than practice, has had several important consequences.

It has allowed opponents to ignore the high level of support direct democracy enjoys where it exists⁵⁹ and proponents to overlook the constitutional safeguards which typically characterise the constitutional initiative, the legislative initiative, and the legislative referendum.⁶⁰ In addition, it has allowed opponents to criticise the practice of direct democracy in terms of representative democracy theory,⁶¹ which is misleading as it ignores the failure of elected representatives to live up to the theoretical ideal of representative democracy. Similarly, proponents of direct democracy tend to exaggerate the failings of representative democracy in terms of direct democracy theory,⁶² which is misleading as it ignores the shortcomings of direct democracy, particularly its majoritarian nature. Furthermore, it has allowed

⁵⁴Walker, above n 25, 59-98.

⁵⁵Magleby, above n 28, 29-30.

⁵⁶Cronin, above n 43, 11.

⁵⁷See eg Butler and Ranney, above n 3, 26-29, 37; Magleby, above n 28, 3.

⁵⁸For discussions of these debates, see generally chapters seven, eight, and nine.

⁵⁹See eg Magleby, above n 28, 9-10 (citing survey data indicating that 77 percent of Americans nationwide support direct democracy, a figure which reaches 85 percent in California); see also Cronin, above n 43, 4 (citing subsequent surveys indicating comparable levels of support for direct democracy).

⁶⁰See generally Submissions on the Citizens Initiated Referenda Bill to the Electoral Law Select Committee (1992).

⁶¹See eg, NZPD, vol 522, 6706 (Lange), 6715 (Hunt), 10 March 1992 (both relying on Burke's theory of representation as an argument against direct democracy); see also Walker, above n 25, 61 (arguing that theory of direct democracy should be compared with theory of representative democracy or the practice of direct democracy with the practice of representative democracy, not the practice of direct democracy with the theory of representative democracy).

⁶²See Walker, above n 25, 251.

proponents to champion and opponents to malign direct democracy as a utopian alternative to representative democracy,⁶³ which ignores the reality that the constitutional initiative, the legislative initiative, and the legislative referendum are merely complementary supplements to representative democracy where they exist.

Magleby, who builds on the work of Butler and Ranney,⁶⁴ provides the most rigorous empirical analysis of whether the ideals of direct democracy are met in practice. He concludes that direct democracy in practice falls short of its theoretical ideals in several respects, primarily because its procedural safeguards, particularly the combination of high signature requirements and short collection periods, limit its use to large grassroots volunteer organisations or small but well-financed interest groups.⁶⁵ However, he does not consider the continuous and vital role interest groups play in democracies as the main means by which people organise themselves to influence policy and legislation.⁶⁶

Magleby also argues that the demographic make up of electors in general elections is broader than in referendums; specifically, older, well-educated, and affluent electors vote in referendums in numbers that are greater than their proportion of the general population, which means that young, less well-educated, and less well-to-do electors are proportionately under-represented.⁶⁷ Although this appears to be a serious criticism, it actually undermines the standard argument that the electors are generally incompetent to decide the issues put before them in referendums.

⁶³Walker, above n 25, 60 (arguing that many of the arguments against direct democracy are built upon the false premise that direct democracy is an alternative to representative democracy).

⁶⁴See generally Butler and Ranney, above n 3.

⁶⁵Magleby, above n 28, 76.

⁶⁶See eg K Jackson *The Dilemma of Parliament* (Allen & Unwin, Wellington, 1987) x (asserting that there are "some 500 nationally organised pressure groups serving New Zealand's 3 million people"); P Schlessinger and R Wright *Elements of Government in California* (Holt, Rinehart & Winston, New York, 1962) 24 (stating that lobbyists perform a valuable service without which legislation would often be completely unrealistic and unresponsive to the wishes of the people and that they usually represent the conflicting pressures that must be assessed before that compromise can be made in the legislative process).

⁶⁷Magleby, above n 28, 121, 183.

In addition, unlike Cronin and Walker, who have had the benefit of Magleby's work, Magleby does not consider the failure of representative democracy in meeting its theoretical ideals as a basis of comparison. As Cronin points out:⁶⁸

Critics of direct legislation frequently have a view of state legislators that borders on the mythical: highly intelligent; extremely well informed; as rational as a virtuous, wise and deliberative statesman; and as competent as corporate presidents and university professors. These same critics tend to view the people as a "mob," unworthy of being trusted. Yet the people, or so-called mob, are the same persons who elect legislators. How is it that they can choose between good and bad candidates but cannot choose between good and bad laws?

Nevertheless, Magleby shares Cronin's and Walker's belief that direct democracy has become an important, if not permanent, feature of the constitutional systems in which it exists.⁶⁹ They also agree that the central political issue is whether electors should play a greater role in the exercise of governmental power.⁷⁰

The practical constitutional concern underlying this issue is whether, and to what extent, direct democracy can be established in a representative democracy without significantly impairing minority rights. This concern regarding the negative aspects of majoritarianism is largely irrelevant to New Zealand's CIR system, primarily because the results are non-binding, which means that either Parliament or the government of the day can ignore them or take steps to remedy or counteract any perceived defects attributed to them. Ultimately, the power to legislate remains with elected representatives.

The concern regarding majoritarianism also does not apply to the legislative referendum. In Switzerland and California, the government can re-enact legislation vetoed by the electorate. In addition, as the device acts as a break on the legislative activity of elected representatives, it cannot be used to deprive any group of existing rights. It can only temporarily prevent the reallocation of existing rights or the creation of new rights. Although the electors can use the device to frustrate reform-minded representatives, they cannot use it to place burdens on any particular group.

However, the majoritarian concern is applicable to initiatives. If these devices were stripped of their safeguards in Switzerland and California, the electors could use them to deprive select groups of their rights, including the "propertied few" whose interests James Madison believed could only be protected against the "propertyless

⁶⁸Cronin, above n 43, 87; see also Walker, n 25, 39 (stating that the representation principle has been perverted by institutional and other factors).

⁶⁹See Magleby, above n 28, 16, 192; Walker, above n 25, 197; Walker, above n 51, 13; Cronin, above n 43, x (stating that his research confirms that direct democracy "is here to stay").

⁷⁰See Magleby, above n 28, 4; Cronin, above n 43, 37; Walker, above n 25, 3-4, 187.

many" through a representative democracy whose power is divided among three branches of government: the legislature, the executive, and the judiciary.⁷¹ These safeguards are examined in Parts II, III, and IV, as they are essential to understanding the role of direct democracy in Switzerland, California, and New Zealand.

III UNDERLYING CONSTITUTIONAL PRINCIPLES

As Parts II, III, and IV also show, direct democracy became an attractive reform option in Switzerland, California, and New Zealand when their respective representative democracy systems had fallen into disrepute. However, ascertaining why reformers in these jurisdictions embraced direct democracy as a means of improving representative democracy requires an understanding of the general constitutional principles underlying direct and representative democracy and their relationship to the question of legitimacy. These principles also help to explain why the direct democracy devices in each jurisdiction are different.

A Key Concepts

In 1765 William Blackstone made a singularly important contribution to the development of constitutional theory by publishing the following observation:⁷²

In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.

On 18 June 1787, in a fateful speech delivered at the American Constitutional Convention, Alexander Hamilton recast Blackstone's observation as a guiding maxim which remains a corner-stone of modern constitutional theory:⁷³

Men love power. . . . Give all power to the many, they will oppress the few. Give all power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself against the other.

Upon this maxim rests two distinct, yet interrelated, constitutional concepts which are essential to the existence of democracy: the separation of powers and the protection of minority rights. Both support a third constitutional concept: the consent of the

⁷¹A Koch "Introduction" in *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (2 rev ed, Ohio University Press, Athens, 1985) xix.

⁷²W Blackstone *Commentaries on the Laws of England* (reprint 1st ed, London, 1966) vol. 1, 142.

⁷³*Notes of Debates*, above n 71, 131, 135.

governed, which constitutional theorists since James Madison have viewed as a litmus test for legitimacy.⁷⁴

1 *Separation of powers*

The doctrine of the separation of powers, in its purest theoretical form, holds that governmental power should be divided among three distinct, separately staffed, and independent branches of government of roughly equivalent constitutional status: the legislature, the executive, and the judiciary.⁷⁵ The purpose of this sharp division of governmental power is to prevent its concentration in any one branch, group, or individual, thus eliminating the primary threat to individual liberty or rights.⁷⁶ The doctrine, then, is intended to safeguard individual liberty or rights, which is essential to the protection of minority rights as the individual is the ultimate minority.

Although the constitutional systems in Switzerland, California, and New Zealand are different, each has, to a greater or lesser extent, conformed to the doctrine. California, which has formalised the separation of powers in a written constitution, approximates, on paper at least, the theoretical ideal. New Zealand, whose Westminster-style constitution lacks any formal separation of powers, appears to lie "at the other end of the continuum."⁷⁷ Nevertheless, Philip Joseph maintains that the doctrine remains "pivotal to constitutional and administrative law" in New Zealand.⁷⁸ Switzerland, whose written constitution features some aspects of the Westminster model, is more similar to California in terms of its approximation of the separation of powers ideal. The doctrine is useful as a means to describe and evaluate the elements and workings of each constitutional system, including direct democracy. It also provides a basis for understanding some of the factors which gave rise to the call for direct democracy in Switzerland, California, and New Zealand.

⁷⁴See eg, Koch "Introduction" in *Notes to Debates*, above n 71, xviii; Sartori, above, n 1, 90; G Marshall *Constitutional Theory* (Oxford University Press, London, 1971) 210.

⁷⁵Marshall, above, n 74, 100.

⁷⁶H Street and R Brazier (eds) *de Smith Constitutional and Administrative Law* (4 ed, Penguin Books, London, 1981 reprint 1983) 31.

⁷⁷Joseph, above n 13, 228 (quote), 237.

⁷⁸Joseph, above n 13, 5 (quote), 237 (function of the concept of law), 239-240 (supported by conventions).

2 *Protection of minority rights*

In casual conversation, democracy is frequently described in terms of "majority rule." The association appears to be based on democracy's origin in small face-to-face assemblies and its modern association with electoral systems. However, the formulation is misleading. As Butler and Ranney have observed:⁷⁹

The very existence of democracy rests upon the willing acceptance by minorities of decisions made by majorities - and upon the forbearance of majorities from imposing on minorities conditions they cannot bear.

Minorities, not majorities, are the concern in the constitutional context. Specifically, minorities must have the right of opposition, as that is the means by which they can maintain respect for and safeguard their rights. Oppressing this right results in the "tyranny of the majority."⁸⁰ Under majority tyranny, the dynamics and the mechanics of democracy cannot be sustained because the protection of minority rights is "a necessary condition of the democratic process itself."⁸¹ As Giovanni Sartori has argued, "'majority rule' is only a shorthand formula for limited majority rule, for a restrained majority rule that respects minority rights."⁸²

If democracy is to survive, majority rule must be limited majority rule.⁸³ Given Dacey's observation that all majorities are themselves coalitions of minorities,⁸⁴ any other construction would ultimately be self-defeating. Consequently, New Zealand's constitutional conventions depend as much on the respect of minority rights as the written constitutions of Switzerland and California, which have express provisions protecting minority rights.⁸⁵

This constitutional principle is essential to understanding why the direct democracy systems in Switzerland, California, and New Zealand are different. As Parts II, III, and IV show, these jurisdictions have adopted different institutional arrangements for protecting minority rights. Once they chose to establish direct democracy, they had to decide how to preserve or extend existing safeguards to account for its majoritarian nature. As these decisions were based on local constitutional variables and conditions, direct democracy, quite naturally, manifested itself differently in each jurisdiction.

⁷⁹Butler and Ranney, above n 3, 26.

⁸⁰Sartori, above, n 1, 133.

⁸¹Sartori, above, n 1, 33.

⁸²Sartori, above, n 1, 31.

⁸³Sartori, above, n 1, 239.

⁸⁴W Riker *Liberalism Against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (W H Freeman & Co, San Francisco, 1982) 234.

⁸⁵See Sartori, above, n 1, 239.

3 *Consent of the governed*

The coercive authority of government, at least in Switzerland and California, is based on the doctrine of the consent of the governed.⁸⁶ According to Cronin, people initially gathered together for mutual protection. Once life and limb were relatively safe, they formed governments to secure and enhance their natural rights, which implies that people are paramount to government. Consequently, the doctrine stipulated, at least during the 1780s, that a government's worth depended largely on "how it improved the well-being and protected the natural rights of its citizens."⁸⁷

Cronin, however, does not address the fate of governments that fail to meet this test. Apart from civil disobedience or electoral opposition, whether the governed can withdraw their consent is rarely considered outside of the context of revolution or immigration. Leaving aside these options, Geoffrey Marshall has noted three circumstances in which the common good gives rise to the duty to resist and replace legitimate authority: first, when government is conducted in a manner in which no legal means of repealing bad law exists; second, when private interests permeate the political system to the extent that there has ceased to be a common interest in maintaining it; and third, when the authority for the objectionable command is sufficiently unrelated to the maintenance of social order and settled rights that it can be resisted without serious detriment to either.⁸⁸

As Marshall does not provide any examples, these categories are of uncertain application. If, in practice, the governed cannot withdraw their consent, except through revolution or immigration, it would explain why constitutional change generally occurs within the established constitutional system, which was the case regarding the establishment of direct democracy in Switzerland, California, and New Zealand. It would also explain why direct democracy in each jurisdiction complements, rather than debases, pre-existing constitutional arrangements. A constitutional reform measure passing through a system it is intended to reform cannot avoid accounting for the constitutional principles underlying that system. As the pre-direct democracy systems in Switzerland, California, and New Zealand were

⁸⁶Article I, section 2 of the California Constitution states that "all political power is inherent in the people." Article 71 of the Swiss Constitution states that "subject to the rights of the people and the Cantons the supreme power of the Confederation shall be exercised by the Federal Assembly." In New Zealand, however, Parliamentary sovereignty, as opposed to the doctrine of the consent of the governed, is the primary theoretical explanation for the coercive authority of government. See below text accompanying notes 124-156.

⁸⁷Cronin, above n 43, 12. Sartori argues that democracy exists "when the relation between the governed and the government abides by the principle that the state is at the service of the citizens and not the citizens of the state, that the government exists for the people, and not vice versa." Sartori, above, n 1, 34.

⁸⁸See Marshall, above, n 74, 206.

different, this, in itself, explains why the direct democracy systems in each jurisdiction are different.

4 *Legitimacy*

If the coercive authority of government is derived from the consent of the governed, then, as Sartori has concluded, "power is legitimate only if it is actually bestowed from below, only if it is an emanation of the popular will, and only if it rests on some expressed, basic consensus."⁸⁹ Although extremely influential in the formation of the Swiss and California constitutional systems, this principle was slowly incorporated into Westminster constitutional systems, where, in its unadulterated form, it still sits somewhat uneasily with the concept of the Crown and, despite its decreasing importance, the theory of parliamentary sovereignty.

Butler and Ranney, however, have developed a more applicable conception of legitimacy. In their view, legitimacy consists of two components: 1) the people's conviction that the institutions and processes by which political decisions are made are, by law, custom, and moral principle, the right and proper ways to make such decisions; and 2) their conviction that these decisions do not go beyond acceptable limits of fairness and decency in awarding benefits to, or imposing burdens on, any part of the population.⁹⁰ Essentially, the exercise of governmental power is legitimate if it creates generally accepted obligations rather than a set of prescriptive norms that require force to ensure widespread compliance. In a pure representative democracy, this acceptance is expressed in periodic elections which allow the electors, in a generalised form, to provide some indication of their approval or disapproval of the exercise of governmental power. The principal direct democracy devices, however, provide the electors with the means to voice their approval or disapproval more frequently and with greater precision.

If either of the convictions identified by Butler and Ranney are undermined, the legitimacy of the constitutional system, and its crucial role in maintaining the rule of law, is undermined.⁹¹ Broadly speaking, this could have two important consequences. First, if the means of creating and enforcing law are widely perceived as illegitimate,

⁸⁹Sartori, above, n 1, 34.

⁹⁰Butler and Ranney, above, n 3, 24. Butler and Ranney have also noted that all political decisions should be as legitimate as possible and that the highest degree of legitimacy is achieved by decisions made by the direct, unmediated vote of the people, which leads them to equate referendums with greater legitimacy. Above; see also Walker, above n 51, 12 (stating that direct democracy has proved to be a source of new legitimacy for enacted law and a bulwark against extremism); Walker, above n 25, 195 (same).

⁹¹For an analysis of the rule of law and its importance to constitutional democracy, see G Walker *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, Melbourne, 1988).

people, by and large, will lose their inner impulse to obey the law.⁹² Second, a growing distrust of legislative bodies, coupled with a growing suspicion that privileged interests exert a disproportionate influence, will produce a demand for more democracy.⁹³ The experience in Switzerland, California, and New Zealand readily confirms the second proposition. However, it also leaves room for the suggestion that those in power may have yielded to the demand for direct democracy because they were unwilling to risk the consequences of undermining the rule of law.

B Relationship of Representative and Direct Democracy

The relationship of representative democracy to direct democracy depends on the constitutional framework in which the two co-exist. In Switzerland and California, they operate within constitutional systems that are based on the Constitution of the United States of America. In New Zealand, they exist within a system that is based on the United Kingdom's Westminster system. The conceptual differences between American and Westminster constitutionalism present different theoretical concerns regarding the relationship of representative democracy to direct democracy. These differences help to explain why direct democracy in Switzerland and California differs from direct democracy in New Zealand.

1 Representative and direct democracy

In classical democratic theory, popular self-government not only required, but promoted the direct participation of citizens in government.⁹⁴ Until the unexpected success of American constitutionalism, democracy meant "rule by the people" in small polities, as this was the only conceivable circumstance in which authority over governmental decisions could rest directly with the people.⁹⁵ In ancient Athens, the old Swiss *Landsgemeiden*, and the early New England town meetings, citizens gathered together to exercise governmental power.⁹⁶ As a flourishing political practice, this form of democracy is still the principal means of local self-government for millions of people around the world.⁹⁷

⁹²Walker, above n 51, 2.

⁹³Cronin, above, n 43, 10.

⁹⁴Walker, above n 25, 53.

⁹⁵Nagal, above n 38, 69.

⁹⁶A Ranney "The United States of America" in Butler and Ranney, above n 3, 68.

⁹⁷Nagal, above, n 38, 70 (noting that this form of democracy exists in places as diverse as Chinese villages, Swiss communes, Israeli kibbutzim, and New England towns).

Democracy became widely understood as representative democracy once Madison and his associates found a way to reconcile "the democratic value of popular sovereignty with the capacity to govern a large territory."⁹⁸ To overcome the obstacle of size, both in territory and population, which rendered face-to-face assemblies impractical, the Founding Fathers embraced the principle of representation.⁹⁹ As a consequence, rather than conveying connotations of direct participation, democracy came to mean a system of government in which citizens participate authoritatively only by electing representatives who alone have the power to make laws.¹⁰⁰

However, this conception of democracy is incomplete. On the local level, as mentioned above, people have continued to participate directly in the exercise of governmental power. More importantly, it overlooks the advent of the initiative and referendum, both of which pre-date the American constitutional convention by centuries. Early instances of the referendum occurred in 1552 when electors in Switzerland and France legitimised the annexation of Metz.¹⁰¹ Joseph Zimmerman traces its first use in America to the Massachusetts Bay Colony in 1640.¹⁰² He also traces the first initiative to Massachusetts in 1715.¹⁰³

This conception of democracy also ignores the importance of the initiative and referendum in representative democracies that use them. In 1900 Ellis Oberholtzer predicted that the initiative and referendum would not supplant representative democracy, but would thrive and influence it materially.¹⁰⁴ Walker, writing 87 years later, validated this prediction with the following conclusion:¹⁰⁵

A century of experience in Europe and America has shown direct legislation to be a valuable supplement to the representative institutions of liberal democratic societies. It has neither replaced the elected assemblies nor degraded their functions. It has, however, improved the quality of their work by giving them an incentive to take more notice of public opinion, to be more careful to put legislation into the best possible form, and to formulate with greater clarity and care the arguments in support of it.

⁹⁸Nagal, above, n 38, 69.

⁹⁹See Cronin, above, n 43, 247.

¹⁰⁰Nagal, above, n 38, 69.

¹⁰¹League, above n 23, 1.

¹⁰²J Zimmerman "Populism Revived" (1986) 58 State Government 172; see also Cronin, above n 43, 41. According to Philip Goodhart, the Council of the Army to Oliver Cromwell, under the leadership of Colonel Ireton, proposed in 1647 that a form of the referendum should be adopted to protect the basic rights of the people against bare majorities in the House of Commons. P Goodhart *Referendum* (Tom Stacey, London, 1971) 70.

¹⁰³Zimmerman, above n 102, 172.

¹⁰⁴E Oberholtzer *The Referendum in America* (Charles Scribner's Sons, New York, 1900) 412-13. According to Woodrow Wilson, "[t]heir intention was to restore, not destroy, representative democracy." Cronin, above, n 43, 2.

¹⁰⁵Walker, above, n 25, 195.

The initiative and referendum, as they exist in modern representative democracies, are a far cry from "government by the masses."¹⁰⁶ Their majoritarian nature is, as shown in Parts II, III, and IV, subject to a host of limitations designed to safeguard minority rights.¹⁰⁷ Further, as Sartori has argued, if participatory forms of democracy, including the initiative and referendum, are "conceived as being inimical to representative democracy - and if the former actually undermines the latter - then . . . both are in deep water."¹⁰⁸ Essentially, direct democracy cannot be viewed as an alternative to representative democracy. It is simply a complementary supplement whose primary purpose is to enhance representative democracy.

2 *Westminster dimension*

Representative and direct democracy merge differently in different constitutional systems. In systems where a strict separation of powers exist, as in Switzerland and California, responsibility for governmental decisions is diffused through different branches and levels of government as well as a relatively weak party system. Consequently, adding another locus of decision-making or another check to balance the system, be it the referendum, the initiative, or both, presents little theoretical or constitutional difficulty.¹⁰⁹ As Cronin has noted:¹¹⁰

¹⁰⁶Oberholtzer, above, n 104, 412.

¹⁰⁷Above.

¹⁰⁸Sartori, above, n 1, 245-246.

¹⁰⁹See Butler and Ranney, above n 3, 225-226. American Courts have ruled that the initiative and referendum are permissible under the US Constitution. Eg *Kadderly v Portland* 44 Or 118 (1903) (Oregon Supreme Court holding that the republican clause does not prevent the people of the several states from amending or changing their constitution in any way they see fit as long as it does not abolish a republican form of government, whose exact form is not in any way prescribed by Article IV of the US Constitution). In 1912, the US Supreme Court refused to rule on the constitutionality of direct democracy on the grounds that it was a political question best left to Congress to decide, that is, outside the jurisdiction of the Court. *Pacific States Telephone and Telegraph Company v Oregon* 223 US 118 (1912). The *Pacific States* decision has been widely interpreted to mean that initiatives and referendums fall within the confines of the US Constitution. Magleby, above n 28, 48. In 1971, the US Supreme Court expressed its deference towards direct democracy. *James v Valtierra* 402 US 141 (1971) (concluding that "California's entire history demonstrates the repeated use of the referendums to give citizens a voice on questions of public policy. . . . Provisions for referendums demonstrate devotion to democracy . . .") In *Fair Political Practices Commission v Superior Court* 599 P2d 46, 157 Cal Rptr 855 (1979), the California Supreme Court ruled that the constitutional provisions establishing direct democracy were drafted in the light of the theory that all power of government ultimately resides in the people. Observing that the provisions reserve the power of initiative and referendum to the people, rather than grant it to the people, the Court concluded that: "It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can be resolved in favor of the use of the reserve power, courts will preserve it."

¹¹⁰Cronin, above n 43, 34-35; L Sirico, Jr "The Constitutionality of the Initiative and Referendum: (1980) 65 Iowa L R 637; but see C Fountaine "Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative" (1988) 61 So Cal L R 733 (suggesting, against the weight of judicial and academic authority, that direct democracy is unconstitutional); D Hsiao "Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic" (1992) 41 Duke L J 1267 (same).

State supreme courts have [denied] that direct democracy devices such as the initiative violate the principle of a republican form of government. They have ruled that a republican form of government is one administered by representatives chosen or appointed by the people or by their authority. The initiative and referendum merely reserve to the people a certain share of the legislative power. Government is still divided into legislative, executive, and judicial departments, and their duties are still discharged by representatives selected by the people. There remains, in effect, only one legislative department, but now with two subdivisions.

The effect of the merger depends, for the most part, on the authority of referendum and initiative results and the extent to which they override the decisions of elected representatives.¹¹¹ In Westminster systems like New Zealand's, however, the merger presents several theoretical concerns, particularly regarding collective ministerial responsibility, electoral mandates, parliamentary sovereignty, and Burkeian representation.

(a) Collective ministerial responsibility

In theory, the Ministers of the Crown in Cabinet (the Executive) are collectively responsible to the electorate through a majority in the House of Representatives (the Legislature). If issues are decided by the electorate against the wishes of the government, holding it accountable under the principle of collective ministerial responsibility would be nonsensical, as judging a government at the polls on the basis of its overall achievements would be virtually impossible if it had not made all of the important decisions.¹¹²

However, this objection fails to acknowledge that New Zealand has regularly held government controlled referendums since 1894¹¹³ without diminishing reliance on the theory.¹¹⁴ It also ignores the same outcome in the United Kingdom regarding its 1975 government controlled referendum on membership in the European Community.¹¹⁵ David Butler and Uwe Kitzinger concluded that it "demonstrated once and for all the feasibility of a referendum" in a Westminster system.¹¹⁶ In constitutional terms, they concluded that the "referendum also showed itself to be a less revolutionary constitutional innovation than many had feared" even though it produced, for the first time an "official acceptance of a public cabinet split within a one-party

¹¹¹ See Butler and Ranney, above n 3, 226.

¹¹² See Butler and Ranney, above n 3, 225; see also F Brookfield "Referendums: Constitutional and Legal Aspects" in Simpson, above n 10, 11-12 (arguing that ministers would be morally bound to give way to the will of the electors, which reduces the importance of ministerial responsibility and suggesting that the government of the day should be neutral in polls and the ministers should be free to speak for or against a proposal, as they were in England for the 1975 EEC referendum.).

¹¹³ Wilson, above n 8, 298.

¹¹⁴ See eg Joseph, above n 13, 45, 282, 626.

¹¹⁵ For discussions of this referendum, see generally above note 5.

¹¹⁶ Butler and Kitzinger, above n 5, 286.

government."¹¹⁷ Furthermore, collective ministerial responsibility is intended primarily to prevent individual ministers from taking public positions against decisions *taken* by Cabinet.¹¹⁸ In a referendum context, unless Cabinet decides otherwise, New Zealand Ministers are free to state publicly their personal views on the issue.¹¹⁹

(b) *Mandate*

This collective ministerial responsibility objection is also weakened by its dependency on the mandate theory, which electoral politics in New Zealand has shown to be unsatisfactory. Under this theory, a person who votes for a given candidate is regarded as giving him a mandate to implement every item in his party's manifesto.¹²⁰ As a corollary, ruling parties are expected to fulfil their manifesto promises, which forms the basis of assessing a government's achievements at the polls.

The electorate, however, is not free to discriminate among items within manifestos, or among candidates within a party. Suggesting that a party that has come to power, either on its own or as part of a coalition, has a mandate to implement every single item in its manifesto would appear to be unreasonable, especially if the majority of the electorate did not vote for the ruling party or parties, or their candidates.¹²¹ In addition, broken electoral promises, particularly between 1984 and 1992, have not been uncommon in New Zealand.¹²² Giving the electorate the means to decide some of the key issues of the day would, as Butler and Ranney have suggested, "by-pass some of the absurdities inherent in the mandate doctrine."¹²³

(c) *Parliamentary sovereignty*

The merger of representative and direct democracy in Westminster systems also runs into the theory of parliamentary sovereignty. The theory, as restated by Dicey in 1885, insists that "a sovereign power cannot, whilst retaining its sovereign character,

¹¹⁷ Above.

¹¹⁸ Joseph, above n 13, 45.

¹¹⁹ See eg R Laugesen "How MPs Vote on Electoral Reform" *The Dominion*, Wellington, New Zealand, 5 Aug 1992 (14 ministers for first-past-the-post, 3 for supplementary member, 1 undecided, 5 unwilling to comment, 3 unavailable for comment).

¹²⁰ Butler and Ranney, above, n 3, 225

¹²¹ See above; see also Walker, above n 25, 41 (discussing breakdown of mandate theory).

¹²² See Joseph, above n 13, 450-451; Interview with Wayne Eagleson, Director of National's Parliamentary Research Unit, Wellington (25 March 1991) (suggesting that the demand for direct democracy is related to the overall dissatisfaction with the "broken promises" perception of the present parliamentary system and a rejection of the validity of the assumptions underlying the present form of government by a significant number of people).

¹²³ Butler and Ranney, above, n 3, 225; see also A V Dicey "The Referendum" (March 1894) *Nat'l R* 65, 71-72 (advocating the referendum as it lets electors decide specific issues unlike voting for representatives which involves endorsing a host of unrelated yet inseparable issues).

restrict its own powers by any particular enactment."¹²⁴ Legal scholars have interpreted this to mean that Parliament, as the legal sovereign, cannot impose substantive, as opposed to procedural (manner and form), restrictions on future parliaments.¹²⁵ Although Parliament can impose rules upon itself by which it must enact, amend, or repeal law, it can alter these rules if it complies with them while doing so. In short, Parliament cannot bind itself. By extension, Parliament cannot permanently entrench direct democracy devices or the laws that they produce.

In this context, David Butler has suggested that an advisory referendum can constrain the freedom of Parliament to do absolutely what it likes. Consequently, "[a] binding or constitutionally entrenched referendum would present a much more fundamental challenge to the traditional rules of the game."¹²⁶ However, like Dicey before him, Butler concludes that "[r]eferendums can be grafted onto the British system of government."¹²⁷ In a manner that echoes Oberholtzer, he also concludes that "they must in some degree change its nature. Still more, they must challenge the theories and the textbook assumptions about its nature."¹²⁸

The challenge, in fact, is underway. F M Brookfield, after canvassing the response of the "manner and form" theorists to "Diceyan objections" to entrenching laws in New Zealand, has suggested that "an appropriate referendum may itself be the means of basic constitutional change, effective to assist the establishment of double entrenchment,"¹²⁹ that is, laws that Parliament cannot amend or repeal without super majorities or the approval of the electors. Anupam Chandler, who rejects the "manner and form" approach as open to abuse, nonetheless concludes that entrenchment of a bill of rights in the United Kingdom could be and should be

¹²⁴A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, London 1965) 68 n 1. In his text, Dicey quotes from Todd *Parliamentary Government in the British Colonies* (1880) 192 as follows: "a Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the Legislature from entire freedom of action at any future time when it might be needful to invoke the interposition of Parliament to legislate for the public welfare." Dicey, above, 67-68.

¹²⁵See eg Joseph, above n 13, 12, 458; A Chander "Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights" (1991) 101 Yale L R 457, 463; Brookfield "Referendums: Constitutional and Legal Aspects" in Simpson, above n 10, 16-17; B Harris "Parliamentary Sovereignty and Interim Injunctions: Factortame and New Zealand" (1992) 15 NZULR 55, 58-59.

¹²⁶D Butler "United Kingdom" in Butler and Ranney, above n 3, 218.

¹²⁷Above.

¹²⁸Above.

¹²⁹Brookfield "Referendums: Constitutional and Legal Aspects" in Simpson, above n 10, 17. For a fuller discussion of these conflicting views, see F Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 Otago L R 603. Double entrenchment means that the provision in a statute that entrenches the statute or some of its provisions is also entrenched. For example, section 268 of the Electoral Act 1993 entrenches certain provisions in the Act; however, it is not entrenched itself, which means that Parliament could repeal section 268 in the usual way and proceed to amend or repeal the provisions it had entrenched. For a recent discussion of the entrenchment provision in the Electoral Act 1993, see P Joseph "Constitutional Entrenchment and the MMP Referendum" (1994) 16 NZULR 67.

achieved through a referendum.¹³⁰ Walker, writing in an Australian context, simply rejects the theory of parliamentary sovereignty as being without legal foundation.¹³¹ Nevertheless, aware of Dicey's support for constitutionally required referendums, he also argues that direct democracy is consistent with the theory.¹³²

While these approaches may be useful, they have overestimated Dicey's attachment to the theory of parliamentary sovereignty.¹³³ He viewed the theory as a political fiction.¹³⁴ He believed that "the electorate is king" and argued that "[t]he referendum gives expression to the will of the people, and under any form of popular government the people must be treated as the sovereign, and entitled to obedience."¹³⁵ In accordance with this principle, Dicey advocated the establishment of a constitutionally required referendum to check the growth of the party system and its self-serving abuse of power.¹³⁶ He was particularly concerned with the progressive habit of governments enacting changes designed to benefit their parties but not necessarily the nation.¹³⁷

Dicey viewed British constitutional history as a record of transactions by which the prerogatives of the Crown had been transformed into the privileges of the electors, who had become the true political sovereign.¹³⁸ Consequently, he argued that changes to the constitution and its fundamental laws should not be made without the approval of the electors.¹³⁹ Although he believed that Parliament had the legal power to evade

¹³⁰Chander, above n 125, 473, 480. Once entrenched by referendum, the bill of rights would only be amendable by referendum. Chander, above n 125, 473.

¹³¹Walker, above n 25, 23; but see *Vauxhall Estates v Liverpool Corp* [1932] 1 KB 733, 743 (per Avory J, stating, speaking for himself, that "no Act of Parliament can effectively provide that no future Act shall interfere with its provisions"), 746 (per Humphreys J, withholding comment on the issue), 747 (per MacNaghten J, withholding comment on the issue) (Div Ct); *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590; [1934] All ER 385, 389 (per Scrutton LJ, stating "Parliament can alter an Act which it has previously passed"), 390 (per Maugham, LJ, stating that it is "plain that the legislature is unable, according to our constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject-matter shall there never be an implied repeal"), 391 (per Talbot J, agreeing) (CA).

¹³²Walker, above n 25, 23-24, 42.

¹³³E S C Wade, Dicey's posthumous editor, chose to "eliminate all reference" to the "new constitutional idea of the referendum" which Dicey favoured. A V Dicey *Introduction to the Study of the Law of the Constitution* (9 ed, Macmillan, London 1952) x. As the 10th edition, above n 124, is the most easily obtainable of Dicey's works, Wade's editorial decision could explain how some legal scholars might have formed the impression that the theory of parliamentary sovereignty presents an obstacle to the establishment of direct democracy in Westminster systems.

¹³⁴A V Dicey "Ought the Referendum be Introduced into England?" (1890) 57 Contemp R 489, 503.

¹³⁵A V Dicey "The Referendum and Its Critics" (1910) 212 Q R 538, 551.

¹³⁶Dicey, above, 540-541, 543, 546-547, 552-555, 557, 559-562 (arguing for the adoption of constitutionally required referendums for constitutional issues and important legislation); Dicey, above n 134, 498, 510-511 (recommending consideration of the principle of the constitutionally required referendum for important legislation, but withholding a direct or decisive recommendation to adopt it).

¹³⁷Dicey, above n 135, 562; Dicey, above n 134, 510-511.

¹³⁸Dicey, above n 134, 498.

¹³⁹Dicey, above n 135, 546, 559-562.

his proposed Referendum Act,¹⁴⁰ he doubted that any party leader would take the political risk of depriving the electors of their legal power under his proposed Act.¹⁴¹ He concluded that "[t]he latent sovereignty of Parliament is in truth an argument, not against, but in favour of the Referendum."¹⁴²

The approaches outlined above have also assumed that the merger of representative and direct democracy in Westminster systems depends on finding a way to entrench direct democracy. Unless it can be entrenched, as Brookfield has argued, the participation of the electorate by referendum in law-making is necessarily by the grace of Parliament.¹⁴³ While this may be correct, it does not follow that direct democracy is inconsistent with the theory of parliamentary sovereignty, as Dicey's support for both demonstrates. Furthermore, Parliament can easily adopt procedural restrictions which would, in effect, redefine Parliament for the purpose of repealing or amending any direct democracy Act or any measure enacted as a result of it. For example, as Hamish Gray has reasoned, such an Act or measure could "be placed practically though not formally beyond repeal" if Parliament passed "an Act protected from repeal except with the assent of 90 per cent of the adult registered voters in a referendum."¹⁴⁴ As the Privy Council held in *The Bribery Commissioner v Ranasinghe*:¹⁴⁵

¹⁴⁰Dicey's proposed Referendum Act consisted of two provisions: 1) no Bill which repealed, changed, added to, or otherwise affected the Acts (of the highest importance, especially constitutionally) enumerated in the Schedule to the Referendum Act should become an Act of Parliament, even though passed by both Houses of Parliament, unless submitted to and sanctioned by a majority of the electors voting on the question of whether the Bill should become law; and 2) any Bill pertaining to the Acts enumerated in the Schedule that was not submitted to or did not receive the approval of the electors should be held invalid by the courts. Dicey, above n 135, 554. Dicey also recommended the exemption of matters of an urgent nature in which the safety of the country imperatively demanded rapid and immediate legislation. Dicey, above n 135, 555.

¹⁴¹Dicey, above n 135, 551.

¹⁴²Above.

¹⁴³Brookfield "Referendums: Constitutional and Legal Aspects" in Simpson, above n 10, 20.

¹⁴⁴H Gray "The Sovereignty of Parliament Today" (1953) 10 U Toronto L J 54, 71-72. The New Zealand courts are unlikely to use the doctrine of implied repeal to negate an Act with special repeal provisions if Parliament were to pass a contrary enactment by simple majority. See *Harris v Donges* [1952] 2 SA 428, [1952] 1 TLR 1245 (South African Supreme Court holding that a law that failed to be enacted according to special majority requirements was void); *Attorney-General (NSW) v Trethowan* [1932] AC 526 (Privy Council holding that the government of NSW could be enjoined from abolishing the Legislative Council by ordinary legislative process because a previous Act which was still law required a referendum to be held before such a constitutional change could take place); but see Joseph, n 13, 475-476 (stating, after reviewing relevant authorities, including *Harris*, *Trethowan*, and *Ranasinghe*, below, that modes of entrenchment include referendums and special majorities in Parliament but that referendums requiring more than 50 percent majorities may be swept aside as impeding legislative power, whereas special parliamentary majorities may be upheld as binding).

¹⁴⁵[1964] 2 WLR 1301, [1964] 2 All ER 785. According to Gray, *Ranasinghe* eliminated the possibility of distinguishing *Harris* and *Trethowan* on the basis that they involved non-sovereign as opposed to sovereign legislatures. H Gray "The Sovereignty of Parliament and the Entrenchment of Legislative Process" (1964) 27 Modern L R 705, 708 (discussing *Ranasinghe*); see also *Attorney-General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522 (Privy Council holding an act to amend entrenched provisions of Constitution of Trinidad and Tobago was valid as it was passed in the manner and form required); but see Joseph, above n 13, at 471-472 (stating that language in *Ranasinghe*

a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates the power to make law. This restriction exists independently of the question whether a legislature is sovereign A constitution can indeed be altered or amended by the legislature if the regulating instrument so provides and if the terms of those provisions are complied with: and the alternation or amendment may include the change or abolition of these very provisions. The proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment, to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.

In addition, the Privy Council decisions in the Canadian cases *In Re The Initiative and Referendum Act*¹⁴⁶ and *R v Nat Bell Liquors*¹⁴⁷ show that the theory has had no role in determining the constitutional validity of direct democracy legislation or legislation enacted under it. In *Re The Initiative*, the Privy Council invalidated Manitoba's Initiative and Referendum Act 1916. Section 92(1) of the Constitution Act 1867 gave each provincial legislature in Canada the power to amend "the constitution of the province, except as regards the office of the Lieutenant Governor." The Act, among other things, allowed the electors to initiate legislation, which could, upon approval of the electorate, become law without the assent of the Lieutenant Governor.¹⁴⁸ The Privy Council considered this diminution in the Lieutenant Governor's role to be in conflict with section 92(1). Consequently, it ruled the Act invalid on the grounds that the Manitoba Parliament did not have the authority to enact it.¹⁴⁹ The Privy Council refused to answer the question of whether the Act was invalid because it undermined Parliament's primacy, which was the primary basis of the decision in the Manitoba Court of Appeal,¹⁵⁰ as it had "no relation to the real topic of controversy."¹⁵¹

regarding parliamentary sovereignty was dicta); Chander, above n 125, 465 (stating that *Ranasinghe and McLeod* demonstrates the Privy Council's willingness to enforce manner and form restrictions on colonial legislatures but that the jurisprudence is not readily transferable to the domestic UK context because of the absence of a rigid constitution which requires obedience and the reluctance of the courts to engage in any sort of judicial review of Westminster legislation).

¹⁴⁶[1919] AC 935; [1919] 3 WWR 1, 48 DLR 18.

¹⁴⁷[1922] 2 AC 128.

¹⁴⁸The Act allowed the electors to initiate law by a petition signed by at least eight percent of their number voting in the last election and presented to Legislative Assembly. If the Legislative Assembly did not enact the proposal, it had to be submitted to the electorate. If the electorate, by simple majority, approved the proposal, it became law without further action by the Legislative Assembly. It also allowed the electors, via a petition signed by five percent of their number voting in the last election, to force a referendum on any law. No Act of the Legislative Assembly could take effect for 90 days after the session in which it was passed, unless two-thirds of the members voting declared it to be an emergency measure. The emergency measure clause did not apply to a Supply Bill or an Appropriation Act under \$100,000. *In Re Initiative*, above n 146, 939-940. Although the Act left the Legislative Assembly intact and in possession of all its powers, the Act could be used to repeal or alter the normal representative process. More importantly, the Act gave the electors the means to completely by-pass the normal legislative process, including the "automatic formality" of the Lieutenant Governor's assent. P Hogg *Constitutional Law of Canada* (2 ed, Carswell, Toronto, 1985) 291.

¹⁴⁹*In Re Initiative*, above n 146, 945.

¹⁵⁰(1916) 27 Man R 1, [1917] WWR 1012, 32 DLR 148 (Man CA) (reversing the decision of Chief Justice of the Court of the King's Bench for Manitoba).

In *Nat Bell Liquors*, the Privy Council upheld Alberta's Liquor Act 1916, which was passed pursuant to a referendum initiated under its Direct Legislation Act 1913. Unlike the procedure in Manitoba, which completely by-passed the Manitoba Parliament, the procedure in Alberta required the Alberta Parliament to enact, without substantive amendment, approved referendum measures as if they were ordinary legislation.¹⁵² As the Alberta Parliament had followed this procedure, the Privy Council reasoned:¹⁵³

It is impossible to say that it was not an Act of the legislature, and it is none the less a statute because it was the statutory duty of the legislature to pass it. If the deference to the will of the people, which is involved in adopting without material alteration a measure of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people is either wholly ignorant or indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables a single project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enable numerous measures to be recommended simultaneously to the electors, it would appear that the legislature is competent to vote as its members may be pledged to vote individually and in accordance with what is called an electoral "mandate," but it incompetent to vote in accordance with the people's wishes expressed in any other form. Unless the Direct Legislation Act can be shown, as it has not been shown on this occasion, to interfere in some way formally with the discharge of the functions of the legislature and of its component parts, the Liquor Act, 1916, being in truth an Act duly passed by the legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shown to be ultra vires.

Peter Hogg has argued that this decision violates the sovereignty of Parliament as the Direct Legislation Act, "as interpreted by the Privy Council, purported to tie the hands of future Legislatures by imposing upon them a duty to enact whatever policies were determined upon by the initiative and referendum process."¹⁵⁴ Ironically, his criticism emphasises the inconsequential role that the theory of parliamentary sovereignty has played in Privy Council decisions regarding direct democracy. It also does not acknowledge the Privy Council's implicit reliance on the manner and form

¹⁵¹*In Re Initiative*, above n 146, 937, 945-946. In obiter dicta, the Privy Council stated that a legislature cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence." *In Re Initiative*, above n 146, 945. Hogg asserts that this statement suggests that the Privy Council would have agreed with the Manitoba Court of Appeal's decision that the Act was unconstitutional on the grounds that "it invested primary powers of legislation in a body (the electorate) which was not a 'Legislature'" had it ruled on the question. Hogg, above n 148, 293.

¹⁵²The Act established an initiative and referendum procedure. An initiative petition containing the proposed measure had to be presented to the Legislative Assembly with a request to hold a referendum. The Assembly had to present the Bill to the electorate. If approved by the electorate, it had to be enacted by Parliament without substantial alteration. *Nat Bell Liquor*, above n 147, 339.

¹⁵³*Nat Bell Liquor*, above n 147, 339-340.

¹⁵⁴Hogg, above n 148, 294-295; but see Boyer, above n 48, 34 (stating the Act was constitutional as it did not alter the essential ingredients by which laws in the province were still enacted).

approach in reaching its decision.¹⁵⁵ Moreover, it overlooks the significance of Parliament's decision to permit referendums or to give the electors the power to trigger referendums. As Brookfield has observed, all of the referendums held in New Zealand were carried out under the authority of Parliament with no theoretical or practical affect on the sovereignty of Parliament.¹⁵⁶

(d) *Burkeian representation*

Edmund Burke has had an immense influence on the theory of representative democracy.¹⁵⁷ After being safely elected to represent Bristol in 1774,¹⁵⁸ he delivered a speech which is still cited by politicians to justify acting contrary to the desires of the constituents in their electorates.¹⁵⁹ Essentially, Burke declared that elected representatives are not delegates charged with the task of presenting the views of their electorate, but independent members of Parliament with the freedom and duty to exercise their judgment in the interests of the nation as a whole.¹⁶⁰ Opponents of direct democracy have argued that this conception of representation, which is not without its critics,¹⁶¹ would be undermined by direct democracy, as it would, in effect, reduce elected representatives to the status of delegates.¹⁶²

¹⁵⁵After reviewing *In Re Initiative*, *Nat Bell Liquor*, and Hogg's criticism, David Conacher concluded that direct democracy can be established in Canada in one of two ways: 1) by following the Alberta system; or 2) by following the Manitoba system, adding the step that the Lieutenant Governor in Council has to give royal assent for the initiative to take effect, and prohibiting the initiative on certain subjects to ensure it is defined as a delegated power. D Conacher "Power to the People: Initiative, Referendum, Recall and the Possibility of Popular Sovereignty in Canada" (1991) 49 U Toronto Faculty L R 174, 189. For additional discussion of *In Re Initiative* and *Nat Bell Liquor*, see Boyer, above n 48, 30-37.

¹⁵⁶Brookfield "Referendums: Constitutional and Legal Aspects" in Simpson, above n 10, 10. In any case, the theory is under attack in New Zealand. See eg Joseph, above, n 13, 446-453, 458-476.

¹⁵⁷V Bogdanor "Introduction" in V Bogdanor (ed) *Representatives of the People?* (Gower, Hartshire, 1985) 4.

¹⁵⁸Walker, above n 25, 31.

¹⁵⁹See eg FAIR Newsletter No. 10 (September 1990) (quoting Mike Moore, then leader of the Labour Party and Prime Minister, as follows: "I am an old-fashioned parliamentarian and draw on the system of Burke and Westminster, where it is said that a member of Parliament is a representative, not a delegate, in that of all (the) things you owe your electors, judgment is the most important"). According to Walker, Burke's disregard for the views of his electors generated so much criticism from his electors that he withdrew his re-election bid. Walker, above n 25, 31.

¹⁶⁰For a reprint of Burke's speech see, M Chen and G Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993) 604-605.

¹⁶¹See eg R Dixon Jr *Democratic Representation: Reapportionment in Law and Politics* (Oxford University Press, London, 1968) 31 (stating that given a choice between an independent legislator and a delegate, the delegate must be chosen, else there is no representative function, that is, no democracy); Walker, above n 91, 31-40.

¹⁶²See eg NZPD, vol 122, 580, 24 September 1902 (Mr Fisher) (stating, in a speech against the Referendum Bill, that "Burke ... teaches us that a member of Parliament should be a leader of the people; his prime function is to instruct and guide the people; he is to lead, and the people are to follow").

This criticism, however, overlooks the modern reality of political party discipline, a phenomenon unknown to Burke.¹⁶³ In Burke's time the right to vote "was on the whole restricted to a comparatively small number of male property owners."¹⁶⁴ As it was humanly possible to develop a close relationship with constituents, Burke's speech appears to be calculated to free himself from the burden of doing so. Today, however, the main threat to a representative's independent judgment comes from his or her party, not his or her constituents, especially as the nominating process is intended to select those who will represent the interests of the party, or more accurately, those who control the party.¹⁶⁵ The typical member of Parliament, in Burkeian terms, is arguably no more than a delegate of the party, who is paraded into the House to vote as the party whips direct.¹⁶⁶ As direct democracy would only have the effect of changing the delegate's political master on occasion, Burke's theory of representation constitutes a spurious objection to direct democracy, especially as it appears to be inconsistent with the mandate theory discussed above.¹⁶⁷

3 *American dimension*

Although refutable, the arguments against direct democracy in the Westminster constitutional context provide some indication as to why New Zealand's citizens initiated referendum system is non-binding. The other significant factor is caution. New Zealand is the first Westminster system to adopt direct democracy. The advisory referendum approach is, as Cronin has pointed out, a prudent first step. The Swiss and the Californians eschewed this approach, largely because they were influenced by American constitutionalism. In America, Burke's theory of representation underwent a subtle, but important, transformation. The change was instrumental in establishing the philosophical foundations of the two competing constitutional responses to direct democracy in Switzerland and California.

¹⁶³Bogdanor, above n 157, 3-4.

¹⁶⁴Bogdanor, above n 157, 4.

¹⁶⁵See above.

¹⁶⁶See H Clark "No to PR, Yes to Parliamentary Reform" *The Evening Post*, Wellington, New Zealand, 6 January 1992, 5; Address by Michael Laws, Member of Parliament for Hawke's Bay, Commonwealth Press Editors' Conference, Wellington (6 June 1991); M Gobbi "The Trial of Socrates: A Matter of Conscience (Is the Party Whip System Justifiable?)" NZLJ 451 (December 1988).

¹⁶⁷See Walker, above n 25, 30.

(a) *Madisonian representation*

Madison refined Burke's theory by linking it with the idea of protecting minority rights. He believed that the purpose of representation was:¹⁶⁸

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

As Madison believed that direct democracy could only be feasible in small communities, as in the ancient city states where citizens voted and simple majority rule held sway, he rejected it as inapplicable to a country as vast as the United States.¹⁶⁹ More importantly, as Adrienne Koch has summarised, Madison believed that simple majority rule would be:¹⁷⁰

pernicious wherever it might be applied because of its failure to provide protection for the rights of minorities. He distrusted this simple or direct democracy for its *minimal* use of deliberative judgment, exercised in a favoring atmosphere of limited powers with opportunities for debating, rethinking, and reasonably deciding intricate issues of moment. At the mercy of this type of simple direct democracy were especially the propertied few (compared to the propertyless many) and wise and honest leaders who would tend to be cast aside in favor of demagogues who would be prepared, at the first opportunity, to emerge in the true colors of despots.

Madison's refinement constitutes a more serious objection to direct democracy than Burke's theory of representation, as it strikes at the heart of democratic constitutional theory. For this reason, his concern still constitutes the principle argument against direct democracy. It also explains why the direct democracy devices in Switzerland, California, and New Zealand are structured in ways that limit their majoritarian potential, as Parts II, III, and IV reveal.

(b) *Jeffersonian democracy*

The logical extension of Madisonian representation is that the so-called common citizen should never be allowed to participate in the exercise of governmental power. Jefferson anticipated this consequence in letter he wrote to Madison from Paris in 1787, in which he warned against giving government too great a role in determining the affairs of the people as it would be oppressive.¹⁷¹ As Cronin has written, Jefferson, like Jean-Jacques Rousseau before him,¹⁷² believed that:¹⁷³

¹⁶⁸The Federalist No. 10 (J Madison).

¹⁶⁹Koch "Introduction" in *Notes to Debates*, above n 71, xix.

¹⁷⁰Above; see also A Toffler *The Third Wave* (Pan Books, London, 1981) 438.

¹⁷¹Cronin, above n 43, 40.

¹⁷²Rousseau disapproved of nations which delegated their sovereignty to representatives: "By dint of laziness and money, they finally have soldiers to enslave the country and representatives to sell it. ... The English people thinks it is free. It greatly deceives itself; it is free only during the election of the members of Parliament. As soon as they are elected, it is a slave, it is nothing. Given the use made of

the will of the people is the only legitimate foundation of any government; even a deficient popular government was preferable to the most glorious autocratic one. Of course, people who rule themselves may commit errors, but they have means of correcting them. He had enormous confidence in the common sense of mankind in general. As long as citizens were informed, they could be trusted with their own governance.

Jefferson, unlike most of his associates, was more willing to trust in the wisdom of the people.¹⁷⁴ His deep suspicion of government lent support to his position.¹⁷⁵ Fundamentally, he believed that people had the capacity to govern themselves.¹⁷⁶ This idea, while not an endorsement of direct democracy,¹⁷⁷ has become the philosophical basis upon which most arguments for direct democracy are based, particularly as developed later by Andrew Jackson, then the Populists, the Progressives, and finally the latter-day participatory democrats.¹⁷⁸ Essentially, faith in Madisonian representation as a bulwark against "the tyranny of majority factionalism" has waned in the face of a "consequent impatience with all forms of indirect or attenuated representation,"¹⁷⁹ especially as people have become more informed and technology has made their participation easier.¹⁸⁰

Nevertheless, many of those following Jefferson have not lost sight of Madison's central concern regarding the protection of minority rights.¹⁸¹ The founders of direct democracy in Switzerland, California, and New Zealand were aware of, and took steps, to counter-balance the majoritarian potential of the systems they established, as Parts II, III, and IV show.

these brief moments of freedom, the people certainly deserve to lose it." J Rousseau *On the Social Contract with Geneva Manuscript and Political Economy* (trans, St Martin's Press, New York, 1978) 102; see also Oberholtzer, above n 104, 2-3.

¹⁷³Cronin, above n 43, 40.

¹⁷⁴Cronin, above n 43, 37, 40.

¹⁷⁵See Cronin, above n 43, 40.

¹⁷⁶Dixon, above n 161, 42.

¹⁷⁷Cronin, above n 43, 40.

¹⁷⁸Cronin, above n 43, 37; Dixon, above n 161, 42; see also eg, D Kramer *Participatory Democracy* (Schenkman, Cambridge, Mass, 1972); L Tallian *Direct Democracy* (People's Lobby, Los Angeles, 1977); B Barber *Strong Democracy: Participatory Politics for a New Age* (University of California Press, Berkeley, 1984); P McGuigan *The Politics of Direct Democracy in the 1980s: Case Studies in Popular Decision Making* (Institute for Government and Politics, Washington, DC, 1985).

¹⁷⁹Dixon, above n 161, 42.

¹⁸⁰Bernard Robertson has argued that information technology has solved many of the practical problems which required the selection of representatives; therefore, citizens are now obliged to take a more active part in decision-making. B Robertson "Constitutional and Administrative Law in New Zealand" NZLJ 213 (June 1993).

¹⁸¹Dixon, above n 161, 42.

IV ASSESSMENT

Walker views the struggle for direct democracy as part of an age-long conflict between the philosophical traditions represented by Madison and Jefferson, respectively. It pits aristocrats against democrats, the party of the elite against the party of the people.¹⁸² According to Walker, elites, throughout history, have embraced and discarded theory after theory to justify denying access to the legislative process by the presumably incompetent masses.¹⁸³ Rousseau's theories were startling, and led to tremendous upheaval, as they constituted a protest against the monarchical forms that supported elites nearly everywhere in his day.¹⁸⁴ As "vague and fanciful" as it may have been, the philosophical movement led by Rousseau was, as Oberholtzer has noted, an "appeal for a new political order, in which the people would receive back their own from unauthorized agents who had got into control of the machinery of government and maintained themselves there through the complexity of the political organization."¹⁸⁵

However, as Oberholtzer and Cronin point out, not even Rousseau, who spoke of primary assemblies as the ideal in government, believed that Paris or France could be ruled by town meeting.¹⁸⁶ As modern ballot systems had not yet been devised, "the people were still to act through representatives, albeit as a necessary evil from which it was thought there could be no escape, at any rate in populous countries of a large territorial area."¹⁸⁷ Even Walker, despite the revolution in communication technologies and his commitment to the party of the people, believes that the initiative and referendum are simply valuable supplements to representative democracy.¹⁸⁸ David Magleby sums up the position as follows:¹⁸⁹

Proponents of both direct democracy and representative democracy share an important common ground: they agree that most of the business of governing cannot be done directly by the people but must be delegated to elected representatives. The initiative and referendum process, even at best, is a complement to the legislative process.

¹⁸²Walker, above n 51, 13; Walker, above n 25, 3-4 (stating that the debate regarding direct democracy boils down to those who want government by the people and those who want rule by the elite). For a tabular summary of the key elements of the competing views, see Cronin, above n 43, 249.

¹⁸³See Walker, above n 25, 177, 180-181, 187-189, 197.

¹⁸⁴See Oberholtzer, above n 104, 390.

¹⁸⁵Above.

¹⁸⁶Above; Cronin, above n 43, 39.

¹⁸⁷Oberholtzer, above n 104, 390.

¹⁸⁸Walker, above n 25, 2 (arguing that the initiative and the referendum are the means to take controversial issues out of the hands of extremists, pressure groups, and power elites thereby allowing the common sense and moderation of the electorate acting as a whole to prevail); see also Butler and Ranney, above n 3, 29 (stating that the Progressives viewed direct democracy as a means of enriching the political process).

¹⁸⁹Magleby, above n 28, 2.

Cronin has articulated a hybrid model of democracy that explains direct democracy's attraction as a complementary supplement to representative democracy. In his view, people value representative institutions and want their representatives to make the vast majority of laws. They also value majority rule, but understand the need to protect minority rights most of the time, which accounts for the general acceptance of the safeguards regulating the majoritarian potential of direct democracy devices. Although people want to improve the legislative process, they also want to vote occasionally on policy issues, particularly on matters that concern them directly. Having ease of access to the legislative process is no less important than actually participating in it. While they trust their representatives most of the time, they distrust the concentration of power in any one institution. They are also interested in opening up the legislative process to lessen the influence of secrecy, money, and single-interest groups.¹⁹⁰

This model accounts for the general support for both representative and direct democracy where they co-exist, the acceptance of limitations on direct democracy devices, and the general lack of interest in creating teledemocracies enabling routine public participation. The model also reconciles the competing philosophical traditions on which most of the arguments for and against direct democracy are based. Provided minority rights are protected sufficiently, Jeffersonian-inspired advocates of direct democracy should not offend adherents of representative democracy, whether Burkeian or Madisonian in its conception.

The model also explains why reformers in Switzerland, California, and New Zealand embraced direct democracy as a means of improving, not displacing, representative democracy. As the underlying constitutional principles upon which the model is based vary from jurisdiction to jurisdiction, it also provides the basis for understanding why representative and direct democracy have merged differently in Switzerland, California, and New Zealand and why the direct democracy devices in these jurisdictions differ.

¹⁹⁰Cronin, above n 43, 249-250.

PART II: SWITZERLAND

ORIGIN OF DIRECT DEMOCRACY IN SWITZERLAND

The constitutional initiative, legislative initiative, and legislative referendum originated in Switzerland after extensive experience with government controlled and constitutionally required referendums. St Gall established the legislative referendum in 1831, and Vaud founded the legislative initiative in 1845. These innovations, which coincided with a widespread disenchantment with representative democracy, spread quickly to other Swiss cantons. Eventually, the Swiss Democrats, who were behind the push for direct democracy on the cantonal level, were successful in establishing the constitutional initiative and the legislative referendum on the federal level. A cumbersome version of the constitutional initiative appeared in the Constitution of 1848. The legislative referendum appeared alongside this device in the Constitution of 1874. In 1891, the Swiss amended the Constitution of 1874 to add a more flexible version of the constitutional initiative.

The Swiss initially embraced these direct democracy devices as a solution to the problems associated with representative democracy in Switzerland during the industrial revolution, particularly the advent of elected representatives dedicated to furthering the economic interests of their class. The installation of these devices on the federal level ended a short-lived experiment with a pure liberal representative democracy modelled after the United States constitutional system. The experiment failed largely because it ignored Swiss constitutional history, especially its emphasis on local autonomy and direct participation in the exercise of governmental power.

Swiss history is well-chronicled. However, the development of the initiative and referendum, as well as their inclusion in the Constitution of 1874, has escaped comprehensive treatment. Simon Deploige, John Vincent, Francis Adams, and E Bonjour provide the most informative accounts, such as they are, in works published between 1889 and 1922.¹ This subject, when it is treated at all by subsequent scholars, is generally dealt with in a cursory or fragmentary fashion.² However, an

¹S Deploige *The Referendum in Switzerland* (trans, Longmans, Green & Co, London, 1898); J Vincent *State and Federal Government of Switzerland* (John Hopkins Press, Baltimore, 1891); F Adams and C Cunningham *The Swiss Confederation* (Macmillan & Co, London, 1889); E Bonjour, H Offler and G Potter *A Short History of Switzerland* (Oxford University Press, London, 1952).

²See generally eg W Martin *Switzerland: From Roman Times to the Present* (Ekek Books, London, 1971); G Thurer *Free and Swiss: The Story of Switzerland* (adapted & trans, Oswald Wolff, London, 1970); W Oechsli *History of Switzerland: 1499-1914* (Cambridge University Press, Cambridge, 1922); see also J Steinberg "Imitations of Switzerland: Historical Reflections" (1988) 23 Gov't & Opp 13.

understanding of the factors which led to the inclusion of the constitutional initiative and the legislative referendum in the Constitution of 1874 is vital to understanding their role in the Swiss constitutional system. It is also vital to understanding the appeal of direct democracy to reformers in California and New Zealand.

To provide this understanding, this chapter identifies the factors which converged to produce and develop direct democracy in Switzerland. It accomplishes this task by tracing the origin of direct democracy in Switzerland. It begins with a discussion of the geographical, economic, and political factors existing in Switzerland prior to the creation of the modern Swiss state. It then examines the forces which led to the formation of the Swiss Confederation and influenced its evolution. Finally, it discusses the circumstances which led the Swiss to produce the Constitutions of 1848 and 1874 and to incorporate the constitutional initiative and legislative referendum into their federal constitutional system.

I PRE-CONFEDERATION (400 to 1291)

The development of the constitutional initiative, legislative initiative, and legislative referendum in Switzerland is intimately related to the country's constitutional history, which begins with the seeds of Swiss political unity. Swiss political unity evolved from a peculiar set of geographical, economic, social, and political circumstances extant in the Alpine communities of central Switzerland after the fall of the Roman Empire.³

A *Teutonic and Lombardian Influences*

Long before the Swiss Confederation came into existence, the Romans had governed the Celtic tribes inhabiting the Alpine province known as Helvetia. In the early 400s, however, Teutonic invaders partially destroyed this Romanic civilisation. The Celts, Romans, and Teutonic invaders intermingled with Lombardian and Illyrian tribes that came from the south, and Latinised Burgundians who ventured into the region from the west.⁴ This blend of diverse cultures in the Alpine regions affected Switzerland's constitutional development. Both the Teutonic and Lombardian influences were especially important.

For a Marxist view of Switzerland's development and institutions, see J Ziegler *Switzerland Exposed* (Allison & Busby, London, 1978).

³See J Steinberg *Why Switzerland?* (University of Cambridge Press, Cambridge, 1976) 11.

⁴F de Salis *Switzerland and Europe: Essays and Reflections* (trans, Oswald Wolff, London, 1971) 19-20.

By settling in Helvetia, particularly in the valleys of Uri, Schwyz, and Unterwalden, the Teutonic invaders, who customarily decided all vital questions at popular assemblies, laid the foundations of Switzerland's existing political institutions. They organised their conquest by dividing the land into districts among elected chieftains. These districts were subdivided into 'hundreds', which were governed by counts. When the Franks conquered the region in the 500s, they made the chieftains dukes of the Merovigian Empire. In the early 800s, when Helvetia became part of the Holy Roman Empire, Charlemagne instituted a system whereby the districts were ruled by governors appointed by royal warrant instead of by election. The district governors administered the law under the oversight of royal commissioners. In the hundreds, however, the counts continued to hold court upon minor offences with the whole body of citizens assembled about them as judges and jury. Uri, Schwyz, and Unterwalden were hundreds within the Helvetian district of Thurgau, which originally included all the north eastern and central part of Switzerland.⁵

The Lombardians also influenced the inhabitants of Uri, Schwyz, and Unterwalden. For centuries, the mountaineers were primarily oriented toward Italy, which affected both their political and religious outlook. From the 1100s they received news of events in Italy from merchants, clerics, and muleteers who travelled across central Switzerland via the newly opened Gotthard Pass. These travellers inspired the mountaineers with reports of the Lombard League, an oath-based alliance of Lombardy's free urban communities. In 1183, Emperor Friedrich Barbarossa acknowledged the Lombard League after he had failed to subdue it. As Uri, Schwyz, and Unterwalden maintained friendly relations with the Lombard League, its initial success provided them with an influential precedent for their initial defensive alliance in 1291,⁶ from which the modern Swiss state evolved.⁷

B *Economic and Political Factors*

Unique economic and political factors combined with these influences to produce institutions of collective, communal self-government in Uri, Schwyz, and Unterwalden. In economic terms, Alpine conditions promoted communal enterprise. For example, raising cattle in the region resulted in common pastures, common marketing of animal and dairy products, and common activity on important passes and roads. Communal enterprise eventually led the inhabitants to organise themselves into extended valley communes. These soon became unified, enclosed cooperatives with

⁵Vincent, above n 1, 4; J Herold *The Swiss Without Halos* (Columbia University Press, New York, 1948) 116.

⁶Herold, above n 5, 117; see also D de Rougemont and C Muret *The Heart of Europe* (1941) 37.

⁷See J Steiner *Amicable Agreement Versus Majority Rule: Conflict Resolution in Switzerland* (trans, rev ed, University of North Carolina Press, Chapel Hill, 1974) 264.

common interests regulated by a common administration in the 1100 and 1200s. Even where, as was frequently the case, a valley was subject to noble or clerical lords, these communities remained non-hierarchical and undivided, that is, non-feudal in character.⁸

The commune affected Switzerland's constitutional development in several ways. First, it provided a model for democratic organisation. The commune's limited area was an ideal environment for direct participation in government. Each citizen personally took part in all decisions concerning the commune; the people directly appointed the members of all administrative bodies. Commune members had the opportunity to discuss, assess, and decide issues, and to personally experience the consequences of their decisions. Second, as an assemblage of individuals and families inhabiting a defined territory with common interests regulated by a common administration, the commune served as an influential precedent for cantonal, then federal administration. Third, the commune provided an organised centre of resistance to feudalism, which contributed largely to the foundation of Swiss political liberties and to the creation of the Swiss Confederation. The Swiss trace both their unity and their political liberties to the independence of the early Alpine communes.⁹

The political interplay of feudalism and the Church in the Alpine regions between 900 and 1200 also fostered the autonomy of Uri, Schwyz, and Unterwalden. Feudalism had changed and complicated land ownership; lordship of the districts and hundreds had become hereditary in different families. Many small owners put themselves under the protection of powerful lords or in feudal relation to the monasteries. Since the late 800s, Uri was a fief of the Abbey of Zurich, which gave Uri immunity from the jurisdiction of the district governor and the local count. Consequently, Uri enjoyed the milder rule of the monastic officials and, later, the direct protection of the Emperor, who appointed the advocate who oversaw the Abbey's possessions. The arrangement allowed the inhabitants of Uri to form the "Community of the People of Uri," which regulated all matters pertaining to their common pastures and woodlands.¹⁰

⁸Steinberg, above n 3, 11; see also Adams, above n 1, 99. The general movement of trade through Switzerland's 22 major and 31 minor passes produced a wave of urban foundations, a struggle between the various existing cities, their feudal overlords, and the valley cooperatives for control of customs, tolls, and carrying trade along the routes. This trade, and its accompanying struggle, contributed to the political independence of the Alpine communities by weakening customary relationships. Steinberg, above n 3, 11-12.

⁹A Siegfried *Switzerland: A Democratic Way of Life* (Jonathan Cape, London, 1950) 129-130; Adams, above n 1, 98-99.

¹⁰Vincent, above n 1, 4-5.

Schwyz also managed to preserve its valley cooperative, which owned its own land and made its own local laws. However, its external political status was not as desirable as Uri's. Schwyz was under the protection of overlords and, as a result, far removed from the Emperor's direct authority. Unterwalden was in a similar position, except that ownership of land was more divided up among monasteries and nobles. In addition, Unterwalden had fewer free farmers than Schwyz. Small land owners in Schwyz and Unterwalden were constantly threatened by the prospect that their overlords would deprive them of their remaining rights by acquiring territorial ownership of their land.¹¹

The scope of law-making in Uri, Schwyz, and Unterwalden at this time went little beyond the concerns of their common farming and pasturage. Popular rights were really expressed in the application of law, that is, by participating as judges or jury members in local trials. In this regard, the mountaineers jealously guarded ancient usages and resented foreign interference. More importantly, their common interests and occasional assemblies promoted a sense of mutual dependence which became the glue that held the Swiss Confederation together in the centuries ahead. In addition, their local agricultural freedom contained the seeds of greater political liberty; it supplied both the instinct and the experience required for action when the time came.¹²

The time for action was hastened at the beginning of the 1200s when the Duke of Zahringen gained hereditary possession of the combined offices of the Count of Zurichgau, now partitioned out of Thurgau, and the Advocate for the Abbey of Zurich. This development brought Uri, Schwyz, and Unterwalden under the control of the same overlord, but with far different relations. In Uri the Duke only exercised a general superintendence through a sub-advocate, while in Schwyz and Unterwalden he administered the laws through his Hapsburg vassals, to whom he had previously awarded offices of count as hereditary fiefs. This situation increased the concern that feudal serfdom would gradually displace the local liberties of the people. This threat was temporarily arrested in 1218 when the House of Zahringen became extinct and its fiefs reverted to the Emperor.¹³

The disappearance of the House of Zahringen coincided with two important developments: a decline in the power of the Holy Roman Empire and the rise of the House of Hapsburg. The Holy Roman Empire was torn by strife between the partisans of the Pope and the Emperor.¹⁴ The long running struggle between the

¹¹Vincent, above n 1, 5. see also Adams, above n 1, 3.

¹²Vincent, above n 1, 5-6.

¹³Vincent, above n 1, 6.

¹⁴Rougemont, above n 6, 36. In the 1200s the Holy Roman Empire was a vast construction which bound together semi-sovereign states of various kinds: kingdoms, duchies, bishoprics, knight holdings,

Hohenstaufen Emperors and the Popes accelerated the development of political autonomy in Uri, Schwyz, and Unterwalden. The conflict had placed Friedrich II, the last Hohenstaufen Emperor, in desperate financial straits, which robbed him of both the power to defend the Alpine communes and the means to force them to remain subservient. Initially, this simply forced each community to assume a greater burden for its own defence and government. However, these communes eventually gained responsibility for local law enforcement, which, in effect, freed them from Imperial control.¹⁵

The Holy Roman Empire was also threatened by the conflict inherent in the growth of the liberal movement in the communes of northern Italy, Flanders and France, and the ambitions of powerful feudal houses, particularly the House of Hapsburg, whose lands were constantly extending in the Alpine region. The growth in Hapsburg territorial ownership was of concern to both the mountaineers and the Emperor. The road over the Gotthard passed first through the valley of Uri, then through the territory of Schwyz. It was vital to the Emperor that this pass not fall into Hapsburg hands, because the Hapsburgs were, at the time, supporting the Pope in the struggle against the Emperor.¹⁶ As the mountaineers dreaded the oppressive grasp of the Hapsburgs,¹⁷ Uri, Schwyz, and Unterwalden offered their allegiance to the Emperor in exchange for the preservation of their liberties and new found independence.¹⁸ The Emperor, anxious to preserve free passage for himself over the strategic Alpine passes, saw that it was in his interest to give the mountaineers what they wanted.¹⁹ Uri forced the Emperor's hands in 1231 when it purchased back the overlordship of its valley, which had been pawned.²⁰ Henri, the Emperor's son and Vicar, granted Uri Imperial immediacy, which freed Uri from the control of feudal overlords and placed it in direct dependence on the Empire.²¹

The situation was somewhat different in Schwyz and Unterwalden. The Emperor hesitated for nine years before he decreed that they should be given the same status as Uri, that is, imperial fiefs governed by imperial advocates.²² The Emperor's reluctance may have been generated by the Hapsburgs' feudal rights in Schwyz and Unterwalden. The Hapsburg had long held the offices of count in these valleys.

and free cities. It comprised roughly the greater part of the German-speaking territories of Europe, and also a large part of Italy. Above.

¹⁵Steinberg, above n 3, 12-13; G Codding *The Federal Government of Switzerland* (Houghton Mifflin Co, Boston, 1961) 20.

¹⁶Rougemont, above n 6, 36-37.

¹⁷Rougemont, above n 6, 36.

¹⁸Steinberg, above n 3, 12; Codding, above n 15, 20.

¹⁹Rougemont, above n 6, 37.

²⁰Steinberg, above n 3, 13.

²¹Above; Rougemont, above n 6, 37.

²²Steinberg, above n 3, 13; Vincent, above n 1, 6.

Changing the status of the valleys to imperial fiefs would make the Hapsburgs imperial instead of feudal administrators. However, this would give the people the right to appeal directly to the Emperor in the case of misgovernment.²³ The Emperor must have realised that this would give him a tighter reign on Hapsburg conduct in the Alpine region. In 1240 he granted charters to Schwyz and Unterwalden that made them free communities within the Empire.²⁴

During this period, Uri, Schwyz, and Unterwalden experienced a growth in the importance of their valley cooperatives. In Uri, for example, the valley cooperative had become a well-established community of largely free peasants under the direction of several powerful families.²⁵ In the 1230s, they began holding a popular assembly called *Landsgemeinde* which, given the growing necessity for self-government, passed legislation, selected leaders, and elected judges.²⁶ The *Landsgemeinde* can be traced to Teutonic popular assemblies in which tribes decided all vital issues facing them.²⁷ It gave full citizens among the mountaineers the opportunity to participate directly in the exercise of governmental power. While gathered together, they decided on legislative proposals and resolutions, usually by a show of hands. They were also entitled to present legislative proposals.²⁸

The initiative and referendum are the successors of the *Landsgemeinde*,²⁹ the means by which the participatory principles of the *Landsgemeinde* were adapted to larger populations and larger geographical areas.³⁰ In addition, the *Landsgemeinde* is the foundation of Switzerland's existing constitutional system. It is based on the "assumption that ultimately the ideal state is the direct democracy or the *Landsgemeinde*, the assembly of all the free citizens in the historic ring. This, the

²³Vincent, above n 1, 6.

²⁴Steinberg, above n 3, 13; Codding, above n 15, 20.

²⁵Steinberg, above n 3, 13.

²⁶Steinberg, above n 3, 73; Salis, above n 4, 22. The literature setting forth early Swiss history uses following terms, sometimes interchangeably, to designate the common administrations governing the communes and valley cooperatives: *Markgenossenschaften*, *Talgenossenschaften*, and *Landsgemeinden*. Literally each term refers to something different. A *Markgenossenschaft* is a rural association, a term which probably originally referred to the commune alone, but is now used to refer to the valley cooperative as well. A *Talgenossenschaft* is a valley cooperative. A *Landsgemeinde* is a popular assembly, but the term is often used to refer to the administration of pre-*Landsgemeinde* periods, most likely the valley cooperative. Since the commune led to the development of valley cooperative and the cooperative led to the creation of the *Landsgemeinde*, the terms can be considered synonyms in an evolutionary sense. However, only the term *Landsgemeinde*, or its plural *Landsgemeinden*, is used in this thesis.

²⁷Herold, above n 5, 41, 116.

²⁸Bonjour, above n 1, 300. For a fuller discussion of the operation of the *Landsgemeinde*, see Deploige, above n 1, 3-18.

²⁹Above.

³⁰D Butler and A Ranney *Referendums: A Comparative Study of Theory and Practice* (American Enterprise Institute for Public Policy Research, Washington DC, 1978) 6.

pure form, not the clauses of a constitution or its preamble, is the truly venerable element in Swiss political life."³¹

C The Pact of 1291

These factors led to the creation of the Swiss Confederation in 1291. In 1250, with the death of Emperor Friedrich II, the Hapsburgs once again threatened the political independence and freedom of Uri, Schwyz, and Unterwalden. After a long and bitterly fought succession struggle, Rudolf of Hapsburg was elected Emperor in 1273. This placed both imperial and feudal overlordship over the Alpine valleys into his hands, which gave him a dangerous combination of governmental power. While Rudolf immediately confirmed the imperial relationship of Uri, he deferred deciding the status of Schwyz and Unterwalden without directly refusing to renew the privileges granted by Friedrich II. Mindful of the Gotthard route to Lombardy, Rudolf began to increase his holdings in central Switzerland and to exercise his feudal rights more actively.³² The mountaineers believed Rudolf's objective was to gain, by gradual usurpation, the territorial lordship over the valleys and to add them to the increasing hereditary possessions of his family. Rudolf's purchase of Lucerne and many small landed properties scattered over Uri, Schwyz, and Unterwalden, along with the imposition of foreign bailiffs and higher taxes confirmed their suspicions.³³

Rudolf exacerbated the situation by dying in 1291 without confirming the status of Schwyz and Unterwalden.³⁴ Seventeen days after his death, to prevent further loss of liberty at the hands of his heir, Albrecht, whose character did not inspire hope of better treatment,³⁵ Uri, Schwyz, and Unterwalden entered into a Pact, which is now recognised as the genesis of present day Switzerland.³⁶ To resist Hapsburg claims, and to prevent conflicts among themselves, the representatives of the three valleys formed a league of mutual aid, swearing eternal fealty in a famous oath taken on the Rutli Meadow in 1291.³⁷ "Nothing united them, but the common will to defend their liberties."³⁸ The object of the Pact of 1291 was not total independence of all outside domination, but the preservation of their direct connection with the empire and long accustomed local rights.³⁹ A central feature of the Pact was the refusal of Uri,

³¹Steinberg, above n 3, 72-73.

³²Codding, above n 15, 20.

³³Vincent, above n 1, 7.

³⁴Above; Codding, above n 15, 20.

³⁵Vincent, above n 1, 7.

³⁶Salis, above n 4, 21.

³⁷Steinberg, above n 3, 13.

³⁸H Kohn *Nationalism and Liberty: The Swiss Example* (reprint 1958 ed, Greenwood Press, Westport, Connecticut, 1978) 18.

³⁹Vincent, above n 1, 7; Adams, above n 1, 3; Steinberg, above n 3, 14.

Schwyz, and Unterwalden to accept any judge or, by implication, any law not of their own making.⁴⁰

The alliance between Uri, Schwyz, and Unterwalden was only one among hundreds of similar alliances concluded in Italy and elsewhere. However, it was the only one that survived the pan-European trend toward monarchy to form the basis of a genuine State. Uri, Schwyz, and Unterwalden alone preserved their civic liberties by successfully opposing the absolutist forces consuming the rest of Europe. In addition to securing their right of self-determination, their tenacious struggle encouraged the growth of the Swiss Confederation, which became the only democratic institution to survive the conflicts which took place in the late Middle Ages. Elsewhere the battles waged for liberty by the peasants of western Europe were defeated.⁴¹

II SWISS CONFEDERATION (1291 to 1798)

Throughout most of its existence the Swiss Confederation was little more than a military alliance of sovereign states called cantons. Initially it served to secure local independence for Uri, Schwyz, and Unterwalden. Its growth from three to 13 cantons by 1513 came about primarily for military reasons. Each canton saw the Confederation as a means of resisting foreign domination and preserving local autonomy. The autonomy of each canton within the Confederation distinguished it from other European political groupings. It also affected Switzerland's constitutional development in two important ways. First, it allowed the Swiss⁴² to escape the full consequences of three characteristic European trends: centralisation, nationalism, and religious conflict,⁴³ which allowed pluralism to flourish. Second, the shared experiences and common interests of the Swiss paradoxically promoted a sense of unity while reinforcing local independence, particularly a brand of cantonal sovereignty that derived its legitimacy from the citizenry. In their struggle to protect their local independence from Hapsburg aggression, the cantons developed a republican statecraft which made an enormous contribution to the evolution of the consultative principles underlying Switzerland's constitutional system.

⁴⁰Steinberg, above n 3, 13.

⁴¹Rougemont, above n 6, 37-39.

⁴²During this period the mountaineers and their confederate allies began to identify themselves as Swiss. Salis, above n 4, 25.

⁴³Steinberg, above n 3, 6. Paradoxically, pan-European economic problems triggered by shortages of silver, debasement of coins, lower crop yields, and the black death strengthened the Swiss tendency to deviate from European norms. Steinberg, above n 3, 15-16.

A *Securing Local Independence through Unity*

The Hapsburg response to the Pact of 1291 had the ironic effect of securing the local independence of the Swiss. Although Albrecht reacted by marching on Zurich, the election of his rival, Adolf of Nassau, as Emperor, gave Uri, Schwyz, and Unterwalden a reprieve from Hapsburg intervention. Adolf encouraged their independence by leaving them to themselves and by renewing, in 1297, the privileges granted by Friedrich II. However, the Hapsburg threat was renewed when Adolf was killed in battle in 1298 and Albrecht succeeded him.⁴⁴

Albrecht outraged the mountaineers with tyrannical measures of government. He lumbered them with overbearing bailiffs who acted as if they were overseers of Hapsburg private estates, rather than governors of imperial fiefs. The bailiffs also angered the Swiss by violating both the written privileges of the cantons and the commonest laws of justice.⁴⁵ Exasperated, the Swiss resolved in 1307 to expel their oppressors and to recover their ancient rights.⁴⁶ Upon news of Albrecht's murder in 1308 the confederates drove out the despised bailiffs. The new Emperor, Heinrich VII, who was not a Hapsburg, assisted the Swiss in their struggle by confirming their imperial independence. He also gave them freedom from the jurisdiction of any court outside their territory, except the royal tribunal.⁴⁷

Heinrich's death in 1314 triggered a succession battle between Ludwig V of Bavaria and the Hapsburg Friedrich III of Austria. As natural enemies of the Hapsburgs, the Swiss sided with Ludwig, a decision which led them into battle against the Hapsburgs at the narrow defile of Morgarten in 1315. The outnumbered mountaineers surprised and routed the invading forces.⁴⁸ Their knowledge and understanding of Switzerland's Alpine environment gave them a decisive advantage. Foreign control of the Swiss communities required the impossible: occupation of hundreds of valleys, villages, and communes spread over thousands of mountainous square miles. The demanding environment in which the Swiss earned their living also gave them an advantage in strength and stamina, which made them formidable opponents in warfare.⁴⁹

In the wake their victory, the Swiss renewed the Pact of 1291 with an important amendment: they stipulated that no member of the Swiss Confederation could submit

⁴⁴Vincent, above n 1, 8. For a comprehensive list of the names and dates of the kings of Germany, see *Meyers Grosses Handlexikon* (Bibliographisches Institut Mannheim, Wien/Zurich, 1985) 186.

⁴⁵Vincent, above n 1, 8.

⁴⁶Adams, above n 1, 3-4.

⁴⁷Vincent, above n 1, 8-9.

⁴⁸W Rappard *Collective Security in Swiss Experience: 1291-1948* (George Allen & Unwin, London, 1948) 5.

⁴⁹Steinberg, above n 3, 14-15.

to an overlord or negotiate with a foreign power without the consent of the others.⁵⁰ Ludwig V rewarded their support by confirming their imperial status in 1316.⁵¹ In 1324, he strengthened their independence by declaring the manorial and feudal rights of Friedrich III forfeited to the Crown, and the tenants of his lands free imperial citizens. This removed most of the inequalities existing between the inhabitants of Uri, Schwyz, and Unterwalden. It also allowed them to displace the jurisdiction of the manor courts with their common law and customs. Both developments secured, at the expense of the Hapsburgs, the local independence of the Swiss and enhanced the sense of unity among the cantons.⁵²

B Pluralistic Nature of the Confederation

The Confederation's origin was due not to an imposed, systematic, and rationalised plan for a federated states, but to a collective grassroots phenomenon,⁵³ which, when it grew, contributed to the pluralistic nature of the Confederation. The desire for local independence brought Uri, Schwyz, and Unterwalden together.⁵⁴ The Swiss had united to remain free.⁵⁵ Their wish to preserve local independence fuelled the growth of the Confederation,⁵⁶ primarily because the geography of the Alps required further expansion for security reasons. The resulting diversity militated against the formation of a strong centralised government, which ultimately led to the demise of the Confederation. However, it enhanced the Swiss orientation toward local autonomy.

1 Unplanned growth of the Confederation

The Confederation grew without forethought as to its structure; its growth was based on military considerations. For example, Lucerne was strategically important to Uri, Schwyz, and Unterwalden because it commanded the approaches of the Gotthard Pass and possessed a respected armed force.⁵⁷ Lucerne found the defensive potential of the Confederation attractive as it was eager to protect itself against the abuses of

⁵⁰Vincent, above n 1, 9.

⁵¹Rappard, above n 48, 6.

⁵²Vincent, above n 1, 9.

⁵³Rougemont, above n 6, 39.

⁵⁴Vincent, above n 1, 29.

⁵⁵Rougemont, above n 6, 39. They also wanted the right to elect their own judges and to levy dues on trade in transit through their territory. Initially, however, the Confederation was just a part of a medieval pan-European communal movement. Its original members did no more than claim greater administrative autonomy, and defend themselves against those who would subjugate them. It took on a political hue when the city cantons began to join it. Salis, above n 4, 21.

⁵⁶See Vincent, above n 1, 9-12.

⁵⁷Rougemont, above n 6, 40.

Hapsburg rule, which was increasingly perceived as foreign and oppressive.⁵⁸ Accordingly, Lucerne joined the Confederation in 1332.⁵⁹

The imperial city of Zurich allied itself with the Confederation for the same reasons in 1351, which triggered another war with Austria. This time the Hapsburgs lost the cantons of Glarus and Zug, which became members of the Confederation in 1352.⁶⁰ Berne, an imperial free city that began the war as an ally of the Hapsburgs, joined the Confederation in 1353 when its leaders concluded that fighting against the Swiss was contrary to their interests.⁶¹ Berne was already an ally of Zurich and had plans to extend its authority over Vaud and the Argovian plateau.⁶² In 1481 Fribourg and Solothurn joined the Confederation.⁶³ Basel and Schaffhausen joined in 1501, and Appenzell in 1513.⁶⁴ The Confederation consisted of these thirteen diverse sovereign cantons⁶⁵ until overwhelmed by Napoleon in 1798.⁶⁶

The union of these cantons was accomplished in the urban cantons by a referendum system in which their associated village communes constituted the sovereign decisional bodies.⁶⁷ These communes were consulted on everything from canton treaties with the Hapsburgs to barrel repair. In the *Landsgemeinde* cantons decisions regarding these matters were reached at frequent and lengthy meetings. This predilection for treating citizens as the real government and elected officials as powerless attendants is still a fundamental characteristic of Switzerland's political system today.⁶⁸

⁵⁸Rappard, above n 48, 6. The House of Hapsburg, as it acquired power, eventually became known as the House of Austria. Accordingly, the wars against the Hapsburgs generally involved Austria.

⁵⁹Adams, above n 1, 1. The expansion of the Confederation also owed a lot to aristocratic bankruptcy. Many small feudal lords collapsed under their debts and frequently pawned their feudal rights, dues or tolls. The still prosperous cities of the Confederation bought these pawned territories. Steinberg, above n 3, 16.

⁶⁰Adams, above n 1, 1; Rougemont, above n 6, 40.

⁶¹Vincent, above n 1, 11.

⁶²See Rougemont, above n 6, 40.

⁶³Adams, above n 1, 2. After 1388 there were no serious attempts to subjugate the confederates. Since they were valuable to large neighbouring powers for strategic reasons, they had to stage several defences of their freedom in first 100 years of their independent existence. However, they offered little temptation to foreign conquerors, as their land was arid and sparsely populated. In the following two centuries Uri, Schwyz, and Unterwalden were aggressors. Their main troubles were economic; their most implacable enemy was nature. Herold, above n 5, 118.

⁶⁴Adams, above n 1, 2. Appenzell was repeatedly denied admission to the Confederation because of the warlike disposition of its people and its likelihood of getting into trouble without sufficient cause. Vincent, above n 1, 17.

⁶⁵Rougemont, above n 6, 40.

⁶⁶Adam, above n 1, 2. During the 1300s, leagues with overlapping membership gradually formed between the principal free mountain valleys and urban communities. Steinberg, above n 3, 16.

⁶⁷Steinberg, above n 3, 73. This practice was also adopted in America by the New England towns. See generally E Oberholtzer *The Referendum in America* (Charles Scribner's Sons, New York, 1900).

⁶⁸Steinberg, above n 3, 73; B Barber *The Death of Communal Liberty: A History of Freedom in a Swiss Mountain Canton* (Princeton University Press, Princeton, 1974) 176.

The Confederation was also augmented by alliances between one or more of the confederates and other towns and states. Geneva, St Gall, the Grisons, the Valais, Mulhouse, and Neuchatel, among others, became allies of the Confederation in this manner.⁶⁹ Like the Confederates, these allies preserved their complete political independence.⁷⁰ These alliances meant that several cantons belonged to two types of alliances: one in which obligations were reciprocal and another in which obligations were not reciprocal.⁷¹ In addition, various combinations of the cantons controlled subject territories which they ruled as sovereign masters. The Ticino, for example, was the property of all the cantons except Appenzell, while Berne and Fribourg ruled over some areas in western Switzerland.⁷²

These circumstances contributed to the pluralistic character of Swiss federalism. Each city or valley had its own special role within the Confederation; and, the Confederation respected the local interests and the particular needs of its constituents. For centuries, it favoured local liberties without lessening the cohesion required to defend them.⁷³ In reality, the Confederation was less a central government than a highly effective collective security arrangement intended to protect local independence.⁷⁴ Each community had reserved the right of self-government. As the Confederation grew in size and strength, it gradually shook off its dependence on the Empire. Its dependence was only nominal by the end of the 1400s and was abolished by the Peace of Westphalia in 1648 when the contracting powers recognised the Confederation's sovereignty.⁷⁵

These factors, along with the conquest of French- and Italian-speaking territories, contributed directly to the development of Switzerland's diverse make-up, its federated nature, and its republican form of government at a time when the rest of Europe was under monarchical rule.⁷⁶ They also set the stage for the torrent of constitutional changes that took place in the 1800s, particularly the adoption of the initiative and the referendum by the cantons and the newly created Swiss state.

⁶⁹Salis, above n 4, 23-24; Codding, above n 15, 25. The communal movement also gained ground in bishop-ruled towns and provinces that did not belong to the Confederation, particularly in Geneva, Lausanne, Basle, Valais, and the Grisons. Administrative autonomy, independent jurisdiction and political freedom grew rapidly at the expense of episcopal rights. Salis, above n 4, 21.

⁷⁰Salis, above n 4, 23-24.

⁷¹Rougemont, above n 6, 40.

⁷²Codding, above n 15, 25.

⁷³Rougemont, above n 6, 41.

⁷⁴Above; see also generally Rappard, above n 48.

⁷⁵Adams, above n 1, 3.

⁷⁶Salis, above n 4, 23-24.

3 *Differences between rural and urban cantons*

The emphasis on local independence also allowed institutional differences to develop between the Confederation's rural and urban cantons. These differences, coupled with those produced by the Reformation, generated conditions which militated against the centralisation of political power within the Confederation, a weakness which prevented the Confederation from pursuing anything but reactionary policies.

In the rural cantons of Uri, Schwyz, Unterwalden, Zug, Glarus, and Appenzell, a pure democracy prevailed. The *Landsgemeinde*, was the sovereign, deciding upon peace and war, alliances, treaties, and laws; it elected the chief magistrate and the other cantonal officials. All adult males who possessed rights of citizenship not only had the right, but the duty, under threat of penalty, to participate in the *Landsgemeinde*. Every year in the spring the men of the cantons, rich and poor, came together from the mountains and the valleys for the principal cantonal assembly; they were also frequently summoned to extraordinary assemblies. They took their responsibility seriously as they were fully aware that the highest authority of the State was vested in them in common.⁷⁷ In the 1300s, these citizens used the *Landsgemeinde* to curb the growing oligarchical influence of prominent families by extending the communal features of the valley cooperative.⁷⁸

It was otherwise in the urban cantons of Lucerne, Zurich, Berne, Basel, Fribourg, Solothurn, and Schaffhausen. Originally the communes in Switzerland possessed vast fields, pasturages, and woods which were held in common by all the inhabitants. As population grew the share of each inhabitant decreased. In the cities, this led to the creation of close corporations, the burgher-communes. By fixing their numbers they excluded others from participating in local administration. The system eventually created a tax problem. The majority, who were not burghers, felt that the burghers should administrate their taxes according to the principles of equity. But the burghers were adverse to giving up their property to increase participation. The solution was the double commune: the burghers kept their property and looked after their interests, while the other inhabitants of the municipality provided for public services.⁷⁹

In addition, the jurisdiction of the cities extended far beyond their walls. Their extra-mural populations did not, however, possess the same rights as those living within the city. In a sense, the city had replaced the former feudal lords, ruling the extra-mural regions as subject lands through bailiffs. Moreover, the burghers as a whole did not

⁷⁷Oechsli, above n 2, 17.

⁷⁸See Steinberg, above n 3, 16; see also *Focus on Switzerland: The Historical Evolution: Political Institutions* (2 ed, Swiss Office for the Development of Trade, Lausanne, 1982) 27.

⁷⁹Adams, above n 1, 101-102.

usually participate in government.⁸⁰ Executive responsibility was vested in the "Small Council" and the legislative power was vested in the "Grand Council". Although sovereignty was legally vested in the whole body of free citizens, essentially only the male members of a ruling family could expect to sit in either Council.⁸¹ The members of either Council were very rarely elected directly by the burghers. In most of the cities the councils filled gaps in their own ranks in accordance with some artificial scheme. Invariably, the authorities of the chief cities were also the supreme government of the respective cantons, and only its citizens were eligible for office.⁸²

The tenure of office was not originally a privilege reserved to certain families. In the councils, manual workers sat side by side with merchants and knights; the extramural populations could easily enter the city, acquire civic rights, and be eligible for all dignities and offices. Even the rural communes ranked as members of the urban cantons, just as did the guilds in the cities. When issues important to the canton had to be decided, government officials were accustomed to ask the opinions of the country folk as well as of the townsmen, and to take action in accordance with the popular decision.⁸³

Eventually, however, the patrician class gained supremacy. The old families assumed more and more privileges in government, in society, and in trade. In some instances, the civil service became the monopoly of a limited number of families, who were careful to perpetuate their privileges. To a degree, this family supremacy was also visible for a time in the rural cantons;⁸⁴ after all, the Confederation owed its creation to the leading families in Uri, Schwyz, and Unterwalden.⁸⁵ In contrast to the rural cantons, however, the attempts at reform were rigorously suppressed in the cities, and government became more and more aristocratic. By the 1590s, the government and its offices in Lucerne, Berne, Fribourg, and Solothurn had become concentrated in ever decreasing numbers of patrician families. They had obtained permanent rule to the exclusion of all others from power. Zurich, Basel, Schaffhausen were semi-aristocratic,⁸⁶ which meant that they still permitted new recruits to the privileged families.⁸⁷

These differences greatly worried the rural cantons. They feared that the growing power of the city cantons endangered their liberties. The chief cause of this concern

⁸⁰Adams, above n 1, 17-18.

⁸¹Codding, above n 15, 24-25.

⁸²Oechsli, above n 2, 18.

⁸³Above.

⁸⁴Vincent, above n 1, 20.

⁸⁵*Focus*, above n 78, 27; see also Codding, above n 15, 20.

⁸⁶Adams, above n 1, 10-11.

⁸⁷Codding, above n 15, 25.

was the distinction the cities had made between the populations within and without their walls, a distinction which disadvantaged the extramural population. In general, they held their rural subjects in invidious subordination. The rural cantons had no desire to become appendages of the rich, aristocratic, and sometimes unscrupulous governments of Lucerne, Zurich, or Berne.⁸⁸ The differences existing between the rural and urban cantons eventually destabilised the Confederation and sparked uprisings when the French revolutionaries invaded in 1798.⁸⁹ Combating the oligarchical power of privileged elites would become a recurring feature of Swiss constitutional development,⁹⁰ particularly in the 1830s and the 1860s, and led the Swiss to embrace direct democracy.

4 *The Reformation*

Religion was another divisive, yet paradoxically unifying, factor in Switzerland. The Reformation deeply affected the development of Switzerland's political institutions. Religious conflict almost destroyed the Confederation on several occasions.⁹¹ At one point two confederations existed side by side, one Catholic and the other Protestant. However, a permanent split never materialised. Instead, a religious dualism, which cut across the rural-urban divide, came into existence. Uri, Schwyz, Unterwalden, Lucerne, Fribourg, and Solothurn remained Catholic, while Zurich, Berne, Basle, and Schaffhausen became Protestant. In Glarus and Appenzell, where the two faiths were equally divided, each parish was free to choose its faith. Appenzell later split into two independent cantons along the lines of religious preference. Among the allies, Geneva and St Gall became Protestant, while Valais and the Abbey of St Gall remained Catholic. The independent communes of the Grisons were divided. Almost all of the subject territories remained Catholic.⁹²

In addition, the religious divisions did not coincide with language frontiers. The Reformation gave Switzerland both French- and German-speaking Protestants and Italian-, French-, and German-speaking Catholics. The one Italian exception was Val Bregaglia, a valley community in the Grisons which became Protestant.⁹³

The Reformation's affect on Swiss politics was pronounced. For example, in Geneva, as in Zurich, the new church identified itself with the city republic; Calvinism

⁸⁸Codding, above n 15, 15.

⁸⁹Codding, above n 15, 13. The uprisings were instigated and carried out by subjects, not citizens. Above.

⁹⁰Vincent, above n 1, 20-21.

⁹¹Salis, above n 4, 25. Four internal wars of religion were fought, mainly over the faith to be adopted in the subject territories, in 1529, 1531, 1656, and 1712. Codding, above n 15, 23.

⁹²Codding, above n 15, 24.

⁹³Salis, above n 4, 27.

promoted the active participation of the laity in church affairs, a democratic influence, which in time was to make itself felt throughout Switzerland. It also strengthened the bonds between the Latin and Alemannic Swiss. The Reformation had the same effect in Catholic regions where it reinvigorated religious life and brought together French-, Italian-, and German-speaking Swiss.⁹⁴ The schism probably saved the Confederation by preventing any one cultural or political group from dominating the it. However, the schism also enhanced its traditional weakness by increasing the obstacles to coordinated action and centralised decision-making. It also contributed to keeping the Swiss out of the religious wars that devastated the rest of Europe in the 1500s and 1600s, which gave the Swiss the opportunity to develop their political institutions.

C *Key Constitutional Development: ad audiendum et referendum*

Although the Confederation was primarily a defensive arrangement among sovereign cantons, it made important contributions to Switzerland's constitutional development. The Confederation laid the foundations of Switzerland's unique form of federalism by encouraging unity within diversity and emphasising local autonomy.

In the Confederation, the real power rested with the sovereign cantons. Each had its own laws and its own militia. In addition, political rights throughout the Confederation were far from uniform. These conditions, as well as the absence of an effective common government, made the active and coordinated pursuit of policy impossible. Despite these weaknesses, the collaboration of the cantons in a federated association greatly strengthen their unity. Essentially, a republican statecraft enabled the delegates to the Diet, the representative assembly of the Confederation, to deliberate on the interests which brought them together and the questions which divided them.⁹⁵

The governmental mechanics of the Confederation were very simple: if something had to be done in concert, the canton that perceived the need called a Diet, which was the only organ for coordinating common action among the confederates. Each canton appointed delegates who acted in accordance with the instructions of their cantonal governments. Each canton was entitled to one vote.⁹⁶

If disagreement arose between two states, each appointed referees. If the referees were unable to agree, they chose an umpire whose opinion prevailed. The Swiss established arbitration for the peaceful settlement of disputes. Its primary aim was to

⁹⁴Salis, above n 4, 27-28.

⁹⁵Salis, above n 4, 24-25.

⁹⁶Vincent, above n 1, 18-19.

guarantee the security of Switzerland on a basis of reciprocity. The policy was effective as long as the confederates had the will to settle by compromise the difficulties they confronted.⁹⁷ The Swiss Federal Tribunal evolved from these arbitration procedures.⁹⁸

If an issue beyond the instructions of the delegates arose during the course of the Diet, then a process called *ad audiendum et referendum* took place.⁹⁹ Because the confederation had no powers of its own, the delegates would *listen* and *report back* to their respective cantons. Once the cantons had considered the matter at hand, the delegates would report the decisions of their cantons at the next Diet.¹⁰⁰ Since the Diet had no means of enforcing its own decrees, its decrees were merely recommendations to the cantons, not binding legislation. In the *Landsgemeinde* cantons, for example, the sovereign body of citizens had the ultimate right to accept or reject decisions reached by the Diet.¹⁰¹ The cantons only obeyed the Diet's resolutions when it suited them.¹⁰²

Although the meaning of the term is different, the name referendum is derived from the Confederation's *ad audiendum et referendum* practice. A transitional form between this ancient referendum and the modern legislative referendum was constituted by the long established referendum in the canton of the Grisons where decisions did not take effect until after referred to and approved by a majority of the communes. Instead of voting in a single popular assembly, as was done in the *Landsgemeinde* cantons, the inhabitants of the Grisons gave their decision upon communal affairs in numerous village assemblies.¹⁰³ Before the French Revolution, the government in the Grisons consisted of leagues of over 200 sovereign communes united in a central Diet which *referred* to the communes almost every issue of substance. The commune was the repository of legal sovereignty.¹⁰⁴

Despite the difficulties produced by the absence of an effective central government, the confederates gradually developed a sense of community and a patriotism common to all. They identified themselves as Swiss. Upon conclusion of the Thirty Years War, the contracting powers formally recognised the sovereignty of the Swiss Confederation in the Peace of Westphalia in 1648. Although lacking a unified

⁹⁷Salis, above n 4, 25.

⁹⁸Vincent, above n 1, 19.

⁹⁹Steinberg, above n 3, 35; Oechsli, above n 2, 405; Deploige, above n 1, 52.

¹⁰⁰Oechsli, above n 2, 405.

¹⁰¹Steinberg, above n 3, 35.

¹⁰²Vincent, above n 1, 19-20.

¹⁰³Oechsli, above n 2, 405-406; see also C Hughes *Switzerland* (Ernest Benn Ltd, London, 1975) 128.

¹⁰⁴Steinberg, above n 3, 35.

political and legal system, the Swiss, as result of their common history and common interests, felt unified in politics and sentiment.¹⁰⁵

However, this unity was more cultural than structural. Initially, the actual bond of union, owing to the pressure of circumstances, was greater than written agreements. Until the Reformation had introduced religious schism between the states, the presence of powerful enemies on every side kept fresh the sense of mutual dependence; the confederates often rose above the letter of their constitution. But when the Confederation had passed through the struggle for existence, and the principle of state-rights no longer found any impediment in its way, the weakness of the central government became apparent. The situation was similar to that of the United States under its Articles of Confederation after the war of independence, except that the disintegration of interests was more marked in Switzerland than in America because of religious conflict.¹⁰⁶

By the 1700s, only the possession of subject lands held the Swiss Confederation together. In this respect they were like shareholders in a multinational corporation. At one stage almost the only questions upon which the Diet could act in concert were those related to the inspection of accounts and other affairs connected with the subject territories. The profits derived from these common properties were all that prevented complete rupture on several critical occasions.¹⁰⁷

Taken together, the differences between the rural and urban cantons, the schism created by the Reformation, the emphasis on local sovereignty, and the absence of a centralised governing body, meant that the Confederation was ill-prepared to withstand the storm unleashed by the French Revolution.¹⁰⁸ It swept the Confederation aside and ushered in a host of constitutional changes which resulted in the creation of the modern Swiss state, complete with its system of direct democracy.

III BIRTH OF THE MODERN SWISS STATE (1798 to 1891)

Arriving in the wake of the Enlightenment, the French Revolution triggered a series of events in Switzerland which eventually produced the modern Swiss state. The Constitution of 1848, and its subsequent revision in 1874, was essentially a compromise between centralists and those who wanted to preserve the sovereignty of

¹⁰⁵Salis, above n 4, 25-26. For a detailed study of the development of direct democracy in the Grisons, a region which constituted a mini-federal state for most of its existence, see generally Barber, above n 68.

¹⁰⁶Vincent, above n 1, 19-20.

¹⁰⁷Vincent, above n 1, 20.

¹⁰⁸See Vincent, above n 1, 19-20.

the cantons. The inclusion of the constitutional initiative and the legislative referendum in the Swiss constitutional system was fundamental to this compromise. The excesses associated with representative democracy during the industrial revolution coupled with the ancient Swiss desire for local autonomy all but ensured that pure representative democracy could not endure in Switzerland, especially once direct democracy proved to be a practical means by which to allow Swiss electors to participate directly in the exercise of governmental power despite being part of a large and geographically dispersed population.

A *Effects of the Enlightenment*

The Enlightenment profoundly affected Switzerland's political development. When Swiss scholars began to plunder the wealth of old chronicles which had been accumulating in Swiss cities since the 1200s, they aroused a proud interest in the constitutional liberties of their forbears. The scholars painted an inspiring portrait of Swiss heritage: Swiss history began with an uprising of yeomen against lords and knights, a struggle against aristocratic society launched by simple peasants and hard-working burghers. This scholarship ignited a Swiss patriotism grounded in freedom, liberty, and republican ideals symbolised by the legendary Wilhelm Tell and supported by the theories of Jean Jacques Rousseau.¹⁰⁹

1 *The legend of Wilhelm Tell*

Swiss legend portrays Tell as a simple mountaineer whose individual defiance of Hapsburg authority led to the creation of the Swiss Confederation. One day Tell refused to do honour to the hat of the domineering Hapsburg bailiff in the square of Altdorf. For this insult, Tell received a death sentence, a fate he could escape only by piercing an apple sitting on his child's head with a bolt fired from his crossbow. Miraculously, he passed the ordeal. Later, Tell saved the bailiff from drowning only to kill him. The legend concludes that Tell's exploits led Uri, Schwyz, and Unterwalden to create the Confederation to throw off the yoke of Hapsburg domination.¹¹⁰

During the Enlightenment, this legend came to represent the attitude of the Swiss toward their own past: Switzerland came into being out of a skilful and persistent local struggle against unjust and foreign domination. Whether Tell ever existed is irrelevant; the legend encapsulates the communal tradition by which the Swiss have

¹⁰⁹Kohn, above n 38, 23-24; Steinberg, above n 3, 19; see also generally J Rousseau *On the Social Contract with Geneva Manuscript and Political Economy* (trans, St Martin's Press, New York, 1978).

¹¹⁰E Fritz *European Switzerland: Historically Considered* (Fretz & Wasmuth Ltd, Zurich, 1951) 7-8.

defined their public values.¹¹¹ The Swiss whom Tell symbolised were exceptionally sensitive to even the slightest interference in their affairs. For this reason, Rudolf of Hapsburg and his bailiffs went down in Swiss history as tyrants although their rule was regarded as mild and beneficent elsewhere.¹¹² Even today the Swiss justify and sanction their institutions not by any 'ism' but by their history alone.¹¹³

2 *Rousseau and his influence*

The symbolic importance of Tell grew as Rousseau's ideas spread throughout Europe.¹¹⁴ Born and raised as a citizen of Geneva,¹¹⁵ Rousseau was deeply influenced by Switzerland's political traditions. His works reveal that he was passionately attached to Switzerland's natural landscape and intimately acquainted with its heroic age, including the principles for which Wilhelm Tell stood: the superiority of the simple and pristine nature of local autonomy over the complex and often corrupt administration of a distant, centralised, and hierarchical authority.¹¹⁶

Rousseau's most famous and influential work, *The Social Contract* (1762), owes a great debt to Switzerland's political heritage, particularly the *Landsgemeinde*. In *The Social Contract*, Rousseau argued that sovereignty was held exclusively by the people, that is, those individuals who had decided to live together as a society. Since sovereignty was vested in the people, it could not be delegated, divided, alienated, or restricted. More importantly, no laws could be made without the consent of the sovereign, that is, the people.¹¹⁷

As a consequence, Rousseau reasoned that a democratically constituted government possessed only executive and judicial powers; only the people, in accordance with the 'general will', were entitled to exercise the power of legislation. Rousseau argued that the general will could only be determined when the people were assembled in person at a centralised location within their state where they could discuss matters

¹¹¹ Steinberg, above n 3, 19; Address by Ambassador Michael von Schenck, Switzerland's Ambassador to New Zealand, entitled *700 Years of Swiss Democracy*, Institute of International Affairs (Shell House, Wellington, 7 November 1991).

¹¹² Harold, above n 5, 117.

¹¹³ Steinberg, above n 3, 19. See also eg *Focus*, above n 78; O Sigg *Switzerland's Political Institutions* (3 ed, Pro Helvetia, Zurich, 1988).

¹¹⁴ Kohn, above n 38, 24 (discussing some of the propaganda uses to which the legend of Wilhelm Tell was put in France and Switzerland to promote the rights of man).

¹¹⁵ P Goodhart *Referendum* (Tom Stacey Ltd, London, 1971) 69; Fritz, above n 110, 28; Herold, above n 5, 160. In addition, Voltaire spent 25 years of his life in Geneva beginning in 1754. Herold, above n 5, 85.

¹¹⁶ Fritz, above n 110, 28-31.

¹¹⁷ See generally Rousseau, above n 109. For similar discussions of the relevant aspects of *The Social Contract*, see Oberholtzer, above n 67, 2-3; Herold, above n 5, 159-161; Goodhart, above n 115, 68; Vincent, above n 1, 125.

together and decide whether to make or unmake any of their laws. This criteria for determining the general will is nothing more than a definition of the *Landsgemeinde*. In Rousseau's model government, the people, not their representatives, were to assemble and sanction their own laws:¹¹⁸

The sovereign having no other force but the legislative power, acts only by the laws; and the laws being only the authentic act of the general will, the sovereign can never act but when the people are assembled.

Rousseau regarded representative government as a sign of political degeneracy caused by patriotic decline, that is, people unwilling or disinclined to attend to their own affairs. He believed that the representative system was the product of an abuse of democratic government, not its natural out-growth. Rousseau also argued that representatives were not qualified to legislate on behalf of the people:¹¹⁹

The deputies of the people . . . are merely its agents. They cannot conclude anything definitely. Any law that the people in person have not ratified is null; it is not a law.

Rousseau disapproved of nations which delegated their sovereignty to representatives. He believed that the political inertia of the people and the concentrated influence of moneyed interests would lead soldiers to enslave the nation and representatives to sell it. Citing the English parliamentary system, Rousseau wrote:¹²⁰

The English people thinks it is free. It greatly deceives itself; it is free only during the election of the members of Parliament. As soon as they are elected, it is a slave, it is nothing. Given the use of made of these brief moments of freedom, the people certainly deserve to lose it.

Rousseau's ideas coincided with Swiss political values.¹²¹ Rather than influence Switzerland's political development, he gave expression to a sentiment that all Swiss citizens shared.¹²² As a citizen of Geneva, Rousseau felt he was a citizen "of a free state and a member of sovereign body."¹²³ Like Rousseau, the citizens of Swiss cantons believed they were sovereigns in reality as well as in legal theory. In 1789, for example, the Russian historian Karamzin wrote that the citizens of Zurich were "as proud of the title [of citizen] as a king of his crown. For more than a 150 years

¹¹⁸Rousseau, above n 109, 99.

¹¹⁹Rousseau, above n 109, 102.

¹²⁰Above. For a discussion of the distinctions between English and Swiss democracy, see B Barber "Participation and Swiss Democracy" (1988) 23 Gov't & Opp 31.

¹²¹Fritz, above n 110, 29-30.

¹²²Herold, above n 5, 161, 164.

¹²³Herold, above n 5, 160. Rousseau misinterpreted the constitution of his own canton, Geneva, which was an aristocracy. However, in the *Landsgemeinde* cantons governing themselves, the citizens constituted a democratic state to the fullest extent possible. Their governments were merely the executive and the judiciary; the legislative power was in the hands of all citizens. Herold, above n 5, 160-161.

no foreigner has obtained the right of citizenship."¹²⁴ Although the functions of sovereignty in most Swiss cantons had fallen into the hands of a few families by the late 1700s, this feeling did not disappear; instead, it led to the downfall of the aristocratic families.¹²⁵ While branded as radical and revolutionary in Russia, Germany, and France, Rousseau's views were considered conservative in Switzerland, especially in the cantons where the *Landsgemeinde* flourished.¹²⁶

Although Rousseau predates the Swiss initiative and referendum, he articulated the political values which led to their creation in Switzerland. Fundamentally, the Swiss do not believe in government by representation. Where it has proven inevitable they have introduced proportional representation as its least evil form.¹²⁷ The Swiss shunned the Anglo-Saxon concept of legislation by representatives in favour of the Rousseauan ideal of legislation by the people. The initiative and the referendum serve as a substitute for the *Landsgemeinde* in determining the general will of the people where geographical considerations and population size make popular assemblies impractical.

3 *Swiss political reality on the eve of the French Revolution*

Ironically Swiss political reality in the late 1700s ran counter to Swiss political ideals. Prior to the French Revolution, Swiss political and civic life had become frozen in obsolete forms and centred in the cantons. The Confederation was powerless, no more than a social club of sovereign cantons that were often deeply divided. In practice, all political rights were limited to hereditary castes: old established peasant families had regained control in the six rural democracies, wealthy guild-masters and merchants held the reigns of power in cities like Basle and Zurich, while small patrician aristocracies ruled cities like Berne and Lucerne. The ruling classes, especially in the city cantons, behaved no better than the French aristocracy of their age. They treated the surrounding rural populations, most of the burghers, and all of the people living in the subject territories as subjects without rights. In the process, they frequently violated old treaties and disregarded established liberties; they also suppressed those who were bold enough to assert their rights.¹²⁸

The unrest caused by this strife intensified with the spread of the Enlightenment and the subsequent outbreak of the French Revolution. The fate suffered by the people of Stafa, a rural commune in the canton of Zurich, is illustrative. Inspired by the

¹²⁴Herold, above n 5, 161

¹²⁵Above.

¹²⁶Herold, above n 5, 164.

¹²⁷Herold, above n 5, 163.

¹²⁸Kohn, above n 38, 23.

historical record of their own ancient liberties and the Declaration of the Rights of Man, the people of Stafa, in 1794, petitioned the cantonal government for equality with the burghers of Zurich, the abolishment of serfdom, and the end of Zurich's commercial and industrial monopoly. The people of Stafa were not revolutionaries; they simply wanted the restoration of the rights to which ancient documents proved they were entitled but had long since been disregarded by the authorities. The authorities responded to their lawful demands by annulling the charters which provided for their rights and punishing those who were involved in the petition. Zurich, then the most progressive canton in the Confederation, treated the appeal to ancient Swiss liberties as a criminal offence.¹²⁹

This policy exposed the hypocrisy of the ruling oligarchies. It also widened the gap between them and their subjects, which had a devastating effect on the Confederation when the winds of the French Revolution reached Switzerland. The French Revolution inspired Swiss malcontents to launch reform parties which caused confusion and weakness throughout the Confederation.¹³⁰ Young men in the cantonal capitals and country towns, who were raised on the ideals of the Enlightenment, came into conflict with the cantonal governments and privileged townsmen that supported the French monarchy and rejected the doctrine of Natural Law.¹³¹ When Napoleon invaded Switzerland in 1798, the Swiss were too divided to resist. The Confederation simply collapsed. The ruling oligarchies had neither the courage nor the determination to unite and reorganise Switzerland.¹³² The French took advantage of this political paralysis, particularly by exploiting the disadvantaged. To win support of Swiss peasants, for example, the French promised to abolish oppressive feudal dues without compensation.¹³³

B Consequences of French Occupation

The French occupation of Switzerland had paradoxical effects. Although the Confederation passed out of existence, it grew in importance as a symbol of Swiss liberty. In addition, the cantons responded to French attempts to centralise Switzerland by insisting on their full sovereignty.¹³⁴ While French efforts to centralise Switzerland rekindled the conflict between Swiss centralists and federalists, their occupation united Swiss revolutionaries and conservatives in their opposition to French rule.¹³⁵ Nevertheless, Napoleon's solution to the problem of controlling

¹²⁹Kohn, above n 38, 32-33.

¹³⁰Bonjour, above n 1, 219.

¹³¹Bonjour, above n 1, 211.

¹³²Kohn, above n 38, 33-34.

¹³³Bonjour, above n 1, 225; see also Deploige, above n 1, 54.

¹³⁴Kohn, above n 38, 33.

¹³⁵Bonjour, above n 1, 221.

Switzerland provided the Swiss with an influential model for the Constitution of 1848. Despite the pan-European upheavals of the post-Napoleonic era and bitter struggles amongst themselves, the Swiss built a strong, modern democracy in the heart of a Europe made up of restored monarchies. Within 33 years of the demise of Napoleon, the Swiss had achieved liberty under the law and unity in diversity to a degree unknown to its neighbours.¹³⁶ The referendum and the initiative were an integral part of that achievement.

1 *The Helvetic Republic*

Power politics led France to invade Switzerland in 1798, but it also stymied its initial attempts to govern Switzerland effectively. Without considering local conditions or traditions, France adjusted Switzerland's territorial boundaries and constitutional form to meet its requirements.¹³⁷ The French and their supporters had planned to abolish Switzerland's "fantastic array of tiny republics, prince-bishoprics, princely abbeys, counties, free cities, sovereign cloisters and monasteries, free valleys, overlapping jurisdictions, guilds, oligarchies and city aristocracies."¹³⁸ To this end, the French revolutionaries foisted the Helvetic Republic on the Swiss on 12 April 1798.

On paper the Helvetic Republic was a representative democracy with a constituent assembly. But in effect it was an attempt to abolish local autonomy and to concentrate the whole power of the state in the hands of a five member directory. The French matched the curtailment of local political rights with the introduction of a dazzling array of civil liberties derived from the ideology of the French Revolution and based on the fundamental doctrines of Natural Law. While many people in the urban cantons welcomed the freedoms of press, association, and petition, the centralisation of political power outraged the inhabitants of the *Landsgemeinde* cantons.¹³⁹

They rejected the Helvetic Republic for one simple reason: it was un-Swiss.¹⁴⁰ The creators of the Helvetic Republic made the mistake of ignoring five centuries of Swiss history, particularly the innate orientation of the Swiss toward self-determination. They also incorrectly believed that a country so diverse in natural conditions, race, religion, customs, and language, could endure the imposed uniformity, dreary equality, and impersonal rigidity of a centralised bureaucratic state.¹⁴¹ The attempt to

¹³⁶Kohn, above n 38, 34.

¹³⁷Bonjour, above n 1, 221.

¹³⁸Steinberg, above n 3, 7.

¹³⁹Bonjour, above n 1, 222-223; see also Deploige, above n 1, 18-20, 55-57.

¹⁴⁰Bonjour, above n 1, 231; Steinberg, above n 3, 7.

¹⁴¹Bonjour, above n 1, 223, 231.

replace the vitality of local autonomy with the moribund administrative machinery of the Helvetic Republic resulted in chaos.¹⁴²

However, French efforts to save the Helvetic Republic gave the Swiss their first experience with a nationwide referendum. To give legitimacy to the regime, the French placed the text of the Helvetic Constitution before the Swiss for their approval in June 1802. The officials conducting the referendum announced before the referendum that abstentions would be considered as affirmative votes. Although some cantons had employed this kind of simple majority system, its use nationwide has remained confined to the referendum on the Helvetic Constitution. Perhaps the Swiss, particularly those from the smaller rural *Landsgemeinde* cantons, never forgot the results produced by the system: the constitution won approval with 92,423 votes against and 72,453 in favour given 167,172 abstentions.¹⁴³

Despite the referendum, or perhaps on account of it, the Helvetic Republic failed. The dramatic changes it attempted to impose on Switzerland were too alien to win broad support.¹⁴⁴ The French managed to prop up the Helvetic Republic with bayonets for five years. But from Napoleon's perspective, the reactionary indignation of the Swiss, which was exacerbated by political abuses, rendered Switzerland ungovernable.¹⁴⁵

2 *The Act of Mediation*

For military reasons, Napoleon needed stability in Switzerland, especially along the approaches to the Alpine passes. The armed resistance of the mountaineers to the Helvetic Republic stood between Napoleon and his objective. To restore order in Switzerland he summoned the representatives of the cantons and the Helvetic Republic to Paris in 1802 to work out a new constitution. Their deliberations produced the Act of Mediation, which took effect on 19 February 1803.¹⁴⁶

The Act of Mediation broke from the unifying principles of the Helvetic Constitution.¹⁴⁷ It was a loose, federal constitution which effectively restored political sovereignty to the cantons, but retained a central government.¹⁴⁸ Each canton regained control over finance, coinage, posts, customs, education, monasteries, and

¹⁴²Steinberg, above n 3, 7.

¹⁴³Deploige, above n 1, 56-57; J Aubert "Switzerland" in Butler and Ranney, above n 30, 39 n.1; see also Hughes, above n 103, 128.

¹⁴⁴Vincent, above n 1, 22; Kohn, above n 38, 44-45.

¹⁴⁵Steinberg, above n 3, 7; Vincent, above n 1, 22.

¹⁴⁶Steinberg, above n 3, 7.

¹⁴⁷Bonjour, above n 1, 232; see also Deploige, above n 1, 20, 58-65.

¹⁴⁸Steinberg, above n 3, 7.

certain monopolies.¹⁴⁹ Each canton was given a form of government, democratic or republican, suited to the habits and inclinations of its inhabitants. It restored the *Landsgemeinde* where it had existed but did not permit the restoration of the privileges that were rife in the patrician municipalities prior to the Helvetic Republic.¹⁵⁰

In addition, it preserved the Helvetic Republic's grant of sovereignty to the old Confederation's subject territories, which brought the number of cantons in Switzerland to 19. It also converted the assembly of the Helvetic Republic into a Diet, but regard was paid to population by giving two votes to those cantons having 100,000 inhabitants or more. Six of the most important cantons, Fribourg, Berne, Solothurn, Basel, Zurich, and Lucerne were appointed *Vororte* to take turns at the head of affairs for one year at a time. During that year the capital of the *Vororte* became the seat of the Diet, and the chief magistrate became president.¹⁵¹ The Swiss drew on these innovations when drafting the Constitution of 1848.

Napoleon gave the Swiss what they wanted for several reasons. Primarily, he understood that a Switzerland divided into cantons that were individually dependent on France could never pose a serious threat to him.¹⁵² But he was also predisposed towards the Swiss because they possessed a spirit of traditionalism which reminded him of his native island, Corsica. In addition, he was deeply influenced by Rousseau, who was not only Swiss but had repeatedly used Switzerland as a model for his political theories.¹⁵³ Napoleon was impressed by the *Landsgemeinde*, even though it fell short of Rousseau's ideals at the time. It rarely reflected the general will because electoral bribery and corruption were common and because the copyholders had no vote at all.¹⁵⁴ But, as Napoleon knew, it was the system for which the mountaineers were willing to fight.

The Act of Mediation lasted until the fall of Napoleon in 1815, a little over a 11 years. During that time it gave Napoleon the measure of control he required over Switzerland's armies, territories, external relations, commerce, and industry.¹⁵⁵ At the same time, it provided the Swiss with an acceptable level of local autonomy. Although Swiss liberty was sharply limited, particularly during the Napoleonic Wars

¹⁴⁹Bonjour, above n 1, 232.

¹⁵⁰Vincent, above n 1, 22-23.

¹⁵¹Above.

¹⁵²Bonjour, above 1, 232.

¹⁵³Kohn, above n 38, 49.

¹⁵⁴Steinberg, above n 3, 7-8.

¹⁵⁵Vincent, above n 1, 23.

of 1805 and 1809, the Swiss were not hostile toward Napoleon. He was widely regarded as almost a second Wilhelm Tell.¹⁵⁶

However, the Act of Mediation accentuated several problems in Switzerland. During the Napoleonic era, intellectual, artistic, and economic life were entirely cantonal. This, along with the terms of the Act of Mediation, prevented the Diet from bringing about the unification of coinage, the standardisation of weights and measures, and the establishment of a reliable and affordable postal system. The Act of Mediation allowed the customs system to relapse into its old localism. Internal duties and tolls proliferated and transit traffic dwindled. Even the rights of freedom of settlement, trade, and industry were constantly endangered by local action.¹⁵⁷ These economic woes turned many patriotic minds toward the benefits of greater national unity.¹⁵⁸

C Founding the Modern Swiss State

The Act of Mediation disappeared with Napoleon. However, the French occupation, which coincided with the influential work of Johann Pestalozzi, left a lasting impression. Both factors gave rise to Swiss nationalism, which eventually produced the modern Swiss state. Although Switzerland won recognition at the Second Congress at Paris on 20 March 1815,¹⁵⁹ the Swiss had to weather 33 years of internal turmoil before finding a constitutional structure which would preserve cantonal autonomy yet leave Switzerland united and well-governed. The inclusion of direct democracy in this structure was vital to its initial acceptance and to its subsequent success.

1 Restoration

The turmoil began as the French were withdrawing. On 29 December 1813, Zurich and Basle, on behalf of the progressive cantons, proposed a union which would consolidate old federal ties and provide for absolute equality between the old and new cantons. The older cantons rejected the proposal, and threatened to go to war if the pre-occupation Confederation were not restored, along with their former privileges. Specifically, they demanded that "the old subject territories give up their newly acquired cantonal sovereignty and return to their condition of servitude."¹⁶⁰ Napoleon's victors, the Four Powers, objected and forced the old cantons to join the Pact of 1815 on 7 August 1815, which when sanctioned by the Congress of Vienna,

¹⁵⁶Kohn, above n 38, 49-51.

¹⁵⁷Bonjour, above n 1, 235.

¹⁵⁸Vincent, above n 1, 22; see also Kohn, above n 38, 24-25.

¹⁵⁹Bonjour, above n 1, 243.

¹⁶⁰Kohn, above n 38, 55.

become Switzerland's federal constitution. It also added Geneva, Valais, and Neuchatel to the Confederation, which brought the number of cantons to 22.¹⁶¹

The Pact of 1815, however, was not a true federal constitution; it was merely an alliance of sovereign states.¹⁶² It was a political expediency foisted upon the Swiss by the Four Powers to ensure the region's neutrality. The Pact's absence of an amending clause, that is, a legal means by which to alter the constitution, was intentional.¹⁶³ It was an agreement between governments, not one reached by the people of Switzerland; they were not consulted or asked to approve the agreement.¹⁶⁴

In practice, the 'new confederation' operated like the previous one. Federal power was vested once again in a Diet of ambassadors from each canton, who voted according to the instructions of their governments. Each canton had one vote. Unlike its predecessor, it could declare war if three-fourths of the cantons approved; decisions regarding other matters within its competence carried on the basis of simple majority vote. However, the Diet had no means by which to enforce its decisions,¹⁶⁵ and no independent means of finance.¹⁶⁶ The cantons retained control over custom duties and tolls, and each canton coined its own currency.¹⁶⁷ These factors expedited the new confederation's eventual demise.

No longer faced with an external threat, the cantons began to focus on internal issues, largely unencumbered by the Diet. Although the privileged classes never regained the position they enjoyed before the Helvetic Republic, they reasserted many of their rights. In the process, they managed to curb religious liberty, the right of assembly, and the freedom of the press, particularly with respect to governmental matters which were largely entrusted to the old ruling families.¹⁶⁸ Essentially, the new confederation "was a reactionary triumph which delayed for nearly half a century the development of the country."¹⁶⁹

2 *Pestalozzi's influence*

During this period, however, due in a large part to Pestalozzi, a sense of national consciousness began to develop.¹⁷⁰ When the Swiss Confederation collapsed in 1798,

¹⁶¹Vincent, above n 1, 24.

¹⁶²Kohn, above n 38, 55.

¹⁶³Bonjour, above n 1, 245.

¹⁶⁴Kohn, above n 38, 56.

¹⁶⁵Vincent, above n 1, 24.

¹⁶⁶See Bonjour, above n 1, 244.

¹⁶⁷Above; Herold, above n 5, 38.

¹⁶⁸Vincent, above n 1, 23-25; Herold, above n 5, 38; Bonjour, above n 1, 248-249.

¹⁶⁹Vincent, above n 1, 24.

¹⁷⁰Kohn, above n 38, 55.

the Swiss found solace in Johannes von Muller's *History of the Swiss Confederation*. Muller's depiction of the heroic struggle of the old cantons revealed the vitality and uniqueness of Switzerland; he surprised his readers by presenting Switzerland as a nation. Combined with the long French occupation, Muller's work sparked a profound nostalgia for and awareness of the ancient strength of Swiss governmental traditions.¹⁷¹

No one expressed the spirit of this Swiss nationalism better than Pestalozzi. He argued that the chief purpose of civil power is the "constitutional safeguard of the citizen from the unlawful usurpation of power by supreme authority, be [it] called King, Parliament or National Convention."¹⁷² Although civil power can protect civil liberty, he reasoned that the power of the state is always the potential enemy of civil liberty because human nature tends to domination: all forms of government are subject to corruption by their trend toward power; therefore, only the strength of the moral freedom of the individual can limit the danger or the abuse of power and can protect civil liberty and individual independence.¹⁷³

Pestalozzi stressed the individual, not the interests of the community, as the true foundation of education and of political life. His view was based on his belief that all social organisations from the family to the state are determined by the quality of those who compose them. As a result, he argued that a state which promotes the individuality and autonomy of its citizens assures the strongest and most enduring basis for its own existence. Pestalozzi believed that the individual possesses a potential faculty for liberty, that is, a self-reliant and autonomous existence, which enables him to resist the temptation of his natural being and of society. As a result, he argued that true civic education has to develop the faculty of individual liberty, which meant it had to oppose collectivistic and nationalistic designs that subjugated the interests of the individual to those of the state.¹⁷⁴

Pestalozzi's philosophy helped Switzerland to emerge successfully from its post-Napoleonic turmoil.¹⁷⁵ Coupled with Swiss moderation and common sense, it restored the balance between local tradition and federal unity, and between individual and nation; the balance was based on the respect for autonomy and diversity which Pestalozzi held in high regard.¹⁷⁶ He provided the intellectual framework by which to weld a nation out of a people who valued local autonomy above national unity; his

¹⁷¹ Bonjour, above n 1, 237-238.

¹⁷² Kohn, above n 38, 63 (quoting Pestalozzi).

¹⁷³ Above.

¹⁷⁴ Above.

¹⁷⁵ Kohn, above n 38, 66.

¹⁷⁶ Kohn, above n 38, 74.

principles gave Switzerland's constitutional framers the tools they needed to create an effective governmental system which united the cantons while minimising their loss of autonomy. In Switzerland, the initiative and the referendum are monuments to how well the Swiss managed to adhere to Pestalozzi's precepts.

3 *Regeneration*

Pestalozzi accurately predicted that the Restoration would be short-lived.¹⁷⁷ With the industrial revolution, the wealth of the traditional ruling classes began to decline relative to those engaged in trade and industry. Those aristocrats who used their privileges for commercial advantage provoked criticism, which added to the resentment that many felt toward an aristocracy whose position had been restored and vouched-safe by foreign powers.¹⁷⁸ Further, the new confederation was ill-equipped to deal with the changes brought about by the industrial revolution,¹⁷⁹ particularly as the cantons, as a result of their independence, often gave their ambassadors instructions that differed widely from each other.¹⁸⁰ Its extreme localism was a burden to those engaged in commerce. Internal custom barriers, for example, brought international traffic to a virtual standstill.¹⁸¹ These and other legal restrictions hampering industry eventually gave rise to demand for a unified state, with "one citizenship, one administration, one commercial and tariff policy."¹⁸²

In addition, the advent of a middle class, consisting of lawyers, teachers, doctors, industrialists, businessmen, retailers, and wealthy farmers coincided with the founding of cantonal banks, which shifted personal dependence on landlords to impersonal dependence on banks. These factors greatly weakened the power and the prestige of the ruling families. As an economically secure and educated group, the growing middle class began to take an active interest in governmental affairs.¹⁸³ Many began to view the aristocracy as a "political party which had illegally arrogated itself exclusive power in the state," rather than as a ruling caste appointed by God.¹⁸⁴

The fall of the Bourbons in the French Revolution of July 1830 triggered the demise of the Swiss Restoration and ushered in the Swiss Regeneration.¹⁸⁵ It brought a

¹⁷⁷Kohn, above n 38, 67.

¹⁷⁸Bonjour, above n 1, 249.

¹⁷⁹See Vincent, above n 1, 25.

¹⁸⁰Adams, above n 1, 16.

¹⁸¹Harold, above n 5, 38.

¹⁸²Bonjour, above n 1, 251; see also Kohn, above n 38, 85.

¹⁸³Bonjour, above n 1, 251.

¹⁸⁴Bonjour, above n 1, 249.

¹⁸⁵See Kohn, above n 38, 67; Adams, above n 1, 16; Vincent, above n 1, 25; Bonjour, above n 1, 249-250, 252; Deploige, above n 1, 65-67.

demand for personal and political freedom.¹⁸⁶ It also unleashed a demand for greater popular representation in the legislative and executive branches of government.¹⁸⁷ The chief proponents of these views, the Liberals, argued that the power of the state should no longer be exercised by a small elite but by the people as a whole.¹⁸⁸ The desire for freedom was accompanied by a desire for participation in governmental affairs; liberty became identified with democracy, and the people with sovereignty.¹⁸⁹ Nationalists joined the Liberals in the formation of the Radical Party which campaigned for centralised federal power, economic unification, and popular rule.¹⁹⁰

The Regeneration began in the larger and economically more dynamic cantons.¹⁹¹ Shortly after the French Revolution of 1830, the Radical Party gained control of Aargau, Vaud, Fribourg, and Schaffhausen without bloodshed when the people marched on the capitals of these cantons. By 1831, 12 Cantons, including Berne, Zurich, Lucerne, Solothurn, St Gall, and Thurgau, had joined the Radical fold and adopted liberal constitutions either peacefully or by revolution.¹⁹² Most of these new constitutions proclaimed the people sovereign, guaranteed the rights of the individual, and were approved by government controlled referendums.¹⁹³ This practice gave rise to the principle that proposed changes to constitutions must be submitted to and approved by the electors to take effect.¹⁹⁴

By and large, these new constitutions established representative democracy throughout urban Switzerland,¹⁹⁵ but were largely irrelevant to the older rural cantons which continued to govern themselves via the *Landsgemeinde*.¹⁹⁶ Under these new constitutions, legislative power typically resided in a Great Council, which was composed of representatives elected by the electors within the canton. The representatives would elect an executive, which was responsible for administering the laws. The officials serving the executive, however, depended on the Great Council for their position and terms of employment. Although these systems proclaimed the people sovereign, the Great Councils, with the exception of the one in St Gall, initially possessed exclusive control over the legislative process.¹⁹⁷ The electors were

¹⁸⁶Bonjour, above n 1, 249.

¹⁸⁷Vincent, above n 1, 25.

¹⁸⁸Bonjour, above n 1, 249-250.

¹⁸⁹See Bonjour, above n 1, 250.

¹⁹⁰Hughes, above n 103, 39; see also Adams, above n 1, 19.

¹⁹¹Kohn, above n 38, 85.

¹⁹²Herold, above n 5, 39; see also Adams, above n 1, 16; Kohn, above n 38, 68.

¹⁹³Adams, above n 1, 16; Kohn, above n 38, 68.

¹⁹⁴See Oechsli, above n 2, 406.

¹⁹⁵Bonjour, above n 1, 299.

¹⁹⁶See Bonjour, above n 1, 245.

¹⁹⁷Bonjour, above n 1, 252. The franchise depended on property or some certificate of higher education. Bonjour, above n 1, 252-53.

not consulted regarding legislation or other matters. Their role was confined to voting for representatives and on constitutional amendments.¹⁹⁸

4 *St Gall and the spread of direct democracy*

In 1831, as a compromise between those who strove for pure direct democracy and those advocating pure representative democracy, the framers of St Gall's new constitution established the legislative referendum.¹⁹⁹ Within 45 days of the Great Council promulgating a law, the individual communes within the canton had the right to submit the proposal to referendum. If a majority of the electors voted against the law, it was annulled.²⁰⁰ Although regarded as an unenviable aspect of St Gall's constitutional system, the device slowly won acceptance throughout Switzerland, first in rural Basle in 1832, then Lucerne in 1841, Thurgau in 1849, Schaffhausen in 1852,²⁰¹ and eventually in the rest of the cantons. Vaud considered adopting the legislative referendum in 1845, but rejected it as negative in character. Instead it took the innovative step of introducing the legislative initiative, an institution which had previously been restricted to the *Landsgemeinde* cantons. However, it could be used to repeal laws.²⁰²

The legislative referendum became increasingly attractive as the shortcomings of representative democracy became more and more apparent. Democratic elements in the Radical Party came to the conclusion that elected representatives were more attuned to class interests than the general will, particularly when levying taxes.²⁰³ These elements also concluded that giving the electors the power to veto legislation would be an effective check on the legislative power of the Great Councils.²⁰⁴ Consequently, they began to support the legislative referendum as a means "to recover for the people the right to that direct share in legislation which they had lost when government by representation alone was established in most of the cantons."²⁰⁵ By 1839, the Conservatives, both Protestant and Catholic, who had opposed the regeneration from its onset, also began to support the "cause of democraticness," when they concluded that "there lurked behind the enfranchised notables a substantial array of simple people who were by no means liberal in their political opinions, and

¹⁹⁸Bonjour, above n 1, 299.

¹⁹⁹Vincent, above n 1, 122; see also Deploige, above n 1, 68-72.

²⁰⁰Oechsli, above n 2, 406; see also Vincent, above n 1, 122-123; Adams, above n 1, 76-77.

²⁰¹Oechsli, above n 2, 406-407; see also Vincent, above n 1, 122-123; Deploige, above n 1, 72-77.

²⁰²Deploige, above n 1, 76-77. According to Article 21 of the Vaud Constitution of 1845, if 8,000 electors demanded a referendum on any question whatever, whether it were the making of a new law or the repeal of one already in existence, the legislature was obliged to comply with this demand. Above. See also below text accompanying note 243.

²⁰³Adams, above n 1, 78.

²⁰⁴Hughes, above n 103, 129.

²⁰⁵Adams, above n 1, 78.

whose unfalsified vote would ensure power for the conservatives of a religious tinge."²⁰⁶

Ironically, the older rural cantons led the Conservatives in opposing the regeneration, which was largely an urban phenomenon. The older cantons, which were small in size and population, viewed the regeneration, with its emphasis on a strong central government, as a threat to their sovereignty, their influence in federal matters, and their religious and political traditions.²⁰⁷ Uri, Schwyz, and Unterwalden, the three rural cantons which founded the Swiss Confederation, were ironically:²⁰⁸

irreconcilable leaders in the struggle against any reform. . . . They upheld their ancient liberties against modern nationalism and middle class ideas, with which they had upheld them against the feudal lords of the Middle Ages.

They successfully resisted initial attempts to reform the constitutional arrangements underpinning the new confederation, in part because the larger, more populous, liberal cantons refused to provide "the considerable revenues that a new Bund would require unless they secured a proportionate increase in their own political influence."²⁰⁹ Although Liberals, Democrats, and Radicals of various shades governed a majority of the population, the Conservatives controlled a majority of the cantons. Consequently, the new confederation remained "a loose alliance of tiny sovereign states, jealous of their independence"²¹⁰ until the brief civil war of 1847, which ushered in the Constitution of 1848 and laid the foundations of the modern Swiss state.²¹¹

5 *Constitution of 1848*

Switzerland was nearly torn asunder in the 1840s, a period in which religious, constitutional, and economic conflicts intermingled to produce political and armed strife.²¹² Younger Radicals began to step up the demand for the abolition of local customs barriers and tolls, and the unification of post, coinage, and weights and measures. They believed that a unified state based on a liberal constitution would eliminate the economic chaos plaguing the new confederation. However, their use of terrorism provoked bitter opposition.²¹³ In addition, Lucerne outraged the Radicals when it recalled the Jesuits and gave them the right to teach higher education in

²⁰⁶Hughes, above 103, 129; see also Adams, above n 1, 77-78.

²⁰⁷Herold, above n 5, 40; Kohn, above n 38, 85, 88.

²⁰⁸Kohn, above n 38, 71.

²⁰⁹Bonjour, above n 1, 257.

²¹⁰Kohn, above n 38, 69.

²¹¹Bonjour, above n 1, 273.

²¹²Kohn, above n 38, 84.

²¹³Bonjour, above n 1, 257-267.

response to Aargau's secularisation of a number of convents.²¹⁴ The Radicals viewed the action as a declaration of war because they considered the Jesuits to be the avowed enemies of progress.²¹⁵

The Radical's hostile reaction caused the Catholic cantons of Lucerne, Uri, Schwyz, Unterwalden, Zug, Fribourg, and Valais to form a defensive alliance called the Sonderbund in 1845 against the anti-Jesuit cantons controlled by the Radicals. On 20 July 1847, shortly after the Radicals had secured a majority in the Diet, the Diet ordered the dissolution of the Sonderbund. The members of Sonderbund refused to obey the order, which prompted the Diet on 4 November 1847 to order the federal army to enforce the order. The ensuing 25 day civil war was a farce but a political triumph for the Radicals, as their victory gave them a free hand to redraft the new confederation's constitution, particularly as the Four Powers were too preoccupied with troubles of their own to intervene.²¹⁶ The Swiss civil war was closely followed by liberal or radical uprisings in France, Italy, Austria, Hungary, Prussia, Ireland, and Romania in 1848, the same year in which Karl Marx published *The Communist Manifesto*.²¹⁷

The task of redrafting the new confederation's constitution went to a handful of far-sighted moderates, who laid aside party feeling to serve their country: Ulrich Ochsenbein, Joseph Munzinger, J Conrad Kern, Henri Druey, Jonas Furrer,²¹⁸ and Johann Rittimann.²¹⁹ As a group, they understood that the political and economic turmoil in Switzerland was caused by the conflicting claims of large and small cantons. They were also familiar with the United States Constitution, especially as Troxler, a Lucerne philosopher, had drawn attention to America's bicameral system as early as 1832 as the only way to reconcile the interests of large and small cantons.²²⁰ Rittimann, who had supported the bicameral solution in the press, was particularly knowledgeable in this regard as he was the author of several important works on the American constitutional system.²²¹ Munzinger was also an influential advocate of bicameralism.

²¹⁴Herold, above n 5, 40-41; see also Kohn, above n 38, 86-87.

²¹⁵Bonjour, above n 1, 257-267.

²¹⁶Above; Kohn, above n 38, 99-103; Herold, above n 5, 40-41. The Confederation lost 78 lives, the Sonderbund even fewer. In addition, the victors were not particularly vindictive, limiting their response to the expulsion of the Jesuits for all time, the levy of fines, and the revision of the federal constitution. Above.

²¹⁷O Robinson, T Fergus, and W Gordon *An Introduction to European Legal History* (Professional Books Ltd, Abingdon, Oxon, 1985) 440.

²¹⁸Bonjour, above n 1, 267.

²¹⁹Kohn, above n 38, 108.

²²⁰See Oechsli, above n 2, 396.

²²¹Kohn, above n 38, 108.

Despite initial opposition to bicameralism, the Revision Commission accepted the concept on 23 March 1848 when its members concluded that Troxler was right.²²² It offered the only way to reconcile the wish for centralised authority with the existence of cantonal sovereignty. The bicameral solution required creating a two House legislature, one which would represent the Swiss nation as a whole on the basis of population and the other which would represent the cantons on a one-to-one basis. The solution provided the Commission with a means by which to make acceptable inroads into cantonal sovereignty while enhancing the power of the confederation,²²³ that is, “to accommodate the needs of national unity with the survival of the sovereignty, traditions and rights of the individual cantons.”²²⁴

Accordingly, the Commission proposed a constitution that clearly delineated federal and cantonal competencies. In addition, it would “establish one Swiss citizenship, one Swiss foreign policy, one customs union, one national economy,” and provide identical political and civil liberties for all Swiss who would also have the right to live and work in any canton.²²⁵ To further the process of harmonisation of laws and rights, the Commission also proposed that cantons be required to ask the federal government to guarantee their constitutions.²²⁶ The federal government would only guarantee a cantonal constitution if it had been ratified by the electors and it contained a clause which would allow the electors to revise it.²²⁷ The Commission extended the revision requirement to the proposed constitution, which effectively introduced a cumbersome version of the constitutional initiative. Using it to add, delete, or modify a provision could only be achieved through the fiction of revising the entire constitution, which required dissolving the legislature and holding fresh elections. The text read as follows:²²⁸

The Federal Constitution may be amended at any time. Amendment is secured through the forms required for passing federal laws. When either council of the Federal Assembly passes a resolution for the amendment of the Federal Constitution and the other council does not agree, or when 50,000 Swiss voters demand a revision, the question whether the Federal Constitution ought to be revised is, in either case, submitted to a vote of the Swiss people, voting Yes or No. If, in either case, the majority of the Swiss citizens who vote pronounce in the affirmative, there shall be a new election of both councils for the purpose of preparing a draft of the revised constitution. The revised Federal Constitution shall come into force when it has been adopted by the majority of Swiss citizens who take part in the vote thereon and by a majority of the states.

²²²Oechsli, above n 2, 396-397.

²²³Bonjour, above n 1, 268-269; see also Adams, above n 1, 22.

²²⁴Kohn, above n 38, 111.

²²⁵Above.

²²⁶See Martin, above n 2, 226.

²²⁷Deploige, above n 1, 80 (quoting Article 6).

²²⁸Above (quoting Articles 111, 112, 113, 114).

In keeping with the ratification process developed in the cantons during the Regeneration, the Diet submitted the Commission's proposed constitution to the cantons for approval. The cantons were given two months to decide whether to approve or reject it. With the exception of Fribourg, the issue was decided in each canton by the electors, who overwhelmingly embraced the proposal: 15.5 cantons approved, 6.5 disapproved; 1,897,887 electors voted for it, 293,371 voted against it.²²⁹ Unlike the Swiss Confederation or its restored counterpart, the legitimacy of the new federal constitutional system rested upon the electors rather than the cantons. Its approval "was a national act which had the people behind it."²³⁰ By requiring the approval of the electors and including a means by which they could call for its total revision, the Constitution of 1848 acknowledged the sovereignty of the people. Any rewrite of the Constitution would have to be submitted to and approved by the electors before taking effect.²³¹ Further, the electors, for the first time, had the means to revise the federal constitution.

6 *Constitution of 1874*

The Constitution of 1848 laid the foundations for a permanent solution to the problem of national unity and local autonomy. It also created a representative democracy more attuned to the aspirations of the Swiss. However, it did not fully account for an important aspect of Swiss political culture; that is, its long term experience with direct participation in the exercise of governmental power, particularly in the *Landsgemeinde* cantons. Eventually, under the leadership of the Swiss Democrats, a group which grew out of the Radical Party due to the abuses associated with representative democracy,²³² the cantons adopted the initiative in addition to the legislative referendum. This movement set the stage for the revision of the Constitution of 1848 and led to the adoption of the legislative referendum on the federal level in 1874 and a more flexible version of the constitutional initiative in 1891.

²²⁹Bonjour, above n 1, 269-272; see also Oechsli, above n 2, 399. The number of electors voting appears large when compared to the number voting on the Constitution of 1874. See below text accompanying note 278. However, both Bonjour and Oechsli use these figures. The variation could be attributed to looser electoral practices in 1848 than in 1874, particularly regarding the criteria used, if any, for determining who might have been eligible to vote.

²³⁰Bonjour, above n 1, 269; see also Steinberg, above n 3, 35.

²³¹Adams, above n 1, 77.

²³²E Gruner and K Pitterle "Switzerland's Political Parties" in H Penniman (ed) *Switzerland at the Polls: The National Elections of 1979* (American Enterprise Institute for Public Policy Research, Washington, DC, 1983) 37; Oechsli, above n 2, 407.

(a) *The rise of the Swiss Democrats*

Between 1848 and 1874, due largely to the excesses of elected representatives or those perceived to be influencing them,²³³ the demand for greater participation in the exercise of cantonal and federal governmental power grew.²³⁴ The Great Council in Neuchatel, for example, outraged its electors by granting "a very high subsidy . . . to a railway of merely local importance," which forced it to adopt a law in 1858 which required "every loan or financial undertaking exceeding the sum of 500,000 francs [to be] submitted to the people for their ratification."²³⁵ By the 1860s, however, the ruling classes in rural districts and urban areas were generally well-to-do. They used the economic freedom created by the Constitution of 1848 and their offices in cantonal governments to strengthen their positions as leaders of commerce and industry. Business interests came to dominate administrative and legislative decisions, and "[p]olicy was in the hands of a few."²³⁶

The domination of the political system by "prosperous industrialists and city bosses" was repugnant to a growing middle class whose access to formal education and a free press made them far more politically sophisticated than previous generations.²³⁷ The industrial revolution also created problems which ruling elites were unable or unwilling to resolve. The peasantry and artisan classes, for example, were in want and often starving. They increasingly called upon their governments to improve their condition by alleviating the burden of military duty, improving access to and the quality of education, reducing the price of salt, imposing taxes equally, and creating cantonal banks.²³⁸ The working class, which came into being as a consequence of industrialisation,²³⁹ "pressed for shorter hours and better conditions than those provided under existing laws."²⁴⁰ Eventually, people from these non-privileged classes, with the support of some self-styled intellectuals and left-wing elements within the Radical Party, began to organise themselves as the Swiss Democrats.²⁴¹ They were united in their "fierce opposition to the old rulers of the moneyed aristocracy" and their belief that the power of the state should be placed into their hands.²⁴²

²³³See Bonjour, above n 1, 300-301.

²³⁴See Thurer, above n 2, 118; see also generally Deploige, above n 1, 82-123.

²³⁵Deploige, above n 1, 82. Berne was also forced to adopt the financial referendum in the late 1860s due to a railway funding scandal which broke after the Radicals controlling the cantonal legislature "voted subsidies to new railways which had exceeded the ordinary revenue of the state." Deploige, above n 1, 83.

²³⁶Bonjour, above n 1, 299; see also Thurer, above n 2, 120.

²³⁷Thurer, above n 2, 120.

²³⁸K Dandliker *A Short History of Switzerland* (Swan Sonnenschein & Co Ltd, London, 1899) 284.

²³⁹Martin, above n 2, 235.

²⁴⁰Thurer, above n 2, 120.

²⁴¹Above; Gruner, above n 232, 37.

²⁴²Bonjour, above n 1, 300; see also Thurer, above n 2, 120.

In 1845, Vaud amended its constitution to provide for the legislative initiative. Under this system, 8,000 (subsequently 6,000) electors could present legislative proposals to the electors for their approval. This position was reached after Henri Druey, the president of Vaud's Great Council and subsequently one of the authors of the Constitution of 1848, proposed that all laws and decrees be submitted to the electors for approval. In 1852, Aargau established a legislative initiative which could be triggered by 5,000 electors. Outside of the *Landsgemeinde* cantons, these systems were the first of their kind in Switzerland.²⁴³

No doubt influenced by these examples, the Swiss Democrats and their supporters "pinned their hopes on having a direct say in legislation."²⁴⁴ Accordingly, "they worked tirelessly throughout Switzerland to establish popular control over local and national government through the introduction of the initiative, the referendum, and direct election of the executive."²⁴⁵ Widespread mistrust of government, believed to be harnessed to economic interests, fuelled the success of the Swiss Democrats.²⁴⁶ Between 1860 and 1874, they managed to incorporate direct democracy devices into the constitutions of 20 cantons.²⁴⁷

(b) Rural then urban victories

The Swiss Democrats won their first victory in Rural Basel in 1863, under the leadership of Christopher Rolle.²⁴⁸ Inspired by the introduction of mandatory financial referendums in Neuchatel in 1858 and Vaud in 1861, which gave the electors the right to approve "extensive new schemes of expenditure," Rural Basel introduced a mandatory referendum for all laws and generally binding decrees passed by the Great Council.²⁴⁹ Rolle and his supporters also managed to secure the introduction of the initiative.²⁵⁰ The electors in this canton were effectively transformed into law-makers akin to the full citizens of the *Landsgemeinde* cantons.²⁵¹ The original Swiss conception of self-government, as initially manifested in the ancient alpine popular assemblies in the 1230s, had at long last found a modern form. Through its

²⁴³Oechsli, above n 2, 406-407; Deploige, above n 1, 76-77, 81.

²⁴⁴Thurer, above n 2, 120.

²⁴⁵Gruner, above n 232, 37.

²⁴⁶Bonjour, above n 1, 300-301.

²⁴⁷Gruner, above n 232, 37.

²⁴⁸Dandliker, above n 238, 285.

²⁴⁹Oechsli, above n 2, 406; Deploige, above n 1, 83. It took 1,500 electors to trigger the legislative referendum in Rural Basel. Above.

²⁵⁰Dandliker, above n 238, 285; Thurer, above n 2, 120-121. They also instituted the direct election of the executive and the judiciary. Dandliker, above n 238, 285.

²⁵¹Thurer, above n 2, 121. According to Oechsli, the constitutional initiative predates the legislative initiative, which is logical given the prior existence of the constitutionally required referendum; however, he does not supply any supporting evidence (dates or cantons). See Oechsli, above n 1, 406-407. Further, Basel adopted the legislative initiative in 1863. The device only required 1,500 citizens to trigger. Oechsli, above n 1, 407.

introduction of the initiative and referendum, Rural Basel had succeeded in extending the participatory principles of the *Landsgemeinde* to larger and more geographical dispersed populations. It would only be a matter of time before the idea would find its way into the federal constitution.

A few years later, Zurich provided the Swiss Democrats with their first urban and most crucial test. In many respects, the struggle anticipated the battle that would be waged between the Progressives and the Southern Pacific Railroad in California between 1890 and 1911.²⁵² The Liberals accepted the Constitution of 1848, but joined the Catholics in opposition to the Radical Party when it came to defending what remained of cantonal sovereignty. Under the leadership of Alfred Escher, a Zurich banking and railroad magnate, the Liberals effectively governed Switzerland.²⁵³ Escher, who had studied law in Germany, was from a wealthy family; he was also extremely well connected. By the age of 29, he was burgomaster of Zurich, and its dominate personality. At 30 he was President of the National Council, a position he held on three other occasions.²⁵⁴ When Jakob Stamflil, an advocate for state intervention, led the Radicals in a campaign to nationalise Switzerland's growing railroad network, Escher managed to block the move.²⁵⁵ The obvious nexus of Escher's business interests and his politics caused resentment, and his "critics assailed him bitterly as the 'banklord' and 'railway king'".²⁵⁶

The Swiss Democrats used this resentment to win support in Zurich, as Escher personified Zurich's representative democracy system and all that the Swiss Democrats found wrong with it.²⁵⁷ By 1867 public antipathy toward Escher was overwhelming. The Swiss Democrats capitalised on it by organising huge public meetings in Zurich, Uster, Winterthur, and Bulach on 15 December 1867. Despite bad weather, the Swiss Democrats collected approximately 26,500 signatures in favour of a constitutional revision, nearly three times the 10,000 required under Zurich law to revise the constitution. A constitutional council drew up a new constitution, which was submitted to the electors for ratification in 1869.²⁵⁸ The constitutional council produced a document which was faithful to the credo of the Swiss Democrats. Article one stated:²⁵⁹

The power of the state rests on the people as a whole. It is exercised directly through the citizens, and only indirectly through the authorities and officials.

²⁵²See generally chapter five, below.

²⁵³See Gruner, above n 232, 36.

²⁵⁴Thurer, above n 2, 121.

²⁵⁵Gruner, above n 232, 37.

²⁵⁶Thurer, above n 2, 121.

²⁵⁷See above; see also Dandliker, above n 238, 285.

²⁵⁸Thurer, above n 2, 121; Dandliker, above n 238, 285.

²⁵⁹Thurer, above n 2, 121.

Accordingly, the document incorporated a mandatory legislative referendum, which required all legislative enactments to be submitted to the electors every spring and autumn. In cases of urgency, the legislature could hold an extraordinary referendum. Further, all annually recurring items of expenditure over 20,000 francs and every single capital expenditure item over 200,000 francs had to be referred to the electors for approval. In addition, it incorporated the initiative, which could be triggered by the signatures of 5,000 electors supporting any proposal for the enactment, modification, or repeal of a law.²⁶⁰

The electors approved the revised constitution by an overwhelming majority in 1869. On a turnout of 90 percent, approximately 50,000 voted for it and 7,300 voted against it.²⁶¹ Escher's vaulted position in the canton collapsed with the disintegration of the political machine he had controlled.²⁶² The Great Council of Zurich shed its authoritarian character and became a consultative institution.²⁶³ Zurich's example was influential because it showed that institutions which had previously been limited to small rural cantons could be used successfully in large urban cantons.²⁶⁴ Thurgau, Aargau, Solothurn, Lucerne, and Berne adopted similar constitutions in the same year.²⁶⁵ Gradually all of the cantons, in one form or another, adopted the initiative and referendum.²⁶⁶

(c) Revising the Constitution of 1848

More importantly, the victory in Zurich gave the Swiss Democrats the momentum they needed to win support for the revision of the Constitution of 1848. As in the period leading up to the Constitution of 1848, constitutional change in the cantons eventually produced constitutional change on the federal level.²⁶⁷ By 1874, after rejecting proposals in 1866 and 1872 as too centralist in character,²⁶⁸ the electors were

²⁶⁰Oechsli, above n 2, 407. In each case, the vote had to be yes or no, and effected by ballot cast in the elector's commune on a day appointed by the commune under the supervision of the electoral bureau. Above. The new constitution also provided for free education, created a cantonal bank, and abolished the death penalty, imprisonment of debtors, and the holding of offices for life. Thurer, above n 2, 121; Dandliker, above n 238, 285.

²⁶¹Thurer, above n 2, 121; Dandliker, above n 238, 285.

²⁶²Bonjour, above n 1, 301.

²⁶³Thurer, above n 2, 121-122. The dire predictions made by dethroned magnates and bureaucrats were not fulfilled. Above.

²⁶⁴See Martin, above n 2, 235.

²⁶⁵Above; Thurer, above n 2, 121-122; Dandliker, above n 238, 285; Bonjour, above n 1, 301.

²⁶⁶Bonjour, above n 1, 301 (Fribourg held out until 1921); see also Adams, above n 1, 80. In some cantons all laws and important financial matters must be submitted to the electors, but in others a certain number of electors must sign a petition requesting a legislative referendum. Oechsli, above n 2, 408.

²⁶⁷Bonjour, above n 1, 299; see also Dandliker, above n 238, 285.

²⁶⁸See Adams, above n 1, 21; see also Dandliker, above n 238, 285-286; Kohn, above n 38, 113. The electors, however, did approve a constitutional amendment in 1866 which granted political rights to Jews. Above. The central authorities put forward this constitutionally required referendum "after

disposed to ratify a total revision of the Constitution of 1848. The Swiss Democrats were aided in their cause by the national concern generated by the pan-European fallout of two events which occurred in 1870: the unification of Germany under Bismarck, which led to the Franco-Prussian War, and the declaration of papal infallibility.²⁶⁹

Although German and French populations would have been expected to divide in their appreciation of Bismarck's *Kulturkampf*,²⁷⁰ they were united in their fear of his aggressive expansionism especially given the weakness of the federal military structure,²⁷¹ which gave centralists their "one law, one army" slogan.²⁷² Although the papal infallibility declaration gave Protestants and Catholics new grounds upon which to oppose one another, it ironically brought them closer together as the Protestants viewed the dogma as arrogance and the old Catholics perceived it as inconsistent with their traditional faith, which provided centralists, who stood for the supremacy of secular power, with additional support.²⁷³

These two events, along with a desire for a greater say in the exercise of federal governmental power, convinced the electors that revision of the Constitution of 1848 was necessary despite the increased centralisation it would bring.²⁷⁴ The 1872 revision, which was rejected by a majority of the electors (261,072 to 255,609) and a majority of cantons (13 to 9), included both the legislative referendum and a flexible form of the constitutional initiative.²⁷⁵ To ensure cantonal support, the drafters of the 1874 revision made a number of compromises to appease the French-speaking Swiss who had been unwilling to relinquish any more cantonal autonomy and who were worried about being dominated by German-speaking Swiss.²⁷⁶ In the process, the initiative provision was dropped from the 1874 revision. However, the 1874 revision retained the direct democracy devices introduced with the Constitution of 1848 and

France had said it would conclude a trade treaty only if all French residents in Switzerland were guaranteed these rights, irrespective of their religion." Thurer, above n 2, 119; see also Deploige, above n 1, 91-93.

²⁶⁹Hughes, above n 103, 106; Kohn, above n 38, 113; Thurer, above n 2, 123; Martin, above n 2, 235.

²⁷⁰The term can be translated literally as "culture battle," but in this context it was understood to mean "Germanification."

²⁷¹See Thurer, above n 2, 123; Hughes, above n 103, 106.

²⁷²Martin, above n 2, 235; Thurer, above n 2, 123.

²⁷³See Thurer, above n 2, 123.

²⁷⁴See Oechsli, above n 2, 409; Thurer, above n 2, 123. The revision of 1874, for example, established the principle of freedom of conscience and of religion in all the cantons, which depoliticised religion and ended the long conflict between Protestants and Catholics. Kohn, above n 38, 113-114.

²⁷⁵Deploige, above n 1, 110-111; J Aubert "Switzerland" in Butler and Ranney, above n 30, 50; Thurer, above n 2, 123 (but stating incorrectly that a majority of the electors supported the 1872 revision, 256,000 to 216,000).

²⁷⁶Above.

added the legislative referendum, which could be triggered by 30,000 electors or 8 cantons.²⁷⁷

On 19 April 1874, the electors (340,199 to 198,013) and the cantons (14.5 to 7.5) approved the total revision of the Constitution of 1848,²⁷⁸ which established the legislative referendum on the federal level. The Constitution of 1874, as amended, is still in effect; it is the foundation upon which the modern Swiss state rests.²⁷⁹ Soon after the Constitution of 1874 came into being, a number of cantons which had not adopted direct democracy proceeded to introduce the initiative, the referendum, or both. For example, Baselstadt followed in 1875, Schaffhausen in 1876, Geneva in 1881, Neuchatel in 1882, and Ticino in 1883.²⁸⁰ Fribourg managed to hold out until 1921.²⁸¹ Today, each canton allows its electors to participate in the exercise of governmental power in one way or another.

From 1874 onwards, due to continual pressure for centralised action of one kind or another, the electors gradually transformed the Constitution of 1874 by ratifying constitutionally required referendums. The electors acquired direct control over this revision process with the inclusion of a more flexible form of the constitutional initiative in the Constitution of 1874 on 5 July 1891 that could be used for partial revisions. Like the total revision version, it could be triggered by 50,000 electors.²⁸² However, it provided greater flexibility as it eliminated the need to dissolve the legislature and hold fresh elections. More importantly, it gave the power to draft specific amendments to those who use it, which meant they no longer had to rely on a reconstituted legislature to draft and put forward their proposal. The device received the support of 18 cantons and 60.3 percent of those voting (181,882 to 120,372) on a turnout of 49.3 percent.²⁸³ In 1961, it was used to propose the introduction of the legislative initiative. However, the proposal was rejected by all the cantons and 60.1 percent of those voting on a turnout of 40.1 percent.²⁸⁴

²⁷⁷ Adams, above n 1, 77; Dandliker, above n 238, 288.

²⁷⁸ Thurer, above n 2, 124; Bonjour, above n 1, 269-272; J Aubert "Switzerland" in Butler and Ranney, above n 30, 50; Kohn, above n 38, 113 (stating in contradiction to the preceding authorities that the cantonal result was 13.5 to 8.5); Deploige, above n 1, 116-117 (same).

²⁷⁹ Bonjour, above n 1, 269-272.

²⁸⁰ Dandliker, above n 238, 285.

²⁸¹ Bonjour, above n 1, 301.

²⁸² Oechsli, above n 2, 414; see also Thurer, above n 2, 119-120; Martin, above n 2, 237 (stating also that all international treaties of certain duration became subject to the referendum in 1921).

²⁸³ Deploige, above n 1, 123; J Aubert "Switzerland" in Butler and Ranney, above n 30, 51

²⁸⁴ J Aubert "Switzerland" in Butler and Ranney, above n 30, 59; see also Steinberg, above n 3, 76.

IV ASSESSMENT

Although its contemporaries believed the importance of the Constitution of 1874 concerned its readjustment of the distribution of governmental power between federal and cantonal authorities, its most significant and enduring innovation has proven to be the introduction of direct democracy on the federal level.²⁸⁵ The Constitution of 1848 was based on a "strict and inflexible division of state competencies between confederation and cantons."²⁸⁶ However, the Constitution of 1874 "completely changed the situation by introducing a convenient means for modifying it at any moment."²⁸⁷

The framers of the Constitution of 1848 had intended to install a pure liberal representative democracy in Switzerland modelled after the United States constitutional system.²⁸⁸ The purity of their experiment, however, was short-lived, largely because it ignored native and long-standing experience with direct democracy. Given the ideals, traditions, and legends which had shaped Swiss constitutional development, pure representative democracy could only persist in Switzerland as long as direct democracy remained impractical, especially during periods in which economic and social uncertainty coincided with a widespread belief that elected representatives were serving the interests of privileged elites rather than giving effect to the general will.

The Swiss Democrats came into being during such a period. Well-to-do members of the ruling Radical-Liberal grouping controlled nearly every representative legislature in Switzerland. Their brief was self-serving, particularly with respect to advancing the economic interests of their class, which deprived them of the ability to deal adequately with the dislocation and hardship caused by the industrial revolution. The Swiss Democrats, who represented the interests of the non-privileged classes, grew out of this grouping. Initially a protest party, the Swiss Democrats eventually became an extremely influential and successful reform party. Their success was founded on promoting a means by which to bring direct democracy to large geographically dispersed populations.

By doing so, they found a way to limit the legislative power of representative assemblies and to satisfy an ancient Swiss desire for localised self-rule. The legislative referendum gave the electors the means to veto legislation passed by their representatives; the initiative gave the electors the power to enact laws should their

²⁸⁵ Martin, above n 2, 237.

²⁸⁶ Above.

²⁸⁷ Above.

²⁸⁸ See Herold, above n 5, 161.

representatives prove to be unrepresentative or unresponsive. The Radicals believed that the Constitution of 1848 “meant the final realization of the liberties won by the Swiss in 1291.”²⁸⁹ However, this was not achieved until 1891 when the Constitution of 1874 contained both the legislative referendum and a flexible form of the constitutional initiative. At that moment, the Swiss completed the process of regaining the kind of democracy that had characterised the three original cantons (Uri, Schwyz, and Unterwalden) and the still older popular assemblies of Switzerland's ancient Teutonic invaders.²⁹⁰

Ironically, the process began when the French imposed a centralised form of government on Switzerland through the guise of a nationwide referendum on the Helvetic Republic. During the Regeneration, the legitimacy of cantonal constitutions was, as a matter of practice, established by submitting them to the electors. This practice was also used to establish the Constitution of 1848. In time, due mainly to the efforts of the Swiss Democrats, this practice was extended in the cantons to legislation and constitutional amendments in the form of the legislative referendum, the legislative initiative, and the constitutional initiative. Shaped by these developments, the Constitution of 1874 had, by 1891, incorporated the legislative referendum and the constitutional initiative.

With these constitutional changes, both on the cantonal and the federal levels, pure representative democracy gave way in Switzerland to a hybrid form of democracy which combined elements of representative and direct democracy.²⁹¹ In doing so, the Swiss Democrats replaced the liberal ideal of parliamentary sovereignty with the democratic ideal of sovereignty of the people.²⁹² The sovereignty of each canton resides in the people of each canton.²⁹³ The electors are the ultimate law-makers.²⁹⁴ As discussed in the next chapter, the constitutional system in which they participate is built from the bottom up.²⁹⁵ Political and social order emanates first from the communes, then the cantons, and finally from the federal government. The electors are ultimately responsible for legislative outcomes in Switzerland, as they are the ultimate authority. Switzerland's direct democracy devices, in effect, have made the electors the most important limitation on the legislative power exercised by their elected representatives.

²⁸⁹Herold, above n 5, 41.

²⁹⁰Herold, above n 5, 41, 162; see also Bonjour, above n 1, 300; Oechsli, above n 2, 405.

²⁹¹For a discussion of Cronin's hybrid model of democracy, see section IV in chapter two.

²⁹²See Bonjour, above n 1, 300, 301.

²⁹³Adams, above n 1, 117.

²⁹⁴Bonjour, above n 1, 300.

²⁹⁵Steinberg, above n 3, 27; see also Siegfried, above n 9, 142-143.

ROLE OF DIRECT DEMOCRACY IN SWITZERLAND

The role direct democracy plays in Switzerland's constitutional system reflects its origins. The Swiss embraced direct democracy to counter the excesses associated with representative democracy during the industrial revolution. They included the legislative referendum and the constitutional initiative in the Constitution of 1874 to curb the legislative power of elected representatives, primarily to prevent their representatives from depriving them of their rights, particularly regarding their local autonomy. By providing the electors with the means to propose, enact, and veto laws, these direct democracy devices ended Switzerland's brief, and largely un-Swiss, experiment with pure representative democracy.

The Swiss constitutional system is built from the bottom up. In Diceyan terms, the electors are both the legal and political sovereign. Law and order emanates from them, first through the communes, then the cantons, and finally the federal government. Direct democracy has made the electors responsible for legislative outcomes in Switzerland. The electors are the ultimate authority, and they have the governmental power to exercise that authority. However, this power, like that exercised by their representatives, is not unlimited. The legislative referendum and the constitutional initiative are subject to procedural safeguards which limit their majoritarian potential.

This chapter examines the relationship between the cantons and the federal government, the structure of the federal government, particularly its legislative, executive, and judicial branches, and the constitutional initiative and the legislative referendum. Although the Constitution of 1874 is at the heart of the discussion, the works of Nicholas Gillett, Oswald Sigg, Jean-Francois Aubert, Erich Gruner, Jurg Steiner, George Coddington, and Christopher Hughes provide useful insights into the actual operation of the system.¹

¹N Gillett *The Swiss Constitution: Can it Be Exported?* (Yes Publications, Bristol, 1989); O Sigg *Switzerland's Political Institutions* (3 ed, Pro Helvetia, Zurich, 1988); J Aubert "The Swiss Federal Constitution" and E Gruner "The Political System of Switzerland" in *Modern Switzerland* (The Society for the Promotion of Science and Scholarship Inc, Palo Alto, 1978); J Aubert "Switzerland" in D Butler and A Ranney (eds) *Referendums: A Comparative Study of Theory and Practice* (American Enterprise Institute for Public Policy Research, Washington, DC, 1978); J Steiner *Amicable Agreement Versus Majority Rule: Conflict Resolution in Switzerland* (rev ed, University of North Carolina Press, Chapel Hill, 1974); G Coddington *The Federal Government of Switzerland* (Houghton Mifflin Co., Boston, 1961); C Hughes *Federal Constitution of Switzerland* (Clarendon Press, Oxford, 1954).

By examining the constituent parts of Switzerland's constitutional system and their relationship to the constitutional initiative and legislative referendum, this chapter provides a basis for understanding the role that these direct democracy devices play in limiting the legislative power of elected representatives in Switzerland. It also reveals the safeguards built into these direct democracy devices which limit the legislative power they give to the electors. Both insights provide the background for a comparative analysis in Parts III and IV of the role that direct democracy plays in California and New Zealand and the safeguards built into their respective direct democracy devices. In addition to demonstrating that direct democracy is integral to Switzerland's constitutional system, this chapter provides the basis for understanding the differences between the direct democracy systems that exist in Switzerland, California, and New Zealand.

I RELATIONSHIP OF CANTONS TO FEDERAL GOVERNMENT

As chapter three showed, the Constitution of 1874 is the product of a long and complex history focussed primarily upon a desire for local autonomy and a need to secure it through unity. The Swiss cantons came together out of economic and political necessity despite their heterogeneous composition. They united to preserve their sovereignty, not to relinquish it.² As Aubert has noted, the Swiss constitutional system is designed "to fortify the Swiss nation while guaranteeing the continued existence of the cantons."³ Direct democracy is a vital component of this guarantee.

A Division of Power

Switzerland is a federal state consisting of 23 sovereign cantons, of which three are divided into half-cantons.⁴ The cantons exercise all the sovereign rights which the Constitution of 1874 has not explicitly or implicitly assigned to the federal government or which it has forbidden them to exercise.⁵ As Sigg has observed, they are not administrative regions in a central state, but "independent small states with their own political institutions."⁶ With the exception of Jura, all of the cantons

²See generally H Kohn *Nationalism and Liberty: The Swiss Example* (Greenwood Press, Westport, Connecticut, 1979); B Barber *The Death of Communal Liberty: A History of Freedom in a Swiss Mountain Canton* (Princeton University Press, Princeton, 1974).

³Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 297; see also Fed Const Swiss, preamble, arts 1, 2, 3, and 5.

⁴Fed Const Swiss, art 1. For discussions of Swiss federalism, see M Frenkel "Swiss Federalism in the Twentieth Century" in *Modern Switzerland*, above n 1, 323; V Bogdanor, "Federalism in Switzerland" (1988) 23 Gov't & Opp 69.

⁵Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 303.

⁶Sigg, above n 1, 12. This arrangement melds well with popular sentiment, as most Swiss place more importance in their canton than in their country. Gillett, above n 1, 19.

predate the federal government.⁷ From a cantonal perspective, federalism in Switzerland is a means of maintaining cantonal independence while promoting economic growth and securing territorial integrity through unity.⁸

In theory, the division of power between the cantons and the federal government falls roughly into four categories: areas in which the federal government is solely responsible, that is, customs, coinage of money and issue of bank notes, post and communications, and railways and shipping; areas in which the cantons are solely responsible, that is, police, social welfare, subsidised housing, and church affairs; areas in which the cantons execute legislation enacted by the federal government, that is, weights and measures, traffic regulations, military organisation, labour regulations, social security, and the civil and penal codes; and areas in which the cantons and the federal government share responsibility, that is, taxation, road-building, hunting and fishing, health insurance, and education.⁹

In practice, the division of powers is more complex. In the area of education, for example, primary schooling is exclusively a cantonal concern, which has led to differences in primary education from canton to canton. Secondary education can also bear a cantonal stamp, which has led to different matriculation examinations qualifying students for tertiary education. This has caused problems for Switzerland's universities and polytechnics, which depend upon a comparable level of qualifications to make their admission decisions. In 1972, the federal government put forward a constitutional amendment that would have unified the start of the school year, the period of compulsory school attendance, the school starting age, and the basic school text-books.¹⁰ To win approval, all constitutional amendments, whether initiated by the federal government or the electors, require a double majority, that is, a majority of the electors who vote and a majority vote in the majority of the cantons.¹¹ The amendment attracted a majority of the national vote, but it failed in a majority of the cantons.¹² However, in 1985, the electors and the cantons agreed to amend the Constitution of 1874 to unify the start of the school year.¹³

The cantons typically resist federal constitutional amendments that encroach upon their preserve in this fashion. As both Sigg and Aubert have observed, outright

⁷See below text accompany note 27.

⁸See generally chapter two.

⁹Sigg, above n 1, 13.

¹⁰Sigg, above n 1, 14.

¹¹Fed Const Swiss, arts 120 and 121; see also Aubert "Switzerland" in Butler and Ranney, above n 1, 41.

¹²The proposal attracted the support of 10.5 cantons and 52.8 percent of the electors on a turnout of 27.5 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 61.

¹³Sigg, above n 1, 14.

rejection is usually followed some years later by an acceptable compromise.¹⁴ Between 29 May 1874 and 31 December 1976, for example, the Swiss voted on 174 amendments to the Constitution of 1874, of which they rejected 83 and accepted 88.¹⁵ Of those rejected, the federal government initiated 27 and the electorate initiated 56. Of those accepted, the federal government initiated 81, while the electorate initiated seven.¹⁶ Most of the amendments that were accepted were rejected when they were first proposed,¹⁷ generally because they were considered too centralist in their original form, that is, the electors believed that they augmented federal governmental power at the expense of cantonal governmental power to an unacceptable degree.

B *Principle of Local Autonomy*

To an extent this cantonal resistance demonstrates the innate desire of the cantons to remain autonomous in their internal affairs. The electors, with a view toward preserving the sovereignty of their cantons, have consistently used direct democracy to prevent the federal government from introducing measures that would have given the federal government the power to deal with problems concerning regional development, economic growth, the media, education, and federal finances.¹⁸ Ironically, however, most of the constitutional amendments that have won acceptance have actually extended the power of the federal government.¹⁹

This development is attributable to several factors. First, the federal government has been far more successful than the electorate in amending the Constitution of 1874 because it generally proposes well-vetted proposals and counter proposals which are more attractive to electors as they enjoy the broad-based support of their elected representatives. In addition, constitutional initiatives put forward by the electors generally come from groups that have decided to appeal directly to the nation because they have failed to gain the support of a sufficient number of their elected representatives, which means they tend to lack broad-based support.²⁰ Second, the framers of the Constitution, when determining the competencies of the cantons and the federal government, were guided more by the principle of cantonal sovereignty than the practical considerations involved in running a modern state.²¹ Experience has

¹⁴ Above; Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 300.

¹⁵ Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 300.

¹⁶ Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 302.

¹⁷ Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 300.

¹⁸ Sigg, above n 1, 14-15.

¹⁹ Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 300 (several concerned political institutions, and some dealt with personal freedoms and rights of the individual).

²⁰ See Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 301.

²¹ See generally chapter three.

since revealed some areas which the cantons and the electors have agreed would be better served or dealt with by federal authorities.²²

However, Switzerland's survival depends on the co-existence of its various linguistic and cultural groupings.²³ The need to maintain this co-existence is the overriding factor governing the relationship between the cantons and the federal government. To preserve their identity, the cantons must be in a strong position relative to the federal government. The Constitution is built upon this principle. Despite the centralising effects of constitutional amendments since 1874, this principle still constitutes the essence of Swiss federalism.

C Role of Direct Democracy

Direct democracy safeguards this principle. As Sigg has stated, "direct democracy . . . with its tendency towards autonomy, leads, by its very nature, to decisions being made by smaller units."²⁴ For example, the Constitution lists the cantons which make up Switzerland.²⁵ This means that a canton cannot be created or eliminated without a formal revision of the Constitution.²⁶ The people of Jura, who had considered themselves a disadvantaged linguistic and denominational minority in the canton of Berne, waged a long and determined campaign for their autonomy. In 1978 they won the political support necessary to amend the Constitution of 1874 which allowed the canton of Jura to come into being.²⁷ Direct democracy provided a peaceful solution to a difficult minority problem in a way that was acceptable to the majority involved.²⁸

Direct democracy also plays a crucial role within the cantons. Like the federal government, each canton gives its citizens the right to initiate changes to the canton's constitution or to veto newly enacted legislation.²⁹ Many cantons also offer their citizens the right to initiate legislation. In some cantons, governmental expenditures beyond a certain amount must be submitted to the electors for approval if requested by the cantonal parliament or a specified number of electors. These legislative initiative and "finance referendum" devices do not exist on the federal level. Essentially, the legislative power in the cantons is exercised by elected representatives

²²See Aubert "Switzerland" in Butler and Ranney, above n 1, 50-64 (listing the type, subject, and results of all federal referendums in Switzerland from 1866 to 1978).

²³Sigg, above n 1, 16.

²⁴Sigg, above n 1, 13.

²⁵Fed Const Swiss, art 1.

²⁶Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 302.

²⁷Sigg, above n 1, 16; see also Gillett, above n 1, 104-108; Supplementary Material from the New York Times and the Associated Press, *The New York Times*, New York, USA, 25 September 1978, 24.

²⁸Sigg, above n 1, 17.

²⁹Sigg, above n 1, 20.

in collaboration with the electors who have their say through direct democracy devices.³⁰

The cantons exert a formative influence on the federal government.³¹ Federal authorities closely monitor political developments in the cantons and continually adjust their policies and legislative programs in light of these developments to reduce the likelihood of legislative referendums and constitutional initiatives, and to minimise the risk losing them.³² If a cantonal innovation proves successful, it will be copied elsewhere in Switzerland. For example, proportional representation was introduced into the cantons before being adopted on the federal level. Extending the franchise to women came about in the same way. Essentially, the Swiss question the assumption that legislation should lead public opinion on the grounds that it leads to a lack of respect for the law. They prefer the slow and steady pace of persuasion to legislative coercion because it ensures that a strong body of opinion supports the law.³³ In addition, the cantons are directly represented in the Council of States, which is the upper house of the Federal Assembly.³⁴ They participate in the formation of all federal legislation and in the election of the Federal Council, which is the executive branch of the federal government.³⁵

In almost every respect, the Swiss constitutional system is designed from the bottom-up rather than from the top-down. For example, the crucial governmental power to levy taxes is divided among the federal government and the cantons in manner that ensures that the cantons cannot be dominated by federal authorities.³⁶ Cantonal taxes are based on income while the federal government levies indirect taxes such as custom

³⁰Sigg, above n 1, 19. In the cantons, executive power is exercised by an executive council whose members are elected by the people. Sigg, above n 1, 19-20.

³¹Sigg, above n 1, 20.

³²See generally Steiner, above n 1; J Steiner and R Dorff *A Theory of Political Decision Modes: Intraparty Decision Making in Switzerland* (University of North Carolina Press, Chapel Hill, 1980); C Schmid *Conflict and Consensus in Switzerland* (University of California Press, Berkeley, 1981); see also R Katz "Dimensions of Partisan Conflict in Swiss Cantons" (1984) 16 *Comp Pol Stud* 505.

³³Gillett, above n 1, 31, 33.

³⁴For a discussion of the Federal Assembly, see below text accompanying notes 43-67.

³⁵Gillett, above 1, 23. For a discussion of the Federal Council, see below text accompanying notes 68-102.

³⁶Gillett, above n 1, 32, 38.

duties and taxes on alcohol and tobacco.³⁷ The communes account for 50 percent of the tax take, the cantons 40 percent, and the federal government 10 percent.³⁸

In addition, despite the trend toward increasing the jurisdiction of the federal government, governmental administration is, whenever possible, pushed down from the federal government to the cantons, which ensures that the electors are close to those who have political power.³⁹ They are likely to have relatives, friends, acquaintances, or neighbours who take part in government, either as officials or elected representatives.⁴⁰ This intimacy, as Gillett has reasoned, avoids the 'us-against-them' mentality predominant in larger democracies.⁴¹ In addition to being highly participatory, the system gives the cantons and their electors the greater portion of governmental power, which goes a long way toward protecting their interests.

II CONSTITUTIONAL STRUCTURE OF FEDERAL GOVERNMENT

As the framers of Switzerland's constitutional system were faced with the problem of bringing sovereign cantons together into a workable and durable political and economic union, they used the United States Constitution as their model.⁴² In doing so, they embraced its principle of separating governmental power into three distinct and independent, but interrelated, branches: the legislature, the executive, and the judiciary. In keeping with this principle, this section describes each branch of the federal government, that is, the Federal Assembly, the Federal Council, and the Federal Tribunal, and outlines their relationship to the constitutional initiative and the legislative referendum.

³⁷Gillett, above n 1, 32. The Constitution of 1874 allows the federal government to impose the following taxes: privilege tax on exemption from military service (art 18(4)), import duties (art 29(1)), export rates (art 29(2)), manufacture and sale of liquor (art 32bis), old age retirement pension levy (art 34), gambling tax (art 35), post and telegraph revenue (art 36), stamp duties on securities and insurance premium receipts, income tax on moveable capital, lottery prizes and insurance payments, raw and manufactured tobacco, special taxes on residents abroad (art 41bis), a special consumption tax on petroleum and natural gas, their products, and beer (art 41ter), and a national defence tax (transitional provision art 8(3)).

³⁸Address by Ambassador Michael von Schenck, Switzerland's Ambassador to New Zealand, entitled *700 Years of Swiss Democracy*, Institute of International Affairs (Shell House, Wellington, 7 November 1991).

³⁹Gillett, above n 1, 29.

⁴⁰Gillett, above n 1, 29, 31, 33-34; see also C Hughes "The Relationship of the Citizens to 'His' Member of Parliament in the Swiss system of Government" in V Bogdanor (ed) *Representatives of the People?* (Gower, Hartshire, 1985) 224.

⁴¹Gillett, above n 1, 29. This intimacy also explains why the turnout in Swiss referendums is low by New Zealand standards. Voting at each referendum is not vital if the outcome is generally in accordance with one's expectations. In addition, an objectionable result can always be challenged in a subsequent referendum.

⁴²J Steinberg "Imitation of Switzerland: Historical Reflections" 23 *Gov't & Opp* 13, 15; Aubert "Switzerland" in Butler and Ranney, above n 1, 39.

A *Federal Assembly (Legislature)*

The Swiss federal legislature is called the Federal Assembly, which consists of two chambers, the National Council and the Council of States. Aside from enacting legislation, its most important function is to elect the members of the Federal Council, the executive. Subject to the direct democracy rights conferred upon the electors and the cantons, the Federal Assembly exercises "the supreme power" of the federal government.⁴³ Its legislative authority, however, is more limited than this constitutional phrase suggests, as the Constitution reserves a great deal of power to the cantons, severely limits the federal power to tax,⁴⁴ and gives the electors the power to veto federal enactments or to enact constitutional amendments that can modify or restrict the power of the Federal Council.⁴⁵ Furthermore, its members are part-time, have little secretarial support, and a limited amount of time to legislate, as the Federal Assembly is only in session for periods amounting to three months of the year.⁴⁶

1 *National Council*

The National Council has 200 representatives, who are distributed among the cantons in proportion to each canton's total population.⁴⁷ In 1903, the Swiss overwhelmingly rejected a constitutional initiative that proposed to distribute representatives on the basis of the total number of Swiss citizens in each canton.⁴⁸ Each canton or half-canton constitutes an electoral district.⁴⁹ Each canton is guaranteed at least one National Councillor.⁵⁰

National Councillors are elected to serve a four year term.⁵¹ The Swiss extended their term from three years in 1931, when they approved a constitutionally required referendum that proposed the extension.⁵² Initially, the Swiss had multi-member districts, in which candidates were elected to the National Council by a simple majority, which typically required a second ballot.⁵³ Since 1919 they have used an

⁴³Fed Const Swiss, art 71.

⁴⁴Gillett, above n 1, 21-22; see also above note 37.

⁴⁵Fed Const Swiss, arts 89, 89bis, 120, and 121.

⁴⁶Gillett, above n 1, 20.

⁴⁷Fed Const Swiss, art 72.

⁴⁸Gillett, above n 1, 20. The proposal attracted the support of four cantons and 24.4 percent of the electors on a turnout of 53.3 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 53.

⁴⁹Fed Const Swiss, art 73.

⁵⁰Fed Const Swiss, art 72.

⁵¹Codding, above n 1, 74.

⁵²The proposal attracted the support of 13.5 cantons and 53.9 percent of the electors on a turnout of 53.4 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 55.

⁵³See Codding, above n 1, 75.

open party list system of proportional representation.⁵⁴ As with many other national political institutions, this system was adopted after successful usage on the cantonal level. The campaign for proportional representation took more than 20 years to succeed and required three constitutional initiatives.⁵⁵

2 *Council of States*

The Council of States has 46 representatives, two from each canton and one from each half-canton.⁵⁶ Cantonal law governs the election of State Councillors. Originally, they were all elected indirectly by their respective cantonal assemblies or parliaments. Now most are elected directly by the electors. Most serve four year terms, although a few serve shorter terms.⁵⁷

The membership of the Council of States is very stable, well-educated, and well-versed in cantonal matters.⁵⁸ As a general rule, only those who have proved their worth in cantonal affairs, usually through experience in the cantonal executives and legislatures, are elected. Most State Councillors hold elective office at the cantonal or communal level as well, which is also the case with the National Councillors.⁵⁹ Most are re-elected for as long as they wish to serve.⁶⁰ Consequently, cantonal concerns are well-known and well-represented in the Federal Assembly.

3 *Legislative process*

Bills generally originate from the Federal Council, the executive, as they are usually based on a government department's recognition that some change is needed.⁶¹ The president of the National Council and the president of the Council of States decide which Council will consider the bill first. The selected Council sets up an ad hoc Commission consisting of members, experts, and interest group representatives to discuss the general principles underlying the bill. The Commission then sends the

⁵⁴Fed Const Swiss, art 72; Gillett, above n 1, 19. For a brief description of the system, see Coddington, above n 1, 76.

⁵⁵Coddington, above n 1, 76. The first constitutional initiative for proportional representation was held in 1900. The proposal attracted the support of 10.5 cantons and 40.8 percent of the electors on a turnout of 59 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 52. The second constitutional initiative was held in 1910. It attracted the support of 12 cantons and 47.5 percent of the electors on a turnout of 62.3 percent. The third was held in 1918. It attracted the support of 19.5 cantons and 68.8 percent of the electors on a turnout of 49.6 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 52. 53.

⁵⁶Fed Const Swiss, art 80; Sigg, above n 1, 35.

⁵⁷Coddington, above n 1, 72.

⁵⁸Coddington, above n 1, 73; Gillett, above n 1, 21.

⁵⁹Gillett, above n 1, 21.

⁶⁰Coddington, above n 1, 73.

⁶¹Gillett, above n 1, 21.

bill, along with an explanation, to the selected Council. Each political party has 15 minutes to make comments. The selected Council usually sends the bill back to the Commission for a less formal discussion of its detail and to propose amendments. The Commission then returns the bill to the selected Council, which almost always approves it before sending it to the other Council. The other Council repeats this entire process. If the two Councils have approved different versions of the bill, their Commissions work out a solution and a final vote is taken on the bill in each Council.⁶²

The possibility of an unpopular bill passing unchallenged is remote.⁶³ First, groups of politicians, with the support of interest groups, may use the Commissions to alter the bill or may organise a legislative referendum on the legislation if it is enacted unchanged.⁶⁴ Second, individuals or groups outside of the legislative process may be able to trigger a legislative referendum to see whether a majority of the electors support the new law. Between 1848 and 1978, for example, the Swiss used the legislative referendum to reject 49 laws and decrees.⁶⁵ The rejected laws and decrees dealt with taxation, government expenditure, social policy, welfare, education, tariffs, town and country planning, defence, and the remuneration of elected representatives, among others subjects.⁶⁶ Many laws and decrees were reintroduced and passed in a more acceptable form at a later date.⁶⁷ To use Rousseau's vernacular, the federal government's legislative process is designed to reflect the 'general will', but in a manner that does not readily countenance simple majority rule, particularly as expressed through elected representatives or their parties.

B Federal Council (Executive)

The Swiss federal executive is named the Federal Council. It is the "supreme executive and governing authority" of the federal government.⁶⁸ It is responsible for the conduct of foreign affairs, the preservation of both internal and external security, and the execution of decisions of the Federal Assembly and the decisions of the federal courts.⁶⁹ The Federal Council also directs the federal government's legislative

⁶²Gillett, above n 1, 20.

⁶³Gillett, above n 1, 21.

⁶⁴See Gillett, above n 1, 20.

⁶⁵Aubert "Switzerland" in Butler and Ranney, above n 1, 44 (table). For a discussion of the differences between a law and a decree, see below text accompanying notes 176-180.

⁶⁶See Aubert "Switzerland" in Butler and Ranney, above n 1, 50-64.

⁶⁷For example, the Swiss electors used the legislative referendum to reject legislation establishing a federal criminal code in 1884 and in 1922; however, they endorsed its establishment via the legislative referendum in 1938. The electors also used it to reject legislation taxing tobacco in 1931, but they endorsed similar legislation in 1952. Above.

⁶⁸Fed Const Swiss, art 95.

⁶⁹Codding, above n 1, 1.

process.⁷⁰ Assisted by an expert staff, it drafts bills and presents them to the Federal Assembly, along with reports that describes their purpose and the reasons why they should or should not be enacted. As a rule, neither Council of the Federal Assembly initiates legislation. If they want to legislate on a particular topic, they formally ask the Federal Council to initiate the legislation.⁷¹ The Federal Assembly rarely enacts legislation which has received an unfavourable report from the Federal Council.⁷²

1 Composition

The Federal Council consists of seven members who are elected by the Federal Assembly for four year terms from among those serving as State or National Councillors.⁷³ In 1900 and 1942, attempts were made to amend the Constitution of 1874 to allow the direct election of Federal Councillors and to increase their number.⁷⁴ Both constitutional initiatives failed by wide margins.⁷⁵ Federal Councillors are generally re-elected for as long as they wish to serve. Most serve two or three terms, but many have served for 25 to 30 years,⁷⁶ which is one of the reasons why the federal government is regarded as the most stable in the world.⁷⁷ As they are elected for a fixed term, Federal Councillors cannot be forced to resign if the Federal Assembly rejects their policies, that is, the Federal Council is not subject to a no confidence vote.⁷⁸

Since 1959, the members of the Federal Council have been drawn from the four main political parties which have constituted the ruling coalition in the Federal Assembly, two each from the Radical Democrats, the Christian Democrats, and the Social Democrats, and one from the Swiss People's Party. As a matter of constitutional convention, Berne and Zurich, the two most populous German-speaking cantons, and Vaud, the most populous French-speaking canton, are always represented. To assure that minority language groups are represented, at least two Federal Councillors must be from one of Switzerland's linguistic minority regions (French, Italian,

⁷⁰Fed Const Swiss, art 102(4).

⁷¹Codding, above n 1, 92.

⁷²See above.

⁷³Codding, above n 1, 88, 90; Gillett, above n 1, 23. Unlike members of the Federal Assembly, members of the Federal Council work full-time. Codding, above n 1, 87-98; Sigg, above n 1, 41.

⁷⁴Codding, above n 1, 99; Aubert "Switzerland" in Butler and Ranney, above n 1, 56.

⁷⁵In 1900, the proposal attracted the support of eight cantons and 35 percent of the electors on a turnout of 59 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 52. In 1942, the proposal attracted the support of zero cantons and 32.4 percent of the electors on a turnout of 61.9 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 56.

⁷⁶Codding, above n 1, 89.

⁷⁷Sigg, above n 1, 39.

⁷⁸Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 340; Codding, above n 1, 88.

Romansch).⁷⁹ None can be from the same canton.⁸⁰ This practice has reinforced the federal government's long tradition of government by consensus.⁸¹

2 *Operation*

The Federal Council acts as a collegiate body; its decisions always come from the body as a whole.⁸² Each Federal Councillor heads one of the seven ministries and serves as the deputy head of another.⁸³ They allocate the ministries among themselves at the beginning of each term on the basis of seniority; the most senior has first choice.⁸⁴ As a general rule, each Federal Councillor retains the ministry that he or she happened to be allocated when originally elected to the Federal Council, which promotes continuity and expertise.⁸⁵

Once a year the Federal Assembly elects a member of the Federal Council to serve as President and another to serve as Vice-President of the Federal Council. As a matter of convention, the Vice-President is elected President the following year.⁸⁶ The Constitution prohibits a Federal Councillor from serving as President for two years in succession.⁸⁷ The powers of the President are nominal; the most important functions are to chair the meetings of the Federal Council and to act as the Head of State at home and abroad.⁸⁸

Federal Councillors are responsible for guiding bills through the legislative process.⁸⁹ The Commissions of both Councils of the Federal Assembly examine bills in the presence of the Federal Councillors who are in charge of them. Federal Councillors give advice and make comments as a Commission proceeds with its work.⁹⁰ When bills reach the Councils, Federal Councillors introduce them, explain them, and defend them if necessary.⁹¹ In essence, they control the most important aspects of the legislative process, policy and procedure.⁹²

⁷⁹ Gillett, above n 1, 23; Sigg, above n 1, 39; see also Coddington, above n 1, 88-91, 117.

⁸⁰ Sigg, above n 1, 39; Coddington, above n 1, 88.

⁸¹ Gillett, above n 1, 21; Coddington, above n 1, 113-124.

⁸² Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 339; Coddington, above n 1, 91.

⁸³ Coddington, above n 1, 96.

⁸⁴ Coddington, above n 1, 90.

⁸⁵ See above.

⁸⁶ Coddington, above n 1, 91.

⁸⁷ Fed Const Swiss, art 98.

⁸⁸ Coddington, above n 1, 91.

⁸⁹ Above.

⁹⁰ Coddington, above n 1, 92-93.

⁹¹ Coddington, above n 1, 93.

⁹² Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 339; Aubert, above n 1, 303; Coddington, above n 1, 93.

The Federal Council's power has grown over the years to the point where it has become the dominant authority in the federal government,⁹³ even though it does not have the power to veto decisions of the Federal Assembly.⁹⁴ The Federal Assembly, given its part-time nature, is dependent on the Federal Council's leadership.⁹⁵ Due to the increasingly complex nature of federal governmental activity, the Federal Assembly has also given the Federal Council a great deal of administrative discretion. The Federal Assembly will typically state the intent of a law in general terms and grant the Federal Council the power to formulate and issue the necessary rules and regulations. These rules and regulations have the force of law and can be upheld in the courts. In emergencies, the Federal Assembly generally grants the Federal Council extensive regulatory power.⁹⁶ During the two World Wars, for example, the grant of regulatory power was so great that the Federal Council virtually displaced the Federal Assembly.⁹⁷

More importantly, rules and regulations issued by the Federal Council are not subject to the legislative referendum.⁹⁸ However, the grant of regulatory power, if not passed as an urgency decree, is subject to the legislative referendum. During World War II, the Federal Assembly passed the grant in the form of an urgency decree, which had the effect of exempting the grant from the legislative referendum.⁹⁹ The only way the electors would have been able to use direct democracy to reach the matters covered by this grant would have been to use the constitutional initiative, which is a comparatively cumbersome, time-consuming, and generally unsuccessful method by which to reverse federal law-making decisions.

When the Federal Council showed signs of continuing to govern under the exempt urgency decree grant in the period immediately following World War II, the electors and the cantons, contrary to the advice of the Federal Assembly, responded by endorsing a constitutional initiative in 1949 dubbed the "Initiative for the Return to Direct Democracy."¹⁰⁰ Essentially, the constitutional initiative amended the Constitution of 1874 to limit the period of validity of urgency decrees. If an urgency decree has a constitutional basis, it can be subjected to a legislative referendum a

⁹³Sigg, above n 1, 41.

⁹⁴Hughes, above n 1, 100.

⁹⁵Sigg, above n 1, 41.

⁹⁶Codding, above n 1, 95.

⁹⁷See above; see also Hughes, above, n 1, 100-101.

⁹⁸Codding, above n 1, 95.

⁹⁹See above.

¹⁰⁰Hughes, above n 1, 103. The initiative was held in 1949. It attracted the support of 12.5 cantons and 50.7 percent of the electors on a turnout of 42.5 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 57. The federal government won a counterproposal on the issue in 1939. The 1939 proposal attracted the support of 21 cantons and 69.1 percent of the electors on a turnout of 46.6 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 56.

year after its passage; if the vote is negative, the decree cannot be renewed. If an urgency decree does not have a constitutional basis, it has to be approved by a majority of the electors and the cantons within a year of its passage or it will lapse and cannot be renewed. In either case, the validity period of the urgency decree must be finite.¹⁰¹ According to Hughes, the impulse to pass this initiative was "a refreshing sign of the vitality of the spirit of liberty in Switzerland."¹⁰²

C *Federal Tribunal (Judiciary)*

The Federal Tribunal is Switzerland's supreme court. It is located in Lausanne to demonstrate its independence from the Federal Assembly and the Federal Council, which are located in Berne. It also demonstrates federal solidarity with regions of linguistic minorities, as Lausanne is French-speaking and Berne is German-speaking.¹⁰³ All Swiss languages, regions, political parties, and the Protestant and Catholic religions are proportionately reflected in the composition of the Federal Tribunal.¹⁰⁴

1 *Composition and structure*

The Federal Tribunal consists of 30 full-time federal judges and 30 alternates.¹⁰⁵ They are elected by the Federal Assembly for six year terms.¹⁰⁶ Although federal judges are not nominated for life tenure, none has ever been denied re-election for political reasons.¹⁰⁷ Although any Swiss elector is eligible to be a federal judge,¹⁰⁸ federal judges are generally elected from cantonal judges, law professors, or federal parliamentarians.¹⁰⁹

The civil, criminal, or administrative courts of first and second instances are cantonal, while the Federal Tribunal is the court of the last instance.¹¹⁰ The cantonal courts apply both federal and cantonal substantive law.¹¹¹ Almost all civil law is federal, as is most of the criminal law. Most of the administrative law is federal, while most of

¹⁰¹Fed Const Swiss, art 89bis.

¹⁰²Hughes, above n 1, 103.

¹⁰³Sigg, above n 1, 42.

¹⁰⁴L Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 316; Codding, above n 1, 103.

¹⁰⁵Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 316.

¹⁰⁶Fed Const Swiss, art 107.

¹⁰⁷Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 316.

¹⁰⁸Fed Const Swiss, arts 75 and 108.

¹⁰⁹Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 316.

¹¹⁰Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 312; Sigg, above n 1, 42; Codding, above n 1, 110.

¹¹¹Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 312.

the tax law is cantonal. Commercial law is federal and so is labour law as a rule.¹¹² The procedural law, both criminal and civil, is exclusively cantonal, apart from the rules resulting from international treaties, which reflects the autonomy of the cantons.¹¹³

Lower courts are not bound by the decisions of higher courts, nor are courts bound by their own precedents. However, precedents are of immense importance in the daily routine of attorneys and the administration of the courts. The Federal Tribunal regularly invokes its own precedents and if, exceptionally, it departs from them, it explains such decisions thoroughly and at some length. The courts follow a rule of interpretation in which they interpret statutes and ordinances so as to conform to, and not thwart, either the Constitution of 1874 or international law.¹¹⁴ The Constitution, however, prevents the Federal Tribunal from declaring international treaties or federal statutes unconstitutional.¹¹⁵

2 *Function and jurisdiction*

The Federal Tribunal's central function is to ensure the uniform application of the law,¹¹⁶ particularly federal civil, commercial, and criminal law.¹¹⁷ The framers of the Constitution of 1874 justified this approach on the grounds that the benefits of a single standard of justice in these areas outweighed the infringement of cantonal authority.¹¹⁸ They also gave the Federal Tribunal the jurisdiction to adjudicate disputes between the federal government and the cantons, between the federal government and corporations or private persons (in a matter of federal law if the federal government is the defendant), between cantons, between cantons and corporations or private persons (in a matter of federal law if both parties request it), and disputes concerning Swiss citizenship.¹¹⁹

The Federal Tribunal must also consider other cases if both parties agree and it involves a question of law.¹²⁰ It also has original jurisdiction over several criminal

¹¹²Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 313.

¹¹³Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 312-313; Coddington, above n 1, 110.

¹¹⁴Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 320.

¹¹⁵See Fed Const Swiss, art 113(3).

¹¹⁶Sigg, above n 1, 42; *Switzerland: People State Economy Culture* (Kummerly & Frey, Berne, 1989) 41; see also Fed Const Swiss, art 106.

¹¹⁷Coddington, above n 1, 110.

¹¹⁸See Coddington, above n 1, 111.

¹¹⁹Fed Const Swiss, art 110; see also A Haefliger "The Hierarchy of Constitutional Norms and Its Function in Protecting Human Rights" (1992) 13 Human Rights L J 81; F O'Brien "Swiss Law and Subversive Groups" (1967) 18 Northern Ireland Legal Q 302; F O'Brien "Baker v Carr Abroad: The Swiss Federal Tribunal and Cantonal Elections" (1962) 72 Yale L J 46.

¹²⁰Fed Const Swiss, art 111.

matters.¹²¹ In addition, the Federal Tribunal adjudicates conflicts of competence between federal and cantonal authorities, disputes between cantons regarding matters of public law, complaints concerning the violation of the constitutional rights of citizens, and individual complaints concerning the violation of concordats and international treaties.¹²²

The bulk of the Federal Tribunal's work concerns "constitutional complaints."¹²³ Any person whose federal constitutional rights have been violated by any cantonal act or measure may bring a constitutional complaint before the Federal Tribunal.¹²⁴ A constitutional complaint may also be brought against cantonal laws which violate cantonal constitutions.¹²⁵ However, the constitutional complaint can not be brought against federal acts.¹²⁶

3 *No power to declare federal acts unconstitutional*

The framers of the Swiss constitution chose not to give the Federal Tribunal the power to declare federal acts unconstitutional after studying the implications of the United States Supreme Court's 1803 *Marbury v Madison* decision. They decided that judges should not be in a position to substitute their interpretation of the Constitution of 1874 for that of the Federal Assembly. Most of all, they did not want to grant judges the power to invalidate a law which the people had previously approved by way of a constitutional initiative or a legislative referendum. Faced with a choice between the principle of democracy and that of the supremacy of the Constitution of 1874 over federal laws, they chose the principle of democracy.¹²⁷

¹²¹Fed Const Swiss, art 112.

¹²²Fed Const Swiss, art 113; Codding, above n 1, 111.

¹²³Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 317.

¹²⁴Above; Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 307; Codding, above n 1, 101, 112.

¹²⁵Gillett, above n 1, 46.

¹²⁶Above; Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 318; Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 307; Codding, above n 1, 101. If other acts of the federal government, such as regulations, were to violate constitutional rights or any other federal law, it is possible to raise an "administrative complaint" before the Federal Tribunal. Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 311. As a rule, however, acts of the Federal Council, including the regulations it promulgates pursuant to federal statutes, cannot be invalidated by the Federal Tribunal. Wildhaber "The Swiss Judicial System" in *Modern Switzerland*, above n 1, 318. Its acts and regulations are subject to the political supervision of the Federal Assembly. In the rare cases where regulations are challenged, they are only challenged with respect to the case before the court. Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 307.

¹²⁷Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 307; see *Marbury v Madison* 1 Cranch 137, 2 L Ed 60 (1803); see also *Fletcher v Peck* 6 Cranch 87 (1810).

For this reason the Federal Tribunal does not have a status equivalent to the United States Supreme Court.¹²⁸ Although giving the Federal Tribunal the power to declare federal acts unconstitutional is a recurring theme in Swiss constitutional debate, the proposal has never enjoyed popular support. A constitutional initiative brought the proposal before the electors in 1939, but they rejected it decisively.¹²⁹ The proposal's opponents believe that such an extension of authority would be undemocratic and unnecessary. They prefer legislative supremacy in which no major law, given the legislative referendum, can come into existence without the tacit or express approval of the electors.¹³⁰

III KEY DIRECT DEMOCRACY DEVICES

The constitutional initiative and the legislative referendum play a crucial role in maintaining and adjusting the balance of power between the cantons and the federal government, primarily by providing the electors with the means to influence the structure of the federal government and its exercise of governmental power through elected representatives. The constitutional initiative has, for example, allowed the electors to bring in a four year term for members of the Federal Assembly, proportional representation for the National Council, and limits on the ability of the Federal Council to circumvent the legislative referendum. The electors have regularly used the legislative referendum to veto unacceptable laws enacted by their representatives.

By providing the electors with legislative power, these direct democracy devices have, in effect, limited the legislative power of elected representatives. Elected representatives in Switzerland are unable to monopolise the legislative process or to ignore the electors to the extent allowed by Burke's theory of representation.¹³¹ These devices have given the electors the means to redress the acts or omissions of their representatives that do not meet their expectations, particularly when they are inconsistent with their ancient desire for local autonomy. In theory and in practice, the constitutional initiative and the legislative referendum have made the electors both the legal and political sovereign. This sovereignty, however, is not without its limitations. Although controlled by the electors, these direct democracy devices are subject to procedural safeguards which neutralise their majoritarian potential.

¹²⁸Codding, above n 1, 112.

¹²⁹The proposal attracted the support of zero cantons and 28.9 percent of the electors on a turnout of 46.6 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 56.

¹³⁰Codding, above n 1, 112.

¹³¹For a discussion of Burke's theory of representation, see section III.B.2(d) in chapter two.

A *Constitutional Initiative*

Article 121 of the Constitution of 1874 establishes the constitutional initiative. It gives the electors the power to amend the Constitution. The constitutional initiative can take one of two forms: partial or total revision of the Constitution. Regarding a total revision, if one Council of the Federal Assembly passes a resolution that there be a total revision of the Constitution and the other Council does not assent to it, or if 100,000 electors demand a total revision, then the question of whether there should be a total revision must be submitted to the Swiss electorate for determination.¹³² In either case, if the majority of the electors taking part in the vote favour total revision, then both Councils must be elected anew to take up the work of total revision.¹³³ When the text is ready, it is submitted to the electors and requires a double majority of the electors and the cantons to be accepted.¹³⁴ Only two total revisions have been attempted since 1874. Both failed.¹³⁵

Attempts at partial revisions are far more common. However, their success rate is very low. From 1880 to 1978, for example, the Swiss have used the constitutional initiative 73 times. Only seven of the proposals managed to obtain the double majority necessary to amend the Constitution of 1874.¹³⁶ Switzerland's diversity has contributed to this low approval rate. Any measure put before the electors must contend with the social, political, cultural, religious and regional differences that exist among Switzerland's four distinct ethnic groups (French, German, Italian, and Romansch). Proposals which are unable to satisfy Switzerland's complex mix of local interests and minority concerns are unlikely to win approval under this unique double majority requirement.

The procedure for using the constitutional initiative to trigger partial revisions involves several stages. To begin the process, a proposal to introduce, set aside, or modify an article of the Constitution of 1874 must be signed by at least seven electors organised as an initiative committee and registered with the Federal Chancellery, which is the Secretariat of the Federal Council, along with the names and addresses of

¹³²Hughes, above n 1, 133.

¹³³Fed Const Swiss, art 120. If the text is rejected, the Federal Assembly, presumably, works out a second one. Hughes, above n 1, 134.

¹³⁴Hughes, above n 1, 134.

¹³⁵A total revision was requested in 1880, when a partial revision was desired to article 39 regarding banknotes but only total revision was recognised. A total revision was also requested in 1935, when Swiss Nazis, right wing Catholics, and others proposed a totalitarian state. Hughes, above n 1, 132; Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 300. Both proposals were rejected. The 1880 proposal attracted the support of 4.5 cantons and 31.8 percent of the electors on a turnout of 60.3 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 51. The 1935 proposal attracted the support of zero cantons and 27.7 percent of the electors on a turnout of 60.9 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 56.

¹³⁶See Aubert "Switzerland" in Butler and Ranney, above n 1, 50-64.

those who are part of the initiative committee.¹³⁷ The proposal may be in the form of a general directive, which would leave the details up to the federal government if approved, or a complete draft article, which can be as detailed and long as any bill. Due to the absence of a federal legislative initiative, constitutional initiatives tend to be specific rather than general.¹³⁸

Once the proposal is registered, the Federal Chancellery publishes the title and the text of the constitutional initiative.¹³⁹ Its proponents have 18 months from the date of publication to collect the signatures of 100,000 electors.¹⁴⁰ Each part of the petition on which signatures are placed must contain the following information: the name of the commune in which the part is permitted to circulate, the purpose of the initiative, its title, and its date of publication, the conditions upon which its promoters may withdraw the initiative, the article of the Constitution of 1874 that it targets, and the names and addresses of those who are part of the initiative committee promoting the initiative.¹⁴¹ Once the signatures have been collected, the whole petition is submitted to the Federal Chancellery, which checks to see if it conforms with these requirements.¹⁴²

The signatures, however, are checked and authenticated by the communes where the signatories are resident,¹⁴³ which is why each part of the petition is permitted to circulate in only one commune. Signatures which are illegible, unidentifiable, duplicates, false, not in handwriting, do not state the elector's full name, date of birth, or address, or belong to someone who is not eligible to vote are invalid.¹⁴⁴ Electors are considered eligible to vote if they were registered to vote on the day they signed the petition.¹⁴⁵ The Federal Chancellery calculates the total number of valid and invalid signatures and publishes the result. If the petition contains more than 100,000 valid signatures, the federal government must place the proposal on the ballot, unless a majority of the initiative committee decides to withdraw the initiative, a right which is extinguished once the Federal Assembly sets a date for the electors to vote on the proposal.¹⁴⁶

¹³⁷Bundesgesetz über die politischen Rechte, s 68.

¹³⁸Aubert "Switzerland" in Butler and Ranney, above n 1, 42-43.

¹³⁹Verordnung über die politischen Rechte, s 25.

¹⁴⁰Fed Const Swiss, art 120.

¹⁴¹Bundesgesetz über die politischen Rechte, s 68.

¹⁴²Bundesgesetz über die politischen Rechte, s 69.

¹⁴³Sigg, above n 1, 30.

¹⁴⁴Verordnung über die politischen Rechte, s 19; Bundesgesetz über die politischen Rechte, ss 61 and 62.

¹⁴⁵Verordnung über die politischen Rechte, s 19

¹⁴⁶Bundesgesetz über die politischen Rechte, s 73.

The Federal Council states its opinion of the initiative, usually negative, and explains its attitude towards it in a comprehensive message to the Federal Assembly.¹⁴⁷ The Federal Assembly then decides whether to endorse or reject the initiative, or to put forward a counter-proposal.¹⁴⁸ If the initiative consists of a general proposal, and the Federal Assembly approves it, then the Federal Assembly prepares a draft article along the lines of the proposal and submits it to the electors for approval. If the Federal Assembly does not approve it, then the general proposal is submitted to the electors for approval. If it is approved, then the Federal Assembly must undertake the requisite revision in conformity with the decision of the electors. If the request is in the form of a complete draft article, or has been rendered in the form a complete draft article by the Federal Assembly, the draft article is submitted to the electors for approval or rejection. If the Federal Assembly does not approve of the complete draft article, it may prepare a counter-proposal or recommend the rejection of the proposed draft article. Its counter-proposal or recommendation of rejection is submitted to the electors with the proposed draft article.¹⁴⁹

The Federal Council, as often happens, will submit a counter-proposal, or present opposing arguments to the electorate through the voter information pamphlets it prepares if it considers a constitutional initiative to be badly timed or unnecessary. According to Gillett, the Federal Council is not above wording the arguments for and against proposals in the pamphlets in a manner designed to encourage the electorate to reject the initiatives it opposes. In any case, drafting a question to put to the electors is difficult, as Gillett has noted, "since it is well known to those who conduct opinion polls that it is easy to change the outcome by rewording a question."¹⁵⁰ In addition, drafters face the complication of expressing their proposal in four languages (German, French, Italian, and Romansch) without changing what is implied by the proposal.¹⁵¹ Undeterred by these considerations, the electorate supplements its understanding of proposals with a careful study of the recommendations made by the Swiss media,¹⁵² which is more diversified and localised than in most other countries. If the federal government puts forward a counter-proposal, the electors cannot accept both proposals. They must accept one or the other or reject both.¹⁵³

If the proposal is accepted by a double majority, that is, a majority of all the electors and a majority of those voting in a majority of the cantons, then the appropriate

¹⁴⁷Sigg, above n 1, 30.

¹⁴⁸See above.

¹⁴⁹Fed Const Swiss, art 121.

¹⁵⁰Gillett, above n 1, 42.

¹⁵¹Above.

¹⁵²Gillett, above n 1, 44.

¹⁵³Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 301; see also Coddington, above n 1, 62-63.

change to the constitution comes into force even if it is against the wishes of their elected representatives.¹⁵⁴ This double majority rule prevents a majority of small cantons from being overruled by a simple majority in the large cantons.¹⁵⁵ This check on the majoritarian character of direct democracy serves to sustain the importance of the cantons by providing some measure of protection against proposals originating elsewhere that may be contrary to their interests, particularly their autonomy and independence.

Constitutional initiatives, while frequently unsuccessful, often pave the way for similar political solutions at a later date. Some trigger an immediate response from the federal government in the form of a counter-proposal, which, in ideal circumstances, forms a common denominator of the views of the Federal Assembly, the Federal Council, and those petitioning for the change. Between 1891 and 1988, for example, only eight constitutional initiatives have been approved; however, in the same period 14 counter-proposals have also been approved.¹⁵⁶ According to Aubert, the most successful constitutional initiatives are those which do not take place; that is, they are withdrawn as a result of favourable governmental action.¹⁵⁷

The constitutional initiative is very popular.¹⁵⁸ However, federal authorities and some political parties, especially the bourgeois parties, are not particularly enthusiastic about it,¹⁵⁹ as well-organised interest groups can use it to prompt governmental action.¹⁶⁰ Essentially, the device forces elected representatives to deal with quite specific political questions which they may not otherwise regard as having top priority.¹⁶¹ In addition, as Gruner has observed, a constitutional initiative can be "a vehicle for concretizing proposals which are not yet broadly anchored within the general public."¹⁶² Consequently, the influence of a proposal can outlive its rejection at the polls, as it can make an important contribution to the crystallisation of public opinion.¹⁶³ Furthermore, initiatives rejected by small majorities, such as the anti-depression initiative of 1935 and the anti-foreign worker initiative of 1970, may force

¹⁵⁴See Sigg, above n 1, 30.

¹⁵⁵Gillett, above n 1, 41-42.

¹⁵⁶Sigg, above n 1, 32. The vast majority of changes to the Swiss constitution have been the product of constitutionally required referendums triggered by the federal government's desire to change the Constitution of 1874. Aubert "The Swiss Federal Constitution" in *Modern Switzerland*, above n 1, 300; see also Aubert "Switzerland" in Butler and Ranney, above n 1, 50-64; Coddington, above n 1, 65-66.

¹⁵⁷See Aubert "Switzerland" in Butler and Ranney, above n 1, 48-49.

¹⁵⁸Sigg, above n 1, 32.

¹⁵⁹Above.

¹⁶⁰Aubert "Switzerland" in Butler and Ranney, above n 1, 48-49.

¹⁶¹Sigg, above n 1, 33.

¹⁶²Gruner "The Political System of Switzerland" in *Modern Switzerland* above n 1, 349.

¹⁶³See above.

the Federal Council to change its policy.¹⁶⁴ According to Gruner, the device acts like a barometer that warns of crisis,¹⁶⁵ since constitutional initiatives generally increase in times of difficulty as was the case at the end of WWI, during the Great Depression, and during the oil shocks of the 1970s.¹⁶⁶

The single subject rule is the only substantive limitation on the constitutional initiative.¹⁶⁷ Consequently, its scope is dramatic. For example, the Swiss used the constitutional initiative in 1922 and 1977 to extend the principles of direct democracy to treaties.¹⁶⁸ Any treaty that involves joining a collective security organisation, like the UN, or a supranational community, like the EEC, is subject to a constitutionally required referendum.¹⁶⁹ To win approval, the referendum must meet the double majority requirement.¹⁷⁰ Treaties which are of an unspecified duration, provide for adherence to an international organisation, or entail a multilateral unification of the law are subject to the legislative referendum.

Despite its virtually unlimited potential to bring radical change, the Swiss electorate has used the constitutional initiative in a manner that reflects, rather than rejects, its basic conservatism in governmental affairs. As Coddington has written:¹⁷¹

Very few "radical" or frivolous initiatives have been submitted to the referendum. Those that have, such as those offered by certain right wing political groups just before WWII, were rejected by substantial majorities.

As a general rule, basic changes to the Constitution of 1874 are rarely approved by the Swiss electors on the first attempt even when initiated by the federal government.¹⁷²

¹⁶⁴Above. The 1935 proposal attracted the support of four cantons and 42.8 percent of the electors on a turnout of 84.4 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 55. The 1970 proposal attracted the support of seven cantons and 46 percent of the electors on a turnout of 74.1 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 61.

¹⁶⁵Gruner "The Political System of Switzerland" in *Modern Switzerland* above n 1, 349.

¹⁶⁶Gruner "The Political System of Switzerland" in *Modern Switzerland* above n 1, 349-350; see also Aubert "Switzerland" in Butler and Ranney, above n 1, 50-64.

¹⁶⁷Fed Const Swiss, art 121(3).

¹⁶⁸Aubert "Switzerland" in Butler and Ranney, above n 1, 41, 55, 63. In 1977, the federal government's counterproposal won. Aubert "Switzerland" in Butler and Ranney, above n 1, 63.

¹⁶⁹Aubert "Switzerland" in Butler and Ranney, above n 1, 41.

¹⁷⁰Fed Const Swiss, art 123.

¹⁷¹Coddington, above n 1, 66.

¹⁷²For example, the Swiss electors and their cantons approved a constitutionally required referendum that amended the Constitution of 1874 to extend the franchise to women on the federal level in 1971. The proposal attracted the support of 15.5 cantons and 65.7 percent of the electors on a turnout of 1.7 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 61. However, the federal government, given the peculiarities of Switzerland's political heritage (where the right to vote was traditionally equated with military service), made its first attempt to extend the franchise in 1959, which failed by a wide margin. The proposal attracted the support of three cantons and 33.1 percent of the electors on a turnout of 66.7 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 59.

B *Legislative Referendum*

Article 89 of the Constitution of 1874 establishes the legislative referendum. It gives the electors the power to veto legislation enacted by the Federal Assembly. All newly enacted federal laws and decrees are subject to the legislative referendum. The Swiss, for example, can use the legislative referendum to veto laws and decrees that impose federal taxes,¹⁷³ a right which is consistent with the long struggle to preserve cantonal sovereignty.¹⁷⁴ The legislative referendum is also applicable to international treaties which are of unspecified duration and cannot be denounced, provide for adherence to an international organisation, or entail a multilateral unification of the law.¹⁷⁵

According to Hughes, "[t]here used to be a distinction between laws and [decrees], but since 1874 it has disappeared."¹⁷⁶ Nevertheless, decrees have a procedural advantage over laws, as all laws are subject to the legislative referendum, but decrees that the Federal Assembly declares to be urgent are not.¹⁷⁷ However, as mentioned previously, the validity period of an urgency decree is limited. Furthermore, an urgency decree with a constitutional basis is subject to the legislative referendum a year after its enactment. If it does not have a constitutional basis, it must be approved by a double majority within a year of its enactment or it will lapse.¹⁷⁸ The 1949 "Initiative for the Return to Direct Democracy" brought in these limitations on urgency decrees to counteract the Federal Assembly's growing practice of avoiding the legislative referendum by passing its enactments in the form of urgency decrees.¹⁷⁹ As discussed above, the legislative referendum cannot be used to veto regulations and rules promulgated by the Federal Council pursuant to laws or decrees that grant the

¹⁷³ Aubert "Switzerland" in Butler and Ranney, above n 1, 42.

¹⁷⁴ The framers of Switzerland's federal constitution had to decide many issues related to the extent of local sovereignty. In the end, they decided that the cantons are sovereign insofar as their sovereignty is not limited by the Constitution of 1874, which means they may exercise all rights which are not entrusted to the federal government. See Fed Const Swiss, art 3. Regarding taxation, the definitive governmental power, the cantons and their communes retained the greater revenue power. The communes account for 50 percent of the tax take in Switzerland, the cantons account for 40 percent, and the federal government accounts for the remaining 10 percent. Address, above n 38. For a list of permissible federal taxes, see above note 37. The limited nature of federal taxation may explain why the Swiss did not exempt taxation from the legislative referendum or the constitutional initiative. A more likely explanation, however, is the lack of subject matter exemptions on the cantonal level. In addition, since the movement toward democratisation in the 1860s, every canton has had budgetary referendums in addition to the usual array of direct democracy devices. Aubert "Switzerland" in Butler and Ranney, above n 1, 40.

¹⁷⁵ Adherence to collective security organisations or to supranational bodies require a majority of the electors and the cantons. Fed Const Swiss, art 89(5).

¹⁷⁶ Hughes, above n 1, 100.

¹⁷⁷ Above.

¹⁷⁸ Fed Const Swiss, art 89bis.

¹⁷⁹ Coddling, above n 1, 64.

Federal Council regulatory power, which is an increasingly common practice.¹⁸⁰ However, the law or decree granting the power, if not passed as an urgency decree, is subject to the legislative referendum.

The procedure for using the legislative referendum is somewhat different from the procedure for using the constitutional initiative. Once the Federal Assembly has published notice of a newly enacted law or a decree, those opposing it have 90 days before it comes into force to collect the signatures of 50,000 electors, which are required to trigger the legislative referendum.¹⁸¹ They approach the Federal Chancellery, which provides a petition free of charge in all official languages.¹⁸² Each part of the petition on which signatures must be placed must contain the following information: the name of the commune in which the part is permitted to circulate, a reference to the law or decree enacted by the Federal Assembly, and a statement of the effect of the legislative referendum if successful, that is, whether the entire law or decree will be vetoed or whether the offensive part will be deleted.¹⁸³ According to Hughes, "the signatures are now often collected by sending reply-cards through the post to the voters, who merely need to sign and drop the card into a letter box."¹⁸⁴

Once the signatures have been collected, the whole petition is submitted to the Federal Chancellery.¹⁸⁵ The signatures, however, are checked and authenticated by the communes where the signatories are resident,¹⁸⁶ which is why each part of the petition is permitted to circulate in only one commune. Signatures which are illegible, unidentifiable, duplicates, false, not in handwriting, do not state the elector's full name, date of birth, or address, or belong to someone who is not eligible to vote are invalid.¹⁸⁷ Electors are considered eligible to vote if they were registered to vote on the day they signed the petition.¹⁸⁸ The Federal Chancellery calculates the total number of valid and invalid signatures and publishes the result. If the petition contains more than 50,000 valid signatures, the federal government must submit the law or decree to the electors for their approval.¹⁸⁹

¹⁸⁰See above text accompanying notes 100-101.

¹⁸¹Fed Const Swiss, arts 89 and 89bis; see also *Switzerland*, above 116, 34; Sigg, above n 1, 33; Hughes, above n 1, 101.

¹⁸²Verordnung über die politischen Rechte, s 18.

¹⁸³Bundesgesetz über die politischen Rechte, s 60.

¹⁸⁴Hughes, above n 1, 101. Hughes also notes that people who sign petitions asking for a legislative referendum often vote in favour of the law or general decree being challenged. Above.

¹⁸⁵Verordnung über die politischen Rechte, s 20.

¹⁸⁶Sigg, above n 1, 30.

¹⁸⁷Verordnung über die politischen Rechte, s 19; Bundesgesetz über die politischen Rechte, ss 61 and 62.

¹⁸⁸Verordnung über die politischen Rechte, s 19.

¹⁸⁹Fed Const Swiss, arts 89 and 89bis.

A law or decree subjected to a legislative referendum only comes into force if it is approved by a majority of the electors voting on the referendum.¹⁹⁰ In effect, the veto occurs the moment the signature threshold is met, which would not be the case if the law or decree were permitted to remain in effect until the electors disapproved it. Accordingly, the federal government, or those who lobbied for the law or decree, have the burden of convincing the electors to vote in favour of the law or decree. In this sense, legislative referendum is a negative device. It acts as a brake on, or regulator of, the exercise of legislative power by elected representatives. Although the electors can use the device to delay reform or the conferral of new rights, they cannot use it to deprive persons or groups of their existing rights, which means that the majoritarian potential of the device is virtually non-existent. Gruner sums up its effect as follows:¹⁹¹

The main effect of the referendum consists in the prevention of undesirable laws. Because of the possibility that parliamentary decision-making may afterward be submitted to a popular vote, one tries to obtain the consensus of all interest groups concerned with a particular bill as early as possible. For it is precisely the interest groups - with their mass support and their good financial resources - who may endanger any legislation that is a potential instigator of a referendum.

Consequently, as Gillett has noted, the most important influence of the legislative referendum is invisible:¹⁹²

Some legislation such as taxation is always unpopular but always necessary, so the reconciliation of taxation with democracy is beset with difficulties. As a bill is drafted or discussed with the relevant 'interests' in a Commission there is at the back of the minds of those involved the possibility that a referendum may be demanded and that the 'Sovereign People' may reject it. The threat of a referendum is a moulding influence in all that takes place.

This threat has influenced the standard, the content, and the manner of the federal legislative process.¹⁹³ Proposed legislation is carefully drafted to avoid triggering a referendum. Elected representatives, and the officials who assist them, are accustomed to consulting a wide range of groups, organisations, and experts with the aim of achieving a political consensus before legislating. They also closely monitor local political activity to gauge the electors' reaction to federal legislative proposals; the outcome of cantonal debates often determines the direction of federal policy.¹⁹⁴

¹⁹⁰Sigg, above n 1, 33; Hughes, above n 1, 101. Eight cantons joining together may also invoke the legislative referendum, but this procedure is yet to be used. Fed Const Swiss, arts 89 and 89bis 89(2).

¹⁹¹Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 348-349.

¹⁹²Gillett, above n 1, 44; see also Sigg, above n 1, 33.

¹⁹³For an in depth issue-specific study on the effects of the initiative and referendum on party policy and elite decision-making see Steiner, above n 1.

¹⁹⁴For example, youth riots in Zurich between 1980 and 1982 caused millions of dollars of property damage to shops along the famous Bahnhofstrasse. "Rioting Zurich Youths Attack Elegant Shopping Area" *The New York Times*, New York, USA, 6 September 1980, 3; "Youths Smash Windows Along Main Zurich Avenue" *The New York Times*, New York, USA, 3 November 1980, 5; P Hofmann "The

The legislative referendum has made the Federal Assembly highly sensitive and responsive to the desires of the electors.¹⁹⁵

In addition, the legislative referendum serves as a means of expressing dissatisfaction in a constitutional system whose legislative process provides virtually no other opportunity to oppose or challenge legislative proposals or enactments. According to Gillett, "[i]t is sometimes used to avoid conflict within government circles, but more characteristically to settle major decisions."¹⁹⁶ The legislative referendum also plays a large role in separating personalities and issues. As ultimate responsibility for enactments lies with the electors, the standing of an elected representative or his or her party is not at stake whenever a bill is introduced. In essence, elected representatives or their parties do not sponsor bills; they merely speak to them. They are personally involved only to the extent that they pride themselves on being able to predict the outcome of a legislative referendum.¹⁹⁷

More importantly, the legislative referendum has enabled the electors to protect their local autonomy. As Hughes has observed, the direct effect of the legislative referendum is conservative, mainly because it is a device which gives the electors the opportunity to preserve the status quo.¹⁹⁸ Essentially, it sets local interests against the policy objectives of federal government.¹⁹⁹ In this context, the electors have regularly used the device to limit the legislative power of their elected representatives. Between 1874 and 1978, for example, the Swiss used it 85 times; they rejected approximately 59 percent of the laws and decrees subjected to the legislative referendum.²⁰⁰ The frequent use of the legislative referendum in Switzerland can be attributed to the ancient Swiss desire to preserve cantonal autonomy. Jealous of their local political rights and freedoms, the electors are likely to veto federal government legislation if it strengthens the federal government at the expense of the cantons. Consequently, as Gillett has noted, the device is popular among conservatives as well as those who see it as an advanced democratic practice.²⁰¹

Swiss Reputation for Clockwork Perfectionism is Being Disrupted by Young Rioters Discontented with the Country's Materialism" *The New York Times Magazine*, New York, USA, 8 February 1981, 35. On 6 June 1982 the federal government presented amendments to the Swiss penal code to the electors for ratification. The electors approved the amendments, which made public incitement to damage-causing demonstrations punishable by three years' imprisonment and allowed federal authorities to bring criminal charges against participants in demonstrations that cause property damage or physical injury even if the victims do not file complaints. "Swiss Voters Approve Antiriot Measures" *The New York Times*, New York, USA 7 June 1982, 5.

¹⁹⁵J Steinberg *Why Switzerland?* (University of Cambridge Press, Cambridge, 1976) 77-78.

¹⁹⁶Gillett, above n 1, 44.

¹⁹⁷Above.

¹⁹⁸Hughes, above n 1, 101.

¹⁹⁹See above.

²⁰⁰Aubert "Switzerland" in Butler and Ranney, above n 1, 43-44.

²⁰¹Gillett, above n 1, 43.

IV ASSESSMENT

Direct democracy is integral to the Swiss constitutional system. Both the constitutional initiative and the legislative referendum give the Swiss electors the power to counteract federal government policy, which, given the brand of coalition politics produced by proportional representation in Switzerland, is relatively unaffected by election results.²⁰² The same coalition has controlled the federal government since 1959. Election results, as a general rule, do not transfer governmental power from one party to another. Furthermore, as the parties which participate in the "magic coalition" are not and cannot be held responsible for federal government policy as a whole, they cannot be punished or rewarded at the polls for the federal government's failures or successes.²⁰³ Consequently, the Swiss electors, through the organisational resources of parties and interest groups, use the legislative referendum and the constitutional initiative to hold the federal government accountable. These devices are the only constitutional means by which the electors may oppose or challenge the decisions made by their elected representatives, as the federal legislative process deliberately integrates the resolution of interest group conflict and laws²⁰⁴ and the courts cannot declare federal laws or decrees unconstitutional.²⁰⁵

The legislative referendum has had a relatively conservative influence, acting as a brake on the legislative process.²⁰⁶ It brings legislation that has weathered the refinement of the full legislative process to the electors for their approval. If elected representatives propose or ratify a law contrary to the wishes of the electors, the electors can challenge their action by threatening to trigger, or triggering, a legislative referendum. In a sense, the legislative referendum allows the electorate to reconstitute itself as a third chamber of the Federal Assembly with an absolute power of legislative veto. Consequently, the legislative referendum is not susceptible to many of the traditional arguments against direct democracy, like poor drafting, lack of deliberation, lack of consultation, lack of consensus, lack of compromise, or lack of protection of minority rights. While it can upset or delay the federal government's legislative timetable or influence its political agenda or the content of its enactments,

²⁰²See Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 348. For discussions of Swiss federal elections, see H Penniman (ed) *Switzerland at the Polls: The National Elections of 1979* (American Enterprise Institute for Public Policy Research, Washington, DC, 1983); C Church "The Swiss Way of Change: Politics Since the 1987 Election" (1989) 45 *The World Today* 117; see also D Sidjanski "The Swiss and Their Politics" (1976) 11 *Gov't & Opp* 294.

²⁰³See Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 348.

²⁰⁴See Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 348-349.

²⁰⁵See above text accompanying notes 127-130.

²⁰⁶Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 348; Sigg, above n 1, 33.

the legislative referendum cannot change the existing constitutional system or undermine the constitutional principles underlying the system, including those protecting existing rights. As Sigg has noted, "there is nothing revolutionary about it."²⁰⁷

The veto threat posed by the legislative referendum is not without its criticism. For example, Hughes, writing from a Westminster perspective, has argued that responsive government comes at the price of responsible government, as ultimate responsibility for legislation rests with the electorate, which is "an anonymous shifting abstraction."²⁰⁸ He also argues that the legislative referendum encourages the federal government to find ways to put its policies into practice without exposing them to the legislative referendum, thereby encouraging illegality.²⁰⁹

However, as Hughes readily admits, these arguments do not undermine the underlying justification for the legislative referendum, which is the moral value it gives to legislation approved by the electors,²¹⁰ particularly in a constitutional system which lacks any other viable or formal means of opposing federal government policy. As a means of legitimising legislation proposed by the Federal Council and enacted by the Federal Assembly, the legislative referendum is unequalled. As the sole means of counteracting the legislative power of the Federal Assembly, it is indispensable. According to Hughes, "[t]he stability of Swiss institutions and the most exaggerated self-respect of the Swiss people owe much to the noble and not unsuccessful experiment of the legislative challenge."²¹¹

In contrast to the legislative referendum, the constitutional initiative has revolutionary potential. In Gruner's words, it "acts as a driving wheel in a decision-making process which is geared toward consensus and which is therefore time-consuming."²¹² For example, the electorate used the constitutional initiative to overcome the refusal of the federal government to consider abolishing the Swiss army, one of Switzerland's most sacred institutions. While the initiative failed at the polls, it gathered enough support to prompt the federal government to embark on a serious program of reform, ostensibly to avoid giving the initiative's proponents the basis for a successful retrial of the issue at the polls.²¹³ An unsuccessful constitutional initiative put forward to

²⁰⁷Sigg, above, n1, 33.

²⁰⁸Hughes, above n 1, 101.

²⁰⁹Above.

²¹⁰See Hughes, above n 1, 102

²¹¹Above.

²¹²Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 342.

²¹³For discussions of this issue, see eg D Benjamin "The Swiss Army Gets Knifed" *Time*, 11 December 1989, 61; "What, Leave the Alps Naked?" *The Economist*, 25 November 1989, 60; A McGregor "Swiss Debate Scrapping Their Army" *The Times*, London, England, 20 November 1989, 12; "The Secret of Switzerland" *National Review*, 10 October 1986, 47; T Netter "Swiss Coalition Presents

deal with the question of the number of foreigners in Switzerland also prompted a previously disinterested federal government to act, in this case in a manner which defused the issue.²¹⁴ Although the device can create a tension-filled voting atmosphere and push democratic discussion to its limits, as it did in these two cases, it has, according to Sigg, "achieved neither decidedly conservative nor decidedly progressive results."²¹⁵

This ambivalent character of the constitutional initiative is attributable to two factors. First, extreme measures, whether radical or reactionary, have virtually no chance of being accepted by the Swiss electorate. Second, the double majority rule assures that any proposed constitutional amendment must have not only the support of populous urban centres, but also the support of those living in more remote and less populated parts of the country. As values and interests range from region to region, the double majority rule insists that any proposed constitutional change must, in effect, be endorsed by a wide demographical cross-section of the Swiss electorate, which explains why only a handful of constitutional initiatives have been approved. In this manner, minority rights, especially as reflected in local autonomy, are protected. Arguably, this safeguard surpasses the protection afforded minority rights in Westminster parliamentary systems, given the legal supremacy of ordinary legislation, the limited time available for deliberation, and the typically unrepresentative demographic composition of legislatures in such systems.

Regarding both devices, Hughes suggests that the high cost of securing the requisite signatures confines their use to corporate bodies like political parties, trade unions,

Petition on Referendum to End Army" *The New York Times*, New York, USA, 14 September 1986, 6; "Swiss Voters Uphold National Conscription" *The New York Times*, New York, USA, 27 February 1984, 5; "Swiss Voters Turn Down Proposals on Military Exemptions and Taxes" *The New York Times*, New York, USA, 5 December 1977, 10; "Swiss Voters Weigh Alternative Service for Conscientious Objectors" *The New York Times*, New York, USA, 4 December 1977, 20.

²¹⁴For discussions of this issue, see eg "Immigrants Rushing to Beat Swiss Deadline" *The New York Times*, New York, USA, 20 December 1987 25; A Naef "Legacy of Mistrust of Foreigners" *The New York Times*, New York, USA, 3 May 1987, 2; T Netter "Swiss Voters Back Curb on Refugees" *The New York Times*, New York, USA, 6 April 1987, 11; "Swiss Asylum Limited By Vote in Parliament" *The New York Times*, New York, USA, 5 June 1986, A5; "Geneva Rightest Party Gains No Council Seat" *The New York Times*, New York, USA, 12 November 1985, A7; "Anti-Immigrant Group on Rise in Geneva" *The New York Times*, New York, USA, 10 November 1985, 8; "Right-Wing Party Gains In Geneva Election" *The New York Times*, New York, USA, 16 October 1985, A7; H Kamm "Pope Asks Swiss to Welcome the Foreign Workers" *The New York Times*, New York, USA, 17 June 1984, 14; "Swiss Reject Plan to Enhance Foreign Workers' Status" *The New York Times*, New York, USA, 6 April 1981, 2; "1,389 Applied for Swiss Asylum" *The New York Times*, New York, USA, 7 February 1979, 5; "Swiss Vote on Proposal to Set Limit on Foreigners" *The New York Times*, New York, USA, 13 March 1977, 4.

²¹⁵Sigg, above n 1, 33-34.

and interest groups, which "increases their already strong influence on policies."²¹⁶ Marjorie Mowlam goes further by concluding that:²¹⁷

. . . the existence of direct democracy reinforces the power not only of the Federal Councillors but also the established interest group leaders. The benefit direct democracy offers to specific groups within the Swiss political system does not support the conclusion that the existence of popular referenda and initiatives increases elite responsiveness to public demands. Rather, it takes power away from the public and the elected representatives of the smaller political parties. Power is partially transferred by the existence of referenda and initiatives to established interest group leaders who are responsible to no one. Specific interest groups are given a virtual representational monopoly within their respective categories in return for select controls over articulation of demands and supports.

Both Hughes and Mowlam, however, fail to acknowledge the continuous and vital role that interest groups play in all representative democracies. Interest groups, be they parties, unions, clubs, societies, charities, churches, or single issue organisations, are the principal means by which people organise themselves to realise shared aspirations and to accomplish shared goals. In democracies, they constitute the primary vehicle by which people influence policy and legislation. Interest group leaders, contrary to Mowlam's supposition, are accountable to their members, that is, to the people they serve as representatives.²¹⁸

In addition, Hughes' concern regarding the signature requirements for the constitutional initiative and the legislative referendum in Switzerland appears to be overstated when compared to the signature requirements in California and New Zealand, which are more onerous. Furthermore, the Swiss electors dismissed Hughes' concern in 1977 when they approved, by comfortable margins, two constitutionally required referendums that raised the signature levels required for the constitutional initiative from 50,000 to 100,000 and for the legislative referendum from 30,000 to 50,000, respectively.²¹⁹

²¹⁶Hughes, above n 1, 102; see also A Eschet-Schwarz "La democratie semi-directe en Suisse: entre la theorie et la realite: 1879-1987" (1989) 22 *Revue canadienne de science politique* 739, 762-764 (arguing that the high frequency of referendums has reduced turnout, thereby giving interest groups and marginal parties a freer reign to use direct democracy to influence the political agenda).

²¹⁷M Mowlam "Popular Access to the Decision-making Process in Switzerland: The Role of Direct Democracy" (1979) 14 *Gov't & Opp* 180, 195.

²¹⁸See K Jackson *The Dilemma of Parliament* (Allen & Unwin, Wellington, 1987) x; P Schlessinger and R Wright *Elements of Government in California* (Holt, Rinehart & Winston, New York, 1962) 24.

²¹⁹The proposal to raise the signature level for legislative referendums from 30,000 to 50,000 attracted the support of 18 cantons and 1.8 percent of the electors on a turnout of 51.6 percent. The proposal to raise signature level for the constitutional initiative from 50,000 to 100,000 attracted the support of 19 cantons and 56.7 percent of the electors on a turnout of 51.6 percent. Aubert "Switzerland" in Butler and Ranney, above n 1, 63. Eschet-Schwarz suggested in 1989 that the signature level for both devices should be raised even higher on the supposition that it would decrease the frequency and increase the importance of referendums in Switzerland, which would increase the participation of the electors. Eschet-Schwarz, above n 216, 764. The suggestion is ironic, as voting is compulsory in Switzerland. Nevertheless, the theory may have some merit as "voters participate in the initiative process in large numbers" in California where the signature levels are much higher. See E Lee "California" in Butler

Both the constitutional initiative and the legislative referendum have played and continue to play a vital role in development and operation of the Swiss constitutional system. As a matter of course, those involved in the Swiss legislative process accept that the ultimate responsibility for legislation lies with the electorate, which requires the electors to be reasonably well-informed. As most legislative proposals must be justified in public, the media has a greater role in Switzerland than elsewhere in keeping the electorate abreast of policy developments.²²⁰ According to Gillett, the Swiss media actively supports the electors' sense of participation.²²¹ However, the most important agent of civic understanding and responsibility in Switzerland is participation. If not directly involved in communal and cantonal affairs, the typical elector is generally in close contact with someone who is.

In a negative sense, the constitutional initiative and the legislative referendum can be characterised as a means to "paralyse or sabotage vital measures and thereby exercise a latent braking power against innovations."²²² However, as Gruner has noted, these devices "are quasi-substitutes for parliamentary votes of no confidence, for which no provision is made in the Swiss system."²²³ As a result, these devices have had the positive effect of making the policies and legislative output of the federal government unusually sensitive to the wishes of the electors, especially as they are expressed through interest groups, which are a valuable and ubiquitous component of all representative democracies, and the cantons, which are unique in their capacity to bring local issues to the attention of the federal authorities.

More importantly, these direct democracy devices, like those found in California and New Zealand, are a part of a constitutional framework that supports representative democracy, particularly its Madisonian role in protecting minority rights. Although the Swiss electors can use the legislative referendum to slow legislative reform, they cannot use it to impose any burdens or confer any benefits on any particular group or individual. The constitutional initiative, with its double majority rule, ensures that any constitutional change must have broad-based support across Switzerland before

and Ranney, above n 1, 116. However, the high participation rate in California needs to be considered in the context of a comparatively much lower voter registration rate. In addition, Cronin has argued that defining voter participation as a major problem is invalid and exaggerated as few advocates of direct democracy have claimed that everyone would vote and that the public would vote with equal levels of enthusiasm on all measures put before them; they merely want a safety valve process for those occasions when some electors come to the conclusion that their elected representatives are not fulfilling their representative obligations. T Cronin *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, Cambridge, 1989) 210.

²²⁰Gillett, above n 1, 44.

²²¹Gillett, above n 1, 45.

²²²Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 349.

²²³Gruner "The Political System of Switzerland" in *Modern Switzerland*, above n 1, 343.

being accepted, a burden that is rarely met. From 1891 to 1994, the Swiss voted on 112 constitutional initiatives but approved only 11 or 9.82 percent,²²⁴ which on average amounts to 1 successful constitutional initiative every 9.36 years. None of these constitutional changes have been upheld as examples of oppression by the opponents of direct democracy. On the contrary, use of the constitutional initiative to bring in proportional representation for the National Council, to rehabilitate the legislative referendum, and to create the canton of Jura are examples which support the conclusion that the device operates in Switzerland to enhance minority rights.

By examining the constituent parts of Switzerland's constitutional system and their relationship to the constitutional initiative and legislative referendum, it has been possible to ascertain the role that these direct democracy devices play in limiting the legislative power of elected representatives in Switzerland. The exercise has also shown that these devices contain procedural safeguards which limit the legislative power they confer on the electors. Both insights, given the origin of direct democracy in Switzerland, provide the basis for understanding the direct democracy systems that exist in California and New Zealand and their differences.

²²⁴For statistics on federal initiatives and referendums in Switzerland, see *100 Jahre Eidgenössische Volksinitiative* (Swiss Federal Chancellery, Berne, 1991); *Statistisches Jahrbuch der Schweiz 1994 - Separatdruck Kapitel 17 Politik* (Federal Office of Statistics, Berne, 1994); *Statistisches Jahrbuch der Schweiz 1993 - Separatdruck Kapitel 17 Politik* (Federal Office of Statistics, Berne, 1993); *Statistisches Jahrbuch der Schweiz 1992 - Separatdruck Kapitel 17 Politik* (Federal Office of Statistics, Berne, 1992).

PART III: CALIFORNIA

ORIGIN OF DIRECT DEMOCRACY IN CALIFORNIA

Direct democracy in California has indigenous as well as foreign sources. People living in New England towns have participated directly in deciding their affairs since the 1600s. Those living in the small communities leading the westward expansion did the same. Furthermore, all of the American states, with the exception of Delaware, have constitutions which were ratified by the electors. Many of these constitutions, including California's, contain clauses which require constitutional amendments to be approved by the electors.¹ However, as the United States grew in size and population, direct participation in the legislative process became increasingly impractical. This factor, in addition to a concern regarding the tyranny of the majority, led the Founding Fathers to create a constitutional system based exclusively upon the principles of representative democracy. The success of their experiment stymied further development of indigenous forms of direct democracy.²

In the late 1800s, industrialisation was accompanied by economic turmoil, the concentration of wealth and political power, and widespread political corruption. These circumstances renewed interest in direct democracy. American reformers, inspired by Switzerland's example, seized upon direct democracy as a means to free legislatures from the grasp of political machines controlled by industrialists and financiers. These reformers, especially the Progressives, eventually succeeded in breaking the power of political machines throughout the United States. In a number of states, including California, they introduced direct democracy to ensure that political machines would never again be able to exercise absolute control over the legislative process.

In California, the Progressives came to power as a result of the excesses of the Southern Pacific Railroad Company. Accordingly, this chapter begins with a history of the rise of the Southern Pacific and how it came to control the exercise of governmental power in California. It then discusses the factors which gave rise to the California Progressives and led them to campaign for direct democracy in California. In doing so, this chapter provides the basis for comparing the origin of direct democracy in California with its origin in Switzerland. A common thread is the coincidence of economic hardship and widespread disillusionment with representative

¹For a discussion of constitutionally required referendums, see section I.A.1 in chapter two.

²See generally E Oberholtzer *The Referendum in America* (Charles Scribner's Sons, New York, 1900); see also section III.B.2 in chapter two.

democracy. Like the Swiss Democrats in their reaction to Alfred Escher's subversion of representative democracy in Switzerland to further his railroad and banking interests,³ the California Progressives embraced direct democracy as a means to break the Southern Pacific's hold on elected representatives in California. They instituted the constitutional initiative, the legislative initiative, and the legislative referendum to reinvigorate representative democracy, not to displace it. They saw these devices as the means of preventing any one group from acquiring complete control over the exercise of governmental power again, primarily by making the legislative process impossible to monopolise.

Although histories of California abound, the origin of direct democracy in California is rarely considered. When it is discussed, it is usually dealt with in passing and in general terms. The League of Woman Voters of California appears to have produced the fullest account available. However, its brief outline is incomplete. It does not deal with the rise of the Southern Pacific, the manner in which it subverted representative democracy in California to further its own interests, the conditions which produced the California Progressives, or the events which brought direct democracy to their attention and encouraged them to campaign for it.⁴

This chapter examines the origin of direct democracy in California in this wider context. In doing so, it draws primarily on the work of David Lavender, Warren Beck and David Williams, Spencer Olin Jr, Robert Fogelson, Don Fehrenbach, and George Mowry.⁵ By examining the factors which led the California Progressives to establish the constitutional initiative, the legislative initiative, and the legislative referendum, this chapter provides the background necessary to understand their role in the California constitutional system. In conjunction with chapter three, which discusses the origin of direct democracy in Switzerland, this chapter also provides the basis for understanding why reformers in New Zealand found direct democracy appealing.

³See section III.C.6(b) in chapter three.

⁴See League of Women Voters of California *Initiative and Referendum in California: A Legacy Lost? A Study of Direct Legislation in California from Progressive Hopes to Present Reality* (League of Women Voters of California, Sacramento, 1984 reprint 1987) 6-11.

⁵D Lavender *California: A Bicentennial History* (W W Norton, New York, 1976); W Beck and D Williams *California: A History of the Golden State* (Doubleday, Garden City, New York, 1972); S Olin *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911-1917* (University of California Press, Berkeley, 1968); R Fogelson *The Fragmented Metropolis: Los Angeles 1850-1930* (Harvard University Press, Cambridge, Massachusetts, 1967); D Fehrenbach *A Basic History of California* (Van Nostrand, Princeton, 1964); G Mowry *The California Progressives* (Quadrangle Books, Chicago, 1963).

I THE RISE OF THE SOUTHERN PACIFIC RAILROAD COMPANY

The California Progressives established direct democracy in California in response to the Southern Pacific's abuse of governmental power. The excesses of the Southern Pacific contributed to the rise of the California Progressives and created the conditions which made Switzerland's direct democracy system an attractive model for constitutional reform in California. To understand these conditions, it is necessary to trace the rise of the Southern Pacific, explain how it acquired control of governmental power in California, and examine some of the ways in which it abused its power.

A *Creation of the Central Pacific*

The history of the Southern Pacific begins with Theodore Judah. After building California's first railroad in the 1850s, a track from Sacramento to Folsom, the young New York engineer became obsessed with the idea of building a transcontinental railroad. He ardently lobbied Congress for funding, patiently explored the Sierras for a practical route, and regularly solicited investors for his project.⁶ In 1860, Judah won the support of four moderately wealthy Sacramento businessmen. Leland Stanford was a wholesale grocer and a candidate for governor who earlier had founded the California Republican Party. Charles Crocker earned a living as a drygoods dealer. Collis Huntington and Mark Hopkins were partners in a wholesale hardware business.⁷ Later known as the Big Four, they each invested \$1,500.⁸

Judah used their financial commitment, plus funds he raised from miners living along the proposed route,⁹ to create the Central Pacific Railroad Company in 1861.¹⁰ As part of the deal, Stanford became president of the Central Pacific, Huntington vice president, and Hopkins treasurer.¹¹ Later in the year Californians elected Stanford governor.¹² Coincidentally, Americans triggered the Civil War by electing Abraham Lincoln president.

B *Passage of the Pacific Railroad Act*

The Civil War enabled Congress to pass the Pacific Railroad Act of 1862. Until then abolitionists and pro-slavery elements in Congress were unable to agree on a route for Judah's transcontinental railroad. Abolitionists wanted it in the North to prevent the

⁶Fehrenbach, above n 5, 45.

⁷Beck, above n 5, 218-223.

⁸Lavender, above n 5, 105.

⁹Beck, above n 5, 218-223.

¹⁰Fehrenbach, above n 5, 45.

¹¹Beck, above n 5, 218-223.

¹²Lavender, above n 5, 103.

spread of slavery. Slavers wanted it in the South to restrict the North's industrial power. Unencumbered by southern opposition, Congress decided to route the railroad through northern states.¹³

The Act named the Central Pacific and the Union Pacific as the builders of the railroad. It provided the builders with loans and land grants to help finance construction. The builders would receive \$16,000 for every mile of track laid on level ground, \$32,000 for semi-mountainous ground, and \$48,000 for mountainous ground. The Act, as amended in 1864, secured these loans with a second mortgage at 6 percent for 30 years over the assets of the builders. This arrangement allowed the builders to use the promise of first mortgage security to attract funds from other sources. The builders also received 20 alternating blocks of land a mile wide and 20 miles in length for every 40 miles of rail they laid. This amounted to half of the land in a strip 40 miles wide along the entire length of the railroad.¹⁴ The land gave the builders a means to meet some of their financial obligations. They sold most of it to speculators and settlers.¹⁵

C Effects of the Pacific Railroad Act

The Act encouraged the Big Four to build as much of the railroad as they could as quickly as possible. However, it failed to provide them with any capital to begin construction. As a result, the Central Pacific began pressing for State and County aid in California. Governor Stanford openly supported its efforts. The Central Pacific also sought to sell its stock to the general public.¹⁶

San Francisco businessmen obstructed both fund-raising schemes to protect their investments. They viewed the Central Pacific as a threat to existing ocean, river, and stage coach transport operations. They also feared that San Francisco's pre-eminence as a wholesale market would be undermined by a transcontinental railroad terminus in Sacramento.¹⁷ To counter the stock scheme, they began a whispering campaign, which was so effective that the Central Pacific only sold enough stock to cover the cost of building a bridge over the American river. To counter the aid scheme, they used the courts to challenge the legality of the bonds authorised by the state and the electors of the counties through which the railroad would pass.¹⁸

¹³Beck, above n 5, 218-223

¹⁴Above.

¹⁵Lavender, above 5, 123.

¹⁶Lavender, above 5, 106.

¹⁷Lavender, above 5, 104.

¹⁸Lavender, above 5, 106.

Although the Central Pacific managed to negotiate compromises that gave it part of the authorised funding, the delays were costly.¹⁹ A shortage of surplus labour compounded these costs. The Comstock Lode had lured many Californians to Virginia City.²⁰ Initially, this deprived the Central Pacific of the hardworking, dedicated, reliable, and cheap labour it required to build the railroad.

The Act also exacerbated the Central Pacific's financial woes by providing the loans in the form of federal bonds. This forced the Big Four to sell the bonds to eastern financiers at horrendous discounts for depreciated greenbacks, which were not legal tender in California. After converting the greenbacks into gold, the Central Pacific would receive 33 cents for every dollar it borrowed from the federal government. At one stage the Central Pacific had to use a federal bond with a face value of \$1,250,000 to purchase supplies worth \$400,000 in California, which included the high cost of shipping the supplies around the Horn.²¹

The Big Four devised several strategies to solve their financial problems. First, they decided to build as fast as possible. However, this plan conflicted with Judah's desire to build a well-engineered railroad. Second, they managed to convince the federal government that the Sierras began 40 miles closer to Sacramento than previous surveys had indicated. Although Judah disapproved of the ploy, it gave the Central Pacific an extra \$500,000 in loans.²²

Finally, the Big Four formed their own construction company, Charles Crocker and Company, later known as the Contract and Finance Corporation, to which they eventually awarded the lucrative railroad construction contracts.²³ This development embittered Judah because it subordinated his dream to the financial interests of the Big Four. The company charged top dollar for its work and accepted stock as part of its payment. It also imported labour from China to keep its costs down.²⁴ This strategy eventually gave the Big Four \$58,000,000 for a construction project that cost them \$14,000,000 to complete.²⁵ It also gave them control over 90 percent of the Central Pacific.²⁶

¹⁹Above.

²⁰Lavender, above 5, 105.

²¹Lavender, above 5, 106.

²²Beck, above n 5, 218-223.

²³Above.

²⁴Lavender, above n 5, 107.

²⁵Beck, above n 5, 218-223; see also League, above n 4, 7 (stating that the construction contracts were fraudulent).

²⁶Lavender, above n 5, 107.

These developments made Judah determined to buy out his partners. He travelled East to raise the necessary funds. On 1 November 1863, he died in New York of a fever he contracted in Panama along the way.²⁷ His death left the future of the Central Pacific in the hands of the Big Four. Crocker, a swaggering extrovert, took charge of construction.²⁸ Hardworking and energetic, he organised and drove his work force like an army.²⁹ Hopkins scrutinised expenditures³⁰ and kept precise and detailed accounts. A conservative voice of reason, his opinion was valued by the others. Stanford, who was trained as a lawyer, served effectively as the Central Pacific's spokesperson; he dealt with officials, drew up useful legislation,³¹ and secured favourable treatment from the California legislature. He also looked after local financing. Huntington went to New York to raise money and to lobby Congress.³² Astute, objective, realistic and ruthless, he also dealt with the Central Pacific's supply problems.³³ Together these men built the empire that generated the forces that brought the California Progressives to power and led to the establishment of direct democracy in California.

D Creation of the Southern Pacific Transportation Monopoly

Construction profit was the initial objective of the Big Four. However, long before the May 1869 meeting with the Union Pacific in Promontory, Utah,³⁴ they had turned their attention to operating the Central Pacific profitably. This shift occurred when the Big Four discovered no one wanted to buy them out.³⁵ Potential buyers viewed the Central Pacific as an unattractive investment for three reasons: 1) its nominal value exceeded the value of its physical assets;³⁶ 2) it was riddled with debt,³⁷ owing nearly \$26,000,000 to the federal government alone;³⁸ and 3) the Suez Canal, which opened in 1869, destroyed its hope of diverting the trade from Asia to Europe across its rails.³⁹

Given these circumstances, the Big Four realised that their only recourse was to set shipping rates as high as possible.⁴⁰ They were also determined that all shipping,

²⁷Beck, above n 5, 218-223.

²⁸Fehrenbach, above n 5, 45.

²⁹Beck, above n 5, 218-223.

³⁰Fehrenbach, above n 5, 45.

³¹Beck, above n 5, 218-223.

³²Fehrenbach, above n 5, 45.

³³Beck, above n 5, 218-223.

³⁴Beck, above n 5, 225.

³⁵Fehrenbach, above 5, 46.

³⁶Above.

³⁷Lavender, above n 5, 120.

³⁸Beck, above n 5, 218-223.

³⁹Lavender, above n 5, 120.

⁴⁰Fehrenbach, above n 5, 46.

foreign or domestic, would be over their rails.⁴¹ These two objectives meant the elimination of competition⁴² and the expansion of their railroad network. In 1865, the Big Four purchased the Southern Pacific Railroad Company⁴³ to initiate their plan to monopolise railroad transportation in California.⁴⁴ They eventually obtained control of every local railroad likely to enter into an alliance with out-of-state competitors.⁴⁵ Using the Southern Pacific's federal land grants for rails laid into Southern California, the Big Four expanded their lines to Arizona and Oregon to acquire control over all points of railroad entry into the State.⁴⁶ This effort effectively prevented rivals from building railroads into California.⁴⁷

By 1869 the Big Four controlled all rails into and out of San Francisco, then the largest metropolitan area in California. They also took over the Oakland water front and acquired steamboat and ferry operations in the area.⁴⁸ This position gave them the clout to dictate rate agreements with the principal Panama steamship line, which eliminated the only transcontinental transportation alternative capable of undercutting the Big Four's predatory freight charges.⁴⁹

To finance the Southern Pacific's expansion, the Big Four used the Contract and Finance Corporation to bludgeon subsidies out of towns and counties en route by threatening to by-pass them. Los Angeles, for example, had to acquire the Los Angeles to San Pedro railroad and turn it over to the Southern Pacific together with a 60 acre plot in the centre of town and \$600,000 in cash to avoid languishing without a railroad.⁵⁰ The Big Four would condemn uncooperative towns to stagnation⁵¹ by routing the railroad through rival villages they would build nearby.⁵² The Big Four also took full advantage of the Southern Pacific's federal land grant rights by rerouting existing lines. By 1871, for example, they had switched routes in Southern California from the coastal region to the inland valley. Although the move was unpopular with coastal residents, it gave the Big Four control of more public land.⁵³

⁴¹Lavender, above n 5, 120.

⁴²Fehrenbach, above n 5, 47.

⁴³Above.

⁴⁴Olin, above n 5, 1.

⁴⁵Lavender, above n 5, 120.

⁴⁶Fehrenbach, above n 5, 47.

⁴⁷Lavender, above n 5, 120.

⁴⁸Beck, above n 5, 225.

⁴⁹Fehrenbach, above n 5, 47.

⁵⁰League, above n 4, 6.

⁵¹Beck, above n 5, 225-226.

⁵²Lavender, above n 5, 123.

⁵³Beck, above n 5, 225.

These practices contributed to the spread of land monopoly in California.⁵⁴ The federal land grants alone gave the Southern Pacific ownership of some 10 million acres.⁵⁵ By the time the Central Pacific became a subsidiary of the Southern Pacific in 1884,⁵⁶ the Big Four had received more than 11 million acres from the federal government in California alone. To dispose of this land as quickly as possible, the Big Four favoured land speculators who were able to buy in quantity.⁵⁷ This practice, which contributed to land and water monopolies, disappointed many settlers who were lured to California during the depressions of the 1870s by the promise of inexpensive farm land.

By the 1870s, the Big Four had a complete monopoly of railroad transportation in California.⁵⁸ They used whatever means they could to increase their profit margins, which meant they charged shippers what they could bear. This practice gave the Big Four a generous portion of the profits of every business and industry in California for more than 40 years.⁵⁹ To protect and further their interests, the Big Four used their transportation monopoly to acquire control of governmental power in California.

E Southern Pacific Control of California

Although closely aligned to Stanford's Republican Party, the Southern Pacific pursued a bipartisan approach to politics.⁶⁰ Californian politics encouraged it. The Democratic and Republican Parties operated in a similar fashion. Each party divided the cities into wards and assigned a boss to each ward. Ward bosses created loyal followings by remembering names and birthdays, attending weddings and funerals, and passing out baskets of food at Christmas. They also helped people who were made homeless by fire or eviction, provided public-work jobs for the unemployed, and arranged bail for their constituents who were in legal trouble.⁶¹

The bosses received gratitude in return for their kindness. The men they befriended would vote for candidates they suggested. In this way, the bosses could determine who would attend city and county conventions. The men attending these conventions would select men, according to the instructions of city or county bosses, to be on the party's state central committee or to attend the party's state nominating conventions.

⁵⁴Lavender, above n 5, 123.

⁵⁵Fehrenbach, above n 5, 47.

⁵⁶Olin, above n 5, 226. The Southern Pacific was incorporated under the laws of Kentucky which were comparatively lax.

⁵⁷Lavender, above n 5, 123.

⁵⁸Olin, above n 5, 1.

⁵⁹Beck, above n 5, 256; see also League, above n 4, 6-7.

⁶⁰Beck, above n 5, 339.

⁶¹Lavender, above n 5, 148.

The men chosen to attend the state nominating conventions would choose candidates for state offices.⁶²

Both parties financed this system in ways which impinged upon the interests of the Southern Pacific. Money came from the sale of utility franchises and public-works contracts, and from vice lords and businessmen who purchased benefits with their contributions. But it also came from elected representatives in the form of kickbacks. To enrich themselves, legislators proposed "cinch" bills against wealthy corporations, particularly the Southern Pacific. Although pitched as reform measures, these bills were actually a form of blackmail. To avoid cinching, the Southern Pacific would pay key legislators to drop the unwanted proposals.⁶³

The process had the ironic effect of expanding the Southern Pacific's political power. Lawmakers who had accepted bribes from the Southern Pacific became vulnerable to threats of exposure,⁶⁴ which encouraged them to look after the interests of the Southern Pacific. During the 1870s the Southern Pacific exercised enormous influence in the California Senate.⁶⁵ It used its political power to resist state regulation of its rates, as high rates constituted the linchpin of the Big Four's commercial strategy. It used its economic power to capture and then maintain its control of the political parties.

The Southern Pacific's excessive rates, coupled with its growing political power, aroused the opposition of populist groups, including the People's Independent Party, the followers of Dennis Kearney, and later the Grangers. Hostility toward the Southern Pacific intensified during the mid 1870s when California followed the nation into a deep depression.⁶⁶ Bank failures, foreclosures, stagnation of trade, and mounting unemployment all contributed to a general mood of disillusionment and anger.⁶⁷

The economic milieu gave the Granger movement an opportunity to take root in California. The Grangers, mostly farmers who viewed themselves as the victims of the "Robber Barons" of corporate America, had established railroad regulation as their top reform priority. At about the same time, Henry George, a San Francisco journalist, was writing his influential book, *Progress and Poverty*, in which he

⁶² Above.

⁶³ Above.

⁶⁴ Above.

⁶⁵ Olin, above n 5, 2.

⁶⁶ Mowry, above n 5, 18.

⁶⁷ Fehrenbach, above n 5, 48.

denounced land monopoly as the ultimate cause of all economic distress.⁶⁸ In California, the Southern Pacific was the embodiment of George's thesis, as many farmers in the San Joaquin Valley knew.⁶⁹ In addition, many unemployed Californians blamed the Chinese labourers imported by the Southern Pacific for their economic woes.⁷⁰

These movements culminated in the revision of the California Constitution in 1879. Although largely neutralised by the party bosses, the reformers managed to establish a Railroad Commission with the power to regulate rates and to prevent discrimination between shippers.⁷¹ However, the Southern Pacific easily captured the Railroad Commission shortly after its creation.⁷² With the Railroad Commission and the legislature under its control, the Southern Pacific defeated all attempts to revise the generous rate schedules that had been written into law before the Civil War as part of the program to stimulate railroad construction. It even exceeded legal rates for small-town merchants by carrying goods they had ordered from the East right through their towns to Sacramento and San Francisco; it would charge full short-haul rates for the extra miles involved in carrying the goods back to their towns.⁷³

The political success of the Southern Pacific was guaranteed by five factors. First, California's population was relatively sparse and consisted mainly of newly arrived residents who lacked interest and influence in local and state politics. Second, by manipulation of freight rates, the Southern Pacific could make or break almost any merchant, industrialist, or agriculturalist in the state. Third, all candidates for public office were nominated by partisan conventions controlled by the Southern Pacific. Fourth, decisions handed down by the United States Supreme Court made judicial and legislative action to reduce railroad rates virtually impossible.⁷⁴ Fifth, the Populist reform movement lost momentum with the return of economic prosperity.⁷⁵

⁶⁸George began the book in 1878 based on his *Our Land and Land Policy* (1871), a 48 page monograph in which he advocated the destruction of land monopoly by shifting all taxes from labour and the products of labour to a single tax based on the value of land. George had trouble finding a publisher for his book, as most found it unsafe and all believed it would not make any money. However, he struck a deal with D Appleton & Co in which he bore the main cost of publishing the book. In the United States and England, once *Progress and Poverty* was put out in paperback, it outsold the most popular novels of the day. It also ran serially in the columns of newspapers in both countries. It was also translated into the main European languages. Between its initial publication in 1880 and 1905, a conservative estimate states that more than two million copies of the book were printed. H George *Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and the Increase of Want with Increase in Wealth: The Remedy* (25 ann ed, Doubleday, Page & Co, New York, 1925) viii-x.

⁶⁹See below text accompanying notes 82-87.

⁷⁰Above.

⁷¹Mowry, above n 5, 18.

⁷²Above; League, above n 4, 7.

⁷³Lavender, above n 5, 122.

⁷⁴Olin, above n 5, 2-3.

⁷⁵Mowry, above n 5, 18.

At the turn of the century, William Herrin, a gifted corporate lawyer, became general counsel for the Southern Pacific. While streamlining the Southern Pacific's operations, he created the Southern Pacific's efficient and effective Political Bureau.⁷⁶ The Bureau's purpose was to ensure that the Southern Pacific would avoid paying its share of taxes, escape state and local regulation, and expand its system unhampered by outside influence.⁷⁷

The Bureau accomplished these goals by providing free passes to state and local legislative representatives, cash subsidies to friendly newspapers, campaign contributions to aspiring politicians, investment opportunities for officials, and rebates to co-operative shippers.⁷⁸ Assisted by a battery of the best legal talent in the state, these techniques enabled the Southern Pacific to dominate California's political and economic life.⁷⁹ Eventually in a position to name virtually every candidate for every office, the well-financed and superbly organised Southern Pacific met with uncommon success in its efforts to attain continued economic prosperity and freedom from regulation.⁸⁰ California reached the point where it possessed only the shadow of representative government; the Southern Pacific wielded the real power.⁸¹

F The Southern Pacific's Abuse of Power

Unrestrained by competition, government, or charity, the Southern Pacific easily abused its power. Between 1880 and 1906, the Southern Pacific was involved repeatedly in incidents which disturbed many Californians and prompted them to question the legitimacy of their constitutional system. The most widely publicised of these incidents were: 1) the Mussel Slough tragedy; 2) the Mary Ellen Colton suit; 3) the funding bill battle; 4) the free harbour fight; and 5) the Abraham Ruef scandal.

1 The Mussel Slough tragedy

While the Southern Pacific was engaged in the process of perfecting its title to barren land formerly held by Mexicans in the San Joaquin Valley, it encouraged farmers to settle in the area. By dint of hardwork, the settlers created productive farms by building 50 miles of irrigation ditches, homes, farm buildings, fences, wells, and orchards. When the Southern Pacific perfected its title, it requested payment for the

⁷⁶Lavender, above n 5, 158-159.

⁷⁷Olin, above n 5, 3.

⁷⁸Beck, above n 5, 324.

⁷⁹Above; Olin, above n 5, 1.

⁸⁰Olin, above n 5, 2; Fehrenbach, above n 5, 54.

⁸¹Mowry, above n 5, 9.

land the settlers had improved. The settlers were willing to pay the price which they believed the Southern Pacific had agreed to accept before they improved the land, which was approximately \$2.50 per acre. The Southern Pacific, however, denied this claim, and demanded payment at \$25.00 to \$50.00 per acre.⁸²

Many of the farmers refused to pay on the grounds that the Southern Pacific was charging them for their improvements. The Southern Pacific responded by selling the land to outsiders. When the settlers resisted displacement, they fell afoul of the law. In 1880, armed with writs of ejectment, representatives of the Southern Pacific tried to evict the settlers who would not or could not pay its price. Seven men died in the shooting that ensued. Five settlers went to jail, but they were greeted as public heroes when they returned to Tulane County.⁸³

Although the Southern Pacific subsequently had its way, its action alienated many Californians. On 9 August 1880, *The Wasp*, a San Francisco weekly, summed up the tragedy by publishing a cartoon which depicted the Southern Pacific as an octopus: the portraits of Crocker and Stanford shone from its glaring eyes; the homes, produce, and industries of California were ensnared in its tentacles.⁸⁴ Inspired by this cartoon, John Robinson, a long time opponent of the railroad, published a scathing, and often erroneous, attack on the Southern Pacific entitled *The Octopus: A History of the Construction, Conspiracies, Extortions, Robberies and Villainous Acts of the Central Pacific, Southern Pacific . . . and Other Subsidized Railroads*.⁸⁵ In 1901, Frank Norris used the metaphor to describe the Mussel Slough tragedy in his widely read naturalistic novel, *The Octopus*.⁸⁶ The term became a powerful weapon in the hands of the Southern Pacific's opponents.⁸⁷

⁸²Beck, above n 5, 257.

⁸³Above.

⁸⁴Lavender, above n 5, 152.

⁸⁵Above.

⁸⁶For a succinct overview of Norris' background and influences, the Mussel Slough tragedy, and his understanding of it and the liberties he took in fictionalising it, see O Cargill "Afterward" in F Norris *The Octopus: A Story of California* (New American Library, New York, 1964) 459-469. Norris had intended to write a one-sided attack on the Southern Pacific, exposing not a representative trust, but one of the most efficient political machines in America. However, after preparing to write his novel, his publisher was taken over by a group more sympathetic to the Southern Pacific's interests. His new publisher arranged for him to meet with Huntington to obtain the railroad's side of the story. Huntington not only intimidated him, but persuasively argued that the Mussel Slough settlers were not complete innocents. Norris also realised that the railroad was beneficial and might not have been built without the concentration of wealth made possible by excessive rates. Recently married, Norris may have also been concerned with job security, and thought that balancing the scales in his novel would please his publisher. These factors led Norris to "manufacture his exciting story of the 'equal' culpability of the ranchers." Cargill, above, 465. As this episode demonstrates, the influence of the Southern Pacific was enormous.

⁸⁷Lavender, above n 5, 152; see also League, above n 4, 7.

2 *The Mary Ellen Colton suit*

The Mary Ellen Colton suit came on the heels of the Mussel Slough tragedy. In 1878, David Colton, a political manipulator employed by the Big Four, died. The Big Four entered into an agreement with his widow, Mary Ellen Colton, to provide her with a \$500,000 settlement. Unfortunately, Hopkins died later in the same year. When his estate was distributed, Mrs Colton noticed that his securities were valued differently than the ones the Big Four had given to her. Rebuffed in her request for more money, Mrs Colton decided to sue in 1883.⁸⁸

Although Mrs Colton lost her case after eight years of litigation, she placed into evidence more than 600 letters written by Huntington to her husband. Most of the letters began with a phrase like "burn after reading." These letters provided an alarming record of how the Big Four had used their money to influence congressmen, senators, judges, commissioners, cabinet ministers, and even a justice of the United States Supreme Court. Many newspapers, including the *San Francisco Chronicle* and the *New York World*, published each letter as it became available. The publicity increased the public's animosity toward the Southern Pacific.⁸⁹

3 *The funding bill battle*

During the Colton suit, the Southern Pacific attempted to refinance the federal loans the Big Four had used to construct the central pacific railroad. Given its connections, the Southern Pacific initially sought passage of a bill that would cancel the debt, which was \$27,000,000 plus 6 percent per annum for 30 years (\$75,600,000 in total). However, the strategy outraged many people, which gave the Southern Pacific's opponents the leverage they required to scuttle the effort. As a fall-back, the Southern Pacific sought passage of a bill that would refinance the debt at 2 percent over 75 years. The Southern Pacific' opponents managed to defeat this effort as well. The battle ended in 1889 when the Southern Pacific agreed to repay \$60,000,000 over 10 years.⁹⁰

However, the settlement actually proved more costly. During the battle, William Randolph Hearst swelled the circulation of his newspapers by publishing the indicting prose of Ambrose Bierce and the thematic illustrations of Homer Davenport. Their coverage of the funding bill battle had a negative impact on the interests of the

⁸⁸Beck, above n 5, 321-322.

⁸⁹Beck, above n 5, 322; see also League, above n 4, 7 (discussing the Southern Pacific's political influence).

⁹⁰Beck, above n 5, 323-324.

Southern Pacific.⁹¹ Although a federal matter, the battle's outcome marked the Southern Pacific's first serious set back at the hands of its opponents.

4 *The free harbour fight*

When California plunged into depression again in the 1890s, criticism of the Southern Pacific grew.⁹² The *Los Angeles Times*, the *Fresno Republican*, the *Sacramento Bee*, and the *San Francisco Bulletin, Examiner, Call*, and *Chronicle* were united in their denunciation of the railroad; they kept anti-railroad sentiment before the public.⁹³ In particular, Harrison Otis of the *Los Angeles Times* supported a group that eventually gave the Southern Pacific its first significant defeat in California.

For generations, San Pedro had served the Los Angeles region as a makeshift harbour. The Southern Pacific, like many southern Californians, had viewed San Pedro as the best site for the establishment of a permanent harbour. However, the Southern Pacific withdrew its support for the San Pedro site when it acquired a railroad joining San Monica to Los Angeles. The purchase gave the Southern Pacific control of large tracts of water front property. Aware of the advantages it enjoyed with its monopoly of the Oakland waterfront in northern California, the Southern Pacific tried to shift the site of the harbour development from San Pedro to the property it had acquired.⁹⁴

This self-serving move united a number of non-governmental organisations against the Southern Pacific. Chief among them were the Los Angeles Chamber of Commerce, the Santa Fe Railroad, and the *Los Angeles Times*. Many people who were not beholden to the Southern Pacific joined the group. They were also joined by rate payers, manufacturers, citrus growers, oilmen, maritime interests, and agriculturalists who had the strength and will to contemplate a fight with the Southern Pacific.⁹⁵

In 1899, the group opposing the Southern Pacific won. The conflict produced by the "free harbour fight" had two dire consequences for the Southern Pacific: 1) it compounded its reputation as a grasping corporate entity which subordinated everything to its own interests; and 2) it increased and emboldened the enemies of the Southern Pacific who realised that its power was limited.⁹⁶

⁹¹Beck, above n 5, 324.

⁹²Mowry, above n 5, 21.

⁹³Olin, above n 5, 5.

⁹⁴Beck, above n 5, 322-323.

⁹⁵Above.

⁹⁶Above.

5 *The Abraham Ruef scandal*

Seven years after the free harbour fight, the Southern Pacific outraged Californians again by its open domination of the Republican Party's 1906 state nominating convention.⁹⁷ Abraham Ruef, a brilliant lawyer who had used the Union Labor Party to take control of San Francisco, sold enough votes to the Southern Pacific to secure nomination for its gubernatorial candidate. The press circulated a picture of Ruef sitting at a table with the Southern Pacific's managers at the convention. It served to confirm reports that Ruef had sold his support to the Southern Pacific for \$14,000 to \$20,000.⁹⁸

The dismal performance of the 1907 legislature only fuelled the Abraham Ruef scandal. Elected representatives displayed "a cynical disregard for honesty, economy, and public welfare."⁹⁹ One editor wrote, "[i]f we are fit to govern ourselves, this is the last time we will submit to be governed by the hired bosses of the Southern Pacific Railroad Company."¹⁰⁰ His words were prophetic. The political and economic excesses of the Southern Pacific created a backlash that swept the Southern Pacific out of power. In quick succession the Southern Pacific lost political control of Los Angeles then San Francisco to the California Progressives. By the end of 1910 the California Progressives had shattered the Southern Pacific's strangle-hold on the exercise of governmental power in California.

II THE RISE OF THE CALIFORNIA PROGRESSIVES

From 1880 until 1911, the Southern Pacific was the single most influential entity operating in California politics.¹⁰¹ Its abuses outraged many Californians and had sparked several failed reform movements. The California Progressives capitalised on these earlier reform efforts, and aroused public opinion, to end the Southern Pacific's domination of state politics and to restore the legitimacy of California's constitutional system.¹⁰² The move to adopt direct democracy in California was a revolt against the Southern Pacific's monopoly over the exercise of governmental power.¹⁰³ The

⁹⁷Fehrenbach, above n 5, 57.

⁹⁸Above; Lavender, above n 5, 149, 161; see also League, above n 4, 7.

⁹⁹Fehrenbach, above n 5, 57.

¹⁰⁰Above.

¹⁰¹Olin, above n 5, 2.

¹⁰²See Olin, above n 5, 55-56; see also generally R Hofstadter *The Age of Reform: From Bryan to F.D.R.* (Alfred Knopf, New York, 1956) (discussing the forces contributing to the passion for progress and reform in the Progressive era in America); A Ekrich *Progressivism in America: A Study of the Era from Theodore Roosevelt to Woodrow Wilson* (New Viewpoint, New York, 1974); R Current, H Williams, F Freidel *American History: A Survey* (Alfred Knopf, New York, 1961) 518-525, 604-610; see also generally below note 120.

¹⁰³E Lee "California" in D Butler and A Ranney (eds) *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute, Washington, DC, 1978) 88.

California Progressives viewed the constitutional initiative, the legislative initiative, and the legislative referendum as instruments capable of neutralising the power of special interest groups and of curtailing the effectiveness of California's political machines.¹⁰⁴

A *Earlier Reform Efforts*

Intense anti-railroad sentiment coincided with the economic depressions that lashed California in the 1870s and the 1890s.¹⁰⁵ To survive these depressions, businessmen either cut costs by reducing wages or by replacing their employees with immigrant labour willing to accept sweatshop conditions. They also created monopolies through mergers or the elimination of competition.¹⁰⁶ In the 1870s these measures increased unemployment in an already overcrowded labour market. Upon completion of the transcontinental railroad, the Big Four contributed to the unemployment problem when they laid-off thousands of the workers they had imported from China.¹⁰⁷

I *Kearneyism*

In 1877, Dennis Kearney, a young San Francisco drayman, used the Workingmen's Party to channel the anger generated by high unemployment into political action. Kearneyites demanded Chinese exclusion acts, state regulation of the railroads and banks, equitable taxation, an eight-hour work day, abolition of contract labour for public works, compulsory education, and the direct election of United States senators.¹⁰⁸

Kearney's success was as spectacular as it was short-lived. His party was able to elect one-third of the delegates to the state's constitutional convention of 1878-79. The delegates managed to win acceptance of their proposals to regulate big business, exclude the Chinese, and establish an eight-hour work day. But Kearney's quick success, coupled with rapid economic recovery, robbed his party of its purpose. By 1885, the Workingmen's Party was a political non-entity.¹⁰⁹

From the decline of Kearneyism to the rise of the California Progressives, the Southern Pacific held virtually uncontested control over California's political life.¹¹⁰

¹⁰⁴Lee "California" in Bulter and Ranney, above n 103, 88-89.

¹⁰⁵Mowry, above n 5, 21.

¹⁰⁶Lavender, above n 5, 154.

¹⁰⁷B Hyink, S Brown, and E Thacker *Politics & Government in California* (8 ed, Thomas Y Cromwell Company, New York, 1973) 63.

¹⁰⁸Hyink, above n 107, 63-64.

¹⁰⁹Hyink, above n 107, 64.

¹¹⁰AHyink, above n 107, 64.

The Railroad Commission established by the constitution of 1879 quickly fell under the sway of the Big Four.¹¹¹ The *San Francisco Call*, as late as 4 July 1908, reported that the Southern Pacific kept an expert political manager in each county to ensure that "the right men were chosen as convention delegates, the right kind of candidates . . . elected, and the right things done by the men in office."¹¹² Kearneyism, however, had one important effect: it stirred up lasting resentment against the railroad machine.¹¹³

2 Populism

Changing demographics and the return of economic hardship rekindled reform efforts in the 1890s. Although the United States was still predominantly rural in 1890, the number of people living on farms was declining rapidly.¹¹⁴ Disastrous economic conditions compounded by denied credit, deeper debt, harsh taxation, and rising rail rates caused farm foreclosures to increase dramatically.¹¹⁵ Although overproduction caused most of their problems,¹¹⁶ many farmers blamed self-serving urban financiers, venal city politicians, and industrial pirates for their woes.¹¹⁷

In the South and the Midwest, farmers formed the nonpartisan Farmers' Alliance to combat their distress.¹¹⁸ Labourers, merchants, socialists, miners, and Henry George's single taxers were also campaigning for reform.¹¹⁹ To varying degrees, these groups called for public ownership of the railroads and utilities. To break the power of party machines, they also advocated the introduction of the initiative, referendum, and recall.¹²⁰

¹¹¹ See above text accompanying notes 71-73.

¹¹² Hyink, above n 107, 64.

¹¹³ Above.

¹¹⁴ Lavender, above n 5, 156.

¹¹⁵ T Cronin *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, Cambridge, 1989) 44.

¹¹⁶ Above. Between December 1870 and December 1899, the United States experienced seven economic slumps. Prices dropped by two-thirds and money became expensive. A debt worth 1,000 bushels in 1865 was worth 3,500 bushels in 1900. Overproduction brought on by an explosion in technology and an abundance of raw materials caused the problem. Lavender, above n 5, 154.

¹¹⁷ Lavender, above n 5, 156; see also Hofstadter, above n 102, 23-59.

¹¹⁸ Above; Cronin, above n 115, 44.

¹¹⁹ Cronin, above n 115, 44; see above also note 68.

¹²⁰ G McKenna *American Populism* (Capricorn Books, GP Putnam & Sons, New York, 1974) 86, 88-89, 93-94; R Hofstadter (ed) *The Progressive Movement* (Prentice-Hall, Englewood Cliff, New York, 1963) 129, 135-136; L Gould *The Progressive Era* (Syracuse University Press, Syracuse, 1974) 18, 31, 34; Lavender, above n 5, 156; see also League, above n 4, 4; H Meier *Friendship Under Stress: U.S. - Swiss Relations 1900-1950* (Herbert Lang & Co, Bern, 1970) 16 (stating that "the voice of the people was drowned out by the political party machines, and corruption on the municipal, state and national level was rampant. As dissatisfaction increased, reformed minded people looked for means to restrict the power of the politicians and to hand over to the people some of the political rights that would give them a voice in the affairs of their community and state. Many advocates of reform thought they had found the tools for achieving this end in the institutions of the referendum and initiative as incorporated in the Swiss federal and cantonal constitutions."). The recall device is a device by which the electors

The Peoples' Independent Party ("Populist Party") evolved out of these alliances when legislatures controlled by special interests proved unresponsive.¹²¹ The Populist Party held its first national convention in Omaha, Nebraska in July 1892. The Populists passed resolutions calling for public ownership of the railroads and the introduction of the initiative and referendum. Most populists viewed direct democracy as a way to circumvent hostile legislatures and to enact laws beneficial to downtrodden farmers, debtors, or labours.¹²²

3 *The direct democracy movement*

While the Populist Party was emerging, books and pamphlets advocating the adoption of the initiative and referendum began to circulate. From 1883 to 1898 some fifteen books and more than fifty articles referring to or discussing Switzerland's direct democracy system were published in English; the output continued unabated until World War I.¹²³ For example, the popularly written *The Swiss Confederation* by Francis Adams and C Cunningham appeared in the United States in 1889.¹²⁴ It was followed in 1891 by John Vincent's *State and Federal Government in Switzerland*.¹²⁵ Both works explained Switzerland's direct democracy system and provided some discussion as to why the Swiss Democrats put the system in place, that is, to break the monopoly enjoyed by powerful business magnates like Alfred Escher over the legislative process.¹²⁶ By 1892, reformers, such as Nathan Cree in his *Direct Legislation by the People*, began to argue that direct democracy would "break the crushing and stifling power of our great party machines, and give freer play to political ideas, aspirations, opinions and feelings of the people."¹²⁷

In 1893, J W Sullivan, a respected labour leader, journalist, and social reform editor, who worked as a national lecturer for the American Federation of Labor, stirred the imagination of reformers with publication of his *Direct Legislation by the Citizenship through the Initiative and Referendum*. Prior to writing this book, Sullivan had

can trigger a referendum on whether an elected official should be dismissed. For a discussion of the recall device, see Cronin, above n 115, 125-156.

¹²¹Cronin, above n 115, 44, 129; see also Hofstadter, above n 102, 60-130.

¹²²Cronin, above n 115, 45; see also Current, above n 102, 524.

¹²³Meier, above n 120, 16.

¹²⁴F Adams and C Cunningham *The Swiss Confederation* (Macmillan & Co, London, 1889) (containing a chapter on the initiative and referendum).

¹²⁵J Vincent *State and Federal Government of Switzerland* (John Hopkins Press, Baltimore, 1891) (containing a chapter on the initiative and referendum). Other influential works were W McCracken *The Rise of the Swiss Republic* (New York, 1908), which was originally published in 1892, and E Oberholtzer *The Referendum in America* (Charles Scribner's Sons, New York, 1900), which appeared in essay form in 1893. See Meier, above n 120, 18-19.

¹²⁶See generally chapter three.

¹²⁷Cronin, above n 115, 46-48.

travelled to Switzerland to observe the Swiss in their use of the initiative and referendum. He had also written a series of articles from 1889 about the initiative and referendum. Sullivan believed that these devices could eliminate distrust of government by increasing the participation of the citizenry.¹²⁸ Sullivan's work was extremely influential, as it was concise, complete, and clear. It circulated all over the United States and did more to give "definiteness and aim to the sentiment of the really democratic leaders . . . than any other one thing."¹²⁹

Although the principles of direct democracy can be traced to New England town meetings and Ancient Greece, its early supporters, and later the California Progressives, based their arguments in favour of direct democracy on the forms of direct democracy then in use in Switzerland.¹³⁰ However, because labour and socialist activists were the first to publicise the initiative and referendum, incumbent legislators initially rejected direct democracy as too radical and as the work of cranks. Nevertheless, the publicising efforts of the newly created National Direct Legislation League increased public interest in the constitutional initiative, the legislative initiative, and the legislative referendum. By the end of the 1890s, support for these devices had grown throughout the West.¹³¹

At the turn of the century, Sullivan carried his campaign for direct democracy to California. His ideas took root in Los Angeles, where the Direct Legislation League, founded and headed by Dr John Randolph Haynes, a prominent physician from Philadelphia with oil investments in the region, fought hard for the adoption of direct democracy devices on the local and then state level.¹³² Haynes would later acknowledge the incomparable influence of Switzerland's direct democracy system on the development of democracy in the United States.¹³³

¹²⁸Cronin, above n 115, 48; see also Meier, above n 120, 18.

¹²⁹Meier, above n 120, 18 (quoting Eltwood Pomeroy, editor of the Direct Legislation Record, which appeared from 1894 to 1903 under the editorship of Sullivan and Pomeroy; the publication was an important instrument of agitation and propaganda which helped to bring about the establishment of direct democracy in America on the city and state levels).

¹³⁰Meier, above n 120, 16-18; League, above n 4, 1-2; Hyink, above n 107, 114; Cronin, above n 115, 164; J Aubert "Switzerland" in Butler and Ranney, above n 103, 66; see also generally Oberholtzer, above n 2.

¹³¹Cronin, above n 115, 50. South Dakota (1898), Utah (1900), and Oregon (1902) pioneered the use of the initiative for constitutional amendments and ordinary legislation. A Ranney "The United States of America" in Butler and Ranney, above n 103, 69. Only ten states, all in the West, have both the constitutional and direct statutory initiative (Oregon, Montana, Oklahoma, Missouri, Arkansas, Arizona, Colorado, California, Nebraska, and North Dakota). This reflects the impact of Progressive reforms of the early 1900s. Lee "California" in Butler and Ranney, above n 103, 88 n 1.

¹³²Beck, above n 5, 337; Olin, above n 5, 6; Fogelson, above n 5, 211-212; Mowry, above n 5, 139; Hyink, above n 107, 114-115; League, above n 4, 7-8.

¹³³See Meier, above n 120, 19 (citing a 1912 interview of Haynes by William Rappard, author of *Collective Security in Swiss Experience: 1291-1948* (George Allen & Unwin, London, 1948)).

Prior to these developments, the Southern Pacific's policy of selling its lands to speculators had earned the ire of many small farmers. To farm in California, a person had to either pay speculators their asking price for land and water or lease by the year. These practices helped to create a huge migrant farm labour system consisting largely of Chinese labour. To fight the degradation caused by high land costs and low produce incomes, small farm owners had created a statewide organisation called the Patrons of Husbandry or simply 'the Grange'.¹³⁴

Like Kearney, the Grangers had pushed for state supervision of the railroad in the 1870s.¹³⁵ They remained undaunted by the ineffectiveness of the Railroad Commission. Instead, like many other foes of the Southern Pacific, they grew in strength.¹³⁶ The growing migration of Midwesterners to California imported populism, Protestant morality, and then progressivism into the state. By 1890 approximately 45 percent of California's population had come from the Midwest. The percentage of Midwesterners was approximately 50 percent in 1900 and 60 percent in 1910.¹³⁷

Unlike the former immigrant populations that had accepted the status quo, the Midwesterners became active in the political and economic life of California.¹³⁸ While newspapers were decrying the abuses perpetrated by the Southern Pacific,¹³⁹ Californians witnessed the rise of new industrial and commercial interests.¹⁴⁰ In addition, Californians became involved with organisations opposed to the Southern Pacific: the Grange, the Southern California Fruit Growers Association, the Deciduous Fruit Protective League, the Los Angeles Chamber of Commerce, and labour unions.¹⁴¹

On 11 April 1890, eleven Californians established the state's first Farmers' Alliance. Two years later, the Farmers' Alliance had 500 chapters throughout California, which were in close contact with alliances throughout America.¹⁴² When their Midwestern and Southern counterparts transformed themselves into populists, their ideas were dissiminated throughout California, including their endorsement of direct democracy.

¹³⁴ Lavender, above n 5, 124.

¹³⁵ Above.

¹³⁶ Mowry, above n 5, 21.

¹³⁷ Mowry, above n 5, 7.

¹³⁸ Above; Olin, above n 5, 2.

¹³⁹ See above text accompanying notes 91 and 93.

¹⁴⁰ Mowry, above n 5, 21; Beck, above n 5, 325.

¹⁴¹ Mowry, above n 5, 22.

¹⁴² Lavender, above n 5, 302.

B *California Progressivism*

The Progressive movement began at the turn of the century. The Populists, the Grangers, and social critics like Henry George, Edward Bellamy, and Henry Demarest contributed to its development, as did the previous four decades of labour unrest and farmer protest.¹⁴³ Together, organised business, labour, and agricultural interests might have been able to neutralise the Southern Pacific; however, they were too preoccupied by their specific economic interests to engage in concerted statewide action.¹⁴⁴

Paradoxically, a group of well-educated individualists, brought together by their reformist zeal, seized leadership of the struggle against the Southern Pacific.¹⁴⁵ Initially, they had only intended to win control of their city governments.¹⁴⁶ But by the time they had liberated Los Angeles and San Francisco, the California Progressives were determined to free the state government from the Southern Pacific's influence.¹⁴⁷ To accomplish this goal, the California Progressives created and used the Lincoln-Roosevelt League to gain control of the Republican Party and then the state government.¹⁴⁸ During their first year in power, the California Progressives won the approval of the electorate to incorporate the constitutional initiative, the legislative initiative, and the legislative referendum into the California Constitution.¹⁴⁹

The Progressive movement was part of a western European phenomenon in which western society began to shift from an agrarian social system to one based on industrialism and urbanisation. The moral, humanitarian, and democratic themes of this shift are found at the heart of progressivism.¹⁵⁰ In California, progressivism manifested itself as a militant middle class reaction against battenning corporations and increasingly powerful labour unions.¹⁵¹ California Progressives objected strongly to control when it emanated from a class above or below them. They attributed the problems of poverty and criminality to the classes below them; and, they blamed the classes above them for the problem of predatory wealth.¹⁵² They were determined to

¹⁴³Mowry, above n 5, 88.

¹⁴⁴Olin, above n 5, 6.

¹⁴⁵Mowry, above n 5, 22; Hyink, above n 107, 63.

¹⁴⁶Mowry, above n 5, 22; Olin, above n 5, 6.

¹⁴⁷Beck, above n 5, 339.

¹⁴⁸Fehrenbach, above n 5, 57; Beck, above n 5, 340.

¹⁴⁹Lee "California" in Bulter and Ranney, above n 103, 88; Olin, above n 5, 55; Lavender, above n 5, 164; Mowry, above n 5, 149.

¹⁵⁰Mowry, above n 5, 88; Olin, above n 5, 35 n 1 (stating that "the heart of progressivism was the ambition of the new middle class to fulfill its destiny through bureaucratic means"); see also Hofstadter, above n 102, 174-214; Meier, above n 120, 16.

¹⁵¹Mowry, above n 5, 101; Fehrenbach, above n 5, 55.

¹⁵²Mowry, above n 5, 97.

rescue themselves from the oblivion to which they, as individuals, had been consigned by the pervasive struggle for power between capital and labour.¹⁵³

The leaders of the California progressive movement shared similar Protestant, upper middle class, urban backgrounds. They were generally economically well-off, over 40, born in the Midwest or California, had northern European names, and came from old American stock. They typically earned a living as attorneys, journalists, independent businessmen, real estate brokers, doctors, bankers, and publishers. They were independent, enterprising, and highly literate. At its inception, three out of four members of the Lincoln-Roosevelt League had a tertiary education.¹⁵⁴

Despite their urban origins, the California Progressives borrowed many of their ideas from the Grangers and the Populists. They argued that the prevailing nexus between business and government, and the growing nexus between organised labour and government, could only be broken by returning power to the electors through the initiative, referendum, recall, and direct primaries.¹⁵⁵ They believed that the electors would use these devices to purify political activity in California.¹⁵⁶ Once the electors destroyed the existing political machines, special privilege would be removed and the individual would again be supreme in California's political and economic life.¹⁵⁷

In essence, the California Progressives argued that the cure for the ills of representative democracy was more democracy.¹⁵⁸ The argument was based on their belief that a lack of democracy and the imperfections of representation had rendered the government unresponsive.¹⁵⁹ Both the initiative and the referendum were part of a reform movement "whose ideology include[d] broad popular participation and hostility towards parties, legislatures, and elected officials."¹⁶⁰ The aspirations of the California Progressives were based upon a profound belief in the fundamental

¹⁵³Mowry, above n 5, 95; see also League, above n 4, 11.

¹⁵⁴Mowry, above n 5, 101; see also Lavender, above n 5, 162.

¹⁵⁵Lavender, above n 5, 162-163; Fehrenbach, above n 5, 58; Ekrich, above n 102, 113-114; Hofstadter, above n 102, 257 (stating that the Progressives hoped to restore popular government as they imagined it to be in a earlier and purer age, which they believed could be accomplished by reviving the morale of the citizen; the Progressives viewed the initiative and referendum, among other measures, as a means of breaking the machine control of government and returning it to popular control); see also League, above n 4, 3-6.

¹⁵⁶Olin, above n 5, 173.

¹⁵⁷Mowry, above n 5, 101.

¹⁵⁸Cronin, above n 115, 8; Beck, above n 5, 337, 341.

¹⁵⁹Fogelson, above n 5, 211; see also League, above n 4, 4.

¹⁶⁰D Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) x. Reform was in the air; throughout America Theodore Roosevelt and the muckrakers were joined in an uneasy and involuntary alliance against corruption and for reform. Beck, above n 5, 339. Reformist sentiment sweeping the country at the start of the twentieth century, under the leadership of Theodore Roosevelt and Robert La Follette, was organised into a political movement in California by the Lincoln-Roosevelt League. Hyink, above n 107, 65.

goodness of the individual and the Yankee-Protestant ideals of personal responsibility.¹⁶¹ This belief contributed to their zealous affirmation of democracy. Their faith in the democratic process separated them from conservative politicians who insisted upon "representative government" and held that "pure democracy" was dangerous.¹⁶²

Their faith in the wisdom of the individual was accompanied by a distrust of formal party organisations, which they viewed as the spawning grounds of special-interest power.¹⁶³ Although repulsed by business immorality, the California Progressives admired the efficiency of corporations.¹⁶⁴ They were convinced that administrative efficiency and scientific management, coupled with more direct citizen participation in government, would expose political parties as both irrelevant and unnecessary.¹⁶⁵

The California Progressives sought to recapture and reaffirm the individualistic and moral values of an older America on all levels of political, economic, and social life.¹⁶⁶ They recognised law as that pertaining to the church-going middle class; they were determined to apply it equally to the home, government, and business.¹⁶⁷ Consequently, they were opposed to the impersonal, concentrated, and privileged property embodied in California's corporate giants.¹⁶⁸ The Southern Pacific, because of its size, power, and visibility, became the focus of their campaign to win political control in California.¹⁶⁹

C The Progressive Revolution in California

The California Progressive movement originated in California's major cities.¹⁷⁰ Its early leaders were primarily interested in the legitimisation of local politics.¹⁷¹ Their initial organisational efforts and political successes took place in Los Angeles and San Francisco.

¹⁶¹Mowry, above n 5, 99; Olin, above n 5, 174; Hofstadter, above n 102, 261.

¹⁶²Mowry, above n 5, 99.

¹⁶³Olin, above n 5, 174.

¹⁶⁴Lavender, above n 5, 162.

¹⁶⁵Olin, above n 5, 173-174; see also Hofstadter, above n 102, 215-271.

¹⁶⁶Mowry, above n 5, 99-101; Fehrenbach, above n 5, 55.

¹⁶⁷Mowry, above n 5, 99. With Johnson furnishing dynamic leadership, the California State legislature of 1911 enacted a comprehensive program of reform. The major emphasis was upon the democratisation of politics and the regulation of public utilities. Fehrenbach, above n 5, 58.

¹⁶⁸Mowry, above n 5, 101.

¹⁶⁹Lavender, above n 5, 149, 163; Olin, above n 5, 20-33; Beck, above n 5, 344.

¹⁷⁰Fehrenbach, above n 5, 55.

¹⁷¹Above; Olin, above n 5, 6, 173.

1 The battle for Los Angeles

Between 1865 and 1900, the most influential participants in Los Angeles politics were the water, gas, and electric companies, the street railway lines, and the Southern Pacific. Given the city council's power to regulate their businesses and to award lucrative contracts and franchises, these concerns had formed a political machine to promote their economic interests.¹⁷²

The machine was responsible for choosing candidates and electing them to office. Its success guaranteed regional support for the Southern Pacific, favourable treatment for the businesses concerned, and long terms for its elected officials.¹⁷³ The Southern Pacific provided leadership; city employees donated the labour; money came from the corporate utilities, public works contractors, and vice lords.¹⁷⁴ The machine supported republicans and democrats alike. As long as successful candidates acknowledged their dependence on the machine, party affiliation was of little consequence. By dint of hardwork, the machine dominated the Los Angeles city council and effectively governed Los Angeles.¹⁷⁵

However, serving the machine at the expense of campaign promises eventually aroused opposition. Los Angeles electors "found taxes outrageously high and services incredibly inadequate." Thinking "frugal administration compatible with liberal improvements," the electors blamed the situation on the machine. They believed it was exploiting them to "gain profits and win elections."¹⁷⁶

Throughout the 1890s, Los Angeles reformers tried to rid the city council of machine control.¹⁷⁷ They formed the Municipal Reform Association and the League for Better City Government to sponsor reform-minded candidates. Although unsuccessful, these early efforts had three important consequences: 1) they brought together the businessmen and professionals who would launch the progressive movement in California; 2) they taught them that success depended upon organisational efficiency, dedicated leadership, and practical schemes to gain political power; and 3) they established reform as a non-partisan issue.¹⁷⁸

¹⁷²Fogelson, above n 5, 206-207.

¹⁷³Fogelson, above n 5, 207.

¹⁷⁴Above; Lavender, above n 5, 148; Mowry, above n 5, 55.

¹⁷⁵Fogelson, above n 5, 209.

¹⁷⁶Above.

¹⁷⁷Olin, above n 5, 6.

¹⁷⁸Fogelson, above n 5, 210-211. The Progressives came to the conclusion that the great vice in municipal politics was the mixing of national party politics with city affairs, and they concluded that what Los Angeles needed was non-partisanship in its municipal government, and decided that they would undertake to organise to that end. Fogelson, above n 5, 205.

These consequences were not lost on Dr John Randolph Haynes. Haynes had moved from Philadelphia to Los Angeles in 1887.¹⁷⁹ His medical profession and his oil investments freed him from economic dependence on the Southern Pacific.¹⁸⁰ His standing in the community also eliminated many of the obstacles that had prevented earlier, especially foreign, immigrants from participating in the political process.¹⁸¹ This combination of economic independence and prominence was characteristic of California Progressives.¹⁸² It gave them both the means and the desire to challenge the Southern Pacific.

After observing Los Angeles politics,¹⁸³ Haynes concluded that the Southern Pacific was responsible for Los Angeles' system of government.¹⁸⁴ He was convinced that the Southern Pacific made the final selection of public officials from village constable to governor.¹⁸⁵ Haynes believed that the only way to achieve civic progress was to broaden participation in government by giving the electors the powers of the initiative, referendum, and recall.¹⁸⁶ His solution was borne of confidence in the electorate and suspicion of elected representatives.¹⁸⁷ He believed that 'the happiness, wisdom and prosperity of a people bear a definite ratio to the extent of their power and participation in the business of government.'¹⁸⁸

In 1895, Haynes organised the Direct Legislation League to promote adoption of the initiative, referendum, and recall. The sole purpose of the League was to bring about a transfer of power from the machine to the electors.¹⁸⁹ The League, together with other progressive groups, popularised its solution by pointing out that it was "simply the principle of the American town meeting applied to the conditions of city life."¹⁹⁰ Persuaded by this argument, a Broad of Freeholders drafted a city charter amendment that provided for the initiative, referendum, and recall. Impressed by their capacity to restrain and remedy government malfeasance, the electors overwhelmingly approved

¹⁷⁹Olin, above n 5, 6.

¹⁸⁰See above text accompany note 132.

¹⁸¹See above text accompanying note 74.

¹⁸²See above text accompanying note 154.

¹⁸³Olin, above n 5, 6.

¹⁸⁴Beck, above n 5, 337.

¹⁸⁵Beck, above n 5, 327.

¹⁸⁶Beck, above n 5, 337; Olin, above n 5, 6. For a definition of the recall device, see above note 120.

¹⁸⁷Fogelson, above n 5, 211.

¹⁸⁸League, above n 4, 5 (quoting Haynes in a 1911 debate arguing for adoption of the initiative and referendum on the State level). Haynes also argued that "the act of law making operates in the case of the individual voter as a great educator [and the people] are better fitted to vote upon measures, the text of which is sent to them three months before election with arguments pro and con than they are to vote for a long array of office holders of whom they know little or nothing." Above.

¹⁸⁹Mowry, above n 5, 39; Olin, above n 5, 6; League, above n 4, 8.

¹⁹⁰Fogelson, above n 5, 212.

them in 1902.¹⁹¹ The state legislature, despite some hesitation, ratified Los Angeles' new city charter in January 1903.¹⁹²

Initially, neither the chaos predicted by conservatives nor the sweeping changes expected by progressives materialised.¹⁹³ Although progressives were convinced that the electors had both the power and the means to purify city government and to achieve civic progress,¹⁹⁴ the Southern Pacific initially retained its powerful influence in Los Angeles' political life.¹⁹⁵ Use of the initiative, referendum, and recall was cautious;¹⁹⁶ progress was slow.¹⁹⁷ In 1904, Los Angeles became the first American city to recall an elected official.¹⁹⁸ However, the machine continued to control the city council throughout the remainder of the decade.¹⁹⁹

Nevertheless, the reform movement continued to grow in strength.²⁰⁰ In 1906, the reformers gained several city council seats. Encouraged by the victory, they drafted amendments to the city charter in 1908 which provided for direct primaries and city-wide nonpartisan elections.²⁰¹ When the machine-controlled city council opposed the amendments, the Good Government League, under the leadership of Edward Dickson of the *Los Angeles Express*,²⁰² used the initiative to place them on the ballot in 1909. The electors approved both amendments by handsome margins. This ended the partisanship and localism that had characterised Los Angeles politics. It also strengthened the California Progressives' drive to win control of Los Angeles.²⁰³

The reform meant that the mayor, council members, and appointive administrators would receive their authority from city-wide rather than ward constituencies. This destroyed the machine's traditional organisational devices; the bosses lost their means of reaching the electors and, as a result, their ability to influence government. Forcing candidates to appeal to the entire electorate strengthened metropolitan institutions such as newspapers, civic clubs, and commercial organisations while weakening local groups such as neighbourhood associations, ethnic minorities, and

¹⁹¹ Above; see also Olin, above n 5, 6; Beck, above n 5, 337.

¹⁹² Olin, above n 5, 6; League, above n 4, 8.

¹⁹³ Olin, above n 5, 7.

¹⁹⁴ Above.

¹⁹⁵ Beck, above n 5, 337; Fehrenbach, above n 5, 56.

¹⁹⁶ Olin, above n 5, 7.

¹⁹⁷ Beck, above n 5, 337.

¹⁹⁸ Mowry, above n 5, 39.

¹⁹⁹ Above; Fogelson, above n 5, 213.

²⁰⁰ Beck, above n 5, 212.

²⁰¹ Fogelson, above n 5, 213.

²⁰² Fehrenbach, above n 5, 56.

²⁰³ Fogelson, above n 5, 213.

radical activists. Financing and publicity became more important than favours and familiarity.²⁰⁴

Los Angeles was not the only city where machine politics was under siege. However, endowed with a huge native-American majority, Los Angeles became the first city to overcome it.²⁰⁵ San Francisco also overcame machine politics during this period, albeit in a more dramatic fashion.

2 *The fight in San Francisco*

San Francisco, then the largest metropolitan area in California, was important to the Southern Pacific. The Big Four had won their first victories there. The city's large immigrant population made it particularly vulnerable to machine politics. Under the shrewd leadership of Christopher Buckley, the machine in San Francisco consistently delivered what the Southern Pacific wanted: freedom from state regulation. Although a democrat, he also engineered the arrangements that helped Stanford, president of the Southern Pacific and a republican, maintain his seat in the United States Senate.²⁰⁶

San Francisco felt the tremors of reform long before the earthquake of 1906. As early as 1894, Buckley and the concerns that used his services, particularly the Southern Pacific, were under fire.²⁰⁷ The growing violence and politicalisation of the labour movement in San Francisco also shook the political establishment. Abraham Ruef took advantage of the unrest by using the Union Labor Party to gain control of San Francisco.²⁰⁸

Ruef's appetite for bribes was insatiable. It led to his downfall and sparked the state-wide campaign against the Southern Pacific that swept the California Progressives into power. In 1906 Patrick Calhoun, president of the United Railroad, San Francisco's dominant street car system, asked Ruef to grant him a franchise to expand his system. He wanted to use overhead trolley wires, which met with the opposition of civic leaders who wanted to preserve San Francisco's beauty; they demanded the use of underground wires, which was more expensive.²⁰⁹

²⁰⁴Fogelson, above n 5, 218.

²⁰⁵Above. Sacramento adopted the initiative and referendum in 1903, the same year as Los Angeles, after the town board had refused to grant the Western Pacific Railroad a franchise to enter the city. Some of the Direct Legislation League's ideas were adopted in San Francisco as early as 1899. However, they were of little consequence until the fall of Abe Ruef. After his victory in Los Angeles, Haynes met with Ruef to seek his support for the establishment of direct democracy in San Francisco, but Ruef remained uncommitted. League, above n 4, 8.

²⁰⁶Lavender, above n 5, 149.

²⁰⁷Above.

²⁰⁸Lavender, above n 5, 161; see also League, above n 4, 8.

²⁰⁹Lavender, above n 5, 149.

Knowing that Ruef, rather than elected representatives, would make the decision, Calhoun's opponents realised that they had an opportunity to oust Ruef on charges of graft. They convinced President Theodore Roosevelt to assign Francis Heney and William Burns, the best investigators in the service of the federal government, to the task of gathering evidence against Ruef. After the 1906 earthquake struck, Ruef sprang the trap by giving Calhoun what he wanted. Shortly afterward, he attended the Republican Party's state nominating convention at Santa Cruz, where he outraged Californians by selling enough votes to the Southern Pacific to nominate its gubernatorial candidate.²¹⁰

The convention debacle, coupled with the graft investigation, reversed Ruef's fortunes. Burns used the evidence he had collected and grants of immunity to encourage Ruef's underlings to testify against him. During Ruef's trial, which was marred by intimidation and disappearing witnesses, a venireman shot Heney, who was prosecuting the case. Hiram Johnson, whose father, State Senator Grover Johnson, was a staunch supporter of the Southern Pacific, took Heney's place and convicted Ruef. The case established Johnson's progressive reputation, and marked him for a leadership role in the upcoming campaign to wrest control of the state government from the Southern Pacific.²¹¹

The Ruef case also contributed to the progressive sentiment that was growing in California.²¹² Inspired by President Roosevelt's dynamic leadership, the crusade of the "muckrakers," and the success of reformers in Wisconsin and Oregon,²¹³ Californians were ready for a new political morality.²¹⁴ Reformers throughout the state were convinced that the structure of government had to change.²¹⁵ As a result, the reform movements in Los Angeles and San Francisco coalesced into a statewide campaign to end California's subservience to the Southern Pacific.²¹⁶

3 *The Lincoln-Roosevelt League*

Following Ruef's Santa Cruz deal, the 1907 state legislature underscored the need for reform by setting "a new record for wastefulness, unscrupulousness and subservience to the machine."²¹⁷ Edward Dickson, a reporter for the *Los Angeles Express*, and

²¹⁰ Above; see also above text accompanying note 98.

²¹¹ Lavender, above n 5, 161; see also League, above n 4, 8.

²¹² Beck, above n 5, 335.

²¹³ Fehrenbach, above n 5, 57.

²¹⁴ Lavender, above n 5, 163.

²¹⁵ Lavender, above n 5 161; Beck, above n 5, 335.

²¹⁶ Fehrenbach, above n 5, 57; Mowry, above n 5, 55.

²¹⁷ League, above n 4, 7 (quoting John Caughey); see also above text accompanying note 99.

Chester Rowell, the editor of the *Fresno Republican*, covered the 1907 session.²¹⁸ Outraged by what they saw, they organised a statewide convention of dissatisfied republicans, which was held in Oakland in August 1907.²¹⁹

Thirty eight delegates attended the convention. Most were well-educated and engaged in a profession such as law, journalism, medicine, or business.²²⁰ Instead of establishing a new party, they decided to remake the California Republican Party along progressive lines.²²¹ To facilitate this decision, they formed the Lincoln-Roosevelt League and resolved to emancipate their party from the Southern Pacific's domination.²²²

The League experienced its first electoral victories in 1908 when it gained several seats in the state legislature.²²³ By 1909, the League controlled as many seats in both houses as the machine. However, the reformers were too inexperienced and unprepared to capitalise on their success. Consequently, the machine easily outmanoeuvred them.²²⁴

Nevertheless, pursuant to a constitutional amendment approved overwhelmingly by the electors in the 1908 election,²²⁵ the reformers managed to pass a bill requiring direct primaries in state elections. The abolishment of nominating conventions enabled candidates to appeal directly to their parties' rank and file for their nominations. This benefited the League by preventing the Southern Pacific from dictating the selection of candidates for all offices in the 1910 election.²²⁶ It gave the League an opportunity to displace the entrenched republican leadership.²²⁷

The League persuaded Hiram Johnson to be its candidate for governor in 1910.²²⁸ The League selected Johnson because of the name he had made for himself by

²¹⁸Olin, above n 5, 11; Fehrenbach, above n 5, 57.

²¹⁹Olin, above n 5, 11; Hyink, above n 107, 65; League, above n 4, 8-9.

²²⁰Olin, above n 5, 11.

²²¹Fehrenbach, above n 5, 57.

²²²Olin, above n 5, 11; Hyink, above n 107, 65; Beck, above n 5, 340.

²²³Fehrenbach, above n 5, 57.

²²⁴Olin, above n 5, 12.

²²⁵Hyink, above n 107, 65. This amendment was the result of a constitutionally required referendum. In 1908, as is the case now, the California Constitution could be amended if the legislature passed an amendment and presented it to the electors for approval. Many of the state constitutions in the United States can be amended in this way.

²²⁶Olin, above n 5, 13.

²²⁷Hyink, above n 107, 65.

²²⁸Above; Fehrenbach, above n 5, 57. For a discussion of Hiram Johnson's campaign, see Olin, above n 5, 20-33; see also S Olin "Hiram Johnson, The Lincoln-Roosevelt League, and the Election of 1910" (September 1966) *Calif Historical Soc'y Q* 225; League, above n 4, 9-10.

prosecuting Ruef.²²⁹ The League was fortunate that he turned out to be an eloquent, combative, and tireless campaigner with progressive ideals.²³⁰ Johnson identified himself with the insurgent republicans back East. In particular, he admired the work of La Follette in Wisconsin and of Cummins and Dolliver in Iowa. He believed that they were fighting his fight, "a fight against the interests and the system, and for true democracy."²³¹

4 *The campaign for California*

Although he acknowledged the support of the League, Johnson thought that it could not wage an effective statewide campaign on his behalf. As a result, Johnson set up his own campaign organisation.²³² Contrary to the League's advice, he built an aggressive campaign around one theme: "kick the Southern Pacific out of politics."²³³ Johnson toured the state in an red, bell-equipped automobile, avoiding trains as if they were the plague. At street corners and cross roads, he rang his bell to attract crowds for his speeches,²³⁴ in which he attacked the Southern Pacific's illegitimate exercise of governmental power.

Johnson's approach increased his fame, which improved his chances of winning the election. Johnson was victorious in the primaries for two reasons. First, the vote was divided between himself and three other candidates running for the republican gubernatorial nomination.²³⁵ Second, he polled extremely well in Los Angeles County, which gave him his margin of victory.²³⁶

In the general election, Johnson ran against Theodore Bell.²³⁷ Bell, a progressive democrat, had failed to win the governorship in 1906, even though he had run an anti-railroad campaign. As both men were running on progressive and anti-railroad platforms, the campaign turned on their personalities. Bell "could not match Johnson's ability to delight crowds and to arouse enthusiasm among his supporters."

²²⁹Fehrenbach, above n 5, 57; Hyink, above n 107, 65. "Conservative newspapers and periodicals were quick to point out that the League, after dedicating itself to direct legislation and democratic reforms, had proceeded to use machine methods in selecting its candidates. Olin, above n 5, 24.

²³⁰Fehrenbach, above n 5, 57.

²³¹Olin, above n 5, 26.

²³²Olin, above n 5, 25.

²³³Beck, above n 5, 344; Hyink, above n 107, 65; Fehrenbach, above n 5, 57; Olin, above n 5, 26; Lavender, above n 5, 163.

²³⁴Lavender, above n 5, 163.

²³⁵Hyink, above n 107, 65; Fehrenbach, above n 5, 57.

²³⁶Olin, above n 5, 29. The large returns for Johnson from Los Angeles county, and the League's impressive results in southern California, were due in large measure to the "dry" vote. The Anti-Saloon League supported Albert Wallace, a prohibitionist who was Johnson's running mate. Although Johnson was a "wet," he benefited from the support of the temperance people. Olin, above n 5, 30.

²³⁷Beck, above n 5, 341; Olin, above n 5, 26; Fehrenbach, above n 5, 57.

As a result, Johnson was successful in his attacks on Bell. By repeatedly accusing Bell of accepting support from the Southern Pacific, Johnson was able to cast Bell as pliable and willing to placate the machine.²³⁸ The Southern Pacific inadvertently strengthened the credibility of Johnson's accusations when it came out in favour of Bell, which cost Bell thousands of votes.²³⁹

Johnson was also able to win the support of the large farmers and ranchers in California. He appealed to their hatred of the Southern Pacific's unjust and excessive rates. Although they were prosperous, these "acquisitive agrarian entrepreneurs wanted more than anything to end the tapping of their incomes by a predatory railroad."²⁴⁰ Johnson held out the promise of bigger profits. They responded by providing him with valuable campaign funding and influential support in rural areas.²⁴¹

Johnson won by a margin of 23,000 votes.²⁴² His campaign also swept a huge progressive republican majority into power.²⁴³ Until Johnson's victory, the Governor was a railroad man. Through the 1909 legislative session, the Southern Pacific controlled the state legislature. The machine administrated the state government primarily in the interest of the Southern Pacific.²⁴⁴ Johnson's victory destroyed this practice.²⁴⁵ Once in office, the California progressives immediately began the process of fulfilling their party's campaign promises,²⁴⁶ including adoption of the constitutional initiative, the legislative initiative, and the legislative referendum.²⁴⁷

5 *Establishing the main direct democracy devices*

During the 1910 election campaign, the Progressives promised to institute the initiative, referendum, and recall on the state level. As these devices had spearheaded their early victories, they held both practical and symbolic value to the Progressives. Between 1902 and 1910, Haynes and his associates had instigated the adoption of these devices in several cities, including Los Angeles and San Francisco.²⁴⁸ These battles had led to the formation of the Lincoln-Roosevelt League and its subsequent campaign to kick the Southern Pacific out of politics.

²³⁸Olin, above n 5, 31-32.

²³⁹League, above n 4, 10.

²⁴⁰Olin, above n 5, 29.

²⁴¹Above.

²⁴²Beck, above n 5, 341.

²⁴³Lavender, above n 5, 163; Fehrenbach, above n 5, 58.

²⁴⁴Beck, above n 5, 338-340.

²⁴⁵ABeck, above n 5, 344.

²⁴⁶Beck, above n 5, 341.

²⁴⁷See Hyink, above n 107, 66, 114.

²⁴⁸Hyink, above n 107, 114.

Edward Dickson, one of the League's founders, was an ardent supporter of Haynes' Direct Legislation League.²⁴⁹ He was also Johnson's trusted travelling companion during the 1910 election campaign. Shortly before the election, Johnson realised that he might win, which prompted him to ask Dickson, "what in the world are we going to do after we do get in?"²⁵⁰ Dickson suggested they institute a system of direct democracy on the grounds that when the Progressives eventually were defeated the machine could never again have the power it once enjoyed. Intrigued by his response, Johnson asked Dickson to explain how the initiative, the referendum, and the recall worked.²⁵¹ Johnson must have been impressed by Dickson's explanation because he became a relentless advocate for the adoption of these devices once he became Governor.²⁵²

Johnson had few specific reform ideas. Party insiders were worried that he would take office without a consequential program in place. After his election, Johnson travelled East to consult the leading reformers of the progressive era: Theodore Roosevelt, Robert La Follette, and Lincoln Steffens. While he was back East, California's Republican State Central Committee appointed subcommittees to draft measures honouring the party's campaign promises. In the week prior to the 1911 legislative session, they presented their proposals, which included railroad regulation and a range of direct democracy devices, to the members of the new legislature at a general meeting.²⁵³

Although he disapproved of the Committee's course of action, particularly its failure to consult him, Johnson publicly supported the Committee's recommendations.²⁵⁴ In his inaugural address of 3 January 1911, he declared:²⁵⁵

A successful and permanent government must rest primarily upon the recognition of the rights of men and the absolute sovereignty of the people.

He also stated:²⁵⁶

In some form or other, nearly every governmental problem that involves the health, the happiness, or the prosperity of the state has arisen because some private interest has intervened or has sought for its own gain to exploit either the resources or the politics of the state.

²⁴⁹See also above text accompanying notes 132, 189-190.

²⁵⁰Mowry, above n 5, 135; League, above n 4, *Introduction*.

²⁵¹Mowry, above n 5, 135.

²⁵²Mowry, above n 5, 148; Olin, above n 5, 46.

²⁵³Olin, above n 5, 33; see also League, above n 4, 10.

²⁵⁴Olin, above n 5, 33.

²⁵⁵Mowry, above n 5, 139; League, above n 4, 10.

²⁵⁶Olin, above n 5, 34.

Johnson argued that big business and the machine politician had prevented recognition of the sovereignty of the people. He also argued that those who employed the state for their own private gain were dangerous to the common welfare. Johnson proposed the destruction of vested interests by making the people and their agents supreme.²⁵⁷ At the expense of corporate influence and machine politics, Johnson intended to "return government to the people."²⁵⁸ He wanted to restore the legitimacy of California's constitutional system.

To achieve this end, he recommended passage of the long list of reforms that the leaders of the Lincoln-Roosevelt League had written into the republican platform. These included a railroad act empowering a commission to fix absolute rates on the basis of physical evaluation, and the initiative, referendum, and recall.²⁵⁹ In his first message to the legislature, Johnson called for the passage of amendments to the California Constitution which would provide for the constitutional initiative, the legislative initiative, the legislative referendum, and the recall. Haynes and Dickson, at Johnson's request, had prepared the necessary amendments.²⁶⁰

The proposal to include these direct democracy devices in the California Constitution triggered the first bitter clash of opinion in the legislature. Conservative members labelled the devices as "socialist measures." Johnson's father, Grove Johnson, who had resigned from the legislature after his son's electoral victory, summed up the objections to the proposal. He argued that it constituted an attempt to substitute an "Athenian democracy for a representative form of government" which would remove stability and moderation from government. He based his argument upon a distrust of the electorate: "The voice of the people is not the voice of God," he declared, "for the voice of the people sent Jesus to the cross."²⁶¹

The proposal also triggered conservative opposition throughout California. The *Los Angeles Times*, a strong opponent of the proposal, underscored Grover Johnson's

²⁵⁷Mowry, above n 5, 139.

²⁵⁸Olin, above n 5, 35.

²⁵⁹Mowry, above n 5, 139. Reforms had sought to redeem the state from railroad control via the Railroad Commission, which for almost 30 years had done little or nothing to safeguard the public interest. The Commission's ineffectiveness was more due to its institutional weakness than malfeasance. However, from 1900 to 1907, railroad political influence made sure that no legislative appropriation was made for its work. As a result, the Commission could not conduct investigations of complaints or even print an annual report. Although the railroad had outmanoeuvred the reformers, it had aroused public sentiment against it. This gave the reformers the support and the opportunity to introduce the Stetson bill which would have given the Railroad Commission the power to regulate rates effectively (punish with imprisonment and fines). However, the railroad managed to pass the Wright bill in place of the Stetson bill, which set maximum rates enforced by fines, but left the railroad free from state supervision. While the reformers did not achieve their initial objective, they managed to force the railroad machine to pass a measure inimical to its interests. Olin, above n 5, 13-18.

²⁶⁰Mowry, above n 5, 139-140.

²⁶¹Mowry, above n 5, 141.

argument by “asserting that the ‘ignorance and caprice and irresponsibility of the multitudes’ would be substituted for ‘the learning and judgment of the legislature.’”²⁶² The *San Francisco Chronicle* and the *San Diego Union* joined the *Los Angeles Times* in urging Californians to reject the initiative, referendum, and recall on the grounds that they undermined representative government.²⁶³ Opponents also argued that agitators would use the proposal to produce radical legislation subjecting business and property rights to constant turmoil.²⁶⁴

Johnson, however, was not deterred. In sharp contrast to the conservatives, the California Progressives had faith in the electorate. They wanted to “return the government to the people” through the initiative, referendum, and recall in order to neutralise machine politics.²⁶⁵ Adoption of the proposal meant “the elimination of superstition, bigotry, intolerance, and ignorance from American politics . . . and end to boss rule and . . . to grafting from the public crib; and an end of fraud, pomposities, and political fakers.”²⁶⁶

The California Progressives also viewed the proposal as a means of providing for civic education on major policy issues and as a means of making the legislature more responsive to the electorate. If the legislature failed to act, the electors could bypass their representative political institutions altogether.²⁶⁷ Empowered by these devices, California electors, as Dickson had explained to Johnson, would never again be subjected to abuse of governmental power that they had to bear under the Southern Pacific.²⁶⁸

Johnson had placed the proposal in a “must pass class” and was prepared to use all of his power to obtain its passage.²⁶⁹ Once the legislature had agreed upon the form of the constitutional amendments and passed them, they were submitted to the electors for approval in a special election held on 11 October 1911²⁷⁰ in accordance with the procedure for constitutionally required referendums.

²⁶²Cronin, above n 115, 52.

²⁶³Olin, above n 5, 46.

²⁶⁴Cronin, above n 115, 52.

²⁶⁵Olin, above n 5, 44.

²⁶⁶Cronin, above n 5, 115.

²⁶⁷G Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies Ltd, St Leonards, 1987) 16.

²⁶⁸See above text accompanying notes 250-252.

²⁶⁹Mowry, above n 5, 140.

²⁷⁰Lavender, above n 5, 164. On 11 October 1911, the California electorate approved 23 constitutional amendments to the California Constitution, including the provisions providing for direct democracy and the provisions revitalising regulatory agencies for the railroads and public utilities. Above; Beck, above n 5, 342. In part, the programs Johnson and his advisers inaugurated had been tested first in Wisconsin, Oregon, and New York. Lavender, above n 5, 164.

During the two months prior to the special election, Johnson campaigned vigorously on behalf of the proposed direct democracy devices.²⁷¹ He virtually ignored all other issues.²⁷² In one of his most effective speeches, Johnson, invoking the democratic spirit of Andrew Jackson, declared that the devices constituted an attempt to bring government close to the electors once again, "in the hope . . . that we may yet live in a free republic."²⁷³ The electors rewarded Johnson's efforts by approving the initiative, referendum, and recall amendments to the California Constitution.²⁷⁴ The special election involved 220,000 electors.²⁷⁵ Although the constitutional initiative and legislative initiative, which were combined in one amendment, barely passed, the recall amendment, which included elected judges, was approved three-to-one.²⁷⁶

Ruef, Johnson's nemesis, unwittingly helped Johnson win adoption of direct democracy in California. Ruef had appealed his conviction to the California Supreme Court. As fate would have it, the appeal reached the Court prior to the special election. The possibility that Ruef might be freed by the Court prompted Californians to overwhelmingly endorse the recall amendment. This incident undoubtedly enhanced Johnson's case for the other direct democracy devices.

Under Johnson's dynamic leadership, the 1911 legislature enacted a comprehensive reform program.²⁷⁷ The program emphasised the democratisation of politics.²⁷⁸ Adoption of the constitutional initiative, the legislative initiative, and the legislative referendum constituted one of the legislature's major achievements.²⁷⁹ Capitalising on previous reform efforts and on aroused public opinion, the California Progressives ended the Southern Pacific's domination of California's politics by building upon the idea that the electors would rule wisely if governmental power was placed in their hands.²⁸⁰ They used the idea to challenge the Southern Pacific's control over the exercise of governmental power and then to break its monopoly over that power.

²⁷¹Mowry, above n 5, 148, 149.

²⁷²Mowry, above n 5, 148.

²⁷³Mowry, above n 5, 149.

²⁷⁴Lavender, above n 5, 164; Olin, above n 5, 46; see also Hyink, above n 107, 115.

²⁷⁵Lee "California" in Butler and Ranney, above n 103, 88.

²⁷⁶Mowry, above n 5, 149; but see League, above n 4, 10 (stating that "direct legislation won approval three-to-one").

²⁷⁷Theodore Roosevelt praised the work of the 1911 legislature as "the most comprehensive program of constructive legislation ever passed at a single session of an American legislature." The California legislature passed over 800 bills. A large part of California's reputation for innovative legislation stems from this period. League, above n 4, 10-11; Beck, above n 5, 342.

²⁷⁸Fehrenbach, above n 5, 58.

²⁷⁹Olin, above n 5, 55.

²⁸⁰Beck, above n 5, 344; see also Olin, above n 5, 35, 55-56; Mowry, above n 5, 139.

III ASSESSMENT

Direct democracy in California finds its origins in the forces that gave rise to the California Progressives. The Southern Pacific Railroad Company was largely responsible for producing those forces. In the course of its reign, it subverted the separation of powers doctrine underpinning California's constitutional system by acquiring control of each branch of government; legislators, governors, and judges were in its service. Consequently, the Southern Pacific completely dominated the legislative process in California.

As in Switzerland during the heyday of Escher and his ilk, representative democracy in California was under the control of a few extremely wealthy individuals who used their power to further their personal economic interests. At the zenith of its power, the Southern Pacific had a supporter in every office which could affect its interests. It used these offices, often with brutal efficiency, to advance and protect its interests. By doing so, the Southern Pacific was able to neutralise those aspects of early reform movements which were directed against its interests.²⁸¹

The California Progressives, however, could not be dealt with in the same fashion. Like the Swiss Democrats, they were, by and large, better educated, better informed, and better off than their predecessors, which gave them both the means and the inclination to be politically active. Both the Swiss Democrats and the California Progressives were part of demographic changes which had dramatically increased the numbers of those who loathed being marginalised by privileged elites and who idealised an earlier age uncorrupted by the negative aspects of industrialism. The Swiss Democrats drew upon the examples of the self-governing ancient mountain cantons and the virtue of the fair-minded and independent individual who had a say in the affairs of his or her community as symbolised by the legendary Wilhelm Tell. The California Progressives sought to recapture and reaffirm the individualistic and moral values of an older America in which those living in small settlements and pioneer towns had a say in the affairs of their communities and were rewarded for hardwork and honest living. Neither were prepared to accept the illegitimate use of governmental power.

The impulse which drove the Swiss Democrats and the California Progressives was essentially the same. They were reacting to the colossal changes brought about by the industrial revolution, particularly the dehumanising consequences of its rapid and unprecedented concentration of economic and political power. It was no accident that the California Progressives embraced Sullivan's argument that California should adopt

²⁸¹See League, above n 4, 7

Switzerland's direct democracy system. His accounts of Switzerland's direct democracy system provided the California Progressives with a concrete example of how they could break the Southern Pacific's stranglehold on the exercise of governmental power in California.²⁸² Like the Swiss Democrats before them, the California Progressives were initially on the outside looking in. They wanted to participate in the exercise of governmental power to bring about the reforms that they considered necessary, but their access was effectively barred and their "representatives" unresponsive. Rather than abandoning their efforts, however, they persisted and continued to work within the existing constitutional framework to find ways to overcome the barriers erected by privileged economic interests.

Like the Swiss Democrats, who began their push for direct democracy in the communes and the cantons, the California Progressives began their campaign on the local level, where they eventually won control of key city governments, most notably Los Angeles and San Francisco. Their success on the local level encouraged them to turn their attention to the state government, just as the Swiss Democrats had turned their attention to their federal government after their cantonal victories. Slowly, but surely, the California Progressives made the inroads necessary to enable them to wrest power from the Southern Pacific.

When the California Progressives had finally achieved their goal, they immediately took steps to entrench devices which would render any repetition of the excesses perpetrated by the Southern Pacific impossible. The constitutional initiative, the legislative initiative, and the legislative referendum were chief among those devices. The constitutional initiative and the legislative initiative would ensure that the electorate's desire for reform could not be easily frustrated by their elected representatives. The legislative referendum would give the electors the means to veto legislation enacted by their elected representatives which did not conform to their expectations. Both devices would increase the difficulty of enacting legislation contrary to their interests, even if a group were to acquire control over each branch of government as the Southern Pacific had during its heyday. Since the electors would have the means to challenge the acts or omissions of their elected representatives, the exercise of governmental power could no longer be monopolised by any one group.

Ultimately, and ironically, the California Progressives chose to remedy the defects of representative democracy by institutionalising direct democracy. Inspired by Hiram Johnson's energetic and eloquent leadership, and all too aware of the inglorious past of the Southern Pacific, the electors ratified the constitutional amendments that established California's direct democracy system. As in Switzerland, direct

²⁸²See Meier, above n 120, 16, 18.

democracy was perceived as a means of improving, not displacing, representative democracy. The inclusion of the constitutional initiative, the legislative initiative, and the legislative referendum in the California Constitution have given Californians a constitutional system that combines the elements of representative and direct democracy.²⁸³ As the next chapter shows, these direct democracy devices have, in effect, limited the power of elected representatives by augmenting the legal sovereignty of the electors.

²⁸³For a discussion of Cronin's hybrid model of democracy, see section IV in chapter two.

ROLE OF DIRECT DEMOCRACY IN CALIFORNIA

The California Progressives drew on Switzerland's direct democracy system when establishing the constitutional initiative, the legislative initiative, and the legislative referendum in California. Inspired by the success of the Swiss Democrats, they embraced these devices as a means of breaking the hold that the Southern Pacific had on California's elected representatives. Their aim was to restore the legitimacy of their constitutional system.

However, the role that these direct democracy devices play in California is different from the role they play in Switzerland. Switzerland, for example, does not have the legislative initiative on the federal level. In addition, the legislative referendum is used far more frequently in Switzerland than it is in California while the constitutional initiative is used far less frequently in Switzerland than in California. These differences are attributable to the procedural differences between Switzerland's and California's direct democracy devices and the legal implications of the results they produce. These factors are in turn largely a consequence of the differences between the Swiss and California constitutional systems, including California's subordinate status to the federal government of the United States of America.

This chapter explores these procedural differences and legal implications by outlining California's constitutional system and comparing it to Switzerland's constitutional system. It begins by examining California's subordinate status to the federal government, which reveals that California's direct democracy devices cannot be used to propose, enact, or veto laws that are within the jurisdiction of the federal government. The chapter then dissects the component parts of California's constitutional system, namely, its legislative, executive, and judicial branches, and analyses their relationship to the constitutional initiative, the legislative initiative, and the legislative referendum. This exercise shows that the separation of powers principle is applied more strictly in California than in Switzerland, which explains why the California Judiciary, unlike its Swiss counterpart, has the power to declare initiative and referendum proposals, or their results, unconstitutional and, therefore, null and void. Although the discussion is based on the California Constitution, the California Election Code, and the relevant case law, the works of Eugene Lee, Philip Schlessinger and Richard Wright, *The League of Women Voters of California*, Clyde

Hardy, and Bernard Hyink, Seyom Brown, and Ernest Thacker provide useful insights into the actual operation of California's constitutional system.¹

Despite the differences in the Swiss and California direct democracy systems, this chapter concludes that California's direct democracy devices, like Switzerland's, limit the legislative power of elected representatives in California by giving the electors the power to propose, enact, and veto laws. In addition, these devices, like those in Switzerland, have safeguards built into them that limit the legislative power they give to the electors. In Switzerland, however, the safeguards are only procedural. In California, the safeguards are both procedural and substantive, that is, California's direct democracy devices are subject to a host of subject matter limitations. These insights provide the basis for analysing New Zealand's Citizens Initiated Referenda Act 1993 in Part IV of this thesis.

I RELATIONSHIP OF CALIFORNIA TO FEDERAL GOVERNMENT

As a geographical, economic, demographic, and cultural entity, California is more like a nation than a state.² As a political entity, however, California holds roughly the same position in the United States of America as a canton does in Switzerland. Although California has far more economic, social, and cultural influence than a Swiss canton, both nationally and internationally, it has less political autonomy, particularly in the all important area of taxation.³ Article VI, section 2 of the United States Constitution states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

¹League of Women Voters of California *Initiative and Referendum in California: A Legacy Lost? A Study of Direct Legislation in California from Progressive Hopes to Present Reality* (League of Women Voters of California, Sacramento, 1984 reprint 1987); E Lee "California" in D Butler and A Ranney (eds) *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute, Washington, DC, 1978); C Hardy *California Government* (4 ed, Canfield Press, San Francisco, 1973); B Hyink, S Brown, and E Thacker *Politics & Government in California* (8 ed, Thomas Y Cromwell Company, New York, 1973); P Schlessinger and R Wright *Elements of Government in California* (Holt, Rinehart and Winston, New York, 1962).

²Lee "California" in Butler and Ranney, above n 1, 87; Hyink, above n 1, 10-15.

³For example, on 9 September 1850, the United States Congress enacted "An Act for the Admission of California into the Union," which contains specific provisions concerning federal lands, taxation, and navigable waters which may not be altered by California. *Constitution of the State of California* (California State Senate, Sacramento, 1961) 311; see also Schlessinger, above n 1, 8.

The Tenth Amendment, however, provides an important qualification to this statement of federal constitutional power:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article I, section 8 of the United States Constitution enumerates the powers delegated to the federal government, which consist of the essential attributes of traditional governmental sovereignty, that is, the power to coin money, to tax, to provide for the national defence, and to regulate foreign and interstate commerce. Article I, section 10 specifically prohibits the states from making treaties, coining money, and enacting any bills of attainder, ex post facto laws, or laws impairing the obligation of contracts. In addition, the states require the consent of the United States Congress to levy duties on exports and imports, form interstate compacts, and wage war. In areas of concurrent jurisdiction, like taxation, Article VI, section 2 ensures that federal law prevails if it conflicts with state law.

Article I, section 3 of the California Constitution expressly recognises the State's subordinate status:

The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

With two important exceptions, California has exclusive jurisdiction in those areas which are not expressly delegated to the federal government. The first exception is the Full Faith and Credit clause in Article IV of the United States Constitution. Under this clause, California must recognise the public acts, records, and judicial proceedings of other states. Its courts, for example, must enforce judgments in civil cases rendered by courts in other states. The second exception is a matter of practical politics. Over the years, increasing reliance on conditional grants from the federal government and federal solutions to problems that were once in California's exclusive domain has effectively reduced California's political autonomy.⁴ In essence, California governs itself subject to federal restrictions and the requirements of sister state reciprocity.⁵

Furthermore, California cannot enact laws that proscribe or circumvent the rights guaranteed under the United States Constitution, particularly those set out in the Bill of Rights. For example, as Hyink, Brown, and Thacker have noted:⁶

⁴Hardy, above n 1, 22.

⁵Hardy, above n 1, 23.

⁶Hardy, above n 1, 26-27. For a discussion of the federal constitutional constraints on the initiative and referendum (particularly substantive and procedural due process, and equal protection grounds), see D

Within twenty years after becoming a state, California, like all other states, was obligated by the Fourteenth and Fifteenth Amendments to provide equal protection of its laws and the right to vote to all citizens, regardless of race or color, and was also prohibited from abridging the privileges and immunities of United States citizens or from depriving any person of life, liberty, or property without due process of law. The Supreme Court subsequently indicated (through a long line of decisions) that the immunities with which a state may not interfere are basically the same ones which the Bill of Rights prohibits Congress from violating.

Both the California and the federal courts have used the United States Constitution to invalidate, in whole or in part, laws produced by constitutional initiatives in California. For example, the California Legislature passed fair housing legislation in 1963 that prohibited realtors and owners of apartment houses and homes built with public assistance from discriminating on racial grounds.⁷ The Citizens League for Individual Freedom tried to use the legislative referendum to veto the enactment, but it failed to gather the requisite number of signatures within the 90 day deadline.⁸ Undeterred, the League then sponsored a constitutional initiative that was designed to give private property owners the absolute right to sell or lease or refuse to sell or lease to whomever he or she chose,⁹ which effectively repealed the fair housing legislation when approved by the electors by a two to one margin in 1964.¹⁰ However, the California Supreme Court and the United States Supreme Court struck down the initiative as being contrary to the equal protection guarantees in the United States Constitution in *Reitman v Mulkey*.¹¹ The federal government also enacted fair housing legislation,¹² which, given the superiority of federal law, would also have rendered the initiative null and void.¹³

Due to the superior status of the United States Constitution and the clear dominance of the federal government in the key areas of traditional governmental sovereignty, direct democracy in California is far less powerful and important than it is in

Jordan "Constitutional Constraints on Initiative and Referendum" (1979) 32 Vand L R 1143. For a discussion of the limitations which should be applied to direct democracy if adopted on the federal level, see J Synder "The Proposed National Initiative Amendment: A Participatory Perspective on Substantive Restrictions and Procedural Requirements" (1981) 18 Harv J Legis 429.

⁷T Cronin *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, Cambridge, 1989) 94.

⁸The League needed 292,633 signatures but gathered approximately 245,000. Hardy, above n 1, 80.

⁹G Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies Ltd, St Leonards, 1987) 71.

¹⁰Hardy, above n 1, 80; Cronin, above n 7, 94.

¹¹413 P2d 825, 64 Cal 2d 529, 50 Cal Rptr 881 (1966) *aff'd* 387 US 369 (1967); see also Hardy, above n 1, 80; Walker, above n 9, 71.

¹²Hardy, above n 1, 80.

¹³For another example, see *Weaver v Jordon* 411 P2d 289, 64 Cal 2d 235, 49 Cal Rptr 537 *cert denied* 385 US 844 (1966) (holding an initiative banning pay television unconstitutional on the grounds that it impaired the freedom of speech as guaranteed by both the California Constitution and United States Constitution).

Switzerland. In Switzerland, the judiciary cannot invalidate federal law, especially federal laws enacted by the Swiss electorate through use of the constitutional initiative. The California electors, however, cannot use the constitutional initiative, the legislative initiative, or the legislative referendum to propose, amend, or veto laws that pertain to matters within the jurisdiction of the federal government or that would abridge the rights guaranteed by the United States Constitution.

II CONSTITUTIONAL STRUCTURE OF CALIFORNIA GOVERNMENT

California's Constitution, like Switzerland's, is based on the United States Constitution.¹⁴ However, the California constitutional system has taken a more formalistic approach to the separation of powers principle than the Swiss constitutional system. In Switzerland, for example, members of the executive are elected by and from members of the legislature. The judiciary does not have the power to invalidate legislation enacted by the legislature. In addition, the executive effectively controls the legislative process. Furthermore, elections have not shifted governmental power from one party to another since 1959. As a consequence, the direct democracy devices in Switzerland constitute the only constitutional means by which to challenge the exercise of governmental power.

In contrast, California has a plural executive whose officers are directly elected by the electors. As a consequence, executive power is often divided among competing political parties. In addition, the Governor, the executive officer who has the power to veto legislation, often belongs to a party that does not control the California Legislature. The California Judiciary, unlike its Swiss counterpart, has the power to invalidate legislation enacted by the Legislature. Furthermore, elections often shift control of the California Executive, particularly the governorship, and the California Legislature from one party to another. Consequently, the direct democracy devices in California constitute one of several constitutional ways by which to challenge the exercise of governmental power.

To ensure that "no governmental agency can be dictatorial and successfully refuse to serve the will of the people,"¹⁵ the framers of the California Constitution chose to divide governmental power among three separate branches: the Legislature, the Executive, and the Judiciary.¹⁶ This division failed to prevent the Southern Pacific from acquiring and exercising virtually unchallengeable governmental power irrespective of "the will of the people." However, this failure led to the introduction

¹⁴Schlessinger, above n 1, 12; Hyink, above n 1, 23; Hardy, above n 1, 18, 29.

¹⁵*Constitution*, above n 3, 351.

¹⁶Cal Const, art III, s 1.

of the constitutional initiative, the legislative initiative, and the legislative referendum, which has affected each branch of the California constitutional system.

A *Legislature*

In theory, the primary purpose of the California Legislature is to act as "the people's bulwark against executive tyranny."¹⁷ The Legislature can discharge this function in several ways. First, it has the power to make and unmake laws, which means that it can authorise or forbid executive action. Second, it has the exclusive power to sanction taxation and expenditure, which means that if it disagrees with executive policy, it can simply refuse to raise or appropriate the funds necessary to implement that policy. Third, it can impeach executive officers if they fail to discharge their duties.¹⁸

I *Senate and Assembly*

Like the Swiss Federal Assembly, the California Legislature is bicameral. It has a 40 member Senate and an 80 member Assembly.¹⁹ Assemblymen serve two-year terms and Senators serve four-year staggered terms.²⁰ Senators from even-numbered districts are elected at gubernatorial elections, the remainder at presidential elections;²¹ so half are elected every two years.²² Assemblymen and Senators are elected in even-numbered years, except those chosen in by-elections to fill vacancies.²³

The electoral system is a "first-past-the-post" system, that is, the candidate with the most votes in an electoral contest is declared elected. If the party that wins control of the Legislature also wins control of the Executive, election results can produce a Westminster-style political environment, in which the majority party runs the governmental system and the minority party assumes the role of critic.²⁴ If one party captures the Executive and another the Legislature, which cannot happen in Switzerland, governing proceeds on the basis of compromise between the two branches. As in the Swiss constitutional system, the Westminster no-confidence convention is nonexistent. Defeat of an executive proposal in the Legislature or the

¹⁷Schlessinger, above n 1, 11.

¹⁸See Hardy, above n 1, 24.

¹⁹Cal Const, art IV, s 2(a).

²⁰Hardy, above n 1, 29; Schlessinger, above n 1, 12, Hyink, above n 1, 142.

²¹Cal Const, art IV, s 2(a); Schlessinger, above n 1, 12.

²²Hyink, above n 1, 142.

²³Schlessinger, above n 1, 12

²⁴Hardy, above n 1, 73. The California governmental system is, for the most part, a two-party one, in which the Democrats and the Republicans compete for power.

veto of a legislative enactment by the Executive simply means the death of the proposal or enactment.

Turnover is generally very low in the Assembly and the Senate.²⁵ In the 1990 California state elections, for example, incumbents out-spent challengers by an 8-to-1 margin, winning re-election in 92 percent of the races.²⁶ This electoral invulnerability bred complacency and a disregard for the wishes of the electors, who, angered by the unresponsiveness of their elected representatives, approved a constitutional initiative in the same year that set term limits for their Assemblymen and Senators.²⁷ The rationale for the change, which is set out in Article 4, section 1.5 of the California Constitution, amounts to a rejection of the Burkeian theory of representation:

The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.

The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than the people whom they are elected to represent.

To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

The initiative amended Article 4, section 2 of the California Constitution to provide that "[n]o Senator may serve more than 2 terms" and "[n]o member of the Assembly may serve more than 3 terms." In an effort to preserve their long-term career prospects, legislators challenged the initiative in the courts as unconstitutional. However, the California Supreme Court upheld the initiative.²⁸ The electorate's

²⁵See Hardy, above n 1, 29.

²⁶Corvitz "Lawmakers Sue for Their Jobs - Another Reason for Term Limits" *The Wall Street Journal*, New York, USA, 19 June 1991, 15.

²⁷Above; Raine "Can Voters Set Political Term Limits?: California Supreme Court Ready to Hear Proposition 140 Challenge Seeking Curbs on Legislature" *San Francisco Examiner*, San Francisco, USA, 8 September 1991, 1.

²⁸"State Constitutional Law - Constitutional Revisions - California Supreme Court Upholds Term Limitation Initiative - *Legislature of California v Eu*, No. So19660, 1991 Cal. LEXIS 4529 (Oct. 10, 1991)" (1992) 105 Harv L Rev 953; see also Corvitz, above n 26; Chiang and Gunnison "State High Court OKs Term Limits for Legislators: Judges Rule that Prop 140 Initiative Protects Against 'Entrenched, Dynastic Bureaucracy'" *San Francisco Chronicle*, San Francisco, USA 11 October 1991, 1; "A Victory for Term Limits and California Voter Initiative Limiting Legislators' Terms is Upheld" *Wall Street Journal*, New York, USA, 11 October 1991; D DeBenedictis "Voters Limit Politicians' Terms" (January 1993) ABA J 26; see also K Bhatia "Republican Reform of Government" (1993)

approval of this initiative indicates that elected representatives are further removed from the electors in California than they are in Switzerland, which is consistent with California's larger size and population. It also suggests that direct democracy is less useful in California than it is in Switzerland as a means of encouraging the Legislature to give expression to "the will of the people," which may be due to the rare use of the legislative referendum in California.

2 *Legislative procedure*

A bill may be introduced in the Assembly by an Assemblyman or the Senate by a Senator. It is given its first reading, then assigned to a relevant committee of the House in question for detailed consideration. Of the 5,000 or so bills introduced each legislative session, approximately two-thirds die in committee.²⁹ If the bill is reported back, it is submitted to a second reading in the House in question, at which time members may propose amendments to the bill. If the bill survives its second reading, it is submitted to a third reading. If the bill passes its third reading, it is sent to the other House, which repeats the process. If the other House passes the bill without change, the bill goes to the Governor to be signed into law or vetoed. The Governor vetoes 9 to 10 percent of the bills sent to him or her each year.³⁰ If the other House changes the bill, it goes to conference where the two Houses attempt to reach a compromise.³¹ If a compromise is struck, it is sent to the Governor. If the bill is rejected at any stage in the process, it is dead.

With the exception of bills with urgency clauses, the Legislature cannot enact bills after 2 October³² and each bill must come into force on 1 January.³³ In effect, most enactments are suspended for 90 days to allow the electors the requisite time period to invoke the legislative referendum. The Legislature can only place an urgency clause in a bill if the bill and the clause, in separate votes, are approved by a two-thirds vote of each House, that is, 54 Assembly votes and 27 Senate votes.³⁴ Bills with urgency clauses take effect as soon as the Governor signs them. Enactments subject to a legislative referendum cannot become effective until the electors approve them at the next general election.³⁵

Colum L R 1300 (reviewing G Will *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* (The Free Press, New York, 1992)).

²⁹Hyink, above n 1, 153 (sessions are two years in length).

³⁰See Hardy, above n 1, 75.

³¹See Hardy, above n 1, 78-79; Hyink, above n 1, 151-152.

³²Hyink, above n 1, 151.

³³Hardy, above n 1, 80; see also Schlessinger, above n 1, 31. The January-October timing rules have created a strong incentive to enact legislation before 2 October, as a bill missing this deadline will have to wait over a year to be implemented. Hardy, above n 1, 80.

³⁴Hyink, above n 1, 151.

³⁵Hardy, above n 1, 80.

Aside from the budget bill, each bill must relate to a single subject, which precludes adding unrelated riders to bills, particularly those which would not pass on their own.³⁶ If the Legislature wants to issue a bond to raise money or amend the California Constitution, it must submit the appropriate legislation to the electors for their approval.³⁷ In either case, the electors must approve the legislation before it can take effect.

The Assembly and Senate committees make their decisions on bills based on a variety of factors.³⁸ At public hearings, advocates, which include legislators, administrators, and lobbyists, present arguments calculated to win support for a particular bill. Opponents will do the opposite, often providing the valuable service of pointing out flaws in the bill. Although interest groups are not invited to sit on the committees of the Legislature, as they are in Switzerland,³⁹ their well-financed persistence, specialist knowledge, and expertise make them extremely influential.

Outside the hearings, advocates and opponents will bombard committee members with mail, phone calls, and personal contact. Committee members balance these views with advice from legislative aides, particularly the Legislative Counsel,⁴⁰ who prepares opinions on the effect of pending legislation. Other sources of information and opinion include consultants, executive secretaries, committee assistants, experienced officials, the state library, the legislature reference library, the Institute of Governmental Studies at the University of California at Berkeley, the Bureau of Governmental Research at Los Angeles, the League of Cities, and the County Supervisors Association. However, as Hardy has noted:⁴¹

Possibly the most important is the exchange of ideas among legislators themselves. Since no one legislator can be familiar with the merits of all bills or resolutions, he must rely upon the knowledge of his peers. Informal give-and-take plays a crucial role.

The sheer volume of legislation, irrespective of its complexity or relevance to a legislator's constituency, makes specialisation by Senators and Assemblymen and their reliance on specialists inevitable. This fact highlights the importance of interest groups in the legislative process.⁴² It also belies the Burkeian myth that all decisions

³⁶Schlessinger, above n 1, 26.

³⁷See Hyink, above n 1, 149; Schlessinger, above n 1, 33-34.

³⁸Hardy, above n 1, 77.

³⁹See section II.C in chapter four.

⁴⁰The Legislative Counsel is also responsible for drafting the bills introduced in the Legislature.

⁴¹Hardy, above n 1, 77-78.

⁴²Hardy, above n 1, 83; Schlessinger, above n 1, 23.

taken by elected representatives are deliberative or made by the exercise of independent judgment.⁴³

B Executive

The California Executive is a plural executive,⁴⁴ as the Governor must share executive power with other officials elected to executive office, namely, the Lieutenant Governor, the Secretary of State, the Controller, the Treasurer, the Superintendent of Public Instruction, and the Board of Equalization (4 members).⁴⁵ As these positions are elected, executive officers can, and often do, belong to different parties. The Governor cannot select or remove them. Both of these factors can create serious policy conflicts within the Executive.⁴⁶

1 Role of the Governor

The Governor serves a four year term,⁴⁷ but may not serve more than two terms due to the successful 1990 constitutional initiative on term limits.⁴⁸ The Legislature may remove the Governor from office if a majority of the Assembly votes to impeach and two-thirds of the Senate votes to convict, in which case the Lieutenant Governor would become Governor.⁴⁹ When the Governor is absent from the State, the Lieutenant Governor becomes acting Governor, which can, in the absence of an agreement between the two, create difficulties if each is from a different party.⁵⁰

Aside from heading the Executive, the Governor is required to submit a budget to the Legislature each fiscal year (1 July to 30 June).⁵¹ The Legislature's role is to consider and approve the budget, which it eventually does, but generally only after making significant changes, especially if the Legislature is dominated by an opposing political party. However, approval of the budget must be by two-thirds vote of each House.

⁴³For a discussion of Burke's theory of representation, see section III.B.2(d) in chapter two.

⁴⁴Hyink, above n 1, 159.

⁴⁵Hardy, above n 1, 32; see also Hyink, above n 1, 158-159; Schlessinger, above n 1, 36.

⁴⁶Hyink, above n 1, 159.

⁴⁷Hyink, above n 1, 170; Hardy above n 1, 32.

⁴⁸Cal Const, art V, s 2. Prior to the advent of the two term limit, no one had served more than two terms as Governor. Hyink, above n 1, 170. The offices of Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer are also subject to the same four year two term limit. Cal Const, art V, s 11.

⁴⁹Hardy, above n 1, 33. Elected officials are also subject to recall in California. Above. The recall device is a device by which the electors can trigger a referendum on whether an elected official should be dismissed. For a discussion of the recall device, see Cronin, above n 7, 125-156.

⁵⁰Hardy, above n 1, 33; see also Hyink, above n 1, 171.

⁵¹Hardy, above n 1, 97; Hyink, above n 1, 160. The Department of Finance, which is directly responsible to the Governor, prepares the budget. Above.

Since the party controlling the Legislature rarely has the requisite majority, it must bargain with minority parties or independent factions within the Legislature.⁵²

When the Legislature sends a bill to the Governor, the Governor has 10 days, excluding Sundays, to sign the bill into law, veto it entirely, or veto an item in it.⁵³ The 'item veto' is particularly important in the context of the budget bill as it gives the Governor the means to sever, without jeopardising the entire bill, irresponsible vote-buying financial measures which may have been included during the approval process.⁵⁴ As Hyink, Brown, and Thacker have noted, "[t]he purpose of the item veto . . . was to strengthen the Governor's hand in the formulation of the State's fiscal program."⁵⁵ Although rarely used, it discourages legislators from adding unrelated riders to budget bills or other vital legislation.⁵⁶ The Legislature, however, can override both the veto and the item veto with a two-thirds vote in both Houses. However, this is seldom done. If the Governor does not sign or veto a bill within 10 days of its presentation, it automatically becomes law.⁵⁷

The Governor has had occasion to veto efforts on the part of the Legislature to restrict the electorate's access to California's direct democracy devices. Although the right to the constitutional initiative, the legislative initiative, and the legislative referendum are entrenched in the California Constitution, most of the administrative specifics for these devices are set out in the California Election Code, which is ordinary unentrenched legislation. In March 1984, the Legislature passed a bill which called for an increase in the initiative filing fee from \$200 to \$1,000, while still providing for a full refund if the measure qualified for the ballot or a refund of \$800 if it attracted at least 25,000 signatures. According to the League of Women Voters of California:⁵⁸

Governor George Deukmejian vetoed the measure, stating that it "would make it more difficult for people to exercise their constitutional rights under the initiative process" and would have a "potential chilling effect . . . on those who seek redress by use of the initiative."

⁵²Hardy, above n 1, 98.

⁵³Hardy, above n 1, 88, 90.

⁵⁴See Hardy, above n 1, 90. The Governor may only use the veto power to negate bills or provisions in bills; he or she cannot use it to increase expenditure. Hyink, above n 1, 162-163.

⁵⁵Hyink, above n 1, 163.

⁵⁶Above.

⁵⁷See Hardy, above n 1, 88; Hyink, above n 1, 162.

⁵⁸League, above n 1, 38; see also Hyink, above n 1, 131 (quoting Governor Edmund Brown's 1965 message to the Legislature: "I will not support any bill that would restrict the value of the initiative").

2 *Use of initiative by executive officers*

Members of the Executive are not above using the initiative process to further their policy objectives or political careers. For example, Jerry Brown, as Secretary of State, helped to draft an initiative which, when approved by the electorate, became the Political Reform Act of 1974.⁵⁹ He built his successful "Mr Clean" gubernatorial campaign around the measure. Brown's predecessor, Governor Ronald Reagan, strengthened his credentials as a republican presidential candidate by proposing a tax limitation measure in 1973.⁶⁰

The initiative process, given its statewide publicity value, has also appealed to those aspiring to become part of the Executive. For example, Tom Bradley, then Mayor of Los Angeles, tried using the initiative process to boost his ill-fated gubernatorial campaign. He helped to place a strict toxics regulatory measure on the 1986 general election ballot in the vain hope that it would attract more electors to the polls who would also vote for him.⁶¹

3 *Effect of devices on the Executive and the Legislature*

Unlike the executive in Switzerland, the California Executive is formed independently from the Legislature. Accordingly, the effect of the legislative referendum on the Executive, assuming one of its proposals is at stake, is the same as the Legislature's refusal to enact legislation necessary for the Executive to carry out its policy objectives, which is a frequent occurrence in the normal legislative process. The effect of the legislative referendum on the Legislature, assuming that one of its measures is at stake, is the same as if the Governor had vetoed it. Constitutional and legislative initiatives by-pass the legislative process altogether, which means that the Governor cannot veto initiatives approved by the electorate.

For the most part, however, the constitutional initiative, the legislative initiative, and the legislative referendum are the nemesis of the Legislature rather than the Executive. The California Progressives brought them in "foremost as a means for citizens to regain an element of control from unresponsive legislatures over the scope

⁵⁹League, above n 1, 36; see also Cal Gov't Code, s 81000 et seq. The Political Reform Act of 1974 was sponsored by the Peoples Lobby, Inc, Ralph Nader's California Citizens Action Group, and California Common Cause. It ranks as one of the most comprehensive legislative amendments in California history. E Steck, Jr. "California Legislation: Sources Unlimited" (1975) 6 Pac L J 536, 545-546; see also N Brestoff "The California Initiative Process: A Suggestion for Reform" (1975) 48 So Cal L Rev 922, 947-951.

⁶⁰Lee "California" in Butler and Ranney, above n 1, 99.

⁶¹L Berg and C Holman "The Initiative Process and its Declining Agenda-setting Value" (1989) 11 L & Pol'y 451, 462.

and nature of basic public policy."⁶² Although the power of incumbency and the successful push for term limits indicate that elected representatives may not be any more responsive to the electorate than they were during the heyday of the Southern Pacific, these direct democracy devices ensure that no one interest group can achieve the same level of control over the exercise of governmental power. Rival interest groups can always use the devices to protect or advance their interests irrespective of the disposition of the group controlling the Legislature or the Executive.

C Judiciary

The California Judiciary, unlike its Swiss counterpart, has the power to rule acts of the Executive and the Legislature unconstitutional. If an executive act has breached either the California Constitution or United States Constitution, the Executive must discontinue the action. Legislation found to breach either constitution is declared null and void. This judicial power ensures that neither the Executive nor the Legislature can act in a manner that is inconsistent with either constitution, particularly their respective bills of rights. The laws produced by direct democracy in California are also subject to this safeguard, as they are subject to the review of both the California and federal courts.⁶³

1 Structure

The California Judiciary is a pyramidal structure that consists of four levels. The municipal courts and justice courts make up the first level. They deal with minor offences and small claims. The judges for both courts are chosen for six year terms by the electors residing within their geographical jurisdiction in nonpartisan elections.⁶⁴ Superior courts occupy the second level. They are the general trial courts of the State. Each county has one. Superior courts exercise appellate jurisdiction over all cases originating in the municipal and justice courts.⁶⁵ Superior court judges are elected in the same manner as municipal and justice court judges. Most incumbents are re-elected automatically.⁶⁶

The district courts of appeal make up the third level. Their jurisdiction is strictly appellate. They review cases tried in the superior courts and decisions made by quasi-judicial agencies located in their respective districts.⁶⁷ District court judges are

⁶²Berg, above n 61, 451.

⁶³See League, above n 1, 38.

⁶⁴Hyink, above n 1, 184.

⁶⁵Hyink, above n 1, 181; Schlessinger, above n 1, 64.

⁶⁶Hyink, above n 1, 185.

⁶⁷Hyink, above n 1, 182.

elected to serve staggered 12 year terms.⁶⁸ However, the elections are not contested. If a district court judge runs for re-election, his or her name, without opponents appears on the general election ballot. If an incumbent decides not to seek re-election, the Governor, with the consent of the Commission on Judicial Appointments, nominates a candidate to appear on the ballot.⁶⁹ If a judicial candidate is not approved, the Governor, with the approval of the Commission, appoints some else to serve until the next election, at which time that appointee is treated as an incumbent.⁷⁰

The California Supreme Court sits on top of this pyramid. Its jurisdiction is both appellate and original. However, most of its work is appellate. Nearly every case reaching the Court on appeal originates in a superior court and has been reviewed by a district court of appeal. As a general rule, its decisions are final and cannot be appealed unless the United States Supreme Court believes it has made a decision that violates the United States Constitution. The California Supreme Court is composed of six associate justices and one chief justice.⁷¹ They are elected for 12 year terms in the same manner as district court judges.⁷²

California's judicial system, unlike Switzerland's, is based on the doctrine of stare decisis, that is, the observance of binding precedent as established by previous decisions.⁷³ California courts are bound by the decisions of higher courts, including the United States Supreme Court. However, they are not bound by their own decisions and can be freed from precedent by new legislation. Appellate decisions, both state and federal, interpreting California legislation are as much a part of the law as the legislation itself. The Attorney-General also issues opinions, which, unless upset by judicial decisions or new legislation, are also authoritative. The opinions are prepared upon request from any State agency, including members of the Legislature, seeking the legal basis for taking or not taking action.⁷⁴

⁶⁸Hyink, above n 1, 185; see also Schlessinger, above n 1, 64.

⁶⁹The Commission on Judicial Appointments consists of the Chief Justice of the California Supreme Court, the presiding judge of the District Court of Appeal, and the Attorney General. Hyink, above n 1, 185.

⁷⁰Hyink, above n 1, 186.

⁷¹Hyink, above n 1, 182.

⁷²The electors can remove any justice or judge by recall as they are elected officials. For a definition of the recall device, see above note 49. One student commentator has suggested that elective judges subject to recall will interpret initiatives in accordance with the prevailing majority view rather than in a way that protects minority rights. C Fountaine "Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative" (1988) 61 So Cal L R 733, 748. However, the suggestion is inconsistent with the Judiciary's very low tolerance for unconstitutional initiatives. See eg below text accompany notes 153-155.

⁷³Schlessinger, above n 1, 67-68.

⁷⁴Schlessinger, above n 1, 68.

The California and federal courts can invalidate acts of the Executive or strike down laws enacted by the Legislature if they are unconstitutional, that is, if they conflict with the provisions of the California Constitution or the United States Constitution. They can also strike down legislative initiatives as unconstitutional for the same reasons. However, with a few exceptions, the California Judiciary can only invalidate constitutional initiatives if they infringe the United States Constitution, which is logical as the purpose of a constitutional initiative is to amend the California Constitution. If a conflict arises between an old provision in the California Constitution and a new one approved by the electors, the new one prevails. Legislative referendums are not subject to constitutional scrutiny as to their substance because they serve to reject rather than to produce law. The result of a successful legislative referendum is a vetoed law, that is, a legal nullity which is not required to meet any constitutional norms.

The California Judiciary seldom deals with the content of a constitutional or legislative initiative proposal before its adoption. However, the courts can review its constitutionality or its qualifying process before it is placed on the ballot.⁷⁵ If they find the initiative unconstitutional they can keep it off the ballot.⁷⁶ The courts are usually called upon to rule upon the constitutionality of initiatives after the electors have approved them.⁷⁷ In addition, the courts settle challenges to initiatives on the basis that they violate the single subject rule in Article II, section 8 of the California Constitution, which states: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."⁷⁸ The courts will also

⁷⁵See eg *League*, above n 1, 39; see also D Michael "Preelection Judicial Review: Taking the Initiative in Voter Protection" (1983) 71 Cal L Rev 1216 (arguing in favour of pre-election judicial review); M Collins "Judicial Intervention in the Preelection Stage of the Initiative Process: A Change of Policy by the California Supreme Court" (1984) 15 Pac L J 1127 (criticising the principles underlying the California Judiciary's pre-election review of initiative measures); C Hunting "Pre-Election Review of Voter Initiatives - *American Federation of Labour-Congress of Industrial Organisations v Eu*, 36 Cal. 3d 687, 686 P2d 609, 206 Cal. Rptr. 89 (1984)" (1985) 60 Wash L Rev 911 (discussing a pre-election judicial review case in depth).

⁷⁶See eg *McFadden v Jordon* 196 P2d 787, 32 C2d 330 *cert denied* 69 S Ct 640, 336 US 918, 93 L Ed 1080 (1948) (keeping the "California Bill of Rights" initiative off the ballot on the grounds that it amounted to a constitutional revision, not an amendment); *Legislature v Deukmejian* 669 P2d 20, 24 Cal 3d 666, 194 Cal Rptr 784 (1983) (removing a electoral district reapportionment initiative from the ballot on the grounds that it was unconstitutional); see also S Mosk "Raven and Revision" (1991) 25 UC Davis L Rev 1.

⁷⁷See *League*, above n 1, 39-40; D Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) 52-53, 203; see also eg J Castello "The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure" (1986) 74 Cal L R 491 (discussing the California Judiciary's decision to hold most of Proposition 24 unconstitutional after it was approved by the electorate in 1984).

⁷⁸See eg *Perry v Jordon* 207 P2d 47, 24 C2d 87 (1949) (establishing the "reasonably germane" single subject test); *Brosnahan v Brown* 651 P2d 274, 32 C3d 236, 186 Cal Rptr 30 (1982) (holding that the "Crime Victims' Bill of Rights" met the "reasonably germane" test). For arguments in favour of the

invalidate legislative referendums that are attempts to veto administrative rather than legislative acts.⁷⁹

3 *Illustration*

The long running debate in California regarding representation illustrates the use of direct democracy and the power of the courts to act as a countervailing force. Since 1965, representation in the Assembly and the Senate has been based on population, as it was prior to 1926. Assembly and Senate districts are redrawn every 10 years following the United States census to account for population shifts.⁸⁰ This system of representation took several ballot measures and a few court cases to develop.

In 1926, the electors approved a constitutional initiative which created a system of representation based on the system used by the federal government; it retained population as the basis of representation in the Assembly but provided for geographic representation in the Senate.⁸¹ The initiative required the Legislature to draw up electoral districts for 40 Senators divided over 58 counties in accordance with the rule that no county can have more than one Senator and no Senator can represent more than one district.⁸² This rule caused huge discrepancies. For example, the Senator from Los Angeles county represented over 6.5 million people while the Senator from District 28, which included three counties, represented fewer than 15,000.⁸³

In 1927, opponents of the system drafted by the Legislature invoked the legislative referendum to prevent the legislation from going into effect. However, in 1928 the electors approved the legislation.⁸⁴ In 1931, after reapportionment of the electoral districts under the system, a group circulated a petition for a constitutional initiative to protest the allocation of Senate seats, but it failed to gather the signatures required to place the measure on the ballot. In 1948, a constitutional initiative was proposed

currently permissive "reasonably germane" single subject test, see D Lowenstein "California Initiatives and the Single-Subject Rule" (1983) 30 UCLA L R 936; for arguments in favour of a stringent interpretation of the single subject requirement, see S Ray "The California Initiative Process: The Demise of the Single-Subject Rule" (1983) 14 Pac L J 1095.

⁷⁹See D Greenberg "The Scope of the Initiative and Referendum in California" (1966) 54 Cal L Rev 1717, 1734 (citations omitted); S Ballew "The Constitutionality of Budgeting by Statewide Statutory Initiative in California" (1978) 51 So Cal L Rev 847, 857. For arguments in favour of abandoning the legislative-administrative test, see M Wilmar "Judicial Limitations on the Initiative and Referendum in California Municipalities" (1966) 17 Hastings L J 805, 806-810, 815.

⁸⁰Hardy, above n 1, 25; Hyink, above n 1, 133, 134, 140-141.

⁸¹Hyink, above n 1, 133, 135.

⁸²Hyink, above n 1, 134; see also Hardy, above n 1, 24-25.

⁸³Hyink, above n 1, 135.

⁸⁴The electors approved the enactment by a vote of 692,000 to 570,000. Above.

that would have moved in the direction of restoring apportionment of the Senate on the basis of population.⁸⁵ However, the electors rejected this proposal.⁸⁶

In 1960, southern California interests sponsored a constitutional initiative known as the Bonelli Plan. This plan would have allocated 20 senators to 13 southern counties and 20 senators to the remaining 45 northern counties, which was the formula adopted by the Legislature for the allocation of state highway funds. Of the eight seats to be shifted to southern California, six would go to Los Angeles. Northern Californians denounced the plan as a power grab by Los Angeles. The electors voted against the plan by a margin of two to one, Los Angeles being the only county to give it a majority. Undeterred, the same group placed another constitutional initiative on the 1962 ballot, which proposed a different allocation plan. This plan would have increased the Senate to 50 members and assigned five of the additional seats to Los Angeles. Opponents attacked the plan on the same grounds as the first. The measure carried in Los Angeles and Orange counties but failed elsewhere.⁸⁷

In 1964, the United States Supreme Court ruled that the districts in both houses of state legislatures must be "substantially equal" in population. In a special session held in 1965, the California Legislature passed the Reapportionment Act of 1965, which drew the 40 Senate districts on a population basis and realigned the 80 Assembly districts. The Supreme Court's decision forced the California Legislature to disregard the provisions in the California Constitution concerning electoral districts.⁸⁸ In effect, it overruled the constitutional initiative approved by the electorate in 1926.

Essentially, the courts have a tremendous influence on the scope of California's direct democracy devices.⁸⁹ As another example, the California Supreme Court, in *Citizens for Jobs & Energy v the Fair Political Practices Commission*,⁹⁰ struck down the campaign financing limits for ballot measures imposed by the initiative that brought in the Political Reform Act of 1974 on the grounds that it impaired the freedom of

⁸⁵ Above.

⁸⁶ The electors rejected the proposal by a vote of 2,252,000 to 1,070,000. Hyink, above n 1, 136.

⁸⁷ The electors rejected the measure by 300,000 votes out of more than 4,000,000 cast. Above.

⁸⁸ Hyink, above n 1, 140. The electors have also approved constitutional amendments that have reorganised the session times of the Legislature and made them two years in length. Hardy, above n 1, 26-27; Schlessinger, above n 1, 26. They have also modified the veto power. Hyink, above n 1, 27-28. In addition, they have allowed the legislators to give themselves salary hikes not exceeding 5 percent per 2 year session. Hardy, above n 1, 28-29; Hyink, above n 1, 142, 156.

⁸⁹ Greenberg, above n 79, 1747.

⁹⁰ 16 Cal3d 671 (1976); see also *Buckley v Valeo* 424 US 1 (1976) (ruling that campaign financing restrictions violate the freedom of expression as guaranteed by the First Amendment of the United States Constitution). For critical analyses of the *Buckley* decision, see *Symposium on Campaign Finance Reform* (1994) 94 Colum L R 1125, particularly V Blasi "Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All" at 1281.

speech. In *Hardie v Fong Eu*,⁹¹ the Court ruled that limiting the amount that could be spent in circulating initiative petitions also amounted to a violation of free speech. The United States Supreme Court extend this free speech protection to the campaign contributions made by corporations in *First National Bank of Boston v Bellotti*.⁹²

The courts have not allowed California's direct democracy devices to reach their full majoritarian potential. The courts are steadfast in their refusal to accept any incursion on the fundamental rights guaranteed by the United States Constitution. Although the constitutional initiative could be used to revoke most of the individual rights guaranteed in the California Constitution, it cannot reach any of the individual rights guaranteed by the United States Constitution. Furthermore, these devices cannot reach any matter within the exclusive jurisdiction of the federal government. In this respect, initiative measures, whether legislative or constitutional, face the same constitutional restraints as any measure enacted by the California Legislature.⁹³ The legislative referendum does not raise the same constitutional concerns, as it functions as a veto of legislative action, not as an agent of change with the potential to circumvent existing constitutional rights.

III KEY DIRECT DEMOCRACY DEVICES

In Switzerland, the constitutional initiative and legislative referendum play a vital role in maintaining and adjusting the balance of power between the cantons and the federal government by giving the electors the means to influence the structure of the federal government and its exercise of governmental power.⁹⁴ In California, the constitutional initiative, the legislative initiative, and the legislative referendum cannot affect the federal government or its exercise of governmental power. However, these direct democracy devices have given the California electors the means to influence the structure of the California constitutional system and its legislative output.

As in Switzerland, these direct democracy devices have, in effect, limited the legislative power of elected representatives by providing the electors with legislative power. Elected representatives in California, like those in Switzerland, are unable to

⁹¹556 P2d 301, 18 C3d 71, 134 Cal Rptr 201 *cert denied* 97 S Ct 1652, 430 US 969, 52 L Ed 2d 360 (1976); see also *Citizens Against Rent Control (CARC) v City of Berkeley* 614 P2d 742, 27 Cal3d 819, 167 Cal Rptr 84 (1980) *prob juris noted* 101 S Ct 1344 (1981) (No. 80-737).

⁹²435 US 765 (1978). For an analysis of the *Bellotti* decision, see S Richman "Election Law: Political Expression by Artificial Persons in Referendum Campaigns" (1979) *Ann Survey Am L* 285; see also J Shockley "Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?" (1985) 39 *U Miami L R* 377; "Notes: State and Local Limitations on Ballot Measure Contributions" (1981) *Mich L R* 1421.

⁹³See Ballew, above n 79, 559.

⁹⁴Switzerland does not have a legislative referendum on the federal level. See section III in chapter four.

monopolise the legislative process or to ignore the electors to the extent allowed by Burke's theory of representation.⁹⁵ The electors have the means to counteract the acts or omissions of their representatives that do not meet their expectations. As in Switzerland, California's direct democracy devices have made the electors both the legal and political sovereign in theory and in practice. Their sovereignty, however, is not unlimited. The constitutional initiative, legislative initiative, and legislative referendum are subject to procedural and substantive safeguards which counteract their majoritarian potential. These safeguards explain why the constitutional initiative is used more frequently and the legislative referendum less frequently in California than in Switzerland.

A *Constitutional Initiative*

Article IV, section 1 of the California Constitution states:

The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.

This provision is important because it implies that the source of legislative power is in the people, rather than the Legislature,⁹⁶ an implication which is supported by Article I, section 2, which states that "all political power is inherent in the people." As a matter of right, the electors have the power to make laws independently of their elected representatives, which explains why the courts have struck down governmental attempts to curtail the initiative power. Article II, section 8(a) of the California Constitution defines the constitutional initiative as "the power of the electors to propose . . . amendments to the Constitution and to adopt or reject them." Although the Constitution outlines the procedure for the constitutional initiative, article II, section 10(e) grants the Legislature the power to "provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors." The provisions regulating the constitutional initiative process are set out in the California Election Code.⁹⁷

1 *Procedure*

The constitutional initiative process begins when the proponents of a particular idea draft the text of their proposal. This is often done in consultation with constitutional lawyers to minimise the risk of a constitutional challenge. They can also use the

⁹⁵For a discussion of Burke's theory of representation, see section III.B.2(d) in chapter two.

⁹⁶K Christenson "Interpreting the Purposes of Initiatives: Proposition 65" (1989) 40 Hastings L J 1031, 1033.

⁹⁷Cal Elec Code, ss 3500-3579, 29710-29795.

services of the Legislative Counsel, who will draft the text if the proponents present a request signed by 25 or more electors and if the proposal is likely to be submitted to the electors.⁹⁸ Once the proposal is drafted, it is submitted to the Attorney General along with a written request for a title and summary,⁹⁹ which is to appear on each page of the petition used to collect signatures,¹⁰⁰ and a \$200 fee, which is refundable if the proposal qualifies for the ballot.¹⁰¹

As a general rule, the Attorney General has 15 days to prepare the title and summary, which together cannot exceed 100 words.¹⁰² If the proponents submit substantive amendments to the text of the proposal within the 15 day period, the Attorney General is allowed a renewed period of 15 days after receiving the submissions.¹⁰³ If the measure requires a fiscal assessment, the Attorney General is given another 25 days to obtain a fiscal analysis from the Joint Legislative Committee and the Department of Finance.¹⁰⁴ The result is included in the summary.¹⁰⁵ Accordingly, the Attorney General could have up to 55 days to prepare the title and summary.

Once the Attorney General completes the title and summary, he or she sends copies of it to the Secretary of State, the Senate, and the Assembly.¹⁰⁶ The Legislature may conduct public hearings on it, but cannot amend it or prevent it from being used.¹⁰⁷ When the Attorney General sends a copy to the proponents, this marks the date the Secretary of State uses to begin tolling the 150 day period in which the proponents must collect the signatures to qualify the proposal for the ballot.¹⁰⁸ For a constitutional initiative to qualify for the ballot, its proponents must present to the Secretary of State:¹⁰⁹

a petition that sets forth the text of the proposed . . . amendment to the Constitution and is certified to have been signed by electors equal in number to . . . 8 percent . . . of the votes for all candidates for Governor at the last gubernatorial election.

⁹⁸League, above n 1, 20.

⁹⁹Cal Elec Code, s 3502; see also Cal Const, art II, s 10(d).

¹⁰⁰Cal Elec Code, s 3507.

¹⁰¹Cal Elec Code, s. 3503.

¹⁰²Cal Elec Code, ss 3502, 3503.

¹⁰³Cal Elec Code, s 3503

¹⁰⁴Above.

¹⁰⁵League, above n 1, 20.

¹⁰⁶Cal Elec Code, ss 3503, 3505

¹⁰⁷Cal Elec Code, s 3505.

¹⁰⁸Cal Elec Code, s 3513.

¹⁰⁹Cal Const, art II, s 8(b).

The number of signatures required to qualify a constitutional initiative for the ballot has grown from 30,857 in 1914 to 615,958 in 1992.¹¹⁰ However, proponents generally aim to collect more than one million signatures to increase their chances of passing the signature verification process and for the publicity that gathering a million signatures usually generates.¹¹¹ If the signature requirement is met, the Secretary of State must place the proposal on the ballot of "the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election."¹¹² If the Secretary of State receives a qualifying petition within 130 days of a general election, he or she places the proposal it supports on the ballot at the next general election.¹¹³ The purpose of this system is to minimise cost by holding constitutional initiatives in conjunction with general elections. The Governor, however, can order the proposal to be presented to the electors prior to the next general election at a special statewide election.¹¹⁴

The California Election Code imposes criminal penalties for abusing the signature collection process.¹¹⁵ For example, petition circulators are forbidden to misrepresent the purpose or content of a petition to potential signatories or to refuse to allow them to read the proposal, its summary, or the petition.¹¹⁶ Although proponents may withdraw their petition before it qualifies for the ballot, it is illegal to induce the proponents to withdraw their petition, either by means of fraudulent promises or financial incentives.¹¹⁷ Only registered electors are allowed to sign petitions, and they may only sign petitions circulated in the county in which they are registered to vote.¹¹⁸ It is illegal to sign a petition more than once.¹¹⁹ It is also illegal to misuse campaign funds, particularly for personal use or for purchasing signatures.¹²⁰ Although the courts have ruled campaign expenditure limits unconstitutional, committees supporting or opposing the proposal must file campaign disclosure statements under the Political Reform Act of 1974. Each contribution or expenditure over \$500 must be documented and reported, as must total expenditures over \$500 made during specified periods.¹²¹

¹¹⁰Magleby, above n 77, 41, 67; Lee "California" in Butler and Ranney, above n 1, 92-93; Bancroft "S.F. Lawyer's Initiative: Long Vacations - By State Law" *San Francisco Chronicle*, San Francisco, USA, 29 July 1991, 1.

¹¹¹See Brestoff, above n 59, 926 n.32.

¹¹²Cal Const, art II, s 8(c).

¹¹³Hyink, above n 1, 117.

¹¹⁴Cal Const, art, II, s 8(b).

¹¹⁵See generally Cal Elec Code, ss 29710-29795.

¹¹⁶Cal Elec Code, ss 29720, 29721.

¹¹⁷Cal Elec Code, s 29740, 29741, 29742.

¹¹⁸Cal Elec Code, ss 3514, 3517.

¹¹⁹Cal Elec Code, s 29732.

¹²⁰Cal Elec Code, s 29795.

¹²¹League, above n 1, 22.

Each part of a petition must be filed at the same time with the County Clerk or Registrar of Voters in the county in which the part was circulated. Within five working days, the Clerk or Registrar must determine the total number of signatures on the part of any petition he or she has received and report the total to the Secretary of State. The Secretary of State adds up the totals in each report. If the total number of signatures on the whole petition is less than the number of the signatures required for the proposal to qualify for the ballot, the petition fails, and the Secretary of State notifies the Clerks and Registrars of the result. If the petition bears the required number signatures or more, the Secretary of State informs the Clerks and Registrars who then have 15 days to verify the signatures.¹²²

If a Clerk or Registrar has more than 500 signatures, he or she uses a random sampling technique to verify the signatures. The sample must include 500 signatures or five percent of the signatures on hand, depending on whichever figure is greater.¹²³ If 75 percent of the sample contains the signatures of registered electors, for example, then 75 percent of the signatures being sampled are deemed to be valid.¹²⁴

The results are reported to the Secretary of State, who determines the statewide total. If the total is less than 95 percent of the valid signatures required, the petition fails. If the total is greater than 110 percent of the valid signatures required, the proposal qualifies for the ballot. If the total is between 95 and 110 percent, the Clerks and Registrars must, within 30 days, determine the validity of every signature on the petition.¹²⁵ If the petition fails, the Secretary of State informs the proponents. If it succeeds, he or she informs the Legislature, which may hold public hearings on the proposal, but not within 30 days of the election. The Legislature has no authority to alter the proposal or to prevent it from being placed on the ballot.¹²⁶

Prior to the election, the Secretary of State prepares an elector information pamphlet which provides the title and summary of any proposal placed on the ballot, their full text along with arguments for and against, and a fiscal assessment of each proposal.¹²⁷ Proponents and their opponents may submit their arguments no later than 131 days before the election. If the proponents do not submit any arguments, other electors may submit supporting arguments within 120 days of the election. The Secretary of

¹²²Cal Elec Code, s 3520.

¹²³Above.

¹²⁴League, above n 1, 21.

¹²⁵Cal Elec Code, s 3521.

¹²⁶League, above n 1, 22. The Legislature rarely takes the opportunity to hold hearings on measures after they have qualified for the ballot. League, above n 1, 37.

¹²⁷See eg California Ballot Pamphlet: General Election, November 3, 1992 (1992) (consisting of 95 pages, covering two bond measures, four constitutionally required referendums, and seven initiatives); see also Hyink, above n 1, 116.

State sends copies of the arguments for and against to the opposing parties so that they may prepare rebuttals to each other's arguments for the pamphlet. If the Secretary of State receives more than one set of arguments for or against an initiative, he or she chooses the arguments to be printed, giving priority to the petition's proponents, followed in order by bona fide associations of electors and then individual electors. At least 20 days before the pamphlet goes to the printers, draft copies must be made available for public examination. Any elector can obtain a court order to amend any portion of the text found to be false, misleading, or in violation of the law, provided it will not substantially interfere with the pamphlet's printing and distribution.¹²⁸

Constitutional initiatives approved by majority vote take effect the day after they are approved, unless they specify otherwise.¹²⁹ If two or more proposals approved at the same election conflict, the measure with the highest number of affirmative votes prevails.¹³⁰ The Legislature can only amend or repeal a provision put in place by a constitutional initiative if it puts a proposal to that effect on the ballot and wins the approval of the electorate.¹³¹ Constitutional initiatives are, therefore, more secure than ordinary legislation. Although legislation enacted through the legislative initiative also cannot be amended or repealed by the Legislature without reference to the electorate, unless the legislation expressly gives the Legislature the right to do so,¹³² a legislative initiative, unlike a constitutional initiative, is subordinate to any provision in the lengthy and complex California Constitution. To avoid running afoul of its provisions, groups using direct democracy generally use the constitutional initiative instead of the legislative initiative, as it allows them to overcome any unforeseen conflicts with the Constitution.¹³³ In addition, as Lee has noted, "there is no bar to proposing detailed legislation - statutory in character - for inclusion in the Constitution."¹³⁴

2 *Use and effects*

The constitutional initiative is used more frequently than the legislative initiative and the legislative referendum in California.¹³⁵ However, the number of constitutional

¹²⁸See League, above n 1, 22.

¹²⁹Cal Const, art II, s 10(a).

¹³⁰Cal Const, art II, s 10(b).

¹³¹See Cal Const, art II, s10(c).

¹³²Above.

¹³³See Hyink, above n 1, 118; see also Lee "California" in Butler and Ranney, above n 1, 92; Christenson, above n 96, 1033-1034; Hardy, above n 1, 23-24 (stating that once an initiative proposal becomes part of the Constitution it is difficult to remove, which is one reason why it has become a favoured device).

¹³⁴Lee "California" in Butler and Ranney, above n 1, 92.

¹³⁵Hyink, above n 1, 118.

amendments placed on the ballot by the electors pales in comparison to the number sponsored by the Legislature.¹³⁶ For example, out of 737 referendums submitted to Californians between 1912 and 1976, 543 came from the Legislature in the form of constitutionally required referendums, of which 300 were approved by the electors.¹³⁷ In comparison, the electors placed 93 constitutional initiatives on the ballot from 1911 to 1980 and approved 27 of them.¹³⁸ In Switzerland, the constitutionally required referendum is also used more frequently than the constitutional initiative. From 1848 to September 1978 the Swiss voted on 297 referendum questions, 212 of which were constitutionally required.¹³⁹ In comparison, the Swiss electors used the constitutional initiative 73 times from 1880 to May 1978, of which seven were approved.¹⁴⁰ Hyink, Brown, and Thacker have attributed the California Legislature's frequent recourse to the ballot to the lengthy and detailed nature of the California Constitution as drafted in 1879.¹⁴¹ To facilitate significant legislative reforms, the Legislature is often obliged to amend the Constitution.

The signature requirement combined with the 150 day collection period constitutes the most significant hurdle in the constitutional initiative process. From 1962 through 1975, for example, the Secretary of State titled 114 initiative petitions, but only 22 qualified for the ballot.¹⁴² Although the number of initiatives qualifying for the ballot has increased in recent elections, the percentage of initiatives qualifying for the ballot has declined dramatically since 1960.¹⁴³ One reason for the decline may be the increased size of the California electorate, which has made the signature requirement more difficult to meet.¹⁴⁴ Another reason is subject matter. Many proposed initiatives fail to qualify because they are based on interests that are too narrow to attract the resources necessary to gather the required signatures.¹⁴⁵

Access to the constitutional initiative is generally limited either to groups that can finance the necessary logistical support or to grassroots organisations that can draw on their membership to supply it.¹⁴⁶ As Lee has observed, "the groups employing the device do not differ significantly from those lobbying before the Legislature."¹⁴⁷ These groups cite the following reasons for using the device: 1) the Legislature has

¹³⁶See Hyink, above n 1, 124-125.

¹³⁷Lee "California" in Butler and Ranney, above n 1, 89

¹³⁸Magleby, above n 77, 71.

¹³⁹J Aubert "Switzerland" in Butler and Ranney, above n 1, 43.

¹⁴⁰See J Aubert "Switzerland" in Butler and Ranney, above n 1, 50-64.

¹⁴¹Hyink, above n 1, 124-125.

¹⁴²Steck, above n 59, 545 (the figures appear to include both constitutional and legislative initiatives).

¹⁴³Magleby, above n 77, 67

¹⁴⁴Magleby, above n 77, 66.

¹⁴⁵Magleby, above n 77, 68.

¹⁴⁶See Magleby, above n 77, 76; Lee "California" in Butler and Ranney, above n 1, 96-97.

¹⁴⁷Lee "California" in Butler and Ranney, above n 1, 96.

refused to pass the measure they want enacted; 2) it removes the measure from the Legislature's power of amendment and repeal; 3) it gives the measure constitutional status; and 4) the campaign has educational value, regardless of its electoral outcome. For example, as Lee has noted:¹⁴⁸

Groups, like that proposing to decriminalize marijuana in 1972, may not anticipate victory at the polls. Instead, they hope that enlightened public opinion, stimulated by the campaign, will lead to subsequent legislative action, which in this instance did result in more liberal marijuana laws. Indeed, the organizational effort involved in the campaign - even in a losing cause - strengthened the effectiveness of the group in its subsequent lobbying activities.

Although failed campaigns can lead to subsequent legislative action, they can also have the opposite effect. For example, Cesar Chavez, the leader of the United Farm Workers, inadvertently undermined political pressure to strengthen California's laws on collective bargaining for farm workers when he sponsored an ill-fated proposal promoting farm labour unionisation. Subsequently, opponents of farm labour unionisation in the Legislature used the result to slow down legislative action in this area.¹⁴⁹ Nevertheless, threatened campaigns, as in Switzerland, often spark a positive response from the Legislature. For example, a proposal to alter the taxation of banks and insurance companies prompted the Legislature to submit a constitutional amendment to the electorate in 1974. In 1981, the Legislature persuaded a group to abandon its initiative petition drive to outlaw the personal use of campaign funds by passing a bill that ended the practice.¹⁵⁰

In addition to its procedural hurdles, the constitutional initiative has several substantive limitations. First, the California Constitution forbids initiatives that embrace more than one subject.¹⁵¹ Second, it also forbids naming any individual to office by initiative or the naming of any private corporation in any initiative.¹⁵² Third, the courts will strike down any constitutional initiative which violates the United States Constitution. Essentially, the Californian electors cannot use the constitutional initiative to encroach upon the powers reserved to the federal government. This removes subjects like defence, foreign affairs, interstate commerce, and federal taxation from their reach; it also cannot be used in any way that impinges upon the rights protected by or granted pursuant to the United States Constitution,¹⁵³ including the Bill of Rights. The courts have a very low tolerance for

¹⁴⁸Lee "California" in Butler and Ranney, above n 1, 97.

¹⁴⁹Lee "California" in Butler and Ranney, above n 1, 98.

¹⁵⁰League, above n 1, 37.

¹⁵¹Cal Const, art II, s 8(d). The Swiss Constitution has a single subject limitation as well. Fed Const Swiss, art 121(3).

¹⁵²Magleby, above n 77, 46.

¹⁵³58 Ops [Cal] Atty Gen 830 (6 November 1975).

unconstitutional initiatives. For example, they struck down, in whole or in part, six of the ten initiatives that the California electorate approved from 1960 to 1980.¹⁵⁴ For this reason, successful constitutional initiatives are almost always challenged in the courts.¹⁵⁵

3 *Illustration*

Proposition 13 remains the most conspicuous illustration of the power of the constitutional initiative to overcome inaction on the part of the Legislature¹⁵⁶ as well as opposition by the Executive.¹⁵⁷ Inflationary pressures in California during the 1970s caused property values to rise dramatically, which increased the property tax burden of most home owners,¹⁵⁸ and threatened to increase them further still.¹⁵⁹ Meanwhile, the State had accumulated a \$5 billion surplus¹⁶⁰ and a reputation for funding wasteful and bureaucratic programs.¹⁶¹ Despite calls for reform, the Legislature lacked the political will to tackle these problems.¹⁶² On the strength of popular dissatisfaction with this state of affairs, Howard Jarvis and Paul Gann formed the Taxpayers Association, which, with the help of thousands of volunteers, qualified Proposition 13 for the June 1978 ballot.¹⁶³

Proposition 13 proposed reducing property taxes to one percent of a property's 1975 assessed market value and only permitting increases in a property's value for tax purposes of two percent per annum.¹⁶⁴ If a property were sold, the tax would be reassessed at one percent of its current market value. The Legislature initially tried to appease the Taxpayers Association by promising to enact what it considered to be a less drastic measure. When its appeasement strategy failed, the Legislature placed its own proposal, Proposition 8, on the ballot as an alternative to Proposition 13.¹⁶⁵ Proposition 8 proposed a split tax roll in which owner-occupier residences would be

¹⁵⁴Magleby, above n 77, 52-53, 203 (the figures appear to include both constitutional and statutory initiatives).

¹⁵⁵Magleby, above n 77, 53.

¹⁵⁶Magleby, above n 77, 35.

¹⁵⁷See Walker, above n 9, 78.

¹⁵⁸See above.

¹⁵⁹See V Kershner "U.S. High Court Agrees to Rule on Proposition 13" *San Francisco Chronicle*, California, USA, 4 June 1991, 1.

¹⁶⁰Above.

¹⁶¹Cronin, above n 7, 87.

¹⁶²Walker, above n 9, 78.

¹⁶³See Magleby, above n 77, 64; Lee "California" in Butler and Ranney, above n 1, 101.

¹⁶⁴Cal Const, art XIII A, ss. 1-2; see also Walker, above n 9, 78; Kershner, above n 159; V Kershner "Fate of Prop. 13 Remains with Supreme Court" *San Francisco Chronicle*, California, USA, 13 June 1991, 1; V Kershner "Supreme Court Agrees to Rule on Prop. 13" *San Francisco Chronicle*, California, USA, 10 August 1991, 1; B Inman "Juggling with the Legality of Prop. 13" *San Francisco Examiner*, California, USA, 10 November 1991, F5.

¹⁶⁵See League, above n 1, 35.

taxed at far lower rates than other properties.¹⁶⁶ The Executive, with the support of the Legislature, orchestrated an enormous campaign against Proposition 13, predicting inaccurately that its passage would result in drastic cuts in public services.¹⁶⁷ The electorate was not persuaded by the campaign. It rejected Proposition 8 as too complicated and as a detriment to business,¹⁶⁸ and approved Proposition 13 by a two to one margin.¹⁶⁹ As Cronin has noted, the electors understood the argument against Proposition 13, but they were unprepared to forgive the Legislature's persistent inaction.¹⁷⁰

Voters understood the trade-off; fewer government services in exchange for tax relief. The two thirds who voted yes wanted to send a message as well as secure economic benefits for themselves. That message was at least twofold: give us back some of the revenue surplus the state is sitting on, and cut out waste and needless bureaucratic programs.

Essentially, Proposition 13 has forced the Legislature to reconsider its spending priorities and the administrative efficiency of the services it has chosen to deliver, particularly as Proposition 13 has survived a number of challenges as to its constitutionality.¹⁷¹ In this respect, the constitutional initiative has enormous potential as a means of enabling the electorate to influence the political agenda.¹⁷² Provided it does not violate any of the rights guaranteed under the United States Constitution, the electors, or the interest groups that win their support, can use the constitutional initiative to by-pass an unresponsive Legislature.

B Legislative Initiative

Article II, section 8(b) of the California Constitution states:

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

Aside from the lower signature threshold, the procedural requirements for the legislative initiative are exactly the same as the constitutional initiative. If the

¹⁶⁶ Above; G Devine "State's Taxation System May Already Be in Jeopardy" *San Francisco Chronicle*, California, USA, 22 October 1991.

¹⁶⁷ See Walker, above n 9, 79, 92.

¹⁶⁸ Devine, above n 166.

¹⁶⁹ Walker, above n 9, 78.

¹⁷⁰ Cronin, above n 7, 87.

¹⁷¹ See Kershner, above n 159.

¹⁷² D Magleby "Legislatures and the Initiative: The Politics of Direct Democracy" (1986) 59 J State Gov't 31, 37.

electorate approves legislation put forward by the legislative initiative, it takes effect automatically, thereby circumventing the Governor's veto power. As discussed above, legislation enacted through a legislative initiative is immune to the Legislature's ordinary amending and repealing powers unless the legislation expressly permits the exercise of these powers without the electorate's approval.¹⁷³ In the absence of such a provision, the Legislature must refer its proposal to amend or repeal legislation enacted through a legislative initiative to the electorate. As Switzerland does not have the legislative initiative on the federal level, a comparison is not possible.

Despite the procedural advantage of a lower signature requirement (393,835 as compared to 630,136), the legislative initiative is used less frequently than the constitutional initiative. From 1911 to 1976, for example, the Californian electors have voted on 69 legislative initiatives,¹⁷⁴ and approved 19 of them.¹⁷⁵ In comparison, the electors placed 93 constitutional initiatives on the ballot from 1911 to 1980 and approved 27 of them. Compared to the constitutionally required referendum, the legislative initiative and constitutional initiative have very low approval rates. The constitutionally required referendum has an approval rate of 56 percent. The rate of approval for the constitutional initiative and the legislative initiative is approximately 27 percent.¹⁷⁶

Although they have nearly identical approval rates, the legislative initiative has not kept pace with the constitutional initiative in terms of usage in California. The gap has been widening for several reasons. First, the high signature requirement has made qualifying a proposition for the ballot very difficult. Collecting the required signatures now requires an organisational effort that can only be supplied by large volunteer grassroots organisations or paid professionals.¹⁷⁷ Once the organisational hurdle is cleared, the difference between collecting 630,136 as opposed to 393,835 signatures becomes less significant given the 150-day signature collection period.

Second, legislative initiatives are legally less secure than constitutional initiatives.¹⁷⁸ As a matter of principle, constitutional law overrides any conflicting legislative

¹⁷³ Cal Const, art II 2, s 10(c).

¹⁷⁴ Lee "California" in Butler and Ranney, above n 1, 90.

¹⁷⁵ Above.

¹⁷⁶ Magleby, above n 77, 71. In general, a legislative or constitutional initiative needs to be well understood and widely supported to win the approval of the electors. See Magleby, above n 77, 168-170; Cronin, above n 7, 84-87. Constitutionally required referendums are more likely to succeed because they must be approved by two-thirds of the full membership of both houses of the Legislature before being put to the electors. Lee "California" in Butler and Ranney, above n 1, 89. This procedure ensures their widespread political support and informs the electors at the same time.

¹⁷⁷ See Cronin, above n 7, 62-66; Magleby, above n 77, 61-65.

¹⁷⁸ Magleby, above n 77, 72.

enactment. As the legislation produced by legislative initiatives is subordinate to the provisions of both the United States Constitution and the California Constitution, it is more vulnerable to constitutional challenge. Given the length and complexity of the California Constitution, legislative initiatives are far more likely than constitutional initiatives to run afoul of one of its provisions.

Third, the legislative initiative has more subject matter limitations than the constitutional initiative. In addition to those limitations that apply to the constitutional initiative, the legislative initiative cannot be used as an indirect legislative referendum on matters not subject to the legislative referendum. The courts, for example, will strike down any legislative initiative that amounts to "backhanded" legislative referendum on tax levies.¹⁷⁹ It also cannot be used to rescind the Legislature's ratification of a federal constitutional amendment.¹⁸⁰ Furthermore, regarding the reversal of governmental action, legislative initiatives can only affect legislative acts. Acts by the Executive that are predicated on a purely constitutional basis are beyond their reach. Due to these procedural and substantive limitations, the legislative initiative is used less frequently than the constitutional initiative.

C Legislative Referendum

The legislative referendum operates in California as it does in Switzerland. As stated in Article II, section 9(a) of the California Constitution:

The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

1 Procedure

A legislative referendum is triggered by presenting to the Secretary of State, within 90 days of the enactment date of a statute, a petition certified in the same manner as a legislative initiative, that is, signed by electors equal in number to five percent of the votes for all candidates for Governor at the last gubernatorial election.¹⁸¹ The petition must specify the statute or part of the statute to be submitted to the electors.¹⁸²

¹⁷⁹See eg *Dare v Lakeport City Council* 91 Cal Rptr 124, 12 CA3d 864 (1970); *Myers v City Council of City of Pismo Beach* 50 Cal Rptr 402, 241 ACA 316 (1966).

¹⁸⁰See 58 Ops [Cal] Atty Gen 830 (6 November 1975).

¹⁸¹Cal Const, art II, s 9(b). For a discussion of the 90 day suspension rule, see above text accompanying note 33.

¹⁸²Cal Const, art II, s 9(b).

If the signature threshold is met, the Secretary of State must place the statute before the electorate for its approval at the next general election held at least 31 days after it qualifies or at any special statewide election held prior to that general election.¹⁸³ If the Secretary of State receives a qualifying petition within 30 days of a general election, he or she places the statute on the ballot at the next general or special election.¹⁸⁴ If the electorate approves the statute, it becomes law, but only after considerable delay and public debate. If the electorate rejects the statute, it does not come into force.¹⁸⁵ In effect, rejection of the statute by the electorate is equivalent to a Governor's veto that the Legislature has no power to override. The California Constitution, however, does not prohibit the Legislature from revisiting the issue. Donald Greenberg has argued that the Judiciary should not allow the Legislature to re-enact a statute too soon after its defeat in a legislative referendum on the grounds that it "would have a crippling effect on the referendum power."¹⁸⁶ His argument is yet to be tested in the courts.

2 *Limitations*

The legislative referendum, like its Swiss counterpart, cannot be used to veto legislation which contains an urgency clause,¹⁸⁷ that is, newly enacted statutes necessary for the immediate preservation of public peace, health, or safety.¹⁸⁸ To be enforceable, an urgency clause must state the reasons for the urgency. In addition, both the urgency clause and the bill that contains the clause must be approved in separate votes by two-thirds of each House of the Legislature. Urgency bills become law as soon as they are signed by the Governor.¹⁸⁹ According to Lee, the "power to declare a statute urgent is liberally utilized and has reduced the potential of referendums as an instrument of direct legislation."¹⁹⁰ During the Great Depression, for example, as many as 11 to 14 percent of the laws the Legislature passed were exempt as urgent.¹⁹¹ The Judiciary has held that:¹⁹²

[T]he determination of the existence of a public necessity for the enactment of an urgency measure rests upon the judgment of the Legislature. It is a legislative question,

¹⁸³Cal Const, art II, s. 9(c).

¹⁸⁴See Hyink, above n 1, 117.

¹⁸⁵See Hyink, above n 1, 116; Schlessinger, above n 1, 33-34.

¹⁸⁶Greenberg, above n 79, 1745-1746 (suggesting that a least a year would be appropriate).

¹⁸⁷Cal Const, art II, s 9(a).

¹⁸⁸Lee "California" in Butler and Ranney, above n 1, 100; see also "Limitations on Initiative and Referendum" (1951) 3 Stan L R 467; C Lowe "Public Safety Legislation and the Referendum Power: A Reexamination" (1986) 37 Public Safety Legis 591.

¹⁸⁹Hardy, above n 1, 80; Hyink, above n 1, 115.

¹⁹⁰Lee "California" in Butler and Ranney, above n 1, 100.

¹⁹¹Hyink, above n 1, 115 n.3.

¹⁹²*Stocburger v Jordon* 10 Cal2d 636, 642, 76 P2d 671, 673-674 (1938); see also *Hollister v Kingsbury* 129 Cal App 420, 425, 18 P2d 1006, 1008 (1933).

the determination of which will not be interfered with by the courts, save in those few exceptional cases where it appears clearly and affirmatively from the Legislature's statement of facts that a public necessity does not exist.

As the courts are "extremely reluctant to interfere with [the Legislature's urgency] determinations,"¹⁹³ the restriction may be, as Greenberg has noted, "correspondingly greater than it necessarily would have to be."¹⁹⁴ In addition, legislation with urgency clauses are not of limited duration as they are in Switzerland.¹⁹⁵ Even if Lee's observation regarding the liberal use of urgency clauses is exaggerated, the fact remains that the California Legislature has the means to deny the electors the right to veto legislation that it considers essential. The only limitation on its use of urgency clauses is the difficulty it faces in obtaining the necessary two-thirds of both Houses, the degree of which can change from issue to issue and from election to election.

Unlike in Switzerland, tax levies or appropriations for the usual current expenses of the State are also exempt from the legislative referendum.¹⁹⁶ To qualify for exemption, appropriations must be for current expenses. However, whether tax levies must be for current expenses appears to be an open question, as the California Supreme Court has indicated that this might not be the case and that it might be open to an argument that all tax levies are exempt.¹⁹⁷ Whether the Judiciary would review a legislative declaration that a tax or appropriation measure is designed to meet current expenses is also uncertain, although Greenberg has argued that the courts would take the same approach it has with respect to urgency declarations.¹⁹⁸

In addition, as in Switzerland,¹⁹⁹ the California legislative referendum is limited to legislative acts. As a result, it cannot be used to refer administrative acts to the electors for their approval.²⁰⁰ Furthermore, the electors would not be able to use it to rescind the Legislature's ratification of a federal constitutional amendment.²⁰¹

As Hardy has noted, the legislative referendum was designed "to allow citizens to stop hasty, ill-advised legislation."²⁰² However, its procedural and substantive

¹⁹³Greenberg, above n 79, 1740.

¹⁹⁴Greenberg, above n 79, 1739. According to Greenberg, the courts may not have the jurisdiction to review urgency determinations as the phraseology of the California Constitution appears to allow the Legislature to "deem" when a matter is necessary to preserve public health, safety or peace. Greenberg, above n 79, 1739, 1740.

¹⁹⁵See sections II.B.2 and III.B in chapter four.

¹⁹⁶Cal Const, art II, s 9(a); see section III.B in chapter four.

¹⁹⁷See *Geiger v Board of Supervisors* 48 Cal2d 832, 836 n.1, 313 P2d 545, 547 n.1 (1957).

¹⁹⁸Greenberg, above n 79, 1743.

¹⁹⁹Aubert "Switzerland" in Butler and Ranney, above n 1, 41-42.

²⁰⁰See eg *Collins v City & County of San Francisco* 247 P2d 363, 112 CA2d 719 (1952); *Fishman v City of Palo Alto* 150 Cal Rptr 326, 86 CA3d 506 (1979).

²⁰¹58 [Cal] Atty Gen 830 (6 November 1975).

²⁰²Hardy, above n 1, 80.

limitations, many of which do not apply to initiatives, explain why the legislative referendum has fallen into disuse in California. The electors have taken part in 39 legislative referendums, 35 between 1912 and 1952, and four in 1982, which was the last time the device was used. The electors have vetoed 64 percent of the acts subjected to the legislative referendum.²⁰³ In roughly the same period, the Swiss have used the legislative referendum more frequently and regularly. Between 1912 and 1978, for example, the Swiss have had 52 legislative referendums, 28 between 1912 and 1952, and 24 between 1952 and 1978. They rejected approximately 58 percent the acts subjected to the legislative referendum.²⁰⁴

Lee attributes the disuse of the legislative referendum in California to the difficulty involved in obtaining the required signatures, more than 393,835, in 90 days.²⁰⁵ The League of Women Voters of California has pointed out that the requirement takes a high degree of involvement and organisation to meet.²⁰⁶ Lee concurs with this observation, noting that the legislative referendum is limited to those groups that are "able to mount a quick, substantial, and costly circulation drive."²⁰⁷

Another reason the device is rarely used can be attributed to the 1966 revision of the California Constitution. Since then, the Legislature has met almost continuously, in contrast to its previously limited biannual sessions. Consequently, as Lee has observed, groups now have "more opportunity to seek amendments to statutes within the regular legislative process, rather than oppose them in costly and uncertain referendums."²⁰⁸ Another significant factor is the relative impermanence of the solution afforded by the legislative referendum, as the Legislature is free to re-legislate a statute vetoed by the electorate at a later date.

IV ASSESSMENT

Lee has concluded that direct democracy in California "has become an integral part of the strategy of law making."²⁰⁹ However, due to the differences between the Californian constitutional system and the Swiss constitutional system, the strategy in California is fundamentally different from the strategy in Switzerland. In Switzerland, the relatively frequent use of the legislative referendum applies a continuous pressure on the Swiss legislature to take into consideration the views of

²⁰³ Lee "California" in Butler and Ranney, above n 1, 90, 92, 100. Hyink, above 1, 116; League, above n 1, 36.

²⁰⁴ Aubert "Switzerland" in Butler and Ranney, above n 1, 43-44.

²⁰⁵ Lee "California" in Butler and Ranney, above n 1, 92, 99, 100; see also League, above n 1, 21.

²⁰⁶ League, above n 1, 36.

²⁰⁷ Lee "California" in Butler and Ranney, above n 1, 99.

²⁰⁸ Lee "California" in Butler and Ranney, above n 1, 100.

²⁰⁹ Lee "California" in Butler and Ranney, above n 1, 98.

interested parties. As the legislative referendum is a rare occurrence in California, the California Legislature is less susceptible to this kind of pressure.

Consequently, in California, interested parties have come to rely on the constitutional initiative and the legislative initiative as a means to encourage the Legislature to act. If action is not forthcoming or it is unsatisfactory, each device can be used to bring the issue directly to the electors. As Hyink, Brown, and Thacker have noted, the initiative process has been instrumental in achieving needed reforms in the face of governmental inaction:²¹⁰

Noteworthy examples are the merit system for government employees, a centralized executive budget, coastline conservation, and permanent voter registration. Were it left to the legislature, these reforms might never have come about.

In many cases, the threat of starting or actually starting an initiative campaign has been sufficient to prod the Legislature into action.²¹¹ In addition, the lengthy and detailed nature of the California Constitution often requires the use of the constitutional initiative to bring about a desired reform. Frequently, even when the Legislature has been cooperative, a reform can only be achieved by reference to the electors because it requires an amendment to the California Constitution.

The legislative referendum, like its Swiss counterpart, is conservative in its effect. If successfully employed, the enactment subject to its operation is vetoed, which results in the preservation of the status quo. While the device can be used to veto new enactments, it cannot be used to eliminate any pre-existing statutory or constitutional rights. The constitutional initiative and the legislative initiative, however, are potentially more dangerous in this respect as it gives the electors the power to propose and enact laws directly without recourse to their elected representatives²¹² or exposure to the moderating influence of the legislative process.²¹³ However, the constitutional initiative is subject to the substantive limitations imposed by the United States Constitution and a range of important procedural limitations. The legislative initiative is subject to the substantive limitations imposed by both the United States Constitution and the California Constitution and the same range of procedural limitations.

²¹⁰Hyink, above n 1, 131-132.

²¹¹League, above n 1, 34; see also L. Whitehall "Direct Legislation: A Survey of Recent Literature" (1985) 5 Legal Reference Services Q 3, 28-32.

²¹²Collins, above n 75, 1127.

²¹³See Collins, above n 75, 1127 n.1.

Nevertheless, Derrick Bell has argued that direct democracy could become a barrier to racial equality.²¹⁴ Although Bell alludes to California's 1964 constitutional initiative regarding the California Legislature's 1963 'fair housing' legislation,²¹⁵ his argument is primarily based on 10 local body legislative referendums on local fair housing ordinances, of which all but one were rejected at the polls.²¹⁶ His argument is based on the unsupported assumption that the electorate's veto of enactments providing for low-income housing constitutes racial discrimination. As Cronin has noted, Bell does not admit that the referendums held on low-income housing have involved factors other than racial prejudice, such as the effect on appreciation and resale values, population density, and traffic flow.²¹⁷ Furthermore, Walker disputes that the referendum results that Bell relies on support the conclusion that they were an expression of racial discrimination, primarily because:

Black American economist Thomas Sowell [has pointed] out that building low income housing (for blacks) in middle class neighbourhoods has been bitterly opposed by blacks already living in such neighbourhoods.

In addition, Bell does not discuss the differences between the constitutional initiative, the legislative initiative, and the legislative referendum, or whether their differing array of safeguards would make any difference to his analysis. The courts are likely to strike down as unconstitutional any law put in place by a constitutional initiative or a legislative initiative that created barriers to racial equality as a violation of the

²¹⁴D Bell "The Referendum: Democracy's Barrier to Racial Equality" (1978) 54 Wash L R 1; see also L Sager "Insular Majorities Unabated: *Warth v Seldin* and *City of Eastlake v Forest City Enterprises, Inc.*" (1978) 91 Harv L R 1373; M Slonim and J Lowe "Judicial Review of Laws Enacted by Popular Vote" (1979) 55 Wash L R 175; P Gunn "Initiatives and Referendums: Direct Democracy and Minority Interests" (1981) 22 Urban L Ann 135. For a brief account of Professor Bell's controversial career and his criticism of American civil rights policies, see S Goldberg "Who's Afraid of Derrick Bell? A Conversation on Harvard, Storytelling and the Meaning of Color" (Sept 1992) ABA J 56. Although Bell is generally cited as the leading proponent of the view that direct democracy could become a barrier to racial equality, Malani Kotchka concluded in an earlier article that the United States Supreme Court has endorsed the use of direct democracy regardless of the discriminatory impact it may have by upholding its use as a neutral democratic process by which to deal with land-use regulation. M Kotchka "Residential Zoning by Voter Participation: A Democratic Means to an Inequitable Result" (1977) 46 Cinn L R 539, 552.

²¹⁵For a discussion of California's 1964 fair housing initiative, see above text accompanying notes 7-13.

²¹⁶Bell, above n 214, 15 n.54 (stating that "between 1963 and 1968, 10 cities and the state of California conducted open housing referenda. All were initiated by opponents of fair housing measures who were successful in every case until 1968, when the Flint, Michigan, ordinance was upheld by a paper-thin margin on recount").

²¹⁷Cronin, above n 7, 94. For discussions of the use of direct democracy to resolve land use and zoning issues, see C Oren "The Initiative and Referendum's Use in Zoning" (1976) 64 Cal L R 74 (concluding that the use of direct democracy in zoning is compatible with the constitutional, statutory, and common law limitations on its scope); K Bachman and L Goldberg "Property: Land Use Decision-Making" 1977 Ann Survey Am L 399 (reviewing judicial decisions upholding zoning by direct democracy); J Paris "The Proper Use of Referenda in Rezoning" (1977) 29 Stan L R 819 (arguing that permissive referendums are preferable to mandatory referendums regarding zoning matters); P Glenn "State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments" (1978) 51 So Cal L R 265 (evaluating the doctrines of state law that the courts have used to validate zoning amendments enacted via the use of direct democracy).

federal constitutional right of equal protection. As for the legislative referendum, Bell's argument ignores the implications of its limited reach. The legislative referendum can only be used to veto legislative enactments. If the Legislature were passing legislation to repeal a law that supported racial inequality, the law being repealed should be subject to challenge in the courts as being unconstitutional on equal protection grounds. As the courts can invalidate laws promoting racial inequality, the legislative referendum is extremely unlikely to perpetuate racial inequality. Walker, in fact, concludes that direct democracy has not produced racial inequality in practice.²¹⁸

Bell's argument is also problematic in two other respects. First, it implies that the electors are fundamentally intolerant. However, the California electorate has opposed initiatives that have threatened minority rights. In 1978, for example, led by then retired Governor Ronald Reagan, the electors rejected an initiative which would have given school boards the power to dismiss any teacher who advocated, solicited, encouraged, or promoted public or private homosexual activity.²¹⁹ In 1986, the electorate rejected an initiative that sought to add AIDS to California's list of communicable diseases which would have empowered health authorities to quarantine those with AIDS.²²⁰

Second, Bell's concern implies that elected representatives are fundamentally more tolerant than the electors. However, Bell does not test this notion by comparing the results of the local fair housing referendums he considered with the proceedings of the relevant local bodies that produced the ordinances that the electors rejected.²²¹ This failure is significant primarily because elected representatives in the United States have perpetrated some notable racial injustices. During World War II, for example, they enacted laws that forced at least 120,000 Japanese Americans into "relocation" camps although not one Japanese American was ever charged or convicted of espionage or sabotage.²²²

In addition, the force of both of these implied arguments is undermined by the procedural and substantive safeguards that limit California's direct democracy devices. In the event that the electorate were to approve a proposal that deprived a group of their constitutional rights, as may have been the case in November 1994

²¹⁸Walker, above 9, 83; see also C Gillette "Plebiscites, Participation, and Collective Action in Local Government Law" (1988) 86 Mich L R 930, 936-937 (rejecting Bell's arguments as "contradictory" and "largely overstated").

²¹⁹Cronin, above n 7, 96.

²²⁰Above.

²²¹See generally Bell, above n 214.

²²²Cronin, above n 7, 92.

when it approved an initiative to prevent illegal aliens from receiving state funded education and medical care, the courts are extremely likely to invalidate the proposal as unconstitutional.²²³

Given the logistical requirements involved in using California's direct democracy devices, a more credible inequality argument concerns access rather than race. California is much larger in size and population than Switzerland. The number of signatures required to trigger California's direct democracy devices is also much higher than it is for Switzerland's direct democracy devices, both in absolute and relative terms.²²⁴ As a consequence, using California's direct democracy devices requires substantially greater resources than using Switzerland's direct democracy devices, either in the form of money or large, broad-based, well-organised, volunteer organisational support. According to Hyink, Brown, and Thacker, "the expense of petition circulation and ballot proposition campaigns discourages all except highly organized interest groups from using the direct legislation approach."²²⁵ As a result, it is not surprising that:²²⁶

the most active organisations sponsoring or opposing ballot propositions in recent years have been well-financed pressure groups representing oil producers, the trucking industry, liquor interests, real estate associations, the medical profession, manufacturers' associations, and labor unions.

Lee concurs with this assessment:²²⁷

while a few groups outside the main political stream occasionally try to employ the initiative process, the main actors are those who regularly do battle in legislative

²²³ Approximately 20 suits were lodged against this initiative the day after the electorate approved it.

²²⁴ In Switzerland, to trigger a legislative referendum, the signatures of 50,000 electors must be collected within 90 days; to trigger a constitutional initiative, the signatures of 100,000 electors must be collected within 18 months. As the population of Switzerland is approximately 6,820,000, the signature requirement amounts to 0.73 and 1.47 of the general population respectively. See "Switzerland" in *Book of the Year: Events of 1991* (Encyclopedia Britannica, Chicago, 1992) 708. If the 1,066,139 resident aliens are deducted, the percentages rise to 0.87 and 1.74, respectively. However, they still end up being less onerous than the corresponding unadjusted figures for California and New Zealand. In California, to trigger a legislative referendum, the signatures of approximately 393,835 electors must be collected within 90 days; to trigger a constitutional initiative requires the signatures of approximately 630,136 electors. As the population of California is approximately 30,380,000, the signature requirements amount to 1.29 and 2.07 percent of the general population, respectively. See "United States of America" in *Book of the Year*, above, 725. To trigger a citizens initiated referendum in New Zealand, the signatures of approximately 232,000 electors are required to be collected within 12 months out of a general population of 3,432,000, which amounts to 6.76 percent of the general population. See "New Zealand" in *Book of the Year*, above, 670.

²²⁵ Hyink, above n 1, 128. For discussions of the amounts and uses of money involved in California initiative campaigns, see J Moore "Election Day Lawmaking" (17 Sept 1988) 20 Nat'l J 2296; P Schrag "California II: Initiative Madness" (22 August 1988) 199 *The New Republic* 18; Whitehall, above n 211, 12-20.

²²⁶ Hyink, above n 1, 131.

²²⁷ Lee "California" in Butler and Ranney, above n 1, 99.

corridors or in campaigns for elective office. For these groups, the initiative is mainly another weapon - or hurdle - in the contest for political power and influence.

Although money can make California's direct democracy devices more accessible, the expenditure of money cannot guarantee a desired result. For example, as Lee has noted:²²⁸

Opponents of the coastal conservation act in 1972 outspent proponents by more than three to one, yet the initiative passed. In contrast, state employees spent \$1.8 million in the same election attempting to secure passage of a salary measure, against the minuscule \$38,000 spent in opposition, but the initiative failed. The opponents of marijuana liberalization spent only \$5,000 but were able to offset expenditures by its supporters amounting to \$214,000. In general, opponents of initiatives who spent the most tended to be successful in defeating the measure; on the other hand, high-spending advocates most often found their cause go down in defeat.

Cronin reached a similar conclusion in his nationwide study. The only established correlation between expenditure and results is negative, that is, "the evidence suggests that the wealthier side has about a 75 percent or better chance of defeating [a proposal]" if the wealthier side is opposing a poorly funded proposal.²²⁹ However, large, broad-based, well-organised, volunteer organisations promoting proposals can, and have, overcome the overwhelming financial superiority of their opponents. The success of the Coastal Alliance in winning the California electorate's support for the Coastal Conservation Act, despite being outspent by more than three to one, is an example.²³⁰

Although California's direct democracy devices may be less effective in curbing the power of interest groups than the Progressives had hoped, they have eliminated the possibility of one group gaining control over the exercise of governmental power to the extent managed by the Southern Pacific Railroad prior to the advent of direct democracy in California. The very existence of California's direct democracy devices, whether used or not, have influenced the behaviour of elected representatives,²³¹ primarily by breaking their monopoly over the legislative process by providing the electors with the power to propose, enact, or veto laws.

However, the legislative power that the constitutional initiative, the legislative initiative, and the legislative referendum give to the California electors is limited. In comparative terms, the legislative power that they confer on the California electors is less than the legislative power that constitutional initiative and the legislative referendum confer on Swiss electors. California's direct democracy devices are

²²⁸Lee "California" in Butler and Ranney, above n 1, 105.

²²⁹Cronin, above n 7, 109.

²³⁰Lee, "California" in Butler and Ranney, above 1, 102, 105.

²³¹Lee, "California" in Butler and Ranney, above 1, 119.

subject to a host of procedural and substantive limitations, while Switzerland's are only subject to a few procedural limitations. These differences are attributable to the differences in the Swiss and California constitutional systems. The Swiss constitutional system was designed to preserve local autonomy. Switzerland's direct democracy devices are consistent with and integral to this design. The California Constitution is subordinate to the United States Constitution. California's direct democracy devices reflect this subordinate status. Although not integral or native to the California constitutional system, the devices are, as Lee has noted, "so deeply rooted in the political culture of the State that no public figure in memory has suggested that [they] be eliminated - or even substantially modified - and none is likely soon to do so."²³²

Despite these differences, the forces which led to the establishment of Switzerland's and California's direct democracy devices were essentially the same. In Switzerland, during the economic turmoil of the industrial revolution, powerful industrialists and financiers, like Escher, were able to further their interests by using their wealth and position to control nearly every representative legislature in Switzerland. In California, the industrial revolution had the same effect. Representative democracy fell under the control of a few extremely wealthy individuals who used their power to further their interests. The combination of economic uncertainty with the widespread belief that elected representatives were serving the interests of privileged elites led both the Swiss Democrats and the California Progressives to embrace direct democracy as a means to restore the legitimacy of their constitutional systems.

Essentially, the direct democracy devices in Switzerland and California reflect the constitutional systems that produced them. As these systems are different, the direct democracy devices found in Switzerland and California are different, particularly in terms of their legal effect. However, these devices came into being during periods of economic upheaval as a means to improve, not displace, representative democracy. The call for direct democracy in New Zealand and the subsequent enactment of the Citizens Initiated Referenda Act 1993 is consistent with this pattern.

²³²Lee, "California" in Butler and Ranney, above n 1, 120; see also Whitehall, above n 211, 40 (stating that most scholars predict that popular enthusiasm for direct democracy will continue and that any attempts to reform the process will be slow, and predicting that its expansion is more likely than its restriction). For a discussion of ill-fated proposals to change California's direct democracy process, see League, above n 1, 61-74.

PART IV: NEW ZEALAND

ORIGIN OF DIRECT DEMOCRACY IN NEW ZEALAND

New Zealand's Citizens Initiated Referenda Act 1993 (CIR Act) came into being as a reaction to the policies of the Fourth Labour Government (1984-1990). The Fourth Labour Government moved rapidly after being elected in 1984 to dismantle the welfare state created by the Liberals in the 1890s and augmented by the First Labour Government in the late 1930s, ostensibly because it was no longer sustainable. Its approach included reducing benefits through the introduction of means testing and the imposition of user charges, reforming taxation, selling state assets, and deregulating the economy, particularly its financial markets. These structural changes were bewildering to many, particularly as they created levels of unemployment comparable to those experienced in New Zealand during the Great Depression, and fuelled a speculative stock-market boom, which, following developments in overseas markets, crashed in October 1987. The crash caused many companies to fold and thousands of people to lose a great deal of money. It also increased unemployment.¹

New Zealanders, who had been sheltered from the spectre of unemployment since the Great Depression by government largesse and intervention, found themselves exposed to the cold winds of market forces. Their elected representatives had chosen, more out of necessity than design, to tackle New Zealand's growing fiscal and trade deficits. However, they lacked a specific electoral mandate to carry out this decision.² As Robert Chapman has noted, the Fourth Labour Government's structural changes were initiated "without manifestos, without informed electoral choice, without the concurrence of party organisations and despite a check from its prime minister."³ Regardless of the merits of this decision, the change in direction was fundamental and contrary to the electorate's expectations.⁴ The economic shock was, therefore, accompanied by a psychological one, which produced an overwhelming demand for constitutional reform. The electorate felt that elected representatives were to blame, and something had to be done to make them more accountable and responsive.

¹K Sinclair "Hard Times (1972-1989)" in *Oxford Illustrated History of New Zealand* (Oxford University Press, Auckland, 1990) 361-364; L Barber *New Zealand: A Short History* (Century Hutchinson NZ Ltd, Wellington, 1989) 68, 208-211.

²See section III.B.2(b) in chapter two.

³R Chapman "A Political Culture Under Pressure: The Struggle to Preserve a Progressive Tax Base for Welfare and the Positive State" (1992) 44 *Pol Sci* 1, 27.

⁴See generally T Simpson *A Vision Betrayed: The Decline of Democracy in New Zealand* (Hodder and Stoughton, Auckland, 1984); see also B Jesson *Fragments of Labour: The Story Behind the Labour Government* (Penguin Books, Auckland, 1989) 14-21.

A host of constitutional reforms were put forward during this period, including proposals for various direct democracy devices. Direct democracy advocates have existed in New Zealand since at least 1893. However, as in Switzerland and California, their success would ultimately depend on a sustained period of economic stress coinciding with a prolonged period of profound disillusionment with representative democracy. The crash brought about this coincidence, and the surprising decision of the subsequent National Government to "stay the course" taken by the Fourth Labour Government, particularly with respect to superannuation, compounded this effect.

The lengthy period of hardship and disappointment gave New Zealand's direct democracy groups an opportunity to thrive and to build support for direct democracy. People who would otherwise have no interest in reforming the constitutional system were receptive to their message as they were actively seeking a means to eliminate the hardship and disappointment they were experiencing. Merv Rusk, then a well-established and long serving member of the National Party, and his supporters were among those who picked up the message. His decision to embrace direct democracy as a necessary constitutional reform to curb the excesses of representative democracy brought the direct democracy debate into the political mainstream. His campaign within the National Party for a binding system of direct democracy resulted in the inclusion of a promise to introduce a non-binding system in the National Party's 1990 election manifesto. This promise would eventually be enacted in the form of the CIR Act, due to the combined efforts of the direct democracy groups, Merv Rusk, and his supporters.

This chapter documents the events leading up to the National Party's pledge to introduce a non-binding system of direct democracy. It traces New Zealand's long-running direct democracy debate, identifies the main direct democracy groups and their contribution to the debate, and examines the forces which led the National Party to make its election manifesto promise. The following chapter documents the legislative history of the CIR Act, which is necessary as New Zealand's direct democracy advocates, unlike their counterparts in Switzerland and California, failed to secure control of the legislative process. Both chapters examine the factors which determined the form and content of the CIR Act, which provides the basis for understanding, in chapter nine, the differences between New Zealand's direct democracy system and those in Switzerland and California.

These tasks have not been undertaken previously. Providing a full and accessible record of the origin of the CIR Act, given the extensive use of primary sources, has

made this chapter and the following chapter relatively lengthy. As a consequence, however, they not only provide an insight into the forces that gave rise to the CIR Act, but they also describe in detail the path that an idea for constitutional reform can take before it becomes law in New Zealand, which is a subject that has previously escaped comprehensive treatment. Taken together, these two chapters provide a practical example for those who wish to promote legislative change or constitutional reform.⁵ More importantly, they provide the basis for comparing the origin of direct democracy in New Zealand with its origin in California and Switzerland.

I CALL FOR DIRECT DEMOCRACY BEFORE THE 1987 CRASH

New Zealand's direct democracy debate began in 1893 with the introduction of the Referendum Bill.⁶ Although the Bill only provided for non-binding government controlled referendums,⁷ it involved the country in the same debate that the California Progressives had started in California, that is, whether Swiss-inspired direct democracy should be made part of the established constitutional framework. The debate owed its origins to the effects of the Industrial Revolution.⁸ Monopolistic practices in an unregulated economic environment, combined with an unprecedented cycle of boom and bust between 1870 and 1900, brought calls for reform from every unprivileged quarter in Europe and America.⁹ No country, least of all New Zealand, was immune to the political turmoil and intellectual fervour of the age.¹⁰ The New Zealand direct democracy debate would ebb and flow for a century, finding advocates for direct democracy within the Liberal Party, the early Labour Party, the Constitutional Society, and the New Zealand Democratic Party (originally the Social Credit Political League) before the crash. After the 1987 crash, various direct

⁵The growing body of "lawyer as lobbyist" literature generally assumes its readers know how the New Zealand legislative process works and what they can do to bring about or forestall change. See eg M Chen "The Introduction of Mixed-member Proportional Representation in New Zealand - Implications for Lawyers" (1994) 5 Public L R 104; G Palmer "Lawyer as Lobbyist: The Role of Lawyers in Influencing and Managing Change" (March 1993) NZLJ 93; "Lawyer as Lobbyist" in 1993 *New Zealand Law Conference: Law and Politics Papers*, Vol 2, 267-335 (March 1993); G Palmer "The New Public Law: Its Province and Function" (1992) 22 VUWLR 1.

⁶NZPD, vol 80, 358, 2 August 1893.

⁷See *Bills Thrown Out* (1893).

⁸See G Mowry *The California Progressives* (Quadrangle Books, Chicago, 1963) 88.

⁹See eg O Robinson, T Fergus, and W Gordon *An Introduction to European Legal History* (Professional Books Ltd, Abingdon, 1985) 440; B Hyink, S Brown, and E Thacker *Politics & Government in California* (8 ed, Thomas Y Cromwell Company, New York, 1973) 63-64; D Lavender *California: A Bicentennial History* (W W Norton, New York, 1976) 124; K Dandliker *A Short History of Switzerland* (Swan Sonnenschein & Co Ltd, London, 1899) 284-289; E Bonjour, H Offler and G Potter *A Short History of Switzerland* (Oxford University Press, London, 1952) 299-343; G Thurer *Free and Swiss: The Story of Switzerland* (adapted & trans, Oswald Wolff, London, 1970) 120; W Martin *Switzerland: From Roman Times to the Present* (Ekek Books, London, 1971) 235.

¹⁰Even Great Britain, a country of time honoured political traditions, participated in the debate, with the ruling Liberals against the adoption of direct democracy and the out-of-power Tories for it. L Watt, *The Referendum: Its Uses and Abuses* (MA thesis in political science held by Victoria University of Wellington, 1956) 15; see also NZPD, vol 87, 642 (17 July 1895).

democracy groups and the party wing of the National Party began to call for the establishment of direct democracy in New Zealand.

A *The Liberals*

The Liberals came to power in 1891 toward the end of a lengthy economic depression. Most of the people in New Zealand were immigrants who had left Great Britain "in search of a better life, with a higher standard of living away from the appalling conditions of nineteenth century industrial towns."¹¹ Instead they found low paid "sweatshop" work or unemployment. During the late 1880s, conditions were so poor that the number of emigrants exceeded immigrants by thousands. Employers easily put down strikes over working conditions by offering work to the unemployed. The depression and the strikes produced hostility between rich and poor, and divided public opinion into two camps, conservative and liberal. The Liberals, who promised land and labour reforms, secured the support of unionists and won the December 1890 election.¹²

The Liberals built their reform program around a self-serving definition of democracy, mainly to restrain those in their midst who favoured radical reform. Most of their leaders "insisted that reform should proceed only as fast and as far as public opinion would allow."¹³ The Liberal Government's Prime Minister, Richard Seddon, argued:¹⁴

The statesman who desires to help his country must keep in touch with the feelings of the country. He must not go ahead of what he is supported in by public or popular opinion. We can only legislate, and our legislation can only stand, if our people are educated to the point of demanding that certain legislation shall be passed.

Seddon used arguments of this kind to avoid making decisions on controversial issues, such as prohibition and bible-reading in school, by suggesting that they be referred to the electors in national referendums. This stratagem shifted responsibility for making controversial decisions away from Seddon to the electors. However, as his government "did not in fact promote the idea of referenda with any real vigour,"¹⁵ Seddon was able to defer deciding controversial issues indefinitely.

¹¹K Sinclair *The Liberal Government, 1891-1912: First Steps Toward a Welfare State* (Heinemann Educational Books, Auckland, 1967 reprint 1972) 1.

¹²Sinclair, above n 11, 1-6; see also D Hamer *The New Zealand Liberals: The Years of Power, 1891-1912* (Auckland University Press, Auckland, 1988) 24-26.

¹³Hamer, above n 12, 46-47.

¹⁴Hamer, above n 12, 47.

¹⁵Above.

Nevertheless, to give the argument substance, Seddon and his colleagues regularly introduced the Referendum Bill knowing full-well that their supporters in the Legislative Council, the then existing second chamber of the General Assembly, would veto the Bill.¹⁶ When initially introduced on 2 August 1893, the Bill was two pages long and consisted of 10 clauses. It provided for a permanent government controlled referendum system in which the government could refer questions on specified topics to the electors if the majority of both the House of Representatives and the Legislative Council agreed or if three-fifths of all the members of either chamber passed a resolution to that effect. By 1905, the Bill was five pages long, consisted of 19 clauses, and no longer had any subject matter limitations.¹⁷ The Legislative Council repeatedly rejected it, primarily on the grounds that its opponents would use it to abolish the Council.

Despite the "understanding" Seddon had with the Legislative Council, the long running debate was spirited and at times fierce. It drew exclusively upon the Swiss direct democracy system, primarily as it was the only one of note in existence. The works Simon Deploige, Francis Adams, Ellis Oberholtzer, and A V Dicey informed both sides of the debate.¹⁸ During the course of the debate, a number of parliamentarians advocated going further than the Bill provided, that is, called for establishing the legislative initiative and the legislative referendum. The debate finally fizzled out on 12 September 1906 when Seddon's successor, Joseph Ward indicated that the General Assembly was too preoccupied with more important work to bother reintroducing the Referendum Bill.¹⁹

¹⁶See Watt, above n 10, 34-35 (arguing that Seddon could have successfully steered the Referendum Bill through the Legislative Council had he desired its passage). The Hansard record for the Referendum Bill supports Watt's argument. See generally below note 19.

¹⁷For copies of the different versions of the Referendum Bill, see *Bills Thrown Out* (1893-1905).

¹⁸See eg Deploige: NZPD, vol 117, 2, 30 July 1901; vol 122, 579, 24 September 1902; vol 127, 555, 13 November 1903; vol 128, 117, 1 July 1904; NZPD, vol 131, 493, 496, 27 October 1904; Adams: NZPD, vol 80, 567, 10 August 1893; vol 116, 224, 9 July 1901; Dicey: NZPD, vol 80, 567, 10 August 1893; vol 85, 281, 29 August 1894; Oberholtzer: NZPD, vol 85, 281, 29 August 1894; vol 128, 117, 1 July 1904. For the works in question, see S Deploige *The Referendum in Switzerland* (trans, Longmans, Green & Co, London, 1898); F Adams and C Cunningham *The Swiss Confederation* (Macmillan & Co, London, 1889); E Oberholtzer *The Referendum in America* (Charles Scribner's Sons, New York, 1900); A V Dicey "Ought the Referendum be Introduced into England?" (1890) 57 *Contemp R* 489; see also A V Dicey "The Referendum and Its Critics" (1910) 212 *Q R* 538.

¹⁹For the Hansard record of the Referendum Bill, see NZPD, vol 80, 358, 2 August 1893, 564-569, 10 August 1893; vol 85, 274-303, 29 August 1894; vol 87, 16, 21 June 1895, 642-664, 17 July 1895; vol 93, 437-443, 23 July 1896; vol 105, 145, 19 October 1898, 768, 4 November 1898; vol 106, 156, 30 June 1899; vol 112, 67-68, 20 July 1900; vol 116, 212-225, 9 July 1901, 266-268, 10 July 1901, 363-364, 12 July 1901, 393, 16 July 1901, 491, 18 July 1901, 495-507, 19 July 1901, 669-671, 26 July 1901; vol 117, 1-12, 30 July 1901, 79-81, 31 July 1901, 139-143, 1 August 1901, 174-175, 2 August 1901; vol 122, 571-601, 24 September 1902; vol 127, 311-312, 3 November 1903, 352-372, 4 November 1903, 550-571, 13 November 1903, 715, November 1903, 1052, 24 November 1903; vol 128, 41, 30 June 1904, 106-121, 1 July 1904; vol 129, 460, 16 August 1904; vol 131, 249-250, 19 October 1904, 373-374, 24 October 1904, 424-428, 25 October 1904, 468-474, 26 October 1904, 486-519, 27 October 1904, 643-651, 1 November 1904; vol 133, 543, 9 August 1905, 724, 17 August 1905; vol 136, 502, 12 September 1906.

B *The Early Labour Party*

During the first decade of the twentieth century, a militant trade union movement, reflecting developments in the United States and Australia, had come into being.²⁰ Ironically, the leaders of this movement were impressed by the political success of the Progressives in the United States, despite their antipathy towards organised labour.²¹ Like the California Progressives, unionists in New Zealand insisted that Parliament was under the control of vested economic interests, particularly the country's employers.²² While the argument may have been self-serving, it generated support for direct democracy. In 1911, the same year that the California Progressives established direct democracy in California, the First Labour Party promised in its manifesto to establish the initiative and the referendum.²³ The promise also appeared in the 1913 manifesto of the Social Democratic Party, which was part of the labour movement.²⁴

Acting on these promises, James McCombs, a member of the Social Democratic Party,²⁵ introduced the Popular Initiative and Referendum Bill in 1918 and 1919. Had it been enacted, the Bill would have given the electors the means to subject any bill or act to a referendum, regardless of when it came into existence. It also would have created an indirect initiative system, which would have given Parliament an opportunity to enact a petition proposal in lieu of placing it before the electors. If Parliament failed to act, the proposal would have gone to the electors. If Parliament passed a substantially altered version of the proposal, the electors would have been given an opportunity to decide which version would become law. Either device could only be triggered by a petition signed by 10 percent of registered electors.²⁶

McCombs' Bill went nowhere. Of the 80 seats available in the General Assembly, the Social Democratic Party held only two and the Labour Party four.²⁷ In addition, although the members of the Legislative Council were repeatedly criticised for self-serving decisions,²⁸ representative democracy in New Zealand had not acquired the

²⁰Barber, above n 1, 63.

²¹See section II.B in chapter five.

²²Barber, above n 1, 63.

²³W McIntyre and W Gardner *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 221.

²⁴McIntyre, above n 23, 228.

²⁵M Bassett *Three Party Politics in New Zealand: 1911-1931* (Historical Publications, Auckland, 1982) 66.

²⁶See *Bills Thrown Out* (1918-1919) (the Bill was 21 pages long and consisted of 80 clauses). For the Hansard record of the Popular Initiative and Referendum Bill, see NZPD, vol 182, 204, 13 April 1918, 214, 15 April 1918; vol 184, 320-328, 9 September 1919.

²⁷Bassett, above n 25, 66.

²⁸See generally K Jackson *The New Zealand Legislative Council* (University of Otago Press, Dunedin, 1972).

same nefarious reputation as it had in Switzerland during the rise of the Swiss Democrats or in California during the rise of the Progressives.²⁹ In these circumstances, despite the view of unionists, the argument in favour of direct democracy was ineffective.

C The Constitutional Society

In 1960, the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand Incorporated submitted a proposed written constitution to Parliament in the form of a parliamentary petition signed by 13,489 people.³⁰ The Constitutional Society, concerned by the abolition of the Legislative Council in 1950, which it viewed as a "bulwark against hasty, radical and ill-conceived legislation," promoted its proposed constitution as a means of establishing rules, where none existed, "to restrain Parliament from any action which would infringe the rights of the people."³¹ Aside from creating a senate to replace the abolished Legislative Council, the proposed constitution outlined a host of fundamental rights and gave the courts the power to declare legislative enactments unconstitutional. It also rendered the theory of parliamentary sovereignty inapplicable by expressly declaring that Parliament did not have the power to make laws inconsistent with the provisions of the proposed constitution.³²

The proposed constitution, which had to be approved by the electors to come into force, could only be amended by reference to the electors. A referendum on an amendment to the constitution could take place if the Head of State received advice to hold such a referendum from both Houses of the legislature or a petition signed by 30,000 electors requesting that such a referendum be held.³³ Essentially, the proposed constitution established both the constitutionally required referendum and the constitutional initiative. In this respect, the influence of Switzerland's Constitution of 1874 is unmistakable.³⁴ The proposed constitution did not, however, specify whether the electors or parliamentarians would control the drafting of constitutional amendments submitted to the electors for their approval. The Public Petitions M to Z Committee, which "carefully considered [the] petition," effectively killed the proposed constitution by reporting to the House of Representatives on 8 November 1961, without elaboration, that it had "no recommendation to make."³⁵

²⁹See generally chapters three and five.

³⁰*Report of Public Petitions M to Z Committee 1961* [1961] AJHR I.2A, 3.

³¹*Report*, above n 30, 4.

³²For a copy of the proposed constitution, see *Report* above n 30, 5-23.

³³*Report*, above n 30, 20-21 (clauses 48 and 50).

³⁴See section III.A in chapter four.

³⁵*Report*, above n 30, 3.

D *The Democrats*

A few years after the Constitutional Society's proposed constitution withered on the vine, the Democrats began to take an interest in direct democracy. The New Zealand Democratic Party (NZDP) is the evolutionary child of the New Zealand Social Credit Political League, which came into existence in 1953.³⁶ Between 1982 and 1985 the League styled itself the Social Credit Party. The League changed its name to the NZDP in 1985.³⁷ The NZDP stands for a comprehensive array of social and economic reforms based on the social credit principles originally advanced in the 1920s by Major Clifford Hughes Douglas.³⁸ For the sake of convenience, those who acted under the banner of the League, the Social Credit Party, or the NZDP are referred to as the Democrats.

1 *Initial support for direct democracy*

The Democrats initially advocated the wider use of government controlled referendums in the late 1960s.³⁹ Their stance coincided with a generalised feeling of powerlessness, particularly among the young, and it appealed to groups unable to secure parliamentary approval for their causes. By the time the Democrats included the idea in their 1975 election manifesto, it had won support among a majority of National, Labour, and Values voters.⁴⁰

The reasons for this wide-spread support were identical to those underlying the call for direct democracy in the late 1980s and early 1990s. In their 1976 study on the role of the referendum in New Zealand politics, Steven Levine and Alan Robinson indicated that many electors felt excluded from the political process, dissatisfied with a parliamentary system that appeared to be unrepresentative and unresponsive, and frustrated by the lack of adequate opportunities to participate in the shaping of public policy. Levine and Robinson concluded that "many New Zealanders would

³⁶NZDP *NZ Democrats: Opportunity with Justice* (NZDP, Auckland, 1985) 5.

³⁷Letter from Chris Leitch, President of the NZDP, to Mark Gobbi (24 May 1991); see also NZPD, vol 467, 7750 (5 November 1985).

³⁸For a discussion of the political and economic theories of Major Douglas, see C Douglas *Social Credit* (rev 3 ed, Eyre Spottiswade, London, 1937). For a discussion of Social Credit as articulated by the New Zealand Social Credit Political League, see C Evlidge *What is Social Credit? A Background to Financial Policy* (rev ed, NZSCPL Publications Committee, Social Credit Information Centre, Auckland, 1981).

³⁹Leitch, above n 37.

⁴⁰See S Levine and A Robinson *The New Zealand Voter - A Survey of Public Opinion and Electoral Behavior* (Price Milburn, Wellington, 1976) 102, 107. This was also the year in which the United Kingdom held its government controlled referendum on whether to remain a member of the European Community. See generally eg D Butler and U Kitzinger *The 1975 Referendum* (Macmillan Press, London, 1976).

appreciate institutional arrangements which gave them the opportunity to participate more frequently and more vigorously in the political life of their country."⁴¹

2 *The 1978 election manifesto promise*

Apparently, the Democrats had come to the same conclusion. In their 1978 election manifesto, they promised to introduce a modified form of Switzerland's direct democracy system. Under the proposed system, the government would be required to hold a referendum on any matter if 100,000 electors signed a petition to that effect.⁴² However, the proposal did not specify whether the results of a national referendum initiated by the electors would be binding on the government. With reference to this proposal, Geoffrey Palmer stated:⁴³

New Zealanders may reduce the grip of executive government and be more satisfied with public decision if a general statute were passed allowing for referenda to be held on important public questions where 100,000 qualified electors so petitioned.

Although Palmer indicated that more frequent use of referendums could weaken ministerial responsibility and pose some operational concerns, he concluded:⁴⁴

Nevertheless, referenda really are democratic. They do give every one a chance to have his or her voice heard. And they must reduce the level of public dissatisfaction with some types of decisions. They are fairer than a free vote in parliament.

3 *The Popular Initiatives Bill*

Aware of Palmer's endorsement,⁴⁵ the Democrats began an ill-fated attempt to establish a non-binding citizens initiated referendum system. On 9 December 1983, Gary Knapp, the Democratic MP for East Coast Bays, motioned for the introduction of a private member's bill entitled the Popular Initiatives Bill.⁴⁶ The Bill had two policy objectives: to increase the participation of the electors in the decision-making process, and to make Government more responsive.⁴⁷ The system proposed in the Bill would have required the signatures of 100,000 electors to trigger a referendum and had no subject matter limitations. However, the wording of questions would be

⁴¹Levine and Robinson, above n 40, 108.

⁴²Social Credit Party *Social Credit '78 Election Manifesto: Bold New Policies to Get New Zealand Working towards a Better Tomorrow* (1978) 50. California's famous Proposition 13 was held in the same year. See section III.A.3 in chapter six.

⁴³G Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979) 149.

⁴⁴Palmer, above n 43, 148-149.

⁴⁵NZPD, vol 455, 4752, 4756 (9 December 1983).

⁴⁶NZPD, above n 45, 4746.

⁴⁷NZPD, above n 45, 4746, 4747, 4756.

determined by a committee of the House of Representatives, and the results would be non-binding.⁴⁸

During the course of the debate, the Democrats discovered that both the National Government and the Labour Opposition opposed the Bill in principle.⁴⁹ However, the Opposition voted in favour of its introduction. Whether Labour's reluctant support resulted from the influence of Palmer, who was then Deputy Leader of the Opposition, or from the institutionalised practice of the Opposition voting against the Government as a matter of principle, is uncertain. Regardless of Labour's motivation, the National Government managed to block the introduction of the Popular Initiatives Bill by one vote.⁵⁰

Encouraged by this narrow vote and Labour's subsequent victory in the 1984 snap election, Knapp and the Democrats decided to try again on 6 November 1984.⁵¹ Once again, both Labour and National opposed the Bill in principle during the debate.⁵² Nevertheless, even though it involved an appropriation, the Labour Government decided to allow the Bill to be introduced and referred to the Electoral Law Select Committee.⁵³ Knapp attributed the Bill's progress to the influence of Palmer, then Deputy Prime Minister.⁵⁴

The Electoral Law Select Committee reported its findings to the House of Representatives on 5 November 1985, a year after the Bill's introduction. On the strength of three meetings, involving just over two hours of hearings and three submissions, it recommended that the Government should not allow the Bill to proceed. Although the Select Committee found the Bill difficult in a number of respects, it reached its recommendation based on two factors: the lack of submissions on the matter, and the existence of the Royal Commission on Electoral Reform.⁵⁵

⁴⁸For a copy of the Popular Initiatives Bill, see *Bills Thrown Out* (1984) (the Bill was five pages long and consisted of 10 clauses).

⁴⁹Jim McLay, then Minister of Justice, and D Jones spoke against the Bill on behalf of the National Government. Michael Cullen spoke against the Bill on behalf of the Labour Opposition. Gary Knapp and Bruce Beetham, both Democrats, spoke in favour of the Bill. See NZPD, above n 45, 4746-4757.

⁵⁰NZPD, above n 45, 4757.

⁵¹NZPD, vol 458, 1313 (6 November 1984).

⁵²Cullen, Richard Northey, and Bill Dillon spoke against the Bill on behalf of the Fourth Labour Government. Ruth Richardson spoke against the Bill on behalf of the National Opposition. Knapp and another Democrat, Neil Morrison, spoke in favour of the Bill. See NZPD, above n 51, 1313-1325.

⁵³NZPD, above n 51, 1313, 1315, 1319, 1324-1325.

⁵⁴NZPD, above n 51, 1324.

⁵⁵NZPD, vol 467, 7746-7748 (5 November 1985). Palmer waited until 25 July 1985 to ask the House to refer the Popular Initiatives Bill to the Electoral Law Select Committee. See NZPD, vol 464, 5971-5972 (25 July 1985).

The Labour Government had created the Royal Commission earlier in 1985 to investigate, among other things, "the use of referenda." The Royal Commission's term of reference regarding referendums was as follows:⁵⁶

To what extent referenda should be used to determine controversial issues, the appropriateness of provisions governing the conduct of referenda, and whether referenda should be legislatively binding.

To avoid pre-empting this term of reference, the Electoral Law Select Committee proposed termination of the Bill's progress and suggested that the Bill be brought to the attention of the Royal Commission.⁵⁷ Knapp criticised the Select Committee's rationale on the grounds that it reached its determination before the creation of the Royal Commission and without seriously considering the difficulties mentioned in the Committee's report.⁵⁸ Irrespective of his arguments, both Labour and National voted against the Democrats, 74 to 2, on the motion to table the Committee's report.⁵⁹ Rather than voting on the Second Reading of the Popular Initiatives Bill, the Government relied upon a procedural tactic to terminate the Bill's progress. On 13 November 1985, the Speaker of the House ruled the Bill out of order for a Second Reading on the grounds that it involved an appropriation.⁶⁰

The Democrats, anticipating the fate of the Popular Initiatives Bill, decided to bring their proposal to the attention of the Royal Commission on Electoral Reform shortly after its creation. In July 1985, they presented a comprehensive submission, along with a copy of the Bill, to the Royal Commission that addressed each of the Commission's terms of reference.⁶¹ Aside from Professor Geoffrey Q de Walker's submission, which was a copy of the manuscript for his influential book *Initiative and Referendum: The People's Law*,⁶² the Democrats presented the only pro-direct

⁵⁶*Report of the Royal Commission on the Electoral System* (Government Print, Wellington, 1986) 167.

⁵⁷NZPD, above n 55, 7748. Pursuant to the Committee's recommendation, the House of Representatives sent a copy of its report and a copy of the Popular Initiatives Bill to the Royal Commission on the Electoral System after the Committee tabled its report on 5 November 1985. The Royal Commission mistakenly stated that it received the report and the Bill following a recommendation of the Committee tabled on 3 July 1985. *Report*, above n 56, 171. What it received in July 1985 was a submission from the NZPD, which included a copy of the Bill. See 1-7 *New Zealand: The Royal Commission on the Electoral System: Submissions* (1986), Submission 742.

⁵⁸NZPD, above n 55, 7748.

⁵⁹NZPD, above n 55, 7751-7752.

⁶⁰NZPD, vol 467, 8069 (13 November 1985); see also above text accompany note 53.

⁶¹Submission 742 in *Submissions*, above n 57.

⁶²Submission 801 in *Submissions*, above n 57. This particular submission was 333 pages in length. The Royal Commission decided not to include a copy of it in its bound record of the submissions. Instead it placed a copy on file with Paul Harris in the Department of Political Science at Victoria University of Wellington. Harris served as the Commission's research officer, and was appointed in 1994 to head the

democracy submission that canvassed the main arguments both for and against direct democracy.⁶³ Predictably, they argued that the Popular Initiatives Bill overcame the standard arguments against direct democracy.⁶⁴ Ironically, their submission was influential. The Royal Commission provided a description of the Popular Initiatives Bill in its Report, but did not comment on it. Most of the Democrats' arguments against direct democracy found their way into the Report, but very few of their arguments in favour met with the same success.⁶⁵ The Royal Commission's conclusion that "initiatives and referenda are blunt and crude devices,"⁶⁶ was no doubt inspired by the Democrats' statement that "[t]he referendum is a blunt instrument," which occurred in the course of their discussion of arguments against direct democracy.⁶⁷

The Royal Commission received 805 written submissions, of which 198 (24.59 percent) dealt with "the use of referenda." The submission presented by the Democrats was one among 48 (5.96 percent) that dealt specifically with direct democracy devices that could be triggered by the electors.⁶⁸ Inexplicably, the Royal Commission reported that "about 30 percent of the submissions received dealt with referenda."⁶⁹ The overall low response to the term of reference on "the use of referenda" can be attributed to the relative importance of the other terms of reference at the time, particularly those concerning proportional representation and Maori representation. The poor response regarding direct democracy devices that could be initiated by the electors can be attributed to the imprecise phrasing of the term of reference on "the use of referenda."⁷⁰ Specifically, the term of reference did not

new Electoral Commission created under the Electoral Act 1993. The Act put in place a version of the proportional representation electoral system recommended by the Royal Commission.

⁶³See generally *Submissions*, above n 57.

⁶⁴See Submission 742 in *Submissions*, above n 57.

⁶⁵Compare *Report*, above n 56, 172-175 with Submission 742 in *Submissions*, above n 57, 2-4. Ironically, Walker's extensive and publishable submission did not merit the same consideration. The Royal Commission neither mentioned nor commented on his work in its Report. Walker had anticipated that his submission might be treated in this manner: "I realise that submissions to a New Zealand Royal Commission that originate in Australia may provoke less than unanimous enthusiasm." In spite of this realisation, Walker made his submission in the hope "that if the matter can receive consideration on its merits in New Zealand, my [Australian] compatriots might be more inclined to give it serious attention themselves." Submission 801 in *Submissions*, above n 57.

⁶⁶*Report*, above n 56, 175.

⁶⁷Submission 742 in *Submissions*, above n 57, 3. However, the Department of Justice, in the "pro" part of its pro/con discussion regarding the "use of referenda," argued that "[t]he nature of Parliamentary elections means that they are a rather blunt instrument for determining the feeling of the electorate on individual issues." Submission of the Department of Justice to the Royal Commission on the Electoral System (October 1985) (concluding that a binding system of direct democracy should not be established).

⁶⁸See generally *Submissions*, above n 57.

⁶⁹*Report*, above n 56, 171.

⁷⁰Hugo Hoffmann, the draftsman of the term of reference, stated that he strove for vagueness in the phrasing to encourage a wide range of responses. He also stated that the term of reference on referendums was an after thought, a matter ancillary to the primary purpose of the Royal Commission, which was to study reform options for New Zealand's electoral system. The term of reference was

draw a distinction between government controlled referendums and other kinds of referendums. It also did not mention devices which could be triggered by the electors. This fact, coupled with New Zealand's exclusive past use of government controlled referendums on the national level, explains why the number of submissions dealing with direct democracy devices that the electors could trigger was so low.

The Royal Commission carried this imprecision into its 1986 Report. After stating the term of reference, the Royal Commission briefly acknowledged several kinds of direct democracy devices. However, when the Royal Commission began to discuss the arguments for and against these devices, it lumped them together under the heading of "initiatives and referenda," which had the effect of rendering the Commission's assessment of each device impossible to evaluate.⁷¹ This imprecision, coupled with the poor response to the vaguely worded term of reference on "the use of referenda," cast doubt on Palmer's assertion that "the views of the Royal Commission are likely to settle the question of the future use of referenda."⁷² The subsequent passage of the CIR Act invalidated his assertion as the Royal Commission had concluded that "there should be no provision for public petitions to compel referenda."⁷³

included as one of several interesting items somewhat related to the primary purpose of the Royal Commission. The Royal Commission's study simply provided an opportunity to explore a few more issues. This, in itself, explains the superficial treatment given to the subject of referendums in the Royal Commission's Report. Interview with Hugo Hoffmann, Senior Legal Adviser, New Zealand Department of Justice, Wellington (19 May 1992).

⁷¹See *Report*, above n 56, 172-175.

⁷²G Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 258. In this second edition, Palmer rewrote his discussion of "referenda." In doing so, he deleted his first edition reference to the Democrats' direct democracy proposal and his assessment that "New Zealanders may reduce the grip of executive government and be more satisfied with public decision if a general statute were passed allowing for referenda to be held on important public questions where 100,000 qualified electors so petitioned." See Palmer, above n 43, 149. The choice appears to be ironic as Palmer changed the title of his book from a question, *Unbridle Power?*, to a statement, *Unbridled Power*. However, he was a university lecturer when he published the first edition and Deputy Leader of the Fourth Labour Government when he published the second edition. Further, the Democrats and others kept citing his earlier endorsement as an argument to win the Fourth Labour Government's support for direct democracy. See eg, NZPD, above n 45, 4752, 4756; Petition of the Coalition of Concerned Citizens (Eketahuna) to the House of Representatives (undated), EL/88/730, Box 1988/15. Having to explain the position to his parliamentary colleagues, who had finally reached the Treasury benches after three terms of National Party rule, may have been sufficiently irritating to encourage him to water down his conclusion with his uncritical reference to the Royal Commission's view on direct democracy. Palmer has also subsequently republished the Royal Commission's findings on "the use of referenda" verbatim without analytical comment. See M Chen and G Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993) 719-723.

⁷³*Report*, above n 56, 176, 181.

II CALL FOR DIRECT DEMOCRACY AFTER THE 1987 CRASH

Although the Royal Commission sounded the death knell of the Democrats' Popular Initiatives Bill, the political wing of the National Party resurrected the proposal embodied in the Bill after the 1987 crash. Public admiration for parliamentarians began to decline under the "belligerent and divisive leadership style" of Robert Muldoon,⁷⁴ Prime Minister of the National Government from 1975-1984, which was the period in which the Democrats renewed the call for direct democracy in New Zealand. The Fourth Labour Government exacerbated the trend by deciding to reduce the size and role of the welfare state when forced to deal with the budget and trade deficits caused by Muldoon's unsustainable economic and fiscal policies. From 1975 to 1989, for example, the approval rating of parliamentarians had slid from 33 percent to 4 percent.⁷⁵

The 1987 crash accentuated the economic and political turmoil caused by the Fourth Labour Government's so-called 'quiet revolution.'⁷⁶ These conditions produced a deluge of proposals for constitutional reform,⁷⁷ including a stronger and more credible call for direct democracy. In 1987, Geoffrey Q de Walker, Professor of Law and Dean of the University of Queensland School of Law, published his influential book, *Initiative and Referendum: The People's Law*, the first Australasian tract in favour of direct democracy.⁷⁸ Walker's book presented direct democracy as a means of making elected representatives more responsive and accountable to the electorate, which appealed to New Zealanders disillusioned with their elected representatives,

⁷⁴Barber, above n 1, 203.

⁷⁵P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co. Ltd, Sydney, 1993) 285; see also K Jackson *The Dilemma of Parliament* (Allen & Unwin, Wellington, 1987) 42.

⁷⁶For an account of the quiet revolution, see C James *The Quiet Revolution: Turbulence and Transition in Contemporary New Zealand* (Allen & Unwin/Port Nicholson Press, Wellington, 1986).

⁷⁷The proposals included calls for the reduction in the size of Cabinet, loosening of the Whip system, establishment of a second chamber, and the introduction of proportional representation, as well as for various forms of direct democracy. See eg H Clark "No to PR, Yes to Parliamentary Reform" *The Evening Post*, Wellington, New Zealand, 6 January 1992 (Cabinet and whip system); "What's Wrong with Parliament?" The Case for Parliamentary Reform: A Backbencher's Lament, Address by Michael Laws MP, Commonwealth Press Editors' Conference, Wellington (6 June 1991) (same); *Report*, above n 56, 208-282 (second chamber); P Downey "A Second Chamber" (December 1990) NZLJ 421 (same); Letter from Jim Bolger, Leader of the Opposition, to J Wright (18 July 1989) and to B Daly (11 July 1989) (stating that the introduction of an elected Second Chamber of Parliament was his preferred constitutional reform); C Clark, "Proportional Representation Abolishes 'Elected Dictators'" *The Evening Post*, Wellington, New Zealand, 16 January 1992, 7 (proportional representation); "Peters Wants Poll Reform by 1993" *The Dominion*, Wellington, New Zealand, 1 June 1991 (same); *Report*, above n 56 (same).

⁷⁸See generally G Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies Ltd, St Leonards, 1987); see also G Walker *The People's Law: Initiative and Referendum: University of Queensland Inaugural Lecture* (delivered 3 June 1987, University of Queensland Press, St Lucis, 1988); G Walker "The People's Law: Initiative and Referendum" (1988) 15 U Queensland L J 33.

particularly their inability or unwillingness to live up to the electorate's expectations.⁷⁹ The book was particularly attractive to groups outside the political mainstream as it was based on the theory that governmental power is controlled by self-serving elites determined to keep the masses out of the legislative process. Although unable to attract support for direct democracy from the main political parties, these groups, played an indispensable role in educating the wider community about direct democracy. They also paved the way for Merv Rusk's successful direct democracy campaign within the National Party.

A *Main Direct Democracy Groups*

The main direct democracy groups were Freedom And Individual Responsibility, the One New Zealand Foundation, Voters' Voice, the New Zealand Citizens Movement, the Coalition of Concerned Citizens, and the New Zealand Superannuitants Federation. With the exception of the New Zealand Superannuitants Federation and the Coalition of Concerned Citizens, these groups came into being after the 1987 crash. However, the New Zealand Superannuitants Federation and the Coalition did not express an interest in direct democracy until after the crash. For various reasons, these groups preferred to work on their own and outside the existing political parties. Although in regular contact with one another, their attempts to work together were belated and largely unsuccessful. Their primary contribution to New Zealand's direct democracy debate was to disseminate information in favour of direct democracy throughout the country by holding seminars, giving lectures, writing articles and letters to editors, using talkback radio, publishing pamphlets and newsletters, writing to MPs, making public submissions to parliamentary select committees, producing audio tapes, and giving interviews. In this effort, most of the groups established contact with Walker and relied heavily on his book. Despite the political establishment's attempt to marginalise these groups,⁸⁰ they managed to broaden support for direct democracy in New Zealand.

⁷⁹See eg Letter from Merv Rusk to Mark Gobbi (15 August 1991) (discussing Rusk's work promoting direct democracy). At the time of the letter, Rusk was a member of the National Party's Auckland Division Committee, Chairman of the National Party's Hobson electorate, and had been a member of the National Party for 31 years. He resigned from the National Party in 1994 when Ross Meurant, the MP for Hobson quit the National Party to form his own political party, the Right of Centre Party (ROC). Telephone interview with Merv Rusk (19 October 1994).

⁸⁰See eg L Crisp "Harvest of Hate" *The Bulletin* (4 April 1989) 42. Jim Bolger, as Leader of the National Party Opposition, used this article to imply that the direct democracy movement was the work of "far right organisations that propound racist or neo-nazi views." Letter from Jim Bolger to FAIR (17 May 1989). Ruth Dyson, then President of the New Zealand Labour Party, stated that the Labour Party had discussed direct democracy, but shied away from it because it was usually advanced by non-party people, independents, or extremists of the left or the right who were interested in direct democracy alone. Telephone interview with Ruth Dyson, President of the New Zealand National Party (3 May 1991).

1 *Freedom And Individual Responsibility*

Leo Gilich, Thea Gilich, M Keane, and Mike Houlding founded Freedom And Individual Responsibility (FAIR) in October 1987. Jean Kissling of Switzerland introduced the idea of direct democracy to Leo and Thea Gilich in the 1970s. Inspired, they began to bring direct democracy to the attention of others, recommending them as tools to check the "dictatorial trend" in New Zealand's party political system. FAIR, which was based in Auckland, evolved out of this effort.⁸¹

FAIR had one objective. It wanted to establish the legislative referendum and the legislative initiative in New Zealand's constitutional system as fundamental rights. Its founders declared that the organisation would disband once it achieved this objective. They also decided that FAIR would not be affiliated with any political or religious organisation but would welcome direct democracy supporters from any organisation.⁸² FAIR was active nationally and regularly shared information, as well as views, with the other direct democracy groups in New Zealand. FAIR also maintained contact with Walker, and often relied on his advice. For example, Walker suggested that FAIR prepare for distribution a short and punchy two page leaflet that introduced people to direct democracy to promote FAIR's objective. FAIR produced the leaflet in August 1988 and distributed it in its first newsletter in September 1988. The response increased its membership.⁸³

Convinced that it could not secure the support of either the Labour Party or the National Party for its direct democracy proposals without widely promoting and explaining its proposals to the electors, FAIR consistently reached out to the electors.⁸⁴ In this respect, FAIR played an indispensable role in educating New Zealanders about the advantages of direct democracy, which generated some media support for direct democracy. For example, on 8 June 1988, the *New Zealand Herald* stated in an editorial entitled "Execution by Referendum" that it has always favoured the increased use of referendums but argued that some issues, such as abortion and capital punishment, were too complex to be framed in a referendum.⁸⁵ However, on

⁸¹Letter from Leo Gilich, National Coordinator of FAIR, to Mark Gobbi (30 April 1991); L Armiger, FAIR Chairman's Report (22 February 1991); FAIR Newsletter No. 1 (September 1988); see also L Gilich *Citizens Initiative But What About Referendum?* (27 September 1989) (a reply to J Bolger "Case for Citizen's Initiative" *New Zealand Herald*, Auckland, New Zealand, 26 September 1989); FAIR Newsletter No. 7 (December 1989); Letter from Leo Gilich to Jim Bolger, Leader of the Opposition (17 July 1989).

⁸²Armiger, above n 81; M Keane, FAIR Chairman's Report (10 April 1989).

⁸³Keane, above n 82.

⁸⁴See above.

⁸⁵Editorial "Execution by Referendum?" *New Zealand Herald*, Auckland, New Zealand, 9 June 1988, 8.

14 March 1989, only nine months later, the same paper published an unqualified endorsement for direct democracy in an editorial entitled "An Admission in Fear" which argued that "the enormous power of New Zealand's executive" would be curbed if the electors "had the power to compel a referendum on issues which move a significant proportion of the electorate." It concluded that "governments which fear referendums raise questions about their right to rule."⁸⁶ FAIR attributed this change in attitude to the letters written to editors and the calls made to talkback shows by its supporters.⁸⁷

2 *One New Zealand Foundation*

The One New Zealand Foundation (ONZF) came into existence in 1988 through the efforts of Peter Clark and others in Tauranga. It became an incorporated society registered in Hamilton in May 1989.⁸⁸ Clark served as chairman of the ONZF before founding Voters' Voice Tauranga,⁸⁹ which grew out of internal wrangling within the ONZF. Wally Boyd of Foxton then became president of the ONZF.⁹⁰

The ONZF was non-sectarian and professed to be non-political. Nevertheless it had three declared objectives: 1) the elimination of racial tension; 2) the withdrawal of all racially discriminatory legislation; and 3) the establishment of direct democracy. Essentially, the ONZF wanted "one law for all New Zealanders"⁹¹ and a political system which is a democratic instrument of the electors, not an "elected dictatorship."⁹² Like FAIR, the ONZF derived from, and credited to, Walker many of its arguments for direct democracy.⁹³ The ONZF decided that one of its most important functions would be to inform its membership and the public about direct democracy.⁹⁴ Like FAIR, the ONZF supported the adoption of the legislative referendum and the legislative initiative.⁹⁵

⁸⁶Editorial "An Admission in Fear" *New Zealand Herald*, Auckland, New Zealand, 14 March 1989, 8.

⁸⁷Keane, above n 82.

⁸⁸Letter from Wally Boyd, President of the ONZF, to Mark Gobbi (9 July 1991); Telephone interview with Wally Boyd (24 July 1991).

⁸⁹See ONZF Press Release (13 November 1989).

⁹⁰Boyd Interview, above n 88.

⁹¹Above.

⁹²Letter from Boyd, above n 88; see also Submission from the ONZF (Nelson Branch) to the National Party Caucus Committee on Electoral and Parliamentary Reform (May/June 1991) (stating that "[w]hen used with the party system, [direct democracy] replaces the party clobbering, whipping machine which destroys and humiliates MPs to the point of exasperation. [Direct Democracy] can produce correction to abuse of power and also prevent it."). The ONZF also argued that direct democracy would render a bill of rights or a written constitution unnecessary. Above.

⁹³See eg ONZF *What Is Voters Referendum* (undated) 1 (citing Walker's work as informative).

⁹⁴Letter from Boyd, above n 88.

⁹⁵*What*, above n 93; Press Release, above n 89.

3 *Voters' Voice*

Voter's Voice came into existence after the ONZF split into two factions, one based in Tauranga under the leadership of Clark and the other eventually based in Foxton under the leadership of Boyd.⁹⁶ The split had as much to do with control over the ONZF as with the pursuit of its objectives. Although a founding member of the ONZF, Clark wanted to emphasise the ONZF's direct democracy objective at the expense of its other objectives.⁹⁷ Clark also helped to form several other autonomous Voters' Voice groups. Of these subsequent groups, Voters' Voice Auckland appeared to be the most active.

Clark promoted direct democracy in two innovative ways. First, he distributed 17,000 copies of a tape entitled *Voters' Voice*,⁹⁸ which was an adapted version of a tape produced by an Australian Christian organisation called the Logos Foundation entitled *Voters' Veto: Power to the People*.⁹⁹ His organisation had also obtained permission to include a recording of Walker on the other side of the tape.¹⁰⁰ The tape decried the abuse of executive power, the rapid growth of government, broken promises, the party whip system, and self-serving representatives who were unresponsive to the general will of the electors. It presented the legislative referendum as a solution to a litany of problems attributed to governments that have increasingly operated beyond the scope of their electoral mandates.¹⁰¹ Second, Voters' Voice experimented with the idea of starting its own political party by sponsoring an unsuccessful candidate, Clifford Enemy, for the Tamaki by-election in 1992.¹⁰²

⁹⁶Letter from Vere Harvey-Brain of Voter's Voice to Mike Houlding of National Reform (21 June 1991).

⁹⁷Boyd Interview, above n 88.

⁹⁸Above.

⁹⁹See Harvey-Brain, above n 96. Howard Carter, a former New Zealand Baptist Minister, founded the Logos Foundation in 1966, two years before moving to Australia. H Carter *Voters' Veto: The Voice of the People* (Logos Forum, Toomwoomba, Queensland, 1988) 1; Crisp, above n 80, 46. The Logos Foundation is a "Christian organisation committed to the maintenance of the historic Judeo-Christian values as the basis for individual, family, ecclesial, economic and civil spheres." Carter, above, 4. In 1989 its direct mailing list included more than 30,000 people from various churches and Christian activist organisations. The list includes ministers, politicians, business people, and "ordinary" people seeking to reestablish the traditional Judeo-Christian value system. Crisp, above n 80, 46. The Logos Foundation allowed Voters' Voice to use its tape on the condition that it acknowledge the Logos Foundation. The acknowledgment has, on occasion, led to the mistaken conclusion that Voters' Voice, as well as the ONZF, is part of the Logos Foundation. Harvey-Brain, above n 96.

¹⁰⁰Harvey-Brain, above n 96.

¹⁰¹Voters' Voice *Voters' Voice (Citizens Initiated Referendum)* (undated).

¹⁰²Enemy placed eighth in a field of 14 candidates. He received 47 out of the 16,307 votes cast. "By-Election Results" *The Evening Post*, Wellington, New Zealand, 17 February 1992, 3.

Given the level of interest in direct democracy in Tauranga, first from the ONZF, then Voters' Voice, and later National Reform and the National Party Tauranga Electorate leadership,¹⁰³ it was only a matter of time before Winston Peters, MP for Tauranga, would respond to the campaign for direct democracy. His circumspect support was soon to follow. Although many of his parliamentary critics believed that his interest in direct democracy was another example of Peters' opportunistic political style, his calls for a binding system of "citizen's initiated referendum" were more or less a genuine expression of what many of his more active and supportive constituents wanted. His national profile also gave the campaign for direct democracy a boost.

4 *New Zealand Citizens Movement*

The New Zealand Citizens Movement (NZCM) came into being in 1989. It consisted of a "small handful of dedicated persons" who carried the financial burden of its activities. However, for all practical purposes, Cliff Tait ran the NZCM from Hamilton where it was most active. The NZCM came into existence because of frustration stemming from the abuse of governmental power. It saw direct democracy as a means of curbing the abuse and giving New Zealand a "government for the people by the people."¹⁰⁴

Like Voters' Voice, the NZCM argued that direct democracy is the only means of making elected representatives accountable to the people they claim to represent. It viewed direct democracy, like the California Progressives, as a means of counteracting the loyalty of representatives to the "party machine" and the "dictatorial system of government" in which representatives primarily represent the interests of their parties.¹⁰⁵ According to Tait:¹⁰⁶

New Zealanders everywhere are becoming more and more disillusioned with politics. They are disenchanted with the growing trend for political parties to have themselves elected on one platform and reveal a totally different agenda the day after the election, leaving the voter, short of a revolution, powerless to do anything about it. When we go to the polls, the only aspect we are free to choose is which political party we are going to let rule us for the next 3 years. We do not even have a choice in selecting an individual representative because the party machine has already selected one for us . . .

¹⁰³For an indication of The National Party Tauranga Electorate's support for binding citizens' initiated referendums, see D Blanshard "Nats Call for Binding Referendums" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 18 May 1992.

¹⁰⁴NZCM Newsletter (June 1991); Letter from Cliff Tait to Andrew Ladley (10 June 1991); NZCM *With Citizens Initiated Referenda This Stranglehold Will Be Broken* (undated). The NZCM was initially known as the New Zealand Independents Movement.

¹⁰⁵*Stranglehold*, above n 104; Newsletter, above n 104; see also C Tait "Referenda the Solution" *Waikato Times*, Hamilton, New Zealand, 23 May 1991; C Tait "Leadership Questioned" *Waikato Times*, Hamilton, New Zealand, 22 March 1991.

¹⁰⁶"Solution", above n 105. Tait's observation is reminiscent of Rousseau's criticism of the English parliamentary system. See J Rousseau *On the Social Contract with Geneva Manuscript and Political Economy* (trans, St Martin's Press, New York, 1978) 102.

who will act in the party's interests, but not necessarily ours. . . . We may protest, but we are powerless to do anything about it.

Given this perception of New Zealand's governmental system, the NZCM saw direct democracy as a way of giving the electors power to control their representatives once they were elected.¹⁰⁷ Accordingly, it considered direct democracy as a better and more effective constitutional reform than an electoral system based on proportional representation.¹⁰⁸ This idea would be used later by National Reform to present direct democracy as an alternative to proportional representation. Like FAIR, the ONZF, and Voters' Voice, the NZCM's primary objective was to bring direct democracy to the attention of the electors. Like the other direct democracy groups, the NZCM promoted Walker's book as an authoritative, "easy to read and unbiased" introduction to direct democracy.¹⁰⁹ It supported the adoption of both the legislative initiative and the legislative referendum.¹¹⁰

5 *Coalition of Concerned Citizens*

The Coalition of Concerned Citizens (CCC) also lent its support to both the legislative referendum and the legislative initiative. The CCC's interest in direct democracy stemmed directly from its futile experience with organising the largest petition drive in New Zealand's history.¹¹¹ The CCC came into being in 1985 to coordinate opposition to the Homosexual Law Reform Bill. Keith Hay, an Auckland businessman, along with other campaigners, organised a petition drive against the Bill through local coalitions throughout New Zealand. The CCC evolved out of these local coalitions. During the 1987 general election it maintained a media office in Auckland and a head office in Christchurch. After the campaign, the CCC shifted its national headquarters to Lower Hutt.¹¹²

Although the CCC characterised itself as "non-political" in character, it was dedicated to upholding: 1) New Zealand's British institutions; 2) the basic Christian values which are the foundation of New Zealand society; and 3) New Zealand's traditional

¹⁰⁷C Tait "Controlling Parliament" *Waikato Times*, Hamilton, New Zealand, 24 May 1991.

¹⁰⁸"Leadership Questioned", above n 105.

¹⁰⁹Tait, above n 104.

¹¹⁰*Stranglehold*, above n 104; "Solution", above n 105.

¹¹¹The petition actually consisted of four separate petitions, containing 581,280, 216,661, 17,312, and 2,475 signatures, respectively, for a grand total of 835,728 signatures. Leading proponents of the Bill questioned both the authenticity of many of the signatures and the legitimacy of the methods used to collect many of the signatures. NZPD, vol 466, 6978 (24 August 1985), vol 467, 7732 (9 October 1985); JHR (1984-1985) 1030; [1987] AJHR I.27, 4-5; Interview with Fran Wilde, MP for Central Wellington, in Wellington (24 June 1991).

¹¹²"Serving Our Nation: Our People's Welfare is Our Concern - And Yours" *Coalition Courier*, Vol 5, No 2 (June/July 1990) 1; see also Submission of the CCC (NZ) to the National Party Electoral Law Reform Caucus Committee (15 May 1990); Submission of the CCC (NZ) to the Electoral Law Select Committee (29 April 1992).

links in the British Commonwealth and the ANZUS Alliance. It was also committed to promoting "the family unit, the sanctity of life, and the worth of every individual, with rights and responsibilities as a unique creation of God."¹¹³

After the 1987 general election, the CCC paused to evaluate its past activities and to formulate a plan of action. Frustrated by Parliament's decision to proceed with the Homosexual Law Reform Bill despite the CCC's enormous petition against it, and a growing list of broken election promises, the CCC decided that it should pursue measures that would give the electors more of a say in government. Consequently, it undertook a study of the merits of various measures, including citizens electoral councils, Christian political parties, proportional representation, and direct democracy. It concluded that "the promotion of a Swiss type system of Citizens Initiated Referendums, binding on Parliament, held the greatest promise of success."¹¹⁴

On 7 June 1988 Robert Capes, on behalf of the CCC (Eketahuana), petitioned the House of Representatives to give New Zealand citizens "the right to request that any issue of their concern be subject to a nationwide referendum with the requirement of 50,000 petitioners."¹¹⁵ The Electoral Law Select Committee referred the petition to the Fourth Labour Government for consideration.¹¹⁶ The Government, relying on the *Report of the Royal Commission on the Electoral System*, which recommended that "there should be no provision for public petitions to compel referenda," decided that no action should be taken in respect of the petition.¹¹⁷

Undaunted, the CCC turned its attention to organising support for direct democracy.¹¹⁸ For example, on 21 May 1990 the CCC held a meeting in the Auckland Town Hall which was called by Voters' Voice and chaired by Paul Tairoa, the producer of the audio tape *Voters' Voice - More Power to the People*.¹¹⁹ The meeting included the following speakers: 1) Henry Sigerist, a former Swiss citizen who had published a series of articles in the *New Zealand Herald* advocating the adoption of Swiss-style direct democracy in New Zealand;¹²⁰ 2) National MP Winston

¹¹³*Courier*, above n 112, 1.

¹¹⁴Above.

¹¹⁵JHR (1987-90) 2418; Petition of the CCC (Eketahuana) to the House of Representatives (undated), EL/88/730, Box 1988/15.

¹¹⁶JHR, above n 115; [1990] AJHR I.17, 3.

¹¹⁷[1990] AJHR A.5 255; see also *Report*, above n 56, 176, 181.

¹¹⁸See eg *Courier*, above n 112, 5, 8. For a discussion of the Logos Foundation, see above note 99. In addition to publishing a quarterly newsletter that carried features on its progress with direct democracy, the CCC sold and rented video and audio tapes that explained how direct democracy devices worked and why they should be adopted. See *Courier*, above n 112, 8.

¹¹⁹*Courier*, above n 112, 5.

¹²⁰See eg H Sigerist "Two-Party System in a World of its Own" *New Zealand Herald*, Auckland, New Zealand, 6 June 1989; H Sigerist "Way Open for Minority Groups" *New Zealand Herald*, 12 June

Peters, who, with his usual circumspection, characterised non-binding referendums as farcical; and 3) a representative of FAIR, who spoke briefly on the need for Parliamentary reform, particularly in regard to giving electors the right to decide matters effecting their welfare. Raymond Souza of Auckland, an articulate and perceptive advocate of direct democracy, spoke on behalf of the CCC.¹²¹

The CCC came to the conclusion that direct democracy was "the only way to stop Government rule by executive decree, regardless of the will of the people."¹²² In its view, the legislative referendum and the legislative initiative provided a means of ensuring that parliamentarians "remain conscious" of their role as representatives of the people and "do not function as an oligarchy and forget the principles of democracy."¹²³

6 *New Zealand Superannuitants Federation*

As most parliamentarians were either not interested in or opposed to direct democracy,¹²⁴ FAIR, the ONZF, Voters' Voice, the NZCM, and the CCC wisely invested most of their resources into educating the wider community of the advantages of direct democracy. The investment paid dividends in 1991 when the New Zealand Superannuitants Federation (NZSF) decided to lend its support for direct democracy. This development helped to prevent the National Government from reneging on its promise to introduce and enact the CIR Act.¹²⁵

Bob Hubbard and Ray Cody founded the NZSF in 1985 to oppose the Fourth Labour Government's surtax on superannuation. Since then the NZSF has, under the leadership of George Drain, taken on a watch-dog role to inform superannuitants of developments regarding superannuation. It has also become a formidable lobby group dedicated to the preservation of universal superannuation.¹²⁶

To capitalise on the NZSF's opposition to the Fourth Labour Government's decisions regarding superannuation, the National Party made its fateful, and widely publicised,

1989; H Sigerist "Swiss Democracy Excellent Model" *New Zealand Herald*, Auckland, New Zealand, 16 December 1989.

¹²¹ *Courier*, above n 112, 5. Souza also spoke on behalf of the CCC submission on the Citizens Initiated Referenda Bill 1992 before the Electoral Law Select Committee on 10 June 1992. M Gobbi, Electoral Law Select Committee Proceedings Notes (10 June 1992).

¹²² *Courier*, above n 112, 5.

¹²³ Submission to Caucus Committee, above n 112.

¹²⁴ See Armiger, above n 81; Keane, above n 82.

¹²⁵ See generally chapter eight.

¹²⁶ Letter from Fred Milner, President of the Auckland Provincial Council of Senior Citizens and Chairman of the Combined Committee of Retired Persons Organisation, to Mark Gobbi (14 May 1991); see also "Superannuitants' Hope Rise" *The Evening Post*, Wellington, New Zealand, 21 October 1991, 13; Submission from NZSF to the Electoral Law Select Committee (April 1992).

pre-election promise to abolish the surtax. For a variety of reasons, the National Government reneged on this promise.¹²⁷ Initially it attempted to replace the surtax with a means testing mechanism which would have instituted a steeper clawback than the surtax. This proposal met with stiff resistance both from the NZSF and within the National Party Caucus.¹²⁸ By October 1991, after nearly a year of acrimonious debate, the National Government abandoned its means testing plans and confirmed its decision to stick with the surtax.¹²⁹ This policy reversal damaged the National Government's credibility.¹³⁰

The policy reversal also contributed to the NZSF's decision to join the call for direct democracy in New Zealand. During the superannuation debate, the Combined Committee of Retired Persons Organisation (CCORPO), which embraces most of the groups in the Auckland area concerned with the welfare of senior citizens, passed a resolution in favour of direct democracy. Its chairman, Fred Milner, predicted that the NZSF would eventually follow suit, which was virtually a certainty as several members of CCORPO also held positions within the NZSF. Shortly after the National Government announced its means testing plan, the NZSF passed a resolution of no confidence in the National Government and voted to support the campaign for direct democracy.¹³¹ The National Government would find this development impossible to disregard as it brought the call for direct democracy out of the political wilderness into the heartland of its electoral support.

B *Merv Rusk and the Origin of National's CIR Proposal*

The direct democracy groups played a vital role in promoting the advantages of the principal direct democracy devices, particularly the legislative initiative and the legislative referendum. Their educational efforts brought the idea to the attention of Merv Rusk, who used his position within the party wing of the National Party to

¹²⁷See M Munro "Caucus Revolt on Super Growing" *The Dominion*, Wellington, New Zealand, 7 August 1991, 1; R Long "Cabinet Yielding to Super Pressure" *The Dominion*, Wellington, New Zealand, 6 June 1991, 1; R Long "U-Turn on Pensions Will Cost \$200 Million" *The Dominion*, Wellington, New Zealand, 4 October 1991, 1; R Laugesen "Super Fiasco Blamed on the Balancing Act" *The Evening Post*, Wellington, New Zealand, 21 October 1991, 7; Editorial "Searching for a Super Policy" *The Evening Post*, Wellington, New Zealand, 8 November 1991.

¹²⁸Munro, above n 127; see also R Long and S Kilroy "Shipley 'Loser' in Caucus Briefing" *The Dominion*, Wellington, New Zealand, 5 June 1991, 1; J Clifton "Pension Meeting Futile - Muldoon" *The Dominion*, Wellington, New Zealand, 15 June 1991, 1; "Superannuitants' Hopes Rise", above n 126.

¹²⁹"U-Turn", above n 127; J Clifton "Pension Surtax May Rise Only 10%" *The Dominion*, Wellington, New Zealand, 5 October 1991, 1.

¹³⁰See eg Joseph, above n 75, 4, 451.

¹³¹Milner, above n 126; see also Submission, above n 126; "NZ Political System in Chaos" *The Dominion*, Wellington, New Zealand, 28 August 1991, 13 (a political advertisement sponsored by the NZSF, the NZCM, and Voters' Voice seeking signatures and contributions in support of a petition against the National Government's superannuation policy and a petition in favour of direct democracy).

campaign for the establishment of direct democracy in New Zealand. The political wing of the National Party reacted negatively to Rusk's proposal, despite the support he was able to generate for it among the non-parliamentarian members of the National Party. The conflict between the party and political wings of the National Party regarding direct democracy produced the National Party's 1990 election manifesto promise to introduce a non-binding system of direct democracy.

1 Merv Rusk

Merv Rusk led the campaign to secure support for direct democracy within the National Party. He was a farmer in Hikurangi who been an active member of the National Party for more than 31 years.¹³² During the height of the campaign, he served as chairman of both the National Party's Hobson electorate organisation and the organisation's policy committee. He was also a member of the National Party's Auckland Division Policy Committee.¹³³

Rusk became interested in direct democracy in 1988 when he heard someone refer to "citizens initiative and referendum." Intrigued by the reference, he consulted his home encyclopedia, which erroneously stated that New Zealand had adopted the initiative and referendum in 1901.¹³⁴ He sought confirmation from a parliamentarian, who informed him that the House of Representatives had passed a Referendum Bill in 1901 but that the Legislative Council had allowed it to lapse.¹³⁵ In June 1988, an acquaintance of Rusk's, who attended an address given by Professor Walker at the New Zealand Centre for Independent Studies (NZCIS) entitled "Constitutional and

¹³²Rusk, above n 79.

¹³³See Submission from the Hobson Electoral of the New Zealand National Party to the National Party Electoral Law Reform Caucus Committee (1 June 1990); Submission from Merv Rusk to the Electoral Law Select Committee (April 1992). The Hobson electorate was a National Party stronghold. From 1946 to 1993, National has lost the electorate only once. When the electorate elected Vern Cracknell as its MP in 1966, it earned the distinction of being the first electorate in the country to elect a Social Credit Party candidate to Parliament. Although Cracknell received a little more than 50 percent of the vote, he lost his seat to National in the next general election. C Norton *New Zealand Parliamentary Election Results, 1946-1987* (Occasional Publication No. 1, Department of Political Science, Victoria University of Wellington, New Zealand, 1988); see also *Justice*, above n 36, 5. This incident led the political wing of the National Party to form the view that the Hobson electorate is unusual. Interview with Wayne Eagleson, Director of National's Parliamentary Research Unit, in Wellington (23 March 1991).

¹³⁴Rusk, above n 79; see E Griswold "Initiative and Referendum" *The World Book Encyclopedia* (Field Enterprise Educational Corp, 1974) 209.

¹³⁵Rusk, above n 79; see also JHR (1901) 1901. For the legislative history of the Referendum Bill, see above note 19.

Democratic Limits on the Role of Government,"¹³⁶ introduced Rusk to Walker's direct democracy work.¹³⁷

Direct democracy appealed to Rusk because it presented itself as a solution to a political problem he had identified. Prior to learning about direct democracy, he came to the conclusion that "[New Zealand's] parliamentary system has been totally perverted," largely because the government of the day can and does ignore the wishes of the electors and the decisions taken by its caucus. On the strength of his 31 years of experience in the National Party, Rusk decided that direct democracy offered a feasible means of improving the responsiveness of the parliamentary system. Consequently, he resolved to campaign within the National Party for its adoption in New Zealand.¹³⁸

2 *The campaign*

Rusk began his campaign in February 1989. In his capacity as a member of the National Party's Auckland Division Policy Committee, he sent a discussion paper he had written on direct democracy, entitled *A Positive Strategy for National to Preserve Democracy*, to National Party Headquarters.¹³⁹ At the time the National Party was accepting discussion papers for the purpose of developing policies for the 1990 general election.¹⁴⁰ The paper discussed both the legislative initiative and the legislative referendum. It also contained supporting material, including Walker's NZCIS address and a Logos Foundation's booklet, *Voters' Veto: The Voice of the People*.¹⁴¹ During 1989, Rusk printed 350 additional sets of his discussion paper and distributed them to key officers in the National Party, along with copies of Walker's 3 June 1987 inaugural lecture at the University of Queensland, entitled *The People's Law: Initiative and Referendum*, which replaced the Logos Foundation booklet.¹⁴²

Rusk quickly realised that the fate of his proposal would ultimately be determined by parliamentarians. He also realised that progress would only be made if his proposal was realistic, that is, based on principles familiar and acceptable to the political wing of the National Party. Consequently, Rusk simplified his proposal. Convinced that

¹³⁶ Walker covered many of the issues he discussed in his 3 June 1987 inaugural lecture at the University of Queensland, which was entitled "The People's Law: Initiative and Referendum." See *Lecture*, above n 78.

¹³⁷ Rusk, above n 79. Leo and Thea Gilich of FAIR attended Walker's address as well. Keane, above n 82; Letter from Geoffrey Q de Walker, Dean of University of Queensland School of Law, to Mark Gobbi (22 May 1991).

¹³⁸ Rusk, above n 79.

¹³⁹ Above; M Rusk *A Positive Strategy for National to Preserve Democracy* (7 February 1989).

¹⁴⁰ Rusk, above n 79.

¹⁴¹ *Strategy*, above n 139; see also generally Carter, above n 99.

¹⁴² Rusk, above n 79.

the electors would derive more benefit from a device that allowed them to veto legislation rather than enact it, he decided to concentrate on securing the adoption of a binding legislative referendum system. He reasoned that he could win support for the legislative initiative once the legislative referendum was in place and a proven success.¹⁴³

In March 1989, the National Party's Auckland Division Policy Committee began debating Rusk's discussion paper.¹⁴⁴ As a member of the Committee and the author of the paper, Rusk was in a position to discuss the merits of his proposal and his strategy. Although his paper did not provide details of his proposal, he initially envisioned a binding legislative referendum system in which referendums triggered by 300,000 signatures (later reduced to 100,000) would be held once a year or on election day in the year of a general election.¹⁴⁵ After full deliberation, the Committee gave its unanimous approval to Rusk's recommendations.¹⁴⁶

By April 1989, National Party remits supporting direct democracy had emerged from three Auckland electorates: Hobson, Onehunga, and Mount Albert.¹⁴⁷ During the same period, the Deputy Prime Minister, Geoffrey Palmer, announced that the Fourth Labour Government would hold a government controlled referendum on a four-year parliamentary term, but not on proportional representation, as Prime Minister David Lange had mistakenly promised before the 1987 general election.¹⁴⁸

Several parliamentarians within the National Party took notice of these developments. Graeme Lee, MP for Coromandel, raised the issue of direct democracy at a National Party Caucus meeting and expressed his intention to develop it further.¹⁴⁹ Shortly afterward, Winston Peters, MP for Tauranga, seized upon the issue. In an address to the Otumoetai Baptist Church Congregation in Tauranga on 16 April 1989, he

¹⁴³ Above.

¹⁴⁴ Above.

¹⁴⁵ See eg A Stone "Support for Voters' Veto Grows Among Nationals" *New Zealand Herald*, Auckland, New Zealand, 25 May 1989, 9; see also Submission (April 1992), above n 133. Later Rusk began to advocate a trigger of 100,000. See Rusk, above n 79; Submission (June 1990), above n 133; Submission (April 1992), above n 133.

¹⁴⁶ Rusk, above n 79. The *New Zealand Herald* gave Rusk's campaign a boost when it published an editorial in favour of direct democracy. FAIR credited the positive tenor of this editorial to its promotional efforts. See above text accompanying note 87.

¹⁴⁷ Rusk, above n 79; see also "National to Debate Northland Proposal for 'Voter Veto'" *The Northern Advocate*, New Zealand, 24 May 1989, 2.

¹⁴⁸ See eg Editorial "Parliament's Answer" *New Zealand Herald*, Auckland, New Zealand, 13 March 1992; "Don't Bet the Farm on Electoral Change Yet" *The Press*, Christchurch, New Zealand, 26 September 1992; Editorial "Mistaken Messages" *The Evening Post*, Wellington, New Zealand, 18 July 1992, 6; see also generally Dugdale "Book Review" (1992) NZLJ 364; P Downey "Constitutional Arrangements" (1990) NZLJ 341.

¹⁴⁹ "Peters Runs Ahead on Moral Issue" *New Zealand Herald*, Auckland, New Zealand, 17 April 1989, 2.

suggested that moral issues resolved in the House of Representatives with conscience votes be subject to referendums. He also suggested that referendums could be extended to cover issues of major political importance, such as the ANZUS question. Although he described his views as "embryonic," he suggested that referendums could be triggered by the signatures of five percent of registered electors and held in conjunction with the general election.

Peters offered the following justifications for his proposal: 1) the electors no longer trust their representatives; 2) Cabinet controls the parliamentary process to the exclusion of nearly 80 percent of parliamentarians; 3) a government can flout the public's concern with impunity, as it did when it ignored the parliamentary petition against the Homosexual Law Reform Bill; 4) New Zealanders are fit to decide issues of public morality; 5) political power in New Zealand has come to favour entrenched groups within the political process ("the tyranny of the few"); and 6) as the New Zealand electorate becomes more educated, more politically aware, and more responsible for its actions, the structures of society must adapt to meet its expectations.¹⁵⁰

In May 1989, the Remit Committee at the National Party's Annual Auckland Division Conference unanimously endorsed a joint Hobson-Onehunga-Mount Albert remit, which read:¹⁵¹

That the next National Government legislate to provide for a system of "Citizen's Initiative and Referendum" whereby voters who do not accept a piece of legislation as beneficial for the well-being of the people of New Zealand can take up a petition to veto the legislation.

The Conference delegates approved this remit calling for the adoption of a binding legislative referendum system without dissent; they voted unanimously to have it debated on the main floor of the National Party's Annual National Conference in Dunedin.¹⁵² On 14 August 1989, a large majority of the delegates to National's Annual National Conference endorsed the remit, complete with a signature trigger of 300,000.¹⁵³

¹⁵⁰ Above; Address by Winston Peters "Church and State: The Quest for Balance", Otumoetai Baptist Church Congregation, Tauranga (16 April 1989).

¹⁵¹ Remit 2, Background Notes for Delegates to Remit Committee 4 (1989).

¹⁵² Rusk, above n 79; Stone, above n 145. However, lack of time prevented the full conference discussing the issue; consequently, it was deferred until the National Party's Annual National Conference in Dunedin in August 1989.

¹⁵³ "National Endorses Hobson Proposal" *The Northern Advocate*, New Zealand, 14 August 1989, 1; J Clifton "Referendum Call Tests Nat MPs on Policy" *The Dominion*, Wellington, New Zealand, 19 August 1989, 2; A Stone "Voters' Veto Plan on Path for National Policy" *New Zealand Herald*, Auckland, New Zealand, 28 August 1989, 6; FAIR Newsletter No. 6 (September 1989).

By any measure, the speed of Rusk's success in winning party support for direct democracy was astonishing. Although some credit for his success is attributable to the educative work of FAIR, the ONZF, Voters' Voice, and the Democrats, Rusk conducted his campaign within the National Party without seeking their support. He intentionally distanced himself from extra-party direct democracy advocates for three reasons: 1) the attitudes and actions of some the advocates hampered sensible discussion with his party's parliamentarians by providing them with convenient, and sometimes sound, reasons for rejecting direct democracy; 2) the members of his party, like those of all other parties, were sensitive about being manipulated by outside interest groups; and 3) he wanted his proposal to stand or fall on its own merits.¹⁵⁴

His proposal had won widespread support among the National Party's non-parliamentarian members. However, a crucial step remained. To incorporate his proposal into the National Party's 1990 election manifesto, Rusk had to win the endorsement of the National Party's Policy Committee.¹⁵⁵ This entailed securing the support of the National Party's parliamentarians, particularly Jim Bolger, who, as Leader of the National Party, chaired the Policy Committee. If a dispute arose between the Committee's party wing and political wing members, Bolger's position would give him an additional vote to decide the issue.¹⁵⁶

3 *Political wing reaction and counterproposal*

Despite the party wing's overwhelming approval of Rusk's proposal for a binding legislative referendum, the political wing balked at it. Ultimately, this prevented his particular proposal from becoming part of the National Party's 1990 election manifesto. Opposition to Rusk's proposal came from a small number of the National Party's leading parliamentarians, particularly Jim Bolger.

(a) *Bolger's opposition*

On 17 April 1989, the day after Winston Peters' Otumoetai address, Bolger began to position himself as an opponent of Rusk's proposal. After citing Graeme Lee as the source of Peters' suggestion that conscience votes be subject to referendums, Bolger stated that referendums were problematic because of the difficulty in framing simple questions to complex issues. He refuted Peters' remark regarding ANZUS by arguing that defence questions were unsuitable issues for a referendum and had to remain the policy of the government of the day. After reaffirming his long standing

¹⁵⁴Rusk, above n 79.

¹⁵⁵Stone, above n 153; Clifton, above n 153.

¹⁵⁶Stone, above n 153.

support for a senate, he attempted to undermine the credibility of Peters' remarks by suggesting that they would find support among the Democrats and their supporters.¹⁵⁷

In June 1989, Bolger toured Europe on the traditional three to four week European travel grant given annually to the Leader of the Opposition. He spent two days of his general tour in Switzerland, where he discussed a range of issues with various officials.¹⁵⁸ In July 1989, Bolger began to draw on his brief one-day visits to Zurich and Berne to express his pre-tour opposition to direct democracy:¹⁵⁹

I have recently visited Switzerland to look at their system of initiative referenda. I returned home reinforced in my view that this system is not suitable for introduction in New Zealand.

He also renewed his half-hearted campaign for his preferred constitutional reform: the senate.¹⁶⁰ Arguing that "the Executive has too much power and legislation is rushed through Parliament without time for adequate scrutiny by either the Opposition or the public," Bolger attempted to recast his senate proposal as a better solution than direct democracy to the problems plaguing New Zealand's political system:¹⁶¹

The loss of confidence in the current political system is directly attributable to the present Government's misuse of its powers. It is therefore understandable that some New Zealanders see initiative referenda as an opportunity to regain some influence in the system. A Second Chamber would, however, remedy the problem more effectively and allow the public a continuous opportunity to contribute to the political system without the need for regular referenda.

On 19 August 1989, a week after the Dunedin Conference, Bolger began to attack the legislative referendum remit in public. Citing his discussions with the Swiss, he suggested that direct democracy is not as democratic as it appears in Switzerland because of the combination of a low trigger level and a low voter turnout.¹⁶²

¹⁵⁷"Peters", above n 149.

¹⁵⁸Interview with Wayne Eagleson, Director of National's Parliamentary Research Unit, in Wellington (16 November 1992).

¹⁵⁹Letter from Jim Bolger, Leader of the Opposition, to J Wright (19 July 1989); Letter from Jim Bolger, Leader of the Opposition, to Bill Daly, National Director, New Zealand League of Rights (11 July 1989); see also Clifton, above n 153.

¹⁶⁰As a reaction to the recommendations of the Royal Commission on Electoral Reform, the Fourth Labour Government's re-election, and Palmer's proposed Bill of Rights, Bolger declared his support for the creation of a senate to act "as a check on the actions of the Executive to prevent the Government from acting in a manner which might abrogate Democratic rights." J Bolger "Upper House" *Otago Daily Times*, Dunedin, New Zealand, 19 September 1988; see also T McGovern *Parliamentary Reform in New Zealand* (BA (Hons) thesis in political science held by Otago University, 1990).

¹⁶¹Letters, above n 159.

¹⁶²Clifton, above n 153. Peters may have influenced Bolger's position. The day before, Peters had stated that his colleagues would be unwise to ignore the demand for a referendum policy and that he intended to continue his advocacy of referendums.

On the same day, Lee announced that he had drawn up a private member's bill dealing with referendums. His proposal differed significantly from Rusk's. Lee's proposal had the following features: 1) a signature trigger of 15 percent of registered electors, which at the time amounted to approximately 317,000 people; 2) a parliamentary select committee would vet proposals to screen out frivolous issues, and would determine the phrasing of referendum questions; 3) petitions approved by the select committee would be subject to referendum at the next general election; and 4) the Speaker of the House would report the result of the referendum, which would be non-binding, to the House of Representatives for consideration. Lee defended the non-binding nature of his proposal by arguing that a government would find a referendum's result difficult to ignore and that future Parliaments should not be bound.¹⁶³ This proposal eventually formed the basis of the CIR Act.

On 11 September 1989, Bolger presented yet another proposal. In a speech before the University of Canterbury Politics Club entitled *Politics, Parliament and the People: A Case for Reform*, he called for the creation of a "citizens initiative" as an alternative to Rusk's proposal. Effectively, he abandoned his effort to supplant Rusk's proposal with his senate proposal. Bolger's alternative amounted to a small change to the parliamentary petition process, which he described as a impotent institution. Essentially, he proposed the creation of a new, more important class of petitions. Petitions collected within a specified time and signed by a large number of electors would automatically be the subject of a parliamentary debate upon presentation. After initial debate, the citizens initiative petition would be referred to an appropriate select committee for more detailed consideration, which would invite submissions from the public and the petition's proponents. The select committee would report the results of its deliberations to the House of Representatives with a detailed recommendation as to any further action, if required and justified, to meet the concerns of those who signed the petition.¹⁶⁴

¹⁶³ Above.

¹⁶⁴ Address by Jim Bolger, Leader of the Opposition, University of Canterbury Politics Club (11 September 1989); see also "Bolger Backs Petition Over Referendums" *New Zealand Herald*, Auckland, New Zealand, 12 September 1989; "Bolger Proposes Petition System" *The Northern Advocate*, New Zealand, 12 September 1989. In his address, Bolger stated that during the 1980s most parliamentary petitions only received government lip service and were rarely debated in Parliament. Although he stated that the government is obliged to respond to petitions, its petition reports are generally published after events have overtaken the petitions. He also inferred that the abolition of the Petitions Committee in 1985, the same year that petitioners opposed the Homosexual Law Reform Bill, had weakened the petition system. Later in the year, Kerry Burke, the Speaker of the House, inadvertently underscored Bolger's criticisms of the petitioning system as an effective method by which any New Zealander could present his or her view to Parliament for consideration. Concerned that certain lobbyists were abusing the petition system with a large number of petitions signed by a small number of people, the Speaker ruled that "[n]o member is obliged to present a petition to the House." NZPD, vol 502, 13500 (14 November 1989); see also *Chaffers v Goldsmid* [1894] 1 QB 186 (cited as authority for the proposition that there is no constitutional requirement for a member to present a petition to the House).

Bolger also attacked the Dunedin Conference remit by using his speech to reiterate the standard arguments against direct democracy: 1) "'referenda are blunt and crude devices' for decision-making"; 2) "while appropriate to resolve major constitutional issues, . . . [referenda] are less suitable for resolving policy issues"; 3) "governments are accountable [and fully responsible for their policies] to the public every three years at the general election"; 4) a government's responsibility for its policies "would be lessened if individual elements of a policy package could be defeated individually by way of a binding referendum"; 5) "[a binding referendum] could even place at risk the coherence of the Government's entire program to advance the country's interest"; 6) "the scope of using referenda against minority groups is also a cause for concern"; 7) "referenda, through its inherent defect of polarising the community into adopting one or other of a yes/no answer, has [sic] the potential to increase the already worrying level of intolerance we have for each others' divergent cultures, aspirations and views"; and 8) "many of the issues confronting modern society are too complex to be capable of answer by a simple yes or no."¹⁶⁵

(b) Rusk's response

Rusk criticised Bolger's proposal. He characterised it as an attempt to divert and water down the National Party's remit calling for the establishment of a binding legislative referendum. He also accurately described it as "a slightly improved way of petitioning Parliament."¹⁶⁶ In addition, Rusk argued that an improved petitioning system, given its non-binding nature, would be ineffective to check executive power, which was the purpose of the remit.¹⁶⁷ The *New Zealand Herald* accused Bolger of offering nothing but "muddled compromise in response to his party's support for binding referendums as a check on the powers of governments."¹⁶⁸

Rusk also countered Bolger's attack on the party's remit. First, he reminded Bolger that the National Party had published its belief that "[the people] are better qualified to make the decisions concerning [their] future than any Government." Second, he argued that Bolger, by confusing the terms "initiative" and "referendum", had

¹⁶⁵ Address, above n 164.

¹⁶⁶ Letter from Merv Rusk to Jim Bolger, Leader of the Opposition (undated).

¹⁶⁷ Above. The creation of a new and comparatively more important class of parliamentary petitions would also have reduced further the effectiveness of ordinary parliamentary petitions; parliamentarians would inevitably use the distinction to justify inaction with respect to ordinary petitions.

¹⁶⁸ Editorial "Dithering on Referendums" *New Zealand Herald*, Auckland, New Zealand, 13 September 1989, 8. The *New Zealand Herald* also asserted that "Bolger is no more inclined than most of the present Government to defer to the electorate on contentious decisions," which led it to question his endorsement for a "citizens' initiative." Above. For Bolger's response, see J Bolger "Case for Citizen's Initiative" *New Zealand Herald*, Auckland, New Zealand, 26 September 1989. In addition, the Democrats criticised Bolger's proposal as superficial. N McMillan "Bolger Wants Change" *Northern Advocate*, New Zealand, 4 October 1989, 13.

directed many of the standard criticisms of the initiative against the legislative referendum. Third, since the remit called for the legislative referendum, not the initiative, most of Bolger's arguments were irrelevant. Fourth, he argued that the possible disruption of a government's legislative program was not a criticism as the purpose of the legislative referendum was to provide a check on executive power. Fifth, regarding the difficulty of reducing complex issues to yes/no questions, Rusk argued that this criticism meant that either parliamentarians could not express themselves intelligently in their legislation or they believe that the electors are too dumb to understand their legislation. He also underscored the irony inherent in this criticism with an implicit reference to New Zealand's frequent use of government controlled referendums: "politicians are prepared to use referenda when it suits *them* but not when it suits the *people*."¹⁶⁹

On 26 September 1989, Bolger softened his position. In response to the *New Zealand Herald's* criticism, he stated that his "citizen's initiative [was] not proposed as a replacement for the proposal for binding referendums," but as "another option available to the people." Bolger also stated that he "[did] not believe the concept of binding referendums should be rejected altogether." However, after reiterating the principle arguments against direct democracy, he concluded that "the resort to binding referendums should be rare." He also implied that binding referendums should have subject matter limitations.¹⁷⁰

(c) *Peters' counter-attack*

On 8 February 1990, Peters countered Bolger's campaign against direct democracy with the delivery of his widely quoted Taradale speech. In his speech, Peters articulated the reasons for the "crisis in confidence in New Zealand politics and its politicians." He concluded that the crisis could be solved if politicians "divest[ed] themselves of their obsessive belief that only politicians possess the combination of intellectual will, moral fibre and factual background to make the nation's key decisions." He then presented a combination of means by which "politicians [could share] their power with the people:" 1) a bill of rights; 2) an Australian-style senate; 3) some form of proportional representation, either for the House of Representatives or a senate; and 4) direct democracy.¹⁷¹

Peters' direct democracy proposal took two forms. First, he called for "the immediate suspension of the 'conscience vote'." As in his Otumoetai address, Peters argued that the electorate "must decide - again, by referenda, the nature of public

¹⁶⁹Rusk, above n 166.

¹⁷⁰Bolger, above n 168.

¹⁷¹Address by Winston Peters, Member of Parliament, Taradale Rotary Club Dinner, Taradale Town Hall (8 February 1990).

morality." Second, he called for the introduction of referendums "to be activated by petition to Parliament with a base level of 100,000 electoral voters required to sign that petition - roughly five percent of New Zealand's electors." Peters stated that Parliament would be responsible for framing the format of the referendum and for providing background information to the electorate. He also stated that party whips should be removed to allow parliamentarians "to exercise their freedom of conscience."¹⁷²

Although Peters' speech attracted heavy criticism from his National Party Caucus colleagues,¹⁷³ it had several important effects. It undermined Bolger's proposed alternatives by distinguishing direct democracy as a unique and discrete reform essential to the resolution of the crisis of confidence in the country's elected representatives, which re-animated New Zealand's direct democracy advocates.¹⁷⁴ Their renewed pressure contributed to the reversal of a decision taken by the National Party Caucus not to support direct democracy in any shape or form.¹⁷⁵

(d) Decisions of National's Caucus Committee

In April 1990, the National Party Caucus appointed a special committee called the Electoral Law Reform Caucus Committee to launch "an inquiry into the need for reform of the New Zealand electoral and parliamentary systems." The Committee consisted of Bolger, Murray McCully (Chairperson), Bill Birch, Peters, Douglas Graham, Robin Gray, Robert Muldoon, and Robert Anderson.¹⁷⁶ Its primary purpose

¹⁷² Above.

¹⁷³ Rusk, above n 79.

¹⁷⁴ See eg Submission from Jim Tatham, National Party Delegate from the Bay of Islands, to the Electoral Law Reform Caucus Committee (25 May 1990) (expressing support for the policies advocated by Peters). The Auckland Policy Committee "fully supported [direct democracy] in preference to all other reform options" and "agreed unanimously to convey its clear preference for [direct democracy] to the [Electoral Law Reform Caucus Committee]." Rusk, above n 79. The 1990 Auckland Conference approved 112-72 a new remit calling for the adoption of direct democracy. Above. Tatham moved the remit. Submission, above. See also "Resolutions" *Seminar on Parliament and Electoral Reform* held for the Wellington Divisional Policy Committee at Wellington (13-14 April 1991) (resolving 11-8 to ask the Electoral Law Reform Caucus Committee to prepare legislation providing for direct democracy in the binding form as approved by the 1989 Party conference, along with the subject matter restrictions listed in the Hobson submission and a signature trigger of 100,000).

¹⁷⁵ See Letter from Murray McCully, MP for East Coast Bays, to Merv Rusk, Chairman Hobson Electorate Policy Committee (3 May 1990) (stating that Caucus had decided to revisit the issue of direct democracy); Letter from Wayne Eagleson, Private Secretary to Jim Bolger, Leader of the Opposition, to Merv Rusk, Chairman Hobson Electorate Policy Committee (30 April 1990) (advising that the Electoral Law Reform Caucus Committee would be considering the issue of direct democracy); Letter from Merv Rusk to Murray McCully (26 April 1990) (advising McCully that Rusk would inform the media if it were true that Bolger had decided to exclude direct democracy from the election manifesto prior to the deliberations of the Electoral Law Reform Caucus Committee); Letter from Merv Rusk to Jim Bolger, Leader of the Opposition (23 April 1990) (asking Bolger to confirm whether he had decided to exclude direct democracy from the election manifesto); Letter from Wayne Eagleson, Private Secretary to Jim Bolger, Leader of the Opposition, to D McKenna (23 January 1990) (advising that direct democracy would not be included the election manifesto).

¹⁷⁶ *Minutes of the Electoral Law Reform Caucus Committee* (19 April 1990) [Bolger absent].

was to determine which reforms, if any, should be included in the National Party's 1990 election manifesto.¹⁷⁷ Ironically, this purpose required the Committee to examine all of the reforms outlined in Peters' Taradale speech.¹⁷⁸ Despite his opposition to direct democracy, "Bolger agreed that the use of referenda should be included in the terms of reference."¹⁷⁹

The Committee's term of reference regarding direct democracy was slightly more specific than the Royal Commission's. It required the Committee to examine the extent to which issues determined by Parliament should be subject to referendums. It also required the Committee to decide whether referendums should be binding or non-binding, and to determine the appropriate signature trigger for initiating referendums.¹⁸⁰

However, the Committee chose to use the Royal Commission's imprecise "use of referenda" phrasing in its extremely limited advertising for public submissions.¹⁸¹ The Committee had roughly \$200 to fund public notices in the major metropolitan newspapers.¹⁸² Accordingly, it decided to rely primarily on newspaper reports of its work to extend its advertising reach outside of the National Party. Within the Party, the Committee solicited submissions from all divisional policy chairpersons, including Rusk. It also brought its work to the attention of the National Party's National Executive.¹⁸³

This selective advertising campaign had two effects. First, in comparison to the Royal Commission's work, it generated a disproportionate response from prominent members of the National Party. The Royal Commission received 805 submissions, of which only four that dealt with referendums came from officials in the National Party.¹⁸⁴ The Committee received approximately 350 submissions, of which 13 that

¹⁷⁷*Report of the Electoral Law Reform Committee to Caucus* (September 1990) 1.

¹⁷⁸*Minutes*, above n 176. The terms of reference required the Committee to investigate the following reform options: 1) a senate; 2) reform of the House of Representatives; 3) proportional representation; 4) referenda; 5) a bill of rights; and 6) a written constitution. Above.

¹⁷⁹McCully, above n 175.

¹⁸⁰*Minutes*, above n 176. For the Royal Commission's term of reference on the "use of referenda", see above text accompanying note 56.

¹⁸¹See Submissions to the Electoral Law Reform Caucus Committee (1990) (containing copy of undated newspaper notice calling for submissions on "the use of referenda" before 1 June 1990).

¹⁸²*Minutes*, above n 176. In contrast, the Royal Commission advertised far more extensively in the press. It also had the means to advertise on television and to travel around the country to collect oral submissions. See generally *Submissions*, above n 57. The Committee neither invited nor considered oral submissions. See generally *Submissions*, above n 181.

¹⁸³*Minutes*, above n 176.

¹⁸⁴See *Submissions*, above n 57. The relevant submissions were: Submission 589 (the National Party's Gibeorne electorate stating that referendums should continued to be used sparingly in their current government controlled form); Submission 626 (the National Party's Waikaremoana electorate taking the same position); Submission 654 (the National Party's Clutha electorate stating that government controlled referendums should be held on a national basis only); and Submission 736 (the National

dealt with referendums came from officials in the National Party.¹⁸⁵ Second, it failed to attract submissions from any of the main direct democracy groups, which effectively excluded their direct input.¹⁸⁶

Nevertheless, the submissions to the Committee would have disappointed opponents of direct democracy within the National Party's Caucus. First, the submissions revealed that support for direct democracy devices had grown substantially in the National Party since 1985. The four National Party submissions to the Royal Commission only supported the rare use of government controlled referendums for constitutional issues like the bill of rights or the term of Parliament. In comparison, 11 of the 13 National Party submissions to the Committee specifically requested adoption of the legislative initiative or the legislative referendum.¹⁸⁷

Party stating that government controlled referendums should be used rarely and only for constitutional issues like the term of Parliament or the Bill of Rights).

¹⁸⁵See Submissions, above n 181. The relevant submissions were: Submission from Allan Anderson, Policy Chairman of National's Waitotara electorate (28 June 1990) (calling for the adoption of binding "citizens-initiated referendums" with a signature trigger of 100,000 electors); Submission from A Murphy, Policy Chairperson for National's Wairarapa electorate (15 June 1990) (discussing perceived difficulties with Swiss and Californian direct democracy and suggesting that legislation introducing direct democracy should account for these difficulties); Submission from the Hobson electorate of the New Zealand National Party, above n 133 (calling for the adoption of a binding legislative referendum with subject matter limitations and a signature trigger of 100,000 electors); Submission from Nick Smith, National Candidate for Tasman (25 May 1990) (calling for the legislative referendum with a signature trigger of 10 percent of the electorate to be collected in six months); Submission from Jim Tatham, above 174 (calling for the adoption of a binding legislative referendum system); Submission from Bruce Knowles, Chairman of National's Taranaki electorate (23 May 1990) (calling for the adoption of a constitutional initiative with a signature trigger of 300,000 electors and a legislative initiative with a signature trigger of 100,000 to 200,000 electors based on the Swiss and Californian direct democracy systems and expressing support for the 1989 National Party remit calling for a binding legislative referendum system); Submission from Carl Pfeifer, Publicity Officer and Campaign Chairman of National's Tauranga electorate (17 May 1990) (calling for referendums triggered by one percent of the electorate); Submission from Dr Bruce Alexander, Member of National Reform (15 May 1990) (calling for the adoption of Swiss or Californian direct democracy); Submission from Barry Gustafson, Chairman of National's Auckland Divisional Policy Committee (26 April 1990) (stating that the Auckland Divisional Policy Committee voted 18 to 0 in favour of Rusk's motion that the Policy Committee convey its express support for direct democracy to the Caucus Committee and that it request the inclusion of the National Party's 1989 Annual Conference remit on direct democracy in National's 1990 election Manifesto); Submission from Marlene Lamb, Policy Chairman for National's Waikato Division (undated) (discussing perceived difficulties with Californian direct democracy and recommending that petitions signed by 100,000 electors or more requesting that a referendum be held at the next general election be accompanied by the proposed law and that the proposed law and the arguments be sent to all electors before election day); Submission from the Waitotara electorate (undated) (calling for the adoption of a legislative referendum system triggered by the signatures of five percent of the electors that would be binding if the majority constitutes at least 40 percent of the electors); Submission from Ross Ireland, Chairman of the Taurarua Branch of the National Party (undated) (calling for the adoption of a direct democracy system based on the Swiss model); Submission from A Quintus, President Pihama Branch of the National Party and Vice President of National's Taranaki Electorate (undated) (calling for the adoption of Swiss or Californian direct democracy).

¹⁸⁶See Submissions, above n 181.

¹⁸⁷See above note 185.

Second, the submissions also revealed that support for direct democracy had increased substantially since 1985 among New Zealanders interested in constitutional reform. The Royal Commission received only 48 submissions that dealt specifically with the topic of direct democracy, of which 46 called for the adoption of the legislative initiative or the legislative referendum.¹⁸⁸ In comparison, the Committee received 283 submissions that dealt with direct democracy, of which 273 called for the adoption of the legislative initiative or legislative referendum.¹⁸⁹

Third, the submissions also revealed some organised support for the adoption of direct democracy in New Zealand. Several dozen of the submissions took the form of petitions, that is, standardised form letters signed by two or more people.¹⁹⁰ In all likelihood, these developments were the result of the nationwide educational efforts of the main direct democracy groups and Rusk's focused campaign. Although none of the groups made a submission to the Committee, they had helped to generate enough support for direct democracy to make its outright dismissal by the Committee politically unviable.

This support for direct democracy emboldened several of the National Party's parliamentarians, particularly Hobson MP Ross Meurant and Tauranga MP Winston Peters. During a debate in Parliament, Meurant declared his support for direct democracy as a means to curb executive arrogance, primarily because some National Party MPs showed a penchant for continuing the Fourth Labour Government's executive arrogance.¹⁹¹ Peters began to use his position on the Committee to advocate adoption of a binding "initiated referenda" system as a means "to truly deliver a public check upon the executive and legislative process of government."¹⁹²

Consequently, the Committee shifted its attention from the issue of whether direct democracy should be included in the National Party's 1990 election manifesto to the issue of what form a pre-election promise for direct democracy should take. On 30 May 1990, moments before Peters' tardy arrival, the Committee unanimously agreed to recommend a non-binding referendum system that would have a signature trigger

¹⁸⁸See above text accompanying notes 68-69.

¹⁸⁹See Submissions, above n 181.

¹⁹⁰Above.

¹⁹¹NZPD, vol 507, 1873-1874 (30 May 1990); see also J Clifton "MP Sticks to Promise on Power Abuse" *The Dominion*, Wellington, New Zealand, 1 June 1990; "Meurant Appeals to MPs" *Northern Advocate*, New Zealand, 25 May 1990.

¹⁹²W Peters *Paper on Initiative Referenda for the Electoral Law Caucus Committee* (undated); see also *Minutes of the Electoral Law Reform Caucus Committee* (30 May 1990); *Minutes of the Electoral Law Reform Caucus Committee* (7 June 1990). At the same time, several of the main direct democracy advocates renewed their campaign for the adoption of direct democracy. See "Groups Supports Paper for Citizens' Referenda" *Daily News*, New Zealand, 2 June 1990; "Parliamentary Reform" *Stratford Press*, New Zealand, 6 June 1990.

of 15 percent of registered electors (ie, approximately 300,000 electors). The Committee reopened its direct democracy discussion when Peters arrived. Peters disagreed with the Committee's decision. He argued that the use of referendums should be increased and that their results should be binding. However, his support was qualified. Peters advocated a mechanism in which the government of the day would only be bound if a proposal was approved by 70 percent of those voting. In addition, he argued that the government should not be bound with respect to revenue and fiscal policy questions.¹⁹³

Peters' objection served to delay the Committee's final decision on direct democracy, which had two important consequences. First, it gave him an opportunity to present a paper at the Committee's next meeting for use in its "final discussion and decision regarding the use of referenda."¹⁹⁴ Second, and more importantly, it allowed Rusk to present the influential Hobson electorate submission, which he had written, to the Committee before it reached its final decision.¹⁹⁵

In his paper, Peters argued "the public have [sic] an incontestable right to oversee the activities of their elected representatives."¹⁹⁶ He also argued that a signature requirement should not be prohibitive in terms of nationwide organisation and economic outlay.¹⁹⁷ Accordingly, he called for a binding referendum system that could be triggered by the signatures of five percent of registered electors (approximately 100,000 electors).¹⁹⁸ Peters argued that a non-binding system would be pointless as the recent history of New Zealand politics indicated that MPs would not necessarily feel morally bound to adhere to a decision of the electorate. He suggested that the signatures be collected within three months to prevent the process from dragging on too long.¹⁹⁹ He also suggested that financial matters might be

¹⁹³ *Minutes of the Electoral Law Reform Caucus Committee* (30 May 1990) [Bolger, Birch, and Anderson absent].

¹⁹⁴ Above; see also Peters, above n 192.

¹⁹⁵ Submission from the Hobson electorate of the New Zealand National Party, above n 133 (Rusk wrote this submission in his capacity as Policy Committee Chairman of the Hobson Electorate; it became widely cited in the course of National's direct democracy debate because it dealt with the central issues succinctly and was one of the few documents available to policy-makers in the National Party that contained any empirical data regarding the use of direct democracy).

¹⁹⁶ Peters, above n 192, 1.

¹⁹⁷ Peters, above n 192, 3.

¹⁹⁸ Peters, above n 192, 2. In addition, Peters argued that the electorate was becoming increasingly educated and was able to decide issues on a more complex formula than the Yes/No equation. In keeping with his earlier argument that conscience votes on moral issues should be referred to the electorate, Peters used the issue of homosexual law reform as an example: "For example, homosexual law reform could have been decided on the basis that the public decided on whether or not homosexual acts between consenting adults should be decriminalised. For those who answered affirmatively, the next list of questions would have read - 'what age should be the age of consent? - 16, 18 or 20 years of age?'" Peters, above n 192, 1-2.

¹⁹⁹ Peters, above n 192, 2.

excluded as a referendum subject for the time being to allow the public to become sufficiently sophisticated to decide appropriation issues.²⁰⁰

In the Hobson submission, Rusk regaled the Committee with accessible and useful information pertaining to the Committee's direct democracy deliberations. He began by reminding the Committee that the party wing had only endorsed the adoption of the legislative referendum, which immediately invalidated any arguments against direct democracy that stemmed from the legislative initiative. With respect to the signature trigger, Rusk provided the Committee with a survey of parliamentary petitions from 1968 to 1987, which showed that only seven petitions out of 1,369 managed to attract more than 100,000 signatures and that only 25 petitions had attracted more than 30,000 signatures.²⁰¹ He suggested that the signature trigger should be 100,000 rather than the 300,000 he had recommended earlier as his survey indicated that 300,000 signatures would be too high.²⁰²

In addition, Rusk argued that "referendums must be binding." He provided three reasons: 1) a non-binding system would not provide the electors with an effective means to check parliamentary excess because the result could be ignored; 2) the value of non-binding referendums would be very low, particularly because they would be less important to people than binding ones; and 3) all overseas legislative referendum systems are binding.²⁰³

However, Rusk indicated that existing direct democracy systems are subject to limitations. Accordingly, he suggested the exemption of the following subjects: 1) enactments passed during a declared national emergency, or regarding natural disaster, epidemic, war, terrorism, or aggression; 2) enactments regarding defence and military intelligence; 3) enactments regarding the status of Parliament, its internal procedures, or its Standing Orders; 4) enactments whose rejection would result in discrimination on the basis of race, sex, or religion, or would infringe any human rights legislation or any bill of rights; 5) enactments regarding the function and existence of the courts; and 6) enactments regarding trade or diplomatic relations, unless they involved joining an economic or political union.²⁰⁴

In light of these developments, the Committee re-opened its discussion of direct democracy on 7 June 1990. It came to the conclusion that "there should be more

²⁰⁰Peters, above n 192, 3-4.

²⁰¹Submission from the Hobson Electorate of the New Zealand National Party, above n 133, 4-8.

²⁰²Submission from the Hobson Electorate of the New Zealand National Party, above n 133, 4, 21.

²⁰³Submission from the Hobson Electorate of the New Zealand National Party, above n 133, 14.

²⁰⁴Submission from the Hobson Electorate of the New Zealand National Party, above n 133, 11.

scope for the use of initiative referenda."²⁰⁵ It also agreed that the signature trigger should be 10 percent of registered electors (approximately 232,000 electors). In addition, the Committee voted five to two in favour of a non-binding system.²⁰⁶ However, the Committee did not resolve the question of exemptions, even though it reached the "general view" that exemptions would be unnecessary in a non-binding system.²⁰⁷

The Committee resumed its consideration of direct democracy on 6 July 1990,²⁰⁸ soon after its Chairperson, McCully, had returned from a three week coast-to-coast tour of the United States where he had "undertaken some study on electoral reform issues," particularly "citizens initiative referenda."²⁰⁹ During his tour, McCully visited Washington, DC; New York, New York; Boston, Massachusetts; Jackson, Mississippi; Miami, Florida; Denver, Colorado; and Sacramento, California. McCully stated that "Massachusetts and California provided the most compelling insights into the [citizens initiative referenda] process."²¹⁰ This was not surprising as New York and Mississippi do not have direct democracy systems; Florida's system, which was adopted in 1978, only has the constitutional initiative and is rarely used; and Washington's system is not well-documented.²¹¹ However, the choice of Massachusetts over Colorado was surprising for two reasons: 1) Massachusetts' system is indirect; and 2) Colorado's system is used more than four times as frequently than Massachusetts'.²¹²

In addition, McCully, despite his effort, only supplied the Committee with the following documents: 1) the part of the Massachusetts Constitution dealing with its direct democracy system; 2) a summary of voting results in Massachusetts broken down by county on four propositions; and 3) a two page excerpt from a chapter on

²⁰⁵ *Minutes of the Electoral Law Reform Caucus Committee* (7 June 1990) [Bolger (afternoon) and Muldoon (morning) absent].

²⁰⁶ Above [McCully, Birch, Graham, Gray, and Muldoon voted for a non-binding system; Peters and Anderson voted for a binding system; Bolger was absent].

²⁰⁷ Above; see also W Eagleson *Exemptions to Initiative Referenda* (5 June 1990). The Committee had instructed Eagleson, who was serving as its Secretary, to prepare this brief discussion paper for its 5 June meeting. *Minutes*, above n 193.

²⁰⁸ *Minutes of the Electoral Law Reform Caucus Committee* (6 July 1990).

²⁰⁹ Memorandum from Murray McCully to the Electoral Law Reform Caucus Committee re US Trip (5 July 1990); see also R Ninnes "Disappointment Quite Likely" *Daily News*, New Zealand, 16 July 1990 (quoting McCully: "The fact that I've spent three weeks in the States looking probably more than anything else at the referendum process suggests to me that I've wasted a good deal of time if we're not giving it serious study").

²¹⁰ Memorandum, above n 209.

²¹¹ See D Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) 38-39; T Cronin *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, Cambridge, 1989) 51; A Ranney "The United States of America" in D Butler and A Ranney (eds) *Referendums: A Comparative Study of Theory and Practice* (American Enterprise Institute for Public Policy Research, Washington, DC, 1978) 70-72.

²¹² See Magleby, above n 211, 38-39, 71.

California's legislature which summarised the mechanics of the initiative and referendum in California.²¹³ Relying on this information and his brief experiences in Boston and Sacramento, McCully informed the Committee that the course it had chosen would eliminate the risk that direct democracy would "become the tool of major vested interests to the exclusion of the ordinary citizen."²¹⁴ With the approval of the Committee,²¹⁵ he also began to use his "findings" in press releases and interviews to justify opposition to "binding public referenda,"²¹⁶ which prompted several National Party stalwarts, including Rusk, Knowles, and Jim Tatham, to question the Committee's impartiality.²¹⁷

After considering McCully's report, the Committee nearly concluded its deliberations regarding direct democracy. Although it was still unable to resolve the issue of exemptions, it finalised the following "procedure for the holding of referenda:"²¹⁸

- 1 A Commission consisting of a High Court Judge and the Clerk of the House would be established;
- 2 Any person intending to seek signatures to a petition calling for a referendum would file a notice of intention with the Commission which would then give the applicant advice and assistance in the wording of the question to be put in the referendum;
- 3 Signatures to the petition would be identified by name, address, and page and line number on electoral rolls for verification purposes;
- 4 The threshold for holding a referendum would be 10 percent of eligible electors;

²¹³See Memorandum from Wayne Eagleson, Secretary, to Members of the Electoral Law Reform Caucus Committee (11 July 1990).

²¹⁴Memorandum, above n 209.

²¹⁵See Summary of the Electoral Reform Forum held at the New Zealand National Party Conference, 22 July 1990 (25 July 1990) 3 (McCully answered criticism for speaking publicly about the defects of America's direct democracy systems by stating that he had raised the issue with the Committee prior to making his statements). Wayne Eagleson, the Committee's Secretary, prepared the Summary. *Minutes of the Electoral Law Reform Caucus Committee* (25 July 1990).

²¹⁶See eg M Daly "Scepticism Rife in National, Claims Hobson" *Northern Advocate*, New Zealand, 19 July 1990; Ninnes, above n 209.

²¹⁷Forum, above n 215, 3 (Tatham); Daly, above n 216 (Rusk); "Electoral Reform Debate Push" *Daily News*, New Zealand, 16 July 1990 (Knowles).

²¹⁸*Minutes*, above n 208. *Minutes*, above n 208. The Committee actually decided to change the '25 percent of those present in the House' veto to a '75 percent of all members of the House' veto. Above. However, the Committee's final report inadvertently recommended the 25 percent veto. *Report of the Committee*, above n 177.

- 5 The petition, having achieved the requisite number of signatures, would be presented to the House by a member and referred to the Commission for verification;
- 6 The Commission would advise the Speaker of the House whether or not the procedural requirements to hold a referendum had been met, with the Speaker to advise the House accordingly;
- 7 The Government would be required to hold a referendum within 12 months of the House being advised that the requirements had been met, unless 25 percent or more of those members present in the House oppose such a proposal; and
- 8 The result of the referendum would be non-binding.

(e) National Party's Annual National Conference

The Committee reached these decisions shortly after Bolger, National Party President John Collinge, and National's five divisional chiefs had decided against permitting debate on any remits regarding electoral reform at the National Party's Annual National Conference in Wellington, which was held on 20-22 July 1990.²¹⁹ This, in effect, ruled out the possibility of discussing direct democracy, or any decisions that the Committee may have reached on the subject, at the Conference.

In defence of the decision, Collinge stated that it was a "collective decision" made in recognition of the Committee's status as the appropriate forum and in deference to its impending recommendations, which were expected to be published soon after the Conference at the end of July.²²⁰ Bolger stated that the issues had already been debated at party conferences; accordingly, the time had come "to make sure that there was mature reflection on the options, not some gut reaction . . . that may or may not be engendered at a party conference."²²¹ Bolger also used the decision to foreshadow the Committee's recommendations. Aware that the Committee's final recommendations would diverge considerably from Rusk's proposal, he pointed out that national conference remits have never been binding.²²²

²¹⁹See J Clifton "Bolger Faces Revolt over Electoral Reform" *The Dominion*, Wellington, New Zealand, 5 July 1990; J Clifton "Electoral Reform Policy Best Left to MPs, Says Bolger" *The Dominion*, Wellington, New Zealand, 6 July 1990; J Clifton "Coalition Dismayed at Bolger's 'Lack of Faith'" *The Dominion*, Wellington, New Zealand, 7 July 1990; Editorial "Bolger Seen in New Light" *The Dominion*, Wellington, New Zealand, 9 July 1990.

²²⁰"Revolt", above n 219.

²²¹"Best Left", above n 219; Editorial, above n 219.

²²²"Best Left", above n 219.

In response, Rusk and his supporters went to the media in an effort to counteract the decision. Jim Tatham, a delegate from the Bay of Islands and a leading member of Voters' Voice, attributed the decision to Bolger's public disapproval of citizens initiated referendums.²²³ Bruce Knowles, Chairman of the National Party's Taranaki electorate organisation, stated that he would push to ensure that electoral reform would be debated at the Conference. He also took umbrage at McCully's action of using his trip to the United States as a means of opposing the 1989 remit calling for a binding legislative referendum system, and criticised McCully for falling into line with Bolger.²²⁴

Rusk, with approval of the Executive Committee of the National Party's Hobson electorate organisation, took the unusual step of releasing copies of his Hobson submission to promote a fair and informative debate on the issue of direct democracy. He argued that the issue could be debated at the Conference despite the decision to remove a remit on the issue from the Conference's agenda. He also criticised McCully's public opposition as being "quite out of order" for a supposedly independent chairperson. Rusk also implied that McCully's opposition was misplaced by pointing out that the arguments he had raised against direct democracy upon his return from the United States applied to the legislative initiative, but not to the legislative referendum.²²⁵

The National Party's direct democracy advocates were not alone in their criticism. *The Dominion* characterised the decision as illogical, hypocritical, and arrogant.²²⁶ The Electoral Reform Coalition stated that Bolger had shown "a complete lack of faith in his own party to debate [electoral reform] properly." It also stated that MPs worried that the vigorous citizens initiated referendum lobby would dominate the debate should organise to counter the lobby rather than to suppress it. John Alan, Christian Heritage Party spokesman and a former National Party candidate, stated that the decision was typical of the attitude that led to his leaving the party. He also stated that it made the Committee's work look like window dressing, as the National Party could not expect people to believe it was sincere about electoral reform if it was not prepared to have it debated openly.²²⁷

Michael Laws, the National Party's candidate for Hawke's Bay, stated that the decision was not wise for two reasons: 1) delegates were looking forward to debating electoral reform and sending a clear message to the party's parliamentary wing, which

²²³ "Revolt", above n 219.

²²⁴ "Reform Debate", above n 217.

²²⁵ Daly, above n 216.

²²⁶ Editorial, above n 219.

²²⁷ "Coalition Dismayed", above n 219.

is the prime purpose of party conferences; and 2) "the public likes to see good, healthy debates in parties, not stage-managed conferences."²²⁸ Peters predicted that the issues before the Committee would be debated at the Conference.²²⁹ He was half-right.

Rusk was able to use this negative reaction to reach a compromise. With the help of Collinge, Bolger, and McCully, he arranged a forum on electoral reform to be held across the street from the Conference venue during the last day of the Conference.²³⁰ This gave Rusk and his supporters the opportunity to debate direct democracy; at the same time, it provided justification for keeping electoral reform off the Conference's agenda.

(f) *Forum*

The Electoral Reform Forum took place on 22 July 1990. McCully chaired the two hour meeting, which drew more than 120 delegates and close to 30 observers.²³¹ The other Committee members in attendance were Birch, Douglas Graham, Gray, and Bolger. McCully tried to broaden the debate through speeches given by Birch on parliamentary reform, Graham on proportional representation, Gray on the senate, and Bolger on the need for electoral reform. However, between each speech, the delegates steadfastly returned to the subject of direct democracy. Nineteen delegates had the opportunity to speak. Sixteen focused on the subject of direct democracy: eight were in favour, five were opposed, and three were ambivalent.²³²

The debate was spirited and, at times, tense, but it was also inconclusive.²³³ Although Rusk and his supporters had the opportunity to present a well-organised, reasoned, and authoritative case in favour of a binding legislative referendum, they failed to do so. Their approach was uncoordinated and unfocussed. Rather than emphasise the merits of a particular proposal, they expressed their support in general terms and spent valuable time criticising the status quo and the decision to forbid discussion of direct democracy on the main floor of the Conference. Even Rusk dwelt on his disappointment, discussing the limits of his loyalty to a party that at times resembled a "recycled dictatorship."²³⁴

²²⁸ Above.

²²⁹ "Best Left", above n 219.

²³⁰ Rusk, above n 79; see also M Daly "Electoral Reform Debate Gets Nod" *Northern Advocate*, New Zealand, 21 July 1990.

²³¹ Forum, above n 215; M Munro "Spirited Debate in a Back Room" *Waikato Times*, New Zealand, 23 July 1990; J Armstrong "McCully Catches Verbal Lashing" *New Zealand Herald*, Auckland, New Zealand, 23 July 1990.

²³² Forum, above n 215 (Rusk and Tatham were among those who spoke in favour).

²³³ See generally n 231.

²³⁴ Forum, above n 215; "Nats Move of Vote Reform" *Northern Advocate*, New Zealand, 23 July 1990; Armstrong, above n 231.

In addition, McCully managed to avoid any discussion of the Committee's 6 July 1990 decisions regarding direct democracy.²³⁵ This obviated the necessity of defending those decisions at the Forum or having to change them in the light of their reception at the Forum. It also gave the Committee the opportunity to present its pre-Forum decisions at a later date as if they were made as a result of the Forum.

The Forum also assuaged Rusk. Despite expressing his disillusionment with the debate early in the Forum,²³⁶ Rusk hailed it in the press as a "new beginning" for electoral reform in New Zealand. Before the Forum, he was worried that the Committee was orchestrating a "snow job." After it, he was convinced that the Committee was no longer just "going through the motions" in its investigation of electoral reform.²³⁷ Rusk stated that the Forum "was very successful from the point of view of citizens initiated referenda."²³⁸ He returned to the Hobson electorate optimistic that the electors were likely to have the choice of several reform options in a referendum and that "citizens initiated referendum" would likely be part of any reform because it was compatible with all the other options.²³⁹

(g) Caucus Committee's final recommendations

The Forum, however, had no appreciable effect on the deliberations of the Committee. On 15 August 1990, the Committee finalised its recommendations regarding direct democracy, which varied from its 6 July 1990 position in only one respect: the Committee finally resolved the question of exemptions, voting five to two that "there would be no matters which could not be the subject of a referendum."²⁴⁰ Nevertheless, in its September 1990 report to the National Party Caucus, the Committee mentioned that it had "benefited from the proceedings of [the Forum]" which had "elicited wide ranging contributions from delegates on various electoral reform issues which were helpful to the Committee in finalising its report to Caucus."²⁴¹ After providing several reasons for not supporting the legislative initiative, binding referendums, or subject matter limitations, the Committee made the following recommendation:²⁴²

²³⁵See Forum, above n 215.

²³⁶Above.

²³⁷"Nats Move", above n 234.

²³⁸Rusk, above n 79.

²³⁹"Nats Move", above n 234.

²⁴⁰*Minutes of the Electoral Law Reform Caucus Committee* (15 August 1990) (Birch, Peters, Graham, McCully, and Anderson voted against exemptions on the grounds that they were unnecessary in a non-binding system; Gray and Muldoon voted for exemptions on the grounds that fiscal matters should be excluded; Bolger did not vote); *Report of the Committee*, above n 177, 12 (outlining finalised "proposed procedure for the holding of referenda").

²⁴¹*Report of the Committee*, above n 177, 1.

²⁴²*Report of the Committee*, above n 177, 6.

[T]he Committee recommends to Caucus that the National Party give a Manifesto commitment to put in place a procedure for holding initiative referenda, non-binding on the Government, where 10 percent of eligible voters sign a petition seeking such a referendum. The Committee further recommends that Caucus accept the procedure for holding referenda outlined in . . . this report.

The National Party Caucus approved the Committee's recommendations. On 11 September 1990, the National Party released its *Manifesto Policy on Electoral Reform*. The National Party promised to:²⁴³

establish a mechanism to enable members of the public to initiate the holding of non-binding referenda on any issue of public concern. For a referendum to be held, a petition signed by 10 percent or more of eligible voters must be presented to Parliament. The government will then be required to hold a referendum within 12 months of this occurring.

4 *National Reform*

The struggle between the party and political wings of the National Party had the effect of formalising support for a binding legislative referendum system within the party wing. On 2 December 1990, a little over a month after the National Party won the 1990 general election, Mike Houlding of Tauranga, a founding member of FAIR, announced the formation of National Reform.²⁴⁴ National Reform was a small, nationwide group of loyal, active, and generally influential National Party members promoting direct democracy.²⁴⁵ It was a formal pressure group with the goal of building on Rusk's work within the National Party.²⁴⁶ Although based in Tauranga, National Reform had plans to establish a representational presence in each electorate.²⁴⁷

National Reform advocated the introduction of direct democracy because its members were convinced that New Zealanders wanted a more responsive governmental system.²⁴⁸ It had four specific objectives: 1) introduce new parliamentarians to the

²⁴³"Improving New Zealand's Democracy" *National's Policy on Electoral Reform* (11 September 1990) 3. McCully served as the National Party's Spokesperson on Electoral Reform. Above.

²⁴⁴National Reform Press Release (2 December 1990). Toward the end of 1984 Houlding met Leo and Thea Gilich in Auckland; they introduced him to Switzerland's direct democracy system. At the time, Houlding was a member of a group agitating for a national referendum on the Fourth Labour Government's "unilateral decision" to pursue a nuclear free policy, which "concerned and annoyed" him because he knew it "would effectively terminate [New Zealand's] membership in ANZUS." Letter from Mike Houlding of National Reform to Mark Gobbi (8 May 1991).

²⁴⁵See M Houlding "National Reform' Who are They? What is It?" 6 Electoral Newsletter No. 3 (14 June 1991) 6; "CIR End for Splinter Groups" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 4 May 1991; "'Get Real' Over Electoral Reform" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 10 April 1991, 36.

²⁴⁶Houlding, above n 244.

²⁴⁷Houlding, above n 245, 6.

²⁴⁸National Reform, *Citizens Initiated Referenda* (undated) 1.

concept of direct democracy; 2) clarify National Party thinking about the precise nature of direct democracy reform; 3) introduce a timetable for the introduction of direct democracy; and 4) campaign for direct democracy as an option to be publicised, debated, and included in the National Government's 1992 government controlled referendum on electoral reform.²⁴⁹

National Reform made some progress toward meeting its first two objectives. It wrote to all new National Party parliamentarians; it received supportive messages from several, and expressions of interest from most. Individuals within National Reform also personally lobbied Ministers and MPs.²⁵⁰ In addition, National Reform produced two papers for distribution within the National Party, and among New Zealand's direct democracy groups, that presented the case for the legislative referendum.²⁵¹

Like FAIR, National Reform had established contact with most of the other direct democracy groups in New Zealand.²⁵² National Reform was also in contact with Walker, whose pro-direct democracy work had inspired its members,²⁵³ and Rusk, whose direct democracy proposal had influenced its campaign strategy and formed the basis of its direct democracy publications.²⁵⁴ National Reform also tried to coordinate support for direct democracy in New Zealand. On 23 May 1991, for example, it sent a letter to New Zealand's main direct democracy groups informing them of the government's plan to introduce a non-binding system, asking who would make oral or written submissions, and setting out the minimum requirements of effective submissions.²⁵⁵ However, for the reasons outlined in the next section, National Reform's efforts to coordinate action among New Zealand's direct democracy groups failed.

Like FAIR, National Reform supported the adoption of both the legislative referendum and the legislative initiative. However, like Rusk, it saw the establishment of direct democracy in New Zealand as an evolutionary process that should begin with a realistically attainable goal, namely, the legislative referendum.

²⁴⁹Press Release, above n 244.

²⁵⁰Houlding, above n 244.

²⁵¹*Citizens*, above n 248; National Reform *Citizens Initiated Referendum Gives You A Say* (10 April 1991).

²⁵²National Reform was in contact with FAIR, Voters' Voice Auckland, Voters' Voice Tauranga, the ONZF, the NZCM, the CCC, New Zealand League of Rights, the NZSF, Research/Action Network, and Plains Club. Letter from Michael Taylor of National Reform to FAIR, *et al* (23 May 1991).

²⁵³Houlding, above n 244. For a list of Walker's direct democracy works, see above note 78.

²⁵⁴M Rusk, Hobson Remit No. 17, Committee Two Background Notes (January 1989); Compare Submission from the Hobson Electorate of the New Zealand National Party, above n 133 with *Citizens*, above n 248, and *Gives You A Say*, above n 251.

²⁵⁵Taylor, above n 252.

National Reform believed that once the legislative referendum was established, a popular broad-based push for the legislative initiative would be feasible.²⁵⁶ National Reform's legislative referendum would have been binding²⁵⁷ and would have required the signatures of 100,000 electors to trigger. Those using the device would have had exclusive control over the drafting of propositions placed on the ballot. However, the following subjects would have been exempt from the device: declared emergencies, defence issues, the status of Parliament, the judicial system, external relations (excluding economic and political unions), and legislation promoting non-discrimination.²⁵⁸

National Reform also saw its proposal as a means of defusing other constitutional reform efforts, especially the proposals for proportional representation and a senate.²⁵⁹ It argued that direct democracy, unlike the other reforms, directly addressed New Zealand's chief governmental illness, that is, the lack of "effective accountability in politics." It believed that direct democracy would deliver a "people responsive government" from the hands of the special interest groups that have "hijacked" New Zealand's law-making process.²⁶⁰ National Reform regarded the other reforms as cosmetic institutional re-arrangements that would exacerbate governmental illness rather than cure it.²⁶¹ The argument presented direct democracy as an attractive alternative to those who were dubious about the merits of either proportional representation or a senate.

5 *Reaction of direct democracy advocates*

The direct democracy advocates began to react to the National Party's Electoral Law Reform Caucus Committee proposal soon after it had delivered its report to Caucus. Each attacked the proposal as inadequate, objecting primarily to the non-binding nature of the system and its high signature trigger threshold. Most of the advocates viewed the proposal as an attempt to subvert the call for direct democracy. Ironically, this perception initially produced the opposite effect. Angered and threatened by the proposal, many of the advocates began meeting to establish common ground and to find ways in which to work together. However, the failure of National Reform's uncompromising attempt to win support among the main direct democracy

²⁵⁶Letter from Mike Houlding of National Reform to Mark Gobbi (15 June 1991).

²⁵⁷Houlding stated that the results of a referendum should be binding "provided enough voters participate." Houlding, above n 244.

²⁵⁸*Gives You A Say*, above n 251, 5-8.

²⁵⁹Houlding, above n 245, 6.

²⁶⁰*Gives You A Say*, above n 251, 1-2. National Reform's position regarding the lack of political accountability is largely based on its frustration with New Zealand's economic deterioration over the past 20 years. *Gives You A Say*, above n 251, 1.

²⁶¹See *Gives You A Say*, above n 251, 9.

groups for its 'legislative-referendum-first' strategy foreclosed the possibility of developing a common long-term strategy.

(a) Voters' Voice

After studying a leaked copy of the Committee's report, Voters' Voice Tauranga issued a warning, published on 19 September 1990, that the Committee's proposed procedure created obstacles that would render the election manifesto promise meaningless. Voters' Voice Tauranga specifically objected to government control over a petition's wording, page and line electoral roll verification of signatures, the huge signature trigger requirement, and the veto which could be exercised by 25 percent of MPs in the House of Representatives.²⁶²

Robert Anderson, MP from Kaimai and a member of the Committee, dismissed the warning by stating that Douglas Graham had drafted the proposed procedure in conjunction with the Clerk of the House as a possible set of rules, but that Caucus had not formally adopted it. He also indicated that Graham's ideas would not constitute the legislative drafting brief given to the Department of Justice once the National Party came to power.²⁶³

However, Anderson's assurances were misplaced. On 28 November 1990, a month after the National Party won the 1990 general election, Justice Minister Douglas Graham stated that he would be working with the Committee to establish a framework for "citizens initiated referendums."²⁶⁴ However, six days later, on 4 December 1990, Graham outlined his proposed framework to the media. With one exception, his proposal replicated the Committee's recommendations: he abandoned the 25 percent veto, but replaced it with a mechanism that would allow parliamentarians to delay the holding of a citizens initiated referendum if 75 percent of all MPs voted to defer it.²⁶⁵

(b) Professor Geoffrey Q de Walker

In September 1990, Walker addressed the annual conference of the New Zealand Democratic Party in Auckland as one of its keynote speakers on the subject of direct democracy.²⁶⁶ He criticised the National Party's proposal on the following grounds: 1) it was unlikely to check the government's power because it was non-binding; and

²⁶²"Nats Plan to Scupper Referendum - Claim" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 19 September 1990. FAIR also criticised the high signature requirement and the non-binding nature of the National Party's election manifesto promise. FAIR Newsletter No. 11 (October 1990).

²⁶³"Nats Plan", above n 262.

²⁶⁴C Ramsay "Referendum Bill on Way" *The Evening Post*, Wellington, New Zealand, 28 November 1990.

²⁶⁵J Clifton "Graham to Introduce Referendum Trigger" *The Dominion*, Wellington, New Zealand, 5 December 1990. The change appears to have been in line with the Caucus Committee's actual decision regarding this issue. See above note 218.

²⁶⁶Walker, above n 137.

2) the 10 percent signature trigger threshold would be difficult to achieve, which could keep the process out of the reach of ordinary people and confine its availability to organised groups like unions or industry associations.²⁶⁷ These ideas reached the other direct democracy advocates through the media, the Democrats, and FAIR.²⁶⁸

Walker also acted independently. In June 1991, shortly after the Minister of Justice and the Department of Justice had worked out the main features of the Citizens Initiated Referenda Bill (CIR Bill), he sent Prime Minister Bolger a copy of Queensland's Constitution (Direct Democracy) Bill.²⁶⁹ The Bill was prepared for introduction in April 1988, but the Queensland legislature did not proceed with it.²⁷⁰ The Bill would have established a binding legislative initiative system, with a two-step trigger. First, a person intending to use the device would have had to submit a petition containing the signatures of 1,000 electors, a copy of his or her bill, and a fee of \$1,000.²⁷¹ Second, once the Minister prepared a succinct 100 word summary of the bill,²⁷² the person would have 12 months to collect the signatures of electors amounting to five percent of the turnout in the last general election.²⁷³ If endorsed by the electorate, the bill would be submitted to the Legislative Assembly, which would be required to ratify it.²⁷⁴ The bill would then be sent to the Governor-General for the Royal Assent. Once the Governor-General assented, the bill would become law.²⁷⁵ Parliament could preempt the referendum if it enacted the bill prepared by the promoter, with the services of the Parliamentary Counsel, prior to the referendum.²⁷⁶

All proposals had to confine themselves to a single subject.²⁷⁷ No proposal could address matters affecting the interests of a particular locality of the State or any particular person(s), the appointment of particular persons to public office, an appropriation of Crown moneys to the ordinary annual services of the government or to any particular purpose, the composition of the judiciary or the appointment or removal or conditions of the judiciary, the constitution, powers or procedure of Parliament, the elector's obligation to vote or the manner and method of voting at

²⁶⁷"Referendum Trigger Level Too High: Expert" *Daily News*, New Zealand, 17 September 1990.

²⁶⁸See above; Walker, above n 266; FAIR Newsletter No. 12 (January 1991).

²⁶⁹Letter from Wayne Eagleson, Director, National's Parliamentary Research Unit (19 June 1991); Letter from Geoffrey Q de Walker, Professor of Law and Dean of the University of Queensland School of Law, to Mark Gobbi (23 July 1991). For a discussion of the drafting of the CIR Bill, see section I in chapter eight.

²⁷⁰Eagleson, above n 269.

²⁷¹Constitution (Direct Democracy) Bill (Draft No. 3, 8 April 1988), cl. 9.

²⁷²CDD Bill, above n 271, cl. 10(1).

²⁷³CDD Bill, above n 271, cls. 11(4) & 12.

²⁷⁴CDD Bill, above n 271, cl. 40(1)-(2).

²⁷⁵CDD Bill, above n 271, cl. 40(3). This procedure is consistent with the Privy Council cases dealing with direct democracy in Canada. See section III.B.2(c) in chapter two.

²⁷⁶CDD Bill, above n 271, cl. 21.

²⁷⁷CDD Bill, above n 271, cl. 10(2).

elections for members of the Legislative Assembly, and any matter provided for by an Act where that provision could be repealed, amended or affected only in a manner and form effectually prescribed by that Act.²⁷⁸

Bolger sent a copy of the Constitution (Direct Democracy) Bill to the Director of National's Parliamentary Research Unit.²⁷⁹ However, neither he nor the Director sent a copy to the Department of Justice.²⁸⁰ This omission might have been justified on the grounds that the Bill was marked confidential or that it bore little resemblance to National Party's election manifesto promise to institute a non-binding citizens initiated referendum system. Nevertheless, the Bill would have accelerated the drafting of the CIR Bill because it would have provided the Department of Justice with a more appropriate model.²⁸¹

(c) FAIR

FAIR began attacking the National Government's proposal as early as January 1991. It criticised the proposal as an extremely weak form of direct democracy because the referendum result would be non-binding and it would require a massive number of signatures (230,000 plus electors) to trigger.²⁸² FAIR characterised these features as being contrary to a democratically viable system.²⁸³ It also resisted the National Government's suggestion that the non-binding proposal was a step in the right direction by criticising the proposal as "an expensive sham, a waste of the taxpayers' money and a cynical attempt to deceive the public."²⁸⁴ The National Government responded to this criticism by arguing that governments which ignored the results of non-binding referendums would pay for it at the next election. FAIR countered with the observation that recent governments were not adverse to ignoring the wishes of the people.²⁸⁵

(d) National Reform

National Reform also considered the proposal as illusionary.²⁸⁶ Like Walker and FAIR, it objected to the proposal's high signature trigger requirement and its non-

²⁷⁸CDD Bill, above n 271, cl. 8(2).

²⁷⁹See Eagleson, above n 269.

²⁸⁰The Department's files on the CIR Bill contain no record or copy of the Constitution (Direct Democracy) Bill.

²⁸¹See section I.C in chapter eight. According to Walker, Bolger did not reply or acknowledge his letter. Walker, above n 269.

²⁸²FAIR Newsletter No. 12 (January 1991). FAIR initially objected to the signature threshold level as being too high, thinking that the collection period would be 3 to 4 months, which would require a large organisation and lots of money. FAIR Newsletter No. 14 (July 1991).

²⁸³FAIR Newsletter No. 12 (January 1991).

²⁸⁴FAIR Newsletter No. 13 (March 1991); see also FAIR Newsletter No. 14 (July 1991).

²⁸⁵FAIR Newsletter No. 13 (March 1991).

²⁸⁶"Get Real", above n 245; "CIR End", above n 245.

binding character.²⁸⁷ These features caused National Reform to view the proposal "a mere palliative."²⁸⁸ As a consequence, its members resolved "to decrease 'trigger levels' from 10 percent as envisaged by Murray McCully's Caucus Committee to three to five percent, and to change the non-binding rule to binding."²⁸⁹

With this objective in mind, members of National Reform met in Wellington on 26 January 1991. Rusk attended the meeting "to keep an eye on things."²⁹⁰ The meeting had two important outcomes. First, it resulted in the publication of *Citizens Initiated Referenda Gives You a Say* on 10 April 1991, which outlined National Reform's arguments for direct democracy and presented a detailed binding legislative referendum proposal. It eventually formed the basis of several submissions from the party wing of the National Party on the CIR Bill including its own.²⁹¹ Second, Rusk became loosely affiliated with National Reform. Initially, he simply supplied information regarding direct democracy and his experience advocating its adoption within the National Party.²⁹² Subsequently, however, he allowed National Reform to use his name as a contact in its publications.²⁹³ Eventually, he worked with its members to build support for "binding citizens initiated referenda" within the National Party.²⁹⁴

(e) ONZF, NZCM, and NZDP

The ONZF rejected the National Government's proposal for the same reasons.²⁹⁵ It argued that the high signature trigger requirement would act as a break on any petition drive. It also argued that referendum results had to be binding to make sure that politicians were responsible for their actions. It called the proposal a "placebo" designed to avoid giving the electors a real say.²⁹⁶ Consequently, in its newsletter of

²⁸⁷Houlding, above n 245, 6; "'Get Real'", above n 245.

²⁸⁸Houlding, above n 245, 6.

²⁸⁹Houlding, above n 244; "'Get Real'", above n 245.

²⁹⁰Rusk, above n 79.

²⁹¹See Submission from Michael Taylor to Electoral Law Select Committee, No. 4 (April 1992); Submission from the Otumoetai Branch of the National Party (Tauranga Electorate) to Electoral Law Select Committee, No. 13W (April 1992); Submission from National Party Taranaki Electorate to Electoral Law Select Committee, No. 18 (April 1992); Submission from National Reform to Electoral Law Select Committee, No. 34 (April 1992).

²⁹²Rusk, above n 79.

²⁹³See eg *Gives You A Say*, above n 251; Submission from National Reform to Electoral Law Select Committee, No. 34 (April 1992).

²⁹⁴See eg Letter from National Reform to Members of the National Party (7 May 1992) (providing Rusk's address and telephone number and stating that he would be pleased to address the electorate organisation and answer any queries regarding "binding citizens initiated referendums"). Shortly before the introduction of the CIR Bill, Rusk reduced his involvement in his campaign for direct democracy for family reasons. After surmounting these difficulties, he returned to the campaign and was pleased to find that others within the National Party had taken up the cause. Telephone interview with Merv Rusk (12 June 1993).

²⁹⁵Telephone interview with Wally Boyd (28 September 1991).

²⁹⁶Letter from Boyd, above n 88; Boyd, above n 295.

25 June 1991, the ONZF warned its supporters that the proposal was "not to the advantage of ordinary New Zealanders."²⁹⁷ The NZCM found the National Government's proposal "totally unacceptable." Like the other direct democracy advocates, it attacked the proposal's high signature requirement and its non-binding nature. The NZCM, however, went further by rejecting the proposal on the grounds that it was not a form of direct democracy. It saw the proposal as "nothing more than an expensive 'Heylen' poll."²⁹⁸ The Democrats also faulted the proposal for its high signature requirement and its non-binding results. They viewed the proposal's non-binding nature as its greatest draw-back. The Democrats concluded that the proposal would be "about as useless as a glorified public opinion poll."²⁹⁹

(f) Failure of joint action

The uniformity of the response from the direct democracy advocates was a natural consequence of their interaction. The NZCM had been trying, without success, to bring the direct democracy groups together in Hamilton to discuss ways in which they could work together to establish direct democracy in New Zealand.³⁰⁰ Nevertheless, various combinations of the groups had been exchanging advice, information, and views regarding direct democracy several years before the National Government's proposal had surfaced. The National Government's proposal, however, gave the direct democracy groups an incentive to work together.

In March 1991, the NZCM reissued its invitation to meet in Hamilton.³⁰¹ Forty-one people decided to attend the 6 April 1991 meeting, including delegates from FAIR, National Reform, the NZCM, Voters Voice, the CCC, and the ONZF.³⁰² Those attending reached "a general consensus that the National Government's proposed non-binding referendum [was] totally unacceptable." They saw the proposal "as another contemptuous attempt to offer something that would not work and so could easily be discredited." They also unanimously agreed that it would be "no more than a very costly and complicated way of conducting a public opinion poll." In addition, they opposed the proposal's high signature requirement.³⁰³

However, those attending the meeting disagreed in one important respect. The groups "were not in agreement as to what forms of direct democracy to pursue." For

²⁹⁷ONZF Newsletter (25 June 1991).

²⁹⁸Tait, above n 104.

²⁹⁹Leitch, above n 37.

³⁰⁰Newsletter, above n 104.

³⁰¹Above.

³⁰²Letter from Leo Gilich, National Coordinator of FAIR, to Mark Gobbi (25 June 1991); Holding, above 245; Tait, above n 104 (Cliff Enemy of New Plymouth was also in attendance); Newsletter, above n 104.

³⁰³Letter from Gilich to Gobbi, above n 81.

tactical reasons, National Reform and Voters Voice Tauranga recommended that the groups concentrate their efforts on establishing the legislative referendum. FAIR, Voters Voice Auckland, and the ONZF expressed support for both the legislative initiative and the legislative referendum. The NZCM and the CCC did not explicitly declare which form(s) they supported. Nevertheless, the groups generally agreed that direct democracy should be applied as widely as possible.³⁰⁴ They also agreed that the results of "citizens initiated referendums" should be binding, triggered by 30,000 to 50,000 electors (one and a half to three percent of the votes cast in the last general election), and be free of subject matter limitations. The wording of a proposition should be determined by those using the device.³⁰⁵ Essentially, the groups were "unanimous in [their] objective but agreed that there was no one way to achieve that objective."³⁰⁶

The groups also decided to hold discussions with their membership to develop a common strategy. They agreed to report back on 26 May 1991.³⁰⁷ Twenty people, representing most of the original gathering, attended the May meeting in Hamilton.³⁰⁸ Their discussion centred on the National Government's recently announced intention to introduce legislation giving effect to its proposal. National Reform, given its members' experience with the submission process, attempted to coordinate action among the main direct democracy groups, initially by renewing its offer to assist those interested in making submissions.³⁰⁹

However, National Reform's efforts floundered.³¹⁰ The May meeting was inconclusive in terms of developing a common strategy. Paradoxically, National Reform had contributed to this outcome. On 10 April 1991, four days after the first Hamilton meeting, National Reform published its *Citizens Initiated Referenda Gives You a Say*, which proved antagonising because it included a detailed legislative referendum proposal.³¹¹ According to FAIR, the groups promoting direct democracy

³⁰⁴ Gilich, above n 302 (these groups also supported the recall, a device which would allow petitioning electors to run a referendum that would decide whether a public official or an elected representative should continue to serve in his or her office).

³⁰⁵ Above; Houlding, above n 244.

³⁰⁶ Newsletter, above n 104.

³⁰⁷ Above; see also Houlding, above n 244.

³⁰⁸ Tait, above n 104.

³⁰⁹ Newsletter, above n 104; see also A Paltridge "Referenda Plans Criticised" *The Daily News*, New Zealand (28 May 1991). A few days before the meeting National Reform sent a letter to each of the direct democracy groups offering to help prepare and coordinate submissions on the CIR Bill. It recommended that interested individuals within each organisation should make submissions in addition to the submission put forward by their organisation. It also recommended that each submission should state that the results of citizensinitiated referendums should be binding "to ensure [that] the legislation is made more effective." Taylor, above n 252. These recommendations were designed to increase the number of submissions in favour of a binding system of direct democracy.

³¹⁰ Houlding, above n 256; National Reform Newsletter (16 June 1991).

³¹¹ NZCM Newsletter [Citizens' Roundtable] (undated); Houlding, above n 244.

had generally accepted the strategy of first convincing parliamentarians to accept the basic principles of direct democracy. Once this was accomplished they would engage a constitutional law expert to draft a proposal handling the legislative details. FAIR criticised National Reform for pre-empting this plan by producing what was in effect draft legislation with some serious shortcomings.³¹² The NZCM agreed with, and subsequently published, FAIR's assessment adding that National Reform should have consulted the other direct democracy groups.³¹³ As National Reform acknowledged later, the incident caused some "ill-feeling" among the direct democracy advocates.³¹⁴

It also revealed that FAIR and National Reform favoured different strategies.³¹⁵ FAIR sought to promote the basic concept of direct democracy ahead of a campaign pushing for the simultaneous adoption of the legislative referendum and the legislative initiative.³¹⁶ National Reform took the position that the establishment of direct democracy in New Zealand was an evolutionary process that should begin with a realistically attainable goal, namely, the legislative referendum.³¹⁷ Once the legislative referendum was established, a popular broad-based push for the legislative initiative would be feasible.³¹⁸

Despite these circumstances, those attending the May meeting remained hopeful. They agreed to meet at Cambridge on 13 July 1991 to discuss in more detail a request from Peter Clark of Voters' Voice Tauranga for a defined strategy.³¹⁹ As a response to National Reform's independent initiative and the National Government's proposal, FAIR drafted a detailed plan for discussion at this meeting. FAIR's plan called for the simultaneous establishment of the legislative referendum and the legislative initiative. It also spelled out the essential features of each device.³²⁰

FAIR's plan had the effect of subverting the goal of developing a common strategy. By emphasising differences rather than areas of agreement, it created "a degree of suspicion and hostility towards the National Party that produced acrimony and time wasting." Instead of planning strategy and coordinating their efforts, those attending the meeting spent most of their time "dealing with misunderstandings and inflexibility." Strategic planning was also hampered by disagreement about the significance of the National Government's proposal. Some viewed the proposal as a

³¹²Gilich, above n 302.

³¹³Newsletter, above n 311.

³¹⁴Houlding, above n 256.

³¹⁵Letter from Leo Gilich, National Coordinator of FAIR, to Mark Gobbi (8 February 1992).

³¹⁶Gilich, above n 302.

³¹⁷Houlding, above n 244.

³¹⁸Houlding, above n 256.

³¹⁹Newsletter, above n 311.

³²⁰*FAIR Proposal for CIR*, preliminary draft (21 June 1991) (calling for the recall as well).

"stumbling block of magnitude," while National Reform saw it as "a panacea, but an advance nevertheless, and a Bill that could be used to agitate for further reform measures."³²¹

In spite of their differences, the direct democracy advocates met again in Cambridge on 29 September 1991. According to the ONZF, the purpose of the meeting was to determine what measures could be taken to pressure the National Government to end its delay in introducing its proposed CIR Bill.³²² With the exception of the NZCM, which flatly opposed the passage of the CIR Bill,³²³ the direct democracy advocates decided to welcome the CIR Bill in the hope that they would be able to win support for its modification during its select committee stage.³²⁴ This decision gave the direct democracy advocates an opportunity to present a common front in their submissions to the Electoral Law Select Committee in April and May 1992. However, it failed to resolve their fundamental differences to the extent necessary to produce a common long-term strategy.

6 *Consequences*

These developments played into the hands of strategists within the political wing of the National Party. Both Wayne Eagleson and Murray McCully had predicted that the direct democracy groups were too disparate in their interests and objectives to work together long enough to be effective.³²⁵ In part, this explains why the National

³²¹Letter from Mike Houlding, National Reform, to Mark Gobbi (30 June 1993); see also Letter from Bruce Knowles, National Reform, to CIR Supporters (8 June 1991).

³²²Boyd Interview, above n 295.

³²³Submission from NZCM to Electoral Law Select Committee, No. 14 (28 April 1992).

³²⁴See eg Submission from Voters' Voice Auckland to Electoral Law Select Committee, No. 19 (10 April 1992); Submission from the ONZF to Electoral Law Select Committee, No. 27 (24 April 1992); Submission from National Reform to Electoral Law Select Committee, No. 34 (April 1992). FAIR did not expressly welcome the CIR Bill; however, it approached the CIR Bill as a given and presented arguments for its modification. Submission from FAIR to Electoral Law Select Committee, No. 21 (23 April 1992). The CCC viewed the CIR Bill as an attempt to "legislate CIR into oblivion;" however, like FAIR, it approached the CIR Bill as a given and presented arguments for its modification. Submission from CCC (Nelson Branch) to Electoral Law Select Committee, No. 39W (28 April 1992); Submission from Coalition of Concerned Citizens to Electoral Law Select Committee (National Headquarters, Lower Hutt), No. 43 (29 April 1992).

³²⁵Eagleson Interview, above n 133. Murray McCully made his observation as a casual observer at the New Zealand Politics Research Group Conference on Referenda (Stout Research Centre - Victoria University of Wellington, 6 December 1991). On the whole, the participants at the Conference reluctantly endorsed the National Government's proposal: If New Zealand must have direct democracy, then it should be non-binding; the signature trigger should be high; the Clerk of the House of Representatives should determine the wording of referendum questions; and Parliament should retain control over the citizens initiated referendum process. They also warned that it would not eliminate the problems associated with New Zealand's democracy. Despite the calibre of the participants, their influence was slight. Both McCully and Eagleson attended part of the afternoon session of the Conference. Although they undoubtedly detected support for a non-binding system, they missed most of the concerns that were expressed. In addition, organisational difficulties delayed publication of the conference papers until after the Electoral Law Select Committee had finished its study of the

Government "tolerated" the long, drawn-out process involved in drafting, introducing, and debating the CIR Bill, which is examined in the next chapter.

However, the strategists misjudged the effect of the promotional work of the direct democracy groups. Although Eagleson, McCully, and Bolger had tried to marginalise the direct democracy groups,³²⁶ the publicity they generated helped Rusk in his effort to mobilise support for direct democracy within the party wing of the National Party.³²⁷ Due to their efforts, many members of the National Party had heard of direct democracy, which allowed Rusk, and later National Reform, to spend less time on educating them and more time on organising their support.

The publicity-generating antics of Michael Laws and Winston Peters also generated support for direct democracy. On 6 June 1991, Laws delivered a speech to the Commonwealth Press Editors' Conference in which he presented a case for parliamentary reform. His speech, which highlighted the undemocratic aspects of the parliamentary system, was widely reported.³²⁸ On 11 June 1991, Peters echoed Laws' theme in a speech to the Business Network. He called "for an increase in both the quality and incidence of democratic choice for New Zealanders." He also reminded his audience of National Party's election manifesto promises regarding electoral and parliamentary reform. Finally, he reiterated his decision to "go on the campaign trail . . . to urge voter support for . . . the use of referenda."³²⁹

Although designed to support the campaign for proportional representation, these speeches heartened those campaigning for direct democracy in two ways. First, Laws and Peters rebutted the argument that parliamentarians would reform Parliament of their own accord.³³⁰ Second, they delivered their speeches in the midst the National Government's failure to remove the Fourth Labour's superannuation surtax.

submissions and departmental reports on the CIR Bill. Consequently, the Select Committee did not refer to the conference papers when deliberating on the CIR Bill or reporting it back to the House. See NZPD, no 86, 17608-17616. For a collection of the conference papers, see A Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University of Wellington, Wellington, 1992).

³²⁶See eg above note 80.

³²⁷Although Rusk acknowledged their work, he chose to keep his distance from them for the following reason: "Most issues have a fringe element and I have been careful to keep my distance from people who don't realise they often hamper the progress of the very thing they work for. The attitudes and actions of some proponents of CIR *really* hampered sensible discussion with the politicians by providing convenient, and sometimes sound reasons, for the politicians to refuse what was wanted." Rusk, above n 79.

³²⁸Laws, above n 77.

³²⁹"Electoral Reform - Why it is Needed," Address by Winston Peters MP, Business Network, Wellington (11 June 1991). Laws had also applauded the Minister of Justice for his work on "citizens initiated referenda." Address, above n 77. Both Laws and Peters were under the impression that the Government had promised to include direct democracy as an option in the 1992 referendum.

³³⁰Laws, above n 77; Peters, above n 329.

The resulting "broken promises" chorus from the media and superannuitants gave the National Government every incentive to deliver on its more memorable campaign promises. At the same time, National Reform intensified its campaign within the National Party for a binding system of direct democracy.³³¹ Given these factors, the National Government began to take action on some of its promises to improve New Zealand's democracy, including the pledge to "establish a mechanism to enable members of the public to initiate the holding of non-binding referenda on any issue."³³²

III ASSESSMENT

The direct democracy debate in New Zealand dates back to 1891, when the Liberals first introduced their perennially ill-fated Referendum Bill. The debate resurfaced periodically, but did not coalesce into a politically significant demand for constitutional reform until after the 1987 crash. As in Switzerland and California, a significant campaign for direct democracy came into existence in New Zealand when economic turmoil coincided with a profound disillusionment with representative democracy.

The 1987 crash followed a whirlwind of social and economic change that the Fourth Labour Government had ushered in without an electoral mandate.³³³ However, the previous National Government shared some responsibility for the economic difficulties that contributed to the call for direct democracy. Muldoon's generous superannuation scheme and his 'Think Big' projects proved to be financially unsustainable.³³⁴ In this respect, he created a time bomb which his electoral fortunes eventually forced him to hand over to the Fourth Labour Government in 1984. Rogernomics, for all its rhetoric, was essentially a failed attempt to defuse this bomb. The crash triggered its explosion 1987. The blast destroyed the Fourth Labour Government.

Amid the debris stood many New Zealanders profoundly worried about their continued prosperity. While many people simply laid the blame at the Labour Party's doorstep, some decided that the time had come to change the way in which governmental decisions were legitimised. Some also came to the conclusion that New Zealanders could no longer afford to continue abdicating all responsibility for their

³³¹ See eg Letter from Bruce Knowles, National Reform, to Murray McCully MP, Chairman of the Electoral Reform Caucus Committee (20 June 1991). For discussions of the surtax issue, see above notes 126-131.

³³² "Improving", above n 243, 3.

³³³ Chapman, above n 3, 27.

³³⁴ See Barber, above n 1, 193-194, 201; see also D McLoughlin "Nine Years After the Revolution: Why Won't the Economy Fly?" *North and South*, July 1993, 46.

welfare to unresponsive elected representatives. Walker's timely book in favour of direct democracy coincided with these circumstances. It had enormous appeal as it presented direct democracy as a viable and effective means by which to acquire some control over the legislative process. Thus inspired, these people became advocates for the adoption of direct democracy in New Zealand. They sought Walker's advice and used his work to promote their cause.

These advocates wanted a binding system of direct democracy. Most of them favoured establishing both the legislative referendum and the legislative initiative. Some were inclined to focus their efforts on establishing only the legislative referendum. This common ground led these advocates to seek each other out and to exchange information. However, their attempts to coordinate their efforts were largely non-existent prior to the National Party's 1990 election manifesto promise to introduce a non-binding citizens initiated referendum system. Although the decision brought them together briefly, they failed to develop a common long-term strategy. Nevertheless, they had already made a significant contribution to the direct democracy debate.

The groups these advocates formed, especially FAIR and Voters' Voice, broke the ice. By making others aware of direct democracy and the promise it held, they managed to bring direct democracy to the attention of the political establishment. However, it would take the commitment of someone within the political establishment to bring the idea closer to reality, namely Merv Rusk. His campaign for direct democracy, which eventually led to the enactment of the CIR Act, was well underway before the direct democracy groups first tried to work together. Rusk had secured the support of the party wing of the National Party for a binding legislative referendum system. The political wing of the National Party tried to kill the idea altogether. The resulting compromise was the inclusion of a promise to introduce a non-binding citizens initiated referendum system in the National Party's 1990 election manifesto, which ultimately became the basis of the CIR Act.

National Reform came into existence as a result of Rusk's campaign. In some respects, National Reform was similar to the reform groups that grew out of the existing political parties during the direct democracy debates in California and Switzerland. The Progressives, who established direct democracy in California, had taken over the Republican Party before it swept to power in the 1910 general election.³³⁵ In Switzerland, the breakaway left-wing of the ruling Liberal-Radical

³³⁵ See S Olin *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911-1917* (University of California Press, Berkeley, 1968) 11; W Beck and D Williams *California: A History of the Golden State* (Doubleday, Garden City, New York, 1972) 340; D Fehrenbach *A Basic History of California* (Van Nostrand, Princeton, 1964) 57-58; Hyink, above n 9, 65; Lavender, above n 9, 163.

grouping, the Swiss Democrats, won a hard-fought battle to establish popular control over local and national government through the introduction of the direct democracy.³³⁶ The California Progressives and the Swiss Democrats were reacting to the effects of the Industrial Revolution and the monopolistic practices of "Robber Barons" who had acquired control over the exercise of governmental power. They were ardent supporters of fundamental constitutional reform aimed at restoring the legitimacy of their constitutional systems.

National Reform wanted to restore the legitimacy of the New Zealand constitutional system. It also had come into existence during a period of economic turmoil and operated within an established political party. However, unlike the Swiss Democrats and the California Progressives, its objective did not lead its members into prolonged conflict with the established National Party leadership.³³⁷ The members of National Reform did not displace the National Party hierarchy, or provide any indication that they would attempt to do so. They had little incentive to take this approach, as they did not perceive the National Party as being controlled by self-serving economic interests, as were the ruling parties were in Switzerland and California prior to the triumph of the Swiss Democrats and the California Progressives. More importantly, the leaders of political wing of the National Party were able to formulate a compromise which held sufficient developmental potential to appease those in the party wing who supported establishing direct democracy in New Zealand, including, for a time, Merv Rusk. Nevertheless, as the next chapter shows, National Reform played an indispensable role in preventing the National Government from abandoning the National Party's election manifesto promise to introduce a non-binding citizens initiated referendum system.

³³⁶E Gruner and K Pitterle "Switzerland's Political Parties" in H Penniman (ed) *Switzerland at the Polls: The National Elections of 1979* (American Enterprise Institute for Public Policy Research, Washington, DC, 1983) 37; see also Bonjour, above n 9, 299-301; Dandliker, above n 9, 284-289; Martin, above n 9, 235, 237; W Oechsli *History of Switzerland: 1499-1914* (Cambridge University Press, Cambridge, 1922) 406-408, 414-415; Thurer, above n 9, 120-123.

³³⁷Gruner and Pitterle, above n 335, 37; Bonjour, above n 9, 300; Oechsli, above n 335, 407; Beck, above n 334, 340; Hyink, above n 9, 65; Olin, above n 334, 11, 13.

LEGISLATIVE HISTORY OF THE CIR ACT 1993

This chapter traces the legislative history of the Citizens Initiated Referenda Act 1993 (CIR Act). In doing so, it continues the analysis begun in chapter seven, which documented the events that led the National Party to promise to introduce a non-binding citizens initiated referendum system in New Zealand. This chapter completes the analysis of the factors which determined the form and content of the CIR Act by examining what happened to the CIR Act at each stage of the legislative process, which is necessary as New Zealand's direct democracy advocates, unlike their counterparts in Switzerland and California, failed to secure control of the legislative process. In doing so, this chapter draws almost exclusively on primary sources. Although the electorate's decision in 1993 to introduce a proportional representation electoral system has complicated the process, primarily by diffusing the locus of power, the CIR Act's legislative history nevertheless provides an instructive example to those who wish to bring about or forestall legislative change or constitutional reform in New Zealand, particularly when considered along with the discussion in chapter seven.

The legislative process begins with the acceptance of an idea by the parliamentarians who control the process. Regarding the CIR Act, the acceptance stage was discussed in chapter seven. This chapter takes the idea behind the CIR Act, namely the National Party's Electoral Law Reform Caucus Committee's plan for a non-binding citizens initiated referendum system,¹ through its legislative stages: drafting, first reading, select committee, report back, second reading, Committee of the whole House, third reading, and assent. Along the way, this chapter outlines the reactions of the direct democracy advocates at various stages in the process and the steps they took to counteract the general antipathy of parliamentarians, particularly those in the National Government, toward direct democracy. Their combined efforts, although largely uncoordinated and ineffectual in changing the form or content of the National Government's Citizens Initiated Referenda Bill (CIR Bill), prevented the National Government from allowing the CIR Bill to die quietly somewhere along the way.

¹*Report of the Electoral Law Reform Committee to Caucus* (September 1990). For an outline of the plan, see sections II.B.3(d) and II.B.3(g) in chapter seven.

I DRAFTING THE CITIZENS INITIATED REFERENDA BILL

On 7 December 1990, Douglas Graham, as Minister of Justice, advised the Department of Justice that he hoped to introduce a bill giving effect to the National Party's citizens initiated referendum election manifesto promise early in 1991.² Starting with the Electoral Law Reform Caucus Committee's plan, officials in the Law Reform Division of the Department of Justice began the process of preparing legislative drafting instructions for the Parliamentary Counsel Office.

A *Initial Changes Recommended by the Department of Justice*

On 19 December 1990, the Department provided the Minister with its initial queries regarding the CIR Bill's legislative detail. It sought clarification regarding the House veto and signature checking provisions. The Department also suggested the possibility of conducting referendums by postal vote.³ The Minister responded that the veto provision should be 75 percent, not 25 percent as stated in the Caucus Committee's plan. He asked the Department to determine whether a page and line electoral roll verification process would be too onerous. He decided that referendums should be conducted on an electorate by electorate basis as in a general election rather than by postal vote.⁴

The Department also sought the views of those in government most likely to be affected by the CIR Bill. Specifically, the Department wrote to the Clerk of the House, the Chief Justice, the Chief Ombudsman, the Officials Committee on Electoral Matters, and the Director of Planning in February 1991.⁵ Based on their responses and its own research, the Department, by 9 April 1991, had developed the view that referendums should be subject to the Ombudsman Act 1975 and the Official Information Act 1982.⁶ The former would add accountability to the referendum process by giving individuals the means to lodge complaints and initiate investigations regarding delays, carelessness in verification, lack of procedural compliance, or incorrect advice to the Speaker. The latter would give individuals the means to

²*Minutes of Meeting with Minister of Justice*, LEG 27-1-9 (7 December 1990).

³Letter from Department of Justice to Minister of Justice (19 December 1990). The Department calculated that voting on referendums in polling booths would cost \$9,760,000 and that voting by post would cost \$7,518,000. Letter from Secretary of Justice to Minister of Justice (5 April 1991).

⁴Department, above n 3 (the Minister sent his response in a form of note dated 8 April 1991 on the letter the Department sent to him). The Caucus Committee had actually decided to raise the '25 percent of those present in the House' veto to a '75 percent of all members of the House' veto. *Minutes of the Electoral Law Reform Caucus Committee* (6 July 1990). However, the Caucus Committee's final report inadvertently recommended the 25 percent present veto. *Report*, above n 1, 1.

⁵See Letter from Department of Justice to Minister of Justice (9 April 1991); see also Minute Sheet, LEG 27-1-9 (1 April 1991).

⁶Department, above n 5.

monitor the referendum process by giving them access to information on proposals and their disposition, including the number of electors who signed or were ruled ineligible, the names of those proposing referendums, details of the verification process generally and in respect of individual petitions, governmental advice regarding the wording of petitions, and information stating when the Speaker received advice that the procedural requirements were met.

The Department also developed the view that various aspects of the Caucus Committee's proposed framework should be modified. First, it recommended that the proposed referendum commission should not include a High Court Judge for three reasons: 1) High Court Judges do not normally perform advisory and clerical functions; 2) they do not have the research facilities required to assess whether referendum questions are clear and fair or whether any explanatory material is comprehensive and accurate; and 3) if an extended period of time were involved, replacement appointments would be essential.⁷

Second, the Department recommended that the signature page and line electoral roll verification procedure be replaced with a different procedure because reliance on printed rolls, at times more than a year out of date, could result in the rejection of signatures of people who are on the current roll and the acceptance of signatures of people who are not on the current roll. As an alternative, the Department suggested that persons signing a petition be required to give their names, addresses, occupation, current electorate (if known), and date of birth (if they wished). The body checking the signatures would take a statistically valid sample and send those names to the Electoral Roll Centre for checking. The result of the checking would determine whether the petition had sufficient signatures of eligible electors to enable it to proceed.⁸

Third, the Department came to the conclusion that the phrase "10 percent of eligible electors" was ambiguous. "Eligible electors" could mean those people on the current roll, those who were qualified to vote under section 99 of the Electoral Act 1956, or those who were eligible to enrol as voters under section 42 of the Act. The Department suggested that "eligible electors" be defined in terms of those people on the current roll because the definition provided a fixed figure by which to calculate the required 10 percent signature threshold.

In addition, the Department advised the Minister that it would, unless countermanded, instruct the Parliamentary Counsel Office to limit the amount of money any individual

⁷Above.

⁸Above.

or group may spend promoting or opposing a particular referendum proposal.⁹ The Department reasoned that advertising limits might reduce the opportunity for campaign manipulation.¹⁰ However, given the precedent of campaign expenditure limits placed on candidates and parties in the Electoral Act 1956, it did not initially consider the freedom of speech implications of its spending limit proposal.¹¹

The Department also advised the Minister that it would, unless countermanded, instruct the Parliamentary Counsel Office that any money required for the purposes of the Bill be paid out of the Public Account without further appropriation.¹² The Department, however, did not evaluate its proposal in terms of the frequency of referendums or in terms of pre-determined referendum dates. Since the Department had estimated that a referendum conducted on the same basis as a general election would cost \$9,760,000,¹³ mismanagement of either factor could render the Department's appropriation proposal expensive.

B Minister of Justice's Response

On 16 April 1991, the Minister agreed to each of the Department's recommendations. However, he added several refinements. To initiate the non-binding referendum process, a person would have to present a draft petition to the Clerk of the House. The petition would be addressed to the Speaker of the House and contain a request that Parliament hold a referendum on the question stated in the petition. The Clerk would not have any discretion to reject a petition, but would, subject to judicial review, have the power to determine the final wording of the question. In addition, the Clerk would have the power to determine whether a proposed petition dealt with a subject considered in a referendum held within the last five years. If it did, then the petition would not be permitted to proceed.¹⁴

Once the question was finalised, its initiator would have 12 months to collect the necessary signatures. If the signature requirement were met, the Clerk would certify the petition and transmit it to the Speaker of the House. The Speaker would then present it to the House of Representatives. The proposed House veto provision

⁹Above.

¹⁰Minute Sheet, LEG 27-1-9 (19 February 1991).

¹¹The Department of Justice vetted the CIR Bill for compliance with the New Zealand Bill of Rights Act 1990 after the Parliamentary Counsel Office produced its preliminary draft of the Bill. As a practical matter, the Department of Justice, even in the case of its own bills, generally vets bills for compliance with the Bill of Rights after the Parliamentary Counsel Office or a private law firm commissioned by the government of the day has drafted them.

¹²Department, above n 5.

¹³Secretary, above n 3.

¹⁴File Note: CIR Bill: Discussion with Minister of Justice - 16 April 1991, LEG 27-1-9 (17 April 1991).

became a House delay provision. Unless 75 percent of the entire membership of the House voted to defer the referendum, it would have to be held within 12 months of the petition's presentation. The House would not be able to defer it for more than 12 months.¹⁵

The Department's progress encouraged the Minister, particularly as he had already publicly relied on 22 March 1991 assurances from officials that the CIR Bill was in preparation and that the next step was to forward drafting instructions to the Parliamentary Counsel Office.¹⁶ Consequently, in mid-April, he informed the media that the CIR Bill was well-advanced in its drafting and that it should be introduced in Parliament about June 1991.¹⁷

C Delays

However, several factors rendered this deadline unrealistic. First, the Department did not produce its first draft of the CIR Bill's drafting instructions until May 1991. Second, the May draft identified a series of technical problems that took a considerable amount of time to solve. The most important of these problems involved working out the sampling method to be used to verify whether the requisite number of signatures had been collected.¹⁸ Although the Department of Statistics worked out a solution as early as 20 May 1991,¹⁹ the Department of Justice did not capture it on paper until June.²⁰ The Department of Statistics did not have the opportunity to review the relevant provisions until July.²¹ Its response on 24 July 1991 remained a subject for discussion as late as 22 November 1991. By December 1991, both Departments had agreed that the original provisions were adequate.²²

¹⁵Above. Apparently, the Minister of Justice unilaterally decided that the veto power should be transmuted into a delay power. See J Clifton "Graham to Introduce Referendum Trigger" *The Dominion*, Wellington, New Zealand, 5 December 1990; see also above note 4. The decision may have been made to present the CIR Bill as a plausible compromise to the direct democracy advocates.

¹⁶*Minutes of Meeting with Minister of Justice*, LEG 27-1-9 (22 March 1991) (informing the Minister that the CIR Bill was in preparation and that the next step was to forward drafting instructions to the Parliamentary Counsel Office). The Minister announced on 1 April 1991 that a separate bill to permit citizen initiated referendums was at the drafting stage and should be passed by Christmas. S Collins "Electoral Poll Will Offer Clear Choice" *New Zealand Herald*, Auckland, New Zealand, 2 April 1991.

¹⁷N McMillan "Electoral Reform Promises of the Government Nearly Ready for Parliament" *Taranaki Daily News*, Taranaki, New Zealand, 22 April 1991.

¹⁸CIR Bill - Drafting Instructions, LRD 27-1-9 [Draft] (May 1991).

¹⁹Fax from Department of Statistics to Department of Justice (20 May 1991).

²⁰CIR Bill - Drafting Instructions, LRD 27-1-9 [Draft] (June 1991).

²¹Letter from Department of Justice to Department of Statistics (3 July 1991).

²²See Letter from Department of Statistics to Department of Justice (24 July 1991) (containing note of 22 November 1991 discussion); see also Letter from Department of Statistics to Department of Justice (16 December 1991).

In addition, the Department of Justice came to the conclusion that neither the Freedom of Information Act 1982 nor the Ombudsman Act 1975 applied to the Clerk of the House as an officer of Parliament.²³ Consequently, the Department had to build the political consensus required to extend the application of these Acts to the Clerk of the House. In June 1991, the Clerk agreed to the application of these Acts with respect to matters arising under a CIR Act. To give effect to this, the Department drafted a provision in June 1991 that would treat the Clerk as an officer of government subject to the Acts when acting pursuant to the CIR Act.²⁴

The Department also had difficulty in locating a suitable precedent upon which to base its drafting instructions.²⁵ Overseas models proved problematic because they were binding and woven into the fabric of written constitutions.²⁶ Domestic referendum enactments also proved problematic because they dealt exclusively with government controlled referendums. Although the Department had studied Knapp's Popular Initiatives Bill 1984,²⁷ it eventually chose the Term Poll Act 1990 as its starting point.²⁸ McCombs' Popular Initiative and Referendum Bills of 1918 and 1919 were not considered.

The Term Poll Act 1990 proved to be an incomplete model. This presented two time-consuming difficulties: 1) many of the essential provisions had to be prepared from scratch; and 2) many of the technical provisions of the Term Poll Act had to be reworked. For example, the Term Poll Act only provided for a government controlled referendum to be held in conjunction with a general election. To allow citizens-initiated referendums to be held at any time, the Department had to modify this provision. It found a solution by adapting the by-election writ provisions of the Electoral Act 1956.²⁹

These factors delayed transmission of the drafting instructions to the Parliamentary Counsel Office until 5 July 1991.³⁰ Two days earlier, the Department had presented a copy of the instructions to the Minister for his approval. The Department informed the Minister that the signature verification provisions were not yet finalised. It also informed the Minister that, in anticipation of Treasury raising the issue of cost

²³Draft May, above n 18.

²⁴Draft June, above n 20.

²⁵Draft May, above n 18.

²⁶See eg Minute Sheet, LEG 27-1-9 (15 April 1991) (summarising the experience with direct democracy legislation in Canada).

²⁷Letter from Department of Justice to Parliamentary Counsel Office (3 July 1991).

²⁸See May Draft, above n 18; compare CIR Bill 1992 with Term Poll Act 1990.

²⁹May Draft, above n 18; compare CIR Bill 1992 with Electoral Act 1956.

³⁰Department, above n 27 (although dated 3 July 1991, the Department hand-delivered the instructions to the Parliamentary Counsel Office on 5 July 1991 after the Minister of Justice had an opportunity to consider them); Letter from Department of Justice to Minister of Justice (3 July 1991).

recovery, the CIR Bill would include a provision that would require a person submitting a draft petition to the Clerk to pay an unspecified fee. The purpose of the fee was to cover the costs of the Clerk, the Government Statistician, and the Chief Registrar of Electors, and to deter frivolous petitions. The Department also asked the Minister if it could provide copies of the drafting instructions to the Clerk of the House, the Chief Electoral Officer, and the Chief Registrar of Electors to facilitate further consultation.³¹

The Minister gave his approval to these matters, including the transmission of the CIR Bill drafting instructions to the Parliamentary Counsel Office with a priority G introduction rating. The rating meant that the CIR Bill was on the legislative program for 1991, but would be introduced near the end of the year, if at all.³²

The further consultation also slowed down the drafting of the CIR Bill. The Chief Electoral Officer and the Chief Registrar of Electors responded by the end of July 1991.³³ The Clerk responded by the end of August 1991.³⁴ They raised a series of minor technical issues, which the Department had little incentive to resolve before the end of November 1991.³⁵ Although the Prime Minister had advised National Party members on 1 August 1991 that the National Government would be introducing the CIR Bill in the next few months,³⁶ the Minister of Justice sanctioned the CIR Bill's delay on 18 August 1991 when he announced that pressure on the parliamentary timetable required deferral of the CIR Bill's introduction until 1992.³⁷

As a consequence of the National Government's legislative activity, the Parliamentary Counsel Office did not produce a preliminary draft of the CIR Bill until 8 November 1991.³⁸ At this time, as a matter of course, the Parliamentary Counsel Office sent copies of the draft CIR Bill to the Department of Justice's Bill of Rights Team and the

³¹Department to Minister, above n 30.

³²Above (the Minister noted his approval on the letter sent to him by the Department).

³³See Letter from Chief Electoral Officer to Secretary of Justice (29 July 1991); Notes of Meeting with Chief Registrar of Electors, LEG 27-1-9 (30 July 1991).

³⁴See Letter from the Office of the Clerk of the House of Representatives to Secretary of Justice (30 August 1991).

³⁵See Note regarding responses, LEG 27-1-9 (undated) (setting a deadline of 29 November 1991).

³⁶Letter from Jim Bolger, Prime Minister, to National Party Member (1 August 1991) (containing *The National Government in Office - Promises and Performance: An Update on the Progress Made by the Government in Implementing Its Manifesto Commitments* (31 July 1991) (reiterating the National Government's promise to "[e]stablish a procedure whereby non-binding referenda can be held on any issue that attains the signatures of 10 percent of eligible voters on a petition seeking such a referendum" and stating that "[l]egislation is currently being drafted to give effect to this commitment and will be introduced to Parliament in the next few months").

³⁷S Collins "Government Reviews Referendum" *The Dominion*, Wellington, New Zealand, 19 August 1991.

³⁸See CIR Bill, PCO 115/P (8 November 1991).

Treasury for analysis. On 22 November 1991, Treasury objected to the CIR Bill's appropriation clause, which read:³⁹

All expenses incidental to the holding of an indicative referendum under this Act shall be paid out of public money without further appropriation than this section.

Treasury wanted to rewrite the appropriation clause as follows:⁴⁰

All expenses incidental to the holding of an indicative referendum under this Act shall be met out of public money appropriated by Parliament.

The former clause provided for a permanent legislative appropriation for citizens initiated referendums. The latter required Parliament to decide how much to appropriate for each citizens initiated referendum.

On 26 November 1991, the Department of Justice advised the Minister of Justice that a permanent legislative appropriation would remove the option of preventing a citizens initiated referendum by simply refusing to provide the necessary funding. The Department, however, also informed the Minister that it would prevent the government of the day from exercising direct control over the cost of a citizens-initiated referendum, which was now estimated to be \$12,380,000 (including GST) per referendum. The Minister directed the Department to retain the permanent legislative appropriation clause.⁴¹

The draft CIR Bill also survived the Bill of Rights Team's scrutiny unchanged. Initially the Team determined that clauses 9-12, 13, 39, 40, and 51 of the draft Bill prima facie infringed the freedom of expression guaranteed under section 14 of the Bill of Rights Act 1990. However, it concluded on 28 November 1991 that each infringement was justifiable under section 5 of the Act, which obviated the necessity of redrafting the clauses.⁴² The Crown Law Office, which reviews bills produced by the Department of Justice for compliance with the Bill of Rights, did not post any objections either.⁴³

³⁹Fax from Treasury to Department of Justice (22 November 1991); see also Letter from Department of Justice to Minister of Justice (26 November 1991)

⁴⁰Department, above n 39.

⁴¹Above (the Minister of Justice noted his instructions on the letter sent to him by the Department of Justice; his exact words were "leave bill as is").

⁴²Minute Sheet, CIR Bill - Bill of Rights Vetting, 2420Y, LEG 7-5-27 (28 November 1991); see also section 14 Bill of Rights Act 1990. Clauses 9-12, 13, 39, 40, and 51 of the draft CIR Bill were numbered 8-11, 12, 41, 42, and 53 in the CIR Bill 1992 (PCO 11/P).

⁴³The Crown Law Office orally advised the Department of Justice a few days before the introduction of the CIR Bill that it had reached the same conclusion. See Fax from Department of Justice to Chief Parliamentary Counsel (4 March 1992).

D Cabinet Legislation Committee's Decisions

At the Minister's direction, the Department of Justice prepared a paper asking the Cabinet Legislation Committee (CLC) to submit the CIR Bill to Cabinet.⁴⁴ The paper reached the CLC on 4 December 1991,⁴⁵ after the Treasury delayed its completion by haggling over the expression of its comment on appropriation.⁴⁶ In the paper, the Minister of Justice recommended that the CIR Bill be introduced no later than 19 December 1991 and passed no later than 31 May 1992.⁴⁷

On 5 December 1991, the CLC met to consider the paper.⁴⁸ During the meeting, the Clerk of the House argued that the House, not the Clerk, should determine the wording of referendum questions. He also argued that the House, not the Prime Minister via advice to the Governor-General, should determine the date of referendums.⁴⁹ The Minister of Justice opposed these recommendations on the grounds that future governments could use these requirements to delay referendums. However, he informed the Clerk that he was prepared to accept the Electoral Law Select Committee's decisions on these matters and invited the Clerk to present his concerns to the Select Committee.⁵⁰

The CLC approved submission of the CIR Bill to Cabinet while taking into account the concerns of the Clerk and the Treasury. It gave the Clerk authority to make a submission to the Select Committee on the points he had raised. It assuaged Treasury's concerns by adjusting clause 59 of the draft CIR Bill to state more clearly that the Governor-General would have the power of "prescribing fees for the purposes of the Act." However, the CLC did not endorse the Minister's timetable. Instead, it "agreed that the draft Bill should be introduced as soon as possible."⁵¹

E Cabinet's Decisions

Cabinet was less generous. On 9 December 1991, it "deferred consideration of the CIR Bill until 1992."⁵² The Department of Justice recorded two ostensible reasons for the delay: 1) the legislative timetable was too tight; and 2) the necessity of having to work with the Clerk to resolve his concerns. However, the Department noted that the

⁴⁴See Draft Cabinet Legislation Committee Paper re CIR Bill, LEG 27-1-9 (2 December 1991).

⁴⁵File Note, CLC, LEG 27-1-9 (5 December 1991).

⁴⁶See Fax from Treasury to Department of Justice (2 December 1991).

⁴⁷*Cabinet Legislation Committee*, LEG (91) 160 (4 December 1991).

⁴⁸File Note, above n 45; *Cabinet Legislation Committee*, LEG (91) M 36/3 (5 December 1991).

⁴⁹File Note, above n 45; Draft, above n 44.

⁵⁰File Note, above n 45.

⁵¹*Cabinet Legislation Committee*, above n 47. Compare clause 59 CIR Bill, PCO 115/3 (4 December 1991) with clause 59 CIR Bill 1992.

⁵²*Cabinet*, CAB (91) M 51/15 (9 December 1991).

real reason was political: the National Government simply did "not want these sorts of referenda right now."⁵³

As late as 4 March 1992, the Minister of Justice was unable to ascertain when he would be able to introduce the CIR Bill.⁵⁴ A few days later, however, he was able to secure a place on the Parliamentary Order Paper for the introduction of the CIR Bill.⁵⁵ On 10 March 1992 at 3:40 pm, nearly 16 months after he began working on the National Party's election manifesto promise to institute a non-binding citizens initiated referendum system, the Minister rose in the House of Representatives to introduce the CIR Bill.⁵⁶

Prior to this date, the Department of Justice and the Parliamentary Counsel Office had refined the draft CIR Bill by incorporating the CLC's instructions, as endorsed by Cabinet, and a few minor technical changes.⁵⁷ By the time of its introduction, the CIR Bill provided for a non-binding system, without any significant subject matter limitations, which could be triggered by the signatures of 10 percent of eligible electors (approximately 232,000 electors). The Clerk would have the power to determine the wording of questions.⁵⁸ Despite the changes that were made, the CIR Bill captured the essence of the Caucus Committee's proposal.

II INTRODUCTION OF THE CIR BILL

The first reading debate was frank yet confused. It outlined the main features of the CIR Bill and the issues that it created. It also revealed the Labour Opposition's opposition to and the National Government's ambivalence toward direct democracy. The most cogent arguments against direct democracy actually came from the National Government's backbench. The debate left the Labour Opposition with the impression that the National Government did not support the Bill wholeheartedly.⁵⁹ In addition,

⁵³File Note, LEG 27-1-9 (10 December 1991).

⁵⁴"Referendum Trigger" *Waikato Times* Hamilton, New Zealand (4 March 1992); see also *Sharon Crosbie Show: Interview of Douglas Graham, Minister of Justice* (National Radio broadcast, 23 January 1992) (transcript on file at Department of Justice, LEG 27-1-9) ("Well, you will be aware, possibly that very shortly I'll be introducing the Citizens' Initiated Referendum Bill, ...").

⁵⁵See Parliamentary Order Paper (10 March 1992).

⁵⁶NZPD, vol 522, 6703 (10 March 1992).

⁵⁷Compare CIR Bill, PCO 115/3 (4 December 1991) with CIR Bill, PCO 115/4 (5 December 1991); compare CIR Bill, PCO 115/4 (5 December 1991) with CIR Bill 1992; see also Letter from Department of Statistics to Department of Justice (16 December 1991) (confirming that the draft CIR Bill's signature verification clauses captured the Department of Statistics formula, but that the formula did not provide for the case of duplicate signatures or the case of fraudulent signatures); Fax from Department of Justice to Department of Statistics (10 March 1992) (advising the Department of Statistics that the Department of Justice would attend to the points raised by its letter of 16 December 1992 while the CIR Bill was before the Electoral Law Select Committee).

⁵⁸See generally CIR Bill 1992.

⁵⁹See eg NZPD, above n 56, 6720 (Hilt), 6721 (Cullen).

those debating the Bill often made points by relying on examples taken out of context or by ignoring the distinctions between the various forms of direct democracy. For example, excesses correctly associated with government controlled referendums were wrongly attributed to citizens initiated referendums.⁶⁰

A *National Government*

The Minister of Justice, McCully, Chris Fletcher, Robert Anderson, and Tony Ryall spoke for the National Government. Each emphasised that the CIR Bill fulfilled the National Party's 1990 election manifesto promise to introduce a non-binding system of direct democracy.⁶¹ The ploy appears to have been designed to recover some of the political capital lost in the National Government's failure to honour its pledge to repeal the Fourth Labour Government's superannuation surtax. Anderson went so far as to boast that the National Government had kept more and broken fewer promises than any government in recent history and challenged the Labour Opposition to dredge up a broken promise other than superannuation.⁶²

With the exception of Ryall, they also argued that the CIR Bill was a complementary and progressive measure which would improve New Zealand's democratic tradition.⁶³ It would give the electors a greater say on issues of national importance during the parliamentary term.⁶⁴ It would also keep the electors in greater touch with Parliament and the government between elections,⁶⁵ and give them greater power to act as a check and balance on the executive.⁶⁶ According to Fletcher, the National Party believed that a healthy democracy is one in which participation by the largest number of people is to be encouraged. She pointed out that the demand for citizens initiated referendums stemmed from the feelings of powerlessness and distrust resulting from the Fourth Labour Government's asset sales.⁶⁷

The Minister of Justice rejected Burke's theory of representation,⁶⁸ which was embraced by David Lange during the debate.⁶⁹ He argued that accepting the

⁶⁰See eg NZPD, above n 56, 6722 (Cullen) (relying on the example of Napoleon's self-serving use of government controlled referendums to argue that questions in citizens initiated referendums could be biased).

⁶¹NZPD, above n 56, 6703 (Graham), 6709 (McCully), 6712, 6713 (Fletcher), 6716 (Anderson), 6720 (Ryall).

⁶²NZPD, above n 56, 6716.

⁶³NZPD, above n 56, 6724 (Graham), 6713 (Fletcher).

⁶⁴NZPD, above n 56, 6703 (Graham), 6717 (Anderson), 6713 (Fletcher).

⁶⁵NZPD, above n 56, 6717 (Anderson), 6723 (Graham).

⁶⁶NZPD, above n 56, 6709 (McCully).

⁶⁷Above (Fletcher).

⁶⁸NZPD, above n 56, 6723. For a discussion of Burke's theory of representation, see section III.B.2(d) in chapter two.

⁶⁹NZPD, above n 56, 6706.

proposition that Parliament has the right to govern without interference or comment from the electorate, whether formal or informal, did not account for issues that arise during the life of Parliament, or for the reality that the electors may support a candidate, but not his or her party's policies, or that they may like some policies, but dislike others.⁷⁰

In addition, the Minister of Justice provided the only explanation for the 10 percent signature threshold. He argued that it would weed out vexatious referendums, reduce the cost of referendums by limiting their number, and enhance the credibility of results by establishing broad-base support at the start of the referendum process.⁷¹ Both Anderson and Ryall acknowledged the Labour Opposition's criticism of the involvement of the Clerk of the House,⁷² but it failed to accept Anderson's invitation to provide an alternative. Anderson also deflected the Labour Opposition's argument that referendums are costly by pointing out that most forms of democracy and democratic reform are costly.⁷³

In the course of the debate, McCully stated that direct democracy is not without its flaws.⁷⁴ Ryall used his speaking time to enumerate its perceived shortcomings. He argued that it can be hijacked by special interest groups with money or by politicians eager to score political points.⁷⁵ He pointed out that over the past 12 months Mike Moore, then Leader of the Labour Opposition, had abused the parliamentary petition process by presenting more petitions to the House of Representatives than anyone else in history, all at the taxpayers' expense. He also argued that the Swiss experience has shown that direct democracy separates issues from parties, which produces governments which do not stand for anything.⁷⁶ In addition, given the accessibility of parliamentarians and their continuous interest in and sensitivity to public opinion, he questioned the need for direct democracy.⁷⁷ Despite his criticisms, Ryall attributed the Labour Opposition's hostility to the CIR Bill to its fear that the electorate would use the CIR Bill to its disadvantage, that is, pass a measure that would limit the number of terms that MPs could serve and abolish their pensions, as had been done in California with Proposition 140.⁷⁸

⁷⁰NZPD, above n 56, 6723.

⁷¹NZPD, above n 56, 6705.

⁷²NZPD, above n 56, 6716 (Anderson), 6720 (Ryall).

⁷³NZPD, above n 56, 6716, 6717.

⁷⁴NZPD, above n 56, 6709.

⁷⁵NZPD, above n 56, 6719, 6720.

⁷⁶NZPD, above n 56, 6719.

⁷⁷NZPD, above n 56, 6720.

⁷⁸NZPD, above n 56, 6721. For a discussion of Proposition 140, see section II.A.1 in chapter six.

B *Labour Opposition*

David Lange, David Caygill, Jonathan Hunt, George Hawkins, and Michael Cullen spoke for the Opposition. Aware of the CIR Bill's origins, they accused the National Government of insincerity, electioneering, and fraud. Cullen described the CIR Bill as "an ill-thought-out piece of political flummery" that was the product "an ill-thought-out piece of electioneering before the election."⁷⁹ He, along with Lange and Hawkins, predicted that it would not satisfy the demand that led to National Party's manifesto promise.⁸⁰ Lange and Cullen both argued that the CIR Bill would create conflict between the electors and a government unwilling to act on their opinion.⁸¹ Cullen also argued that rejecting a referendum result could engender a feeling of betrayal, which would invite contempt of Parliament.⁸²

Lange also reminded the Minister of Justice that the Prime Minister opposed direct democracy.⁸³ In addition, both he and Hawkins insisted that the Minister of Justice did not really support it either.⁸⁴ The Labour Opposition tried to prove the National Government's hypocrisy by arguing that the CIR Bill created an insurmountable obstacle course.⁸⁵ Caygill stated that the signature threshold was high enough to question whether the exercise was worth pursuing.⁸⁶ Cullen pointed out that the CIR Bill did not define the nature of the sample to be taken to check the validity of the signatures, a failing which would create arguments about whether the threshold had been properly met.⁸⁷ He also argued that requiring promoters to supply all the forms for the petitions would present a tremendous barrier to small groups without money.⁸⁸ Lange warned that the undetermined application fee could be set high enough to eliminate potential applicants.⁸⁹

Lange and Hunt also argued that the CIR Bill was an illusionary reform. It would be disappointing because it would not affect the practices of the House or the political parties.⁹⁰ It did not resolve the real problem of political parties making election

⁷⁹NZPD, above n 56, 6721.

⁸⁰NZPD, above n 56, 6708 (Lange), 6718 (Hawkins), 6721 (Cullen).

⁸¹NZPD, above n 56, 6708 (Lange), 6723 (Cullen).

⁸²NZPD, above n 56, 6723. Given the factors which gave rise to the call for direct democracy, Cullen's point was ironic.

⁸³NZPD, above n 56, 6706.

⁸⁴NZPD, above n 56, 6706 (Lange), 6719 (Hawkins).

⁸⁵NZPD, above n 56, 6707, 6709 (Lange).

⁸⁶NZPD, above n 56, 6712.

⁸⁷NZPD, above n 56, 6723.

⁸⁸NZPD, above n 56, 6722.

⁸⁹NZPD, above n 56, 6707, 6709.

⁹⁰NZPD, above n 56, 6708 (Lange).

promises that they do not keep.⁹¹ According to Lange, the democratic process would be unchanged, which would make the CIR Bill "a fraud on the community."⁹²

The Labour Opposition also argued that most issues are too complex to be resolved by referendum.⁹³ Cullen stated that framing a question in a way that allows only one of two answers rules out the consideration of an enormous number of issues.⁹⁴ Caygill reasoned that it would allow skewed questions. For example, a group could run a referendum on penal punishment that gave a choice between hanging and flogging.⁹⁵ The result would not indicate whether either option enjoyed popular support. Cullen also noted that questions can be biased.⁹⁶ Hunt, using abortion as an example, doubted that the Clerk of the House could frame questions which were fair to both sides.⁹⁷

In addition, Lange and Hunt embraced Burke's theory of representation. Lange argued that a government should be allowed to govern until it fails to command a parliamentary majority or is turfed out at a general election. In his view, indicative referendums are destructive of government authority; the implementation of an election manifesto or program should not be frustrated by initiatives.⁹⁸ Hunt admitted that he had never polled his electorate and stated that he probably never will. He argued that his only obligation to the electorate was to vote on the issues without abstaining. His record was open for judgement at election, which was to be expected in a democracy. If his constituents did not like his decisions, they could vote him out of office. He opposed the CIR Bill because it would upset this system of accountability.⁹⁹ However, Hawkins softened this stance by arguing that the "government is answerable to the people at all times."¹⁰⁰

The Labour Opposition also criticised the CIR Bill for placing a raft of novel obligations on the Clerk of the House.¹⁰¹ Caygill argued that requiring the Clerk to determine the questions for referendums would draw the Clerk into the political arena in an unprecedented manner.¹⁰² Cullen predicted that it would politicise the Office of the Clerk.¹⁰³ In addition, the Labour Opposition faulted the CIR Bill's advertising

⁹¹NZPD, above n 56, 6716 (Hunt), 6719 (Hawkins).

⁹²NZPD, above n 56, 6707, 6708.

⁹³NZPD, above n 56, 6706 (Lange), 6712 (Caygill), 6715, 6716 (Hunt), 6721 (Cullen).

⁹⁴NZPD, above n 56, 6721.

⁹⁵NZPD, above n 56, 6712.

⁹⁶NZPD, above n 56, 6722.

⁹⁷NZPD, above n 56, 6716.

⁹⁸NZPD, above n 56, 6706.

⁹⁹NZPD, above n 56, 6715.

¹⁰⁰NZPD, above n 56, 6718.

¹⁰¹NZPD, above n 56, 6707 (Lange), 6712 (Caygill).

¹⁰²NZPD, above n 56, 6712.

¹⁰³NZPD, above n 56, 6722.

restrictions as unenforceable.¹⁰⁴ Lange argued that any amount could be spent; third parties, ostensibly working independently, could circumvent the \$50,000 limit placed on individuals or those working in conjunction with others.¹⁰⁵

Lange, Hunt, and Hawkins also reminded parliamentarians that the Royal Commission on the Electoral System was firmly against the idea of citizens initiated referendums.¹⁰⁶ Lange and Hawkins pointed out that referendums attract lower turnouts than general elections.¹⁰⁷ Hawkins also suggested that the CIR Bill would give some people an opportunity to manipulate public opinion, which he characterised as easy.¹⁰⁸ Hunt implied that promoters would flood New Zealand with referendums designed to reduce taxes.¹⁰⁹ In addition, Lange criticised the delaying mechanisms built into the CIR Bill because they would allow the marshalling of all referendums into one election.¹¹⁰

C Common Ground

Despite their differences, the National Government and the Labour Opposition agreed that the system should be non-binding.¹¹¹ Those participating in the debate provided the following reasons: 1) some issues, like national security, foreign affairs, and fiscal policy, must always remain the responsibility of the government of the day because only it has all the information necessary to make a decision;¹¹² 2) it provides a safeguard for minority rights, particularly in cases with low turnouts and narrow majorities;¹¹³ 3) the National Party's election manifesto promised it would be non-

¹⁰⁴NZPD, above n 56, 6712 (Caygill).

¹⁰⁵NZPD, above n 56, 6709.

¹⁰⁶NZPD, above n 56, 6707 (Lange), 6715 (Hunt), 6719 (Hawkins). The Australians also noted that the CIR Bill was contrary to the Royal Commission's recommendations. "Developments" (1992) 3 Public L R 127.

¹⁰⁷NZPD, above n 56, 6709 (Lange), 6718 (Hawkins).

¹⁰⁸NZPD, above n 56, 6718.

¹⁰⁹Above. Hunt incorrectly claimed that every proposition in the United States concerns the reduction of taxation. See generally eg D Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984); G Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies Ltd, St Leonards, 1987); T Cronin *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, Cambridge, 1989).

¹¹⁰NZPD, above n 56, 6721.

¹¹¹NZPD, above n 56, 6723.

¹¹²NZPD, above n 56, 6704 (Graham).

¹¹³NZPD, above n 56, 6704, 6705 (Graham), 6714 (Fletcher), 6720 (Ryall), 6706, 6707 (Lange), 6723 (Cullen). The Minister of Justice argued that under a binding system low turnouts with narrow majorities could permit a small percentage of the electors to impose their will, which would risk the oppression of minority groups. NZPD, above n 56, 6704, 6705. Cullen argued: "It is utterly wrong to have binding referendums because the House at times stands to protect minorities against majorities. Democracy is not just about the majority ruling; it is also about the protection of minorities, and binding referenda are a very dangerous mechanism for destroying the rights of minorities. NZPD, above n 56, 6723. Both Lange and Hunt argued that direct democracy in Switzerland prevented women from getting the vote in national elections until 1971 (but they did not mention that giving women the

binding;¹¹⁴ 4) it avoided the necessity, and complex problem, of developing subject matter limitations;¹¹⁵ 5) changes to the parliamentary system of representative democracy should be made carefully, cautiously, and deliberately;¹¹⁶ 6) the moral force of a non-binding referendum result would be enormous and overpowering;¹¹⁷ 7) it would protect the silent majority against a vocal minority, especially well-organised or well-financed minority;¹¹⁸ 8) there is no need to regain control of the legislature from powerful moneyed interests;¹¹⁹ 9) it is a compromise; 10) a government should be allowed to govern without interference until it fails to command a parliamentary majority or is voted out of office at a general election;¹²⁰ 11) a binding system would take the process of lawmaking away from legislators and result in an incoherent and chaotic body of law;¹²¹ and 12) the example of history and of other countries indicates that a binding system would be unwise and would force the government of the day to change the legislation in the years to come.¹²²

However, the National Government left open the possibility of a binding system. The Minister of Justice noted that none of the speakers wanted a binding system *at this time*.¹²³ He stated that the National Government would review the CIR Bill in 5 years, at which time making referendums binding may be appropriate.¹²⁴ Anderson echoed the Minister's sentiments; however, he suggested a 10 year period.¹²⁵ McCully invited those who wanted a binding system to run a referendum to demonstrate public support for their position.¹²⁶ These comments were undoubtedly intended to assuage those who were advocating a binding system.

right to vote in national elections necessitated a constitutionally required referendum). NZPD, above n 56, 6707, 6715. Lange also argued that worthwhile reforms, like the abolishment of capital punishment or the decriminalisation of homosexuality, would not have occurred if put to a referendum. NZPD, above n 56, 6707.

¹¹⁴NZPD, above n 56, 6710 (McCully), 6720 (Ryall).

¹¹⁵NZPD, above n 56, 6710 (McCully), 6720 (Ryall).

¹¹⁶NZPD, above n 56, 6710 (McCully), 6714 (Fletcher), 6717 (Anderson). They argued that the CIR Bill was a cautious first step toward greater public participation. Above.

¹¹⁷NZPD, above n 56, 6710 (McCully), 6717 (Anderson), 6724 (Graham).

¹¹⁸NZPD, above n 56, 6717 (Anderson), 6720 (Ryall). Fletcher argued that it would allow common sense to deal with the problem of frivolous and vexatious petitions. NZPD, above n 56, 6714.

¹¹⁹NZPD, above n 56, 6720 (Ryall).

¹²⁰NZPD, above n 56, 6706 (Lange).

¹²¹NZPD, above n 56, 6711, 6712. To suggest that the California legal system is chaotic is erroneous. The error is compounded by suggesting that the complex interplay between federal and state laws in California is chaotic because of binding referendums, particularly as the vast majority of the successful referendums in California have been sponsored by the California State Government. See generally chapter six.

¹²²NZPD, above n 56, 6717 (Hunt).

¹²³NZPD, above n 56, 6723.

¹²⁴NZPD, above n 56, 6705.

¹²⁵NZPD, above n 56, 6717.

¹²⁶NZPD, above n 56, 6710.

In addition, both Lange and Anderson suggested that a non-binding system would present many of the difficulties inherent in a binding system. Lange argued that indicative referendums were destructive of government authority.¹²⁷ Anderson explained why:¹²⁸

Any government that does not recognise a clear mandate from the people would be foolish to ignore the message that comes from the public

In his view, both parties would implement a referendum result backed by an overwhelming majority.¹²⁹ The Minister of Justice acknowledged this point by stating:¹³⁰

If the Government allows the people to have a say, and a large number of people support the proposition, the Government will have to go out of its way to persuade the public why its wish is not being adopted. If the Government cannot do that it will fail.

However, the Minister viewed this as a virtue rather than as a vice. Lange, who had anticipated this argument, rationalised the Minister's stance by arguing that the National Government had no intention of giving effect to any result which it found objectionable.¹³¹

In spite of its objections, the Labour Opposition decided to let the CIR Bill go to the Electoral Law Select Committee without forcing a division. Both Lange and Hunt felt that the Bill involved issues on which people should make submissions.¹³² However, Lange also hoped it would result in a replay of the debacle Bolger experienced in trying to remove direct democracy from the agenda of the National Party Annual National Conference in 1990.¹³³ Cullen stressed that the Labour Opposition's decision could not be interpreted as support for the CIR Bill.¹³⁴

¹²⁷NZPD, above n 56, 6706.

¹²⁸NZPD, above n 56, 6717. Hawkins argued that having to respond to some referendum issues would cause all sorts of problems for a government. NZPD, above n 56, 6719.

¹²⁹NZPD, above n 56, 6717 (Anderson). However, Anderson defined "majority" in terms of registered electors, not just those taking part in the referendum. Above. This point was debated and rejected in the context of the proportional representation debate. Peter Shirtcliff, the Chief Executive Officer of Telecom and Head of the Campaign for Better Government organisation, had asked the Electoral Law Select Committee to amend the Electoral Reform Bill so that proportional representation could only become law if a majority of registered electors approved it, rather than just a simple majority of those who voted. The Select Committee rejected Shirtcliff's proposal as undemocratic. Caygill argued that it would effectively give those who did not vote a vote against proportional representation. The so-called Shirtcliff amendment also failed to win support when the Electoral Reform Bill reached the Committee of the whole House.

¹³⁰NZPD, above n 56, 6724.

¹³¹NZPD, above n 56, 6708 (Lange) (stating: "We are throwing out to the waiting dogs a crumb of hope, and when they find it they will be tranquillised by it, because the Government will not take any notice of what the public seems to prefer").

¹³²NZPD, above n 56, 6708 (Lange), 6714 (Hunt).

¹³³NZPD, above n 56, 6708. See sections II.B.2(e) and II.B.2(f) in chapter seven.

¹³⁴NZPD, above n 56, 6721.

D Media Response

The New Zealand Press Association (NZPA) produced a widely published account of the CIR Bill's first reading debate.¹³⁵ It reported, without challenge, the concerns that Caygill and Hunt had raised regarding the wording of referendum questions. It also briefly mentioned Lange's observation that the National Government reluctantly supported the CIR Bill. However, it focused on two main issues: 1) the CIR Bill's non-binding nature; and 2) its 10 percent signature threshold requirement.

Although the NZPA referred to the CIR Bill's non-binding nature as a "catch," it did not offer one argument against it. Instead it paraphrased the main arguments for a non-binding system: 1) it was promised in National Party's election manifesto; 2) some issues, particularly national security, foreign policy, and fiscal policy, should remain the responsibility of the government because only it has all the information necessary to make a decision; 3) it obviated the necessity of devising subject matter limitations; and 4) it offset the risk that minority groups would be oppressed by results based on low turnouts with small majorities.

The NZPA also defended the 10 percent signature trigger threshold. However, it offered a justification that did not arise during the first reading debate. The NZPA suggested that the 232,000 odd signature requirement was reasonable because it fell

¹³⁵ See eg "Bill Backs Referenda: But Gov't Will Insist on Veto Clause" *Daily News*, New Zealand, 11 March 1992; "Referendum Draft Holds Catch" *Daily Post*, New Zealand, 11 March 1992; "Bill Allows Petitions to Force Referendums" *The Evening Post*, Wellington, New Zealand, 11 March 1992; "Petitions May Force Polls" *Nelson Evening Mail*, Nelson, New Zealand, 11 March 1992; "Bill to Allow Referenda Introduced" *Timaru Herald*, Timaru, New Zealand, 11 March 1992; "Giving Us a Say in a Way" *Waikato Times*, Hamilton, New Zealand, 11 March 1992. For additional syndicated commentary in the same vein, see M Munro "The Voice of the People May Not Be Powerful" *The Dominion*, Wellington, New Zealand, 16 March 1992; M Munro "Non-binding Vote Cooked Up" *The Waikato Times*, Hamilton, New Zealand, 16 March 1992; M Munro "MPs Lock Horns with Dilemma" *The Timaru Herald*, Timaru, New Zealand, 16 March 1992. See also J Armstrong "Government Grapples with Another Promise" *New Zealand Herald*, Auckland, New Zealand, 14 March 1992. Other reports simply covered the highlights of the debate and concentrated on the CIR Bill's procedural aspects, particularly the power given to the House to delay a citizens initiated referendum for up to 24 months if 75 percent of all MPs agree. However, as a point of departure, they highlighted the National Government's intention to review the legislation in five years time to consider whether to move to a binding system. See eg M Munro "Referendum Bill Introduced - With Several Conditions" *The Dominion*, Wellington, New Zealand, 11 March 1992; "Government Introduces Referendum Bill" *The Press*, Christchurch, New Zealand, 11 March 1992; P Luke "Gov't Not Bound by Outcome of Polls" *The Press*, Christchurch, New Zealand, 11 March 1992, 6; A Stone "Gov't Can Ignore Citizens' Referendum" *New Zealand Herald*, Auckland, New Zealand, 11 March 1992. One reporter quipped that the way things were going the first to use the CIR Act would be the National Government's own backbench and some of its Ministers. J Clifton "Referendums to the Rescue" *The Dominion*, Wellington, New Zealand, 11 March 1992.

"well within the range of big petitions in recent years."¹³⁶ After citing some of the largest parliamentary petitions, it mentioned the 181,551 signatures that then New Labour Leader Jim Anderton had collected for his petition asking the National Government to resign. Although the NZPA did not report the fact, Anderton had collected the signatures in five months.¹³⁷ Anderton inadvertently lent more support to the NZPA's 'ease-of-collection' theory when he declared that he had gathered the signatures by "trundling around the electorates and quite without any mass institutional support."¹³⁸

The NZPA's argument, however, was flawed in two respects. First, it did not acknowledge that collecting signatures from registered electors would be more difficult than collecting signatures from anyone regardless of their status, which is typically the case with parliamentary petitions. Anderton, for example, stated that every single person who passed him in Bluff had signed his petition.¹³⁹ Second, petitioners would have to collect substantially more than the minimum number of required signatures to compensate for the margin of error that any sampling technique used to verify the signatures would produce. A certain percentage of electors who were registered when they signed a petition would not be registered by the time their signatures were checked.¹⁴⁰

The leading editorials gave the CIR Bill a mixed reception.¹⁴¹ The *New Zealand Herald*, the *Timaru Herald*, and the *Waikato Times* welcomed it as a means of reducing the likelihood that politicians would continue to ignore public opinion as they have, which would place some constraints on executive power. The *Daily Post*, the *Gisborne Herald*, the *Evening Post*, the *Dominion*, and the *Press* opposed it for a variety of reasons: 1) it would be a costly exercise that would only create the illusion of greater participation; 2) it was the product of an ill-judged election promise; 3)

¹³⁶The NZPA cited the petitions regarding the Homosexual Law Reform Bill (817,000 signatures), the Maruia Declaration (337,000), and the Campaign for Nuclear Disarmament (333,052). See NZPA articles, above n 135.

¹³⁷Anderton launched his petition on 9 August 1991. "Election Petition" *The Dominion*, Wellington, New Zealand, 10 August 1991. He closed his petition drive on 30 November 1991. See D Dawson "Elderly Voice Criticism" *The Dominion*, Wellington, New Zealand, 25 November 1991, 3.

¹³⁸J Anderton "Reflections on Referendums" in A Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University of Wellington, Wellington, 1992) 88.

¹³⁹Above.

¹⁴⁰The inverse is unlikely as prudent petitioners would generally ask those who sign their petitions whether they are registered to vote, which is the practice in California.

¹⁴¹"Referendum Bill a Futile Exercise" *Daily Post*, New Zealand, 11 March 1992; "Two Cheers for Polls" *New Zealand Herald*, Auckland, New Zealand, 12 March 1992; "Referendums an Extra Communication Line" *Waikato Times*, 13 March 1992; "Risks of Referendums" *The Press*, Christchurch, New Zealand, 14 March 1992; "A Say for the Public" *Timaru Herald*, Timaru, New Zealand, 16 March 1992; "An Illusion of Participation" *The Dominion*, Wellington, New Zealand, 17 March 1992; "More Common Sense and There Would Be No Need for Referenda" *Gisborne Herald*, Gisborne, New Zealand, 17 March 1992; "Referendums Bill a Hollow Gesture" *The Evening Post*, 18 March 1992.

referendums are blunt and crude devices; 4) MPs are elected to govern and to represent the public and to make decisions for its betterment, not reflect its opinion;¹⁴² and 5) the triennial election remains the best option to curb executive power, especially if politicians stick to their word.¹⁴³

However, they all agreed, for the reasons articulated in the first reading debate, that citizens initiated referendums should be non-binding. Although some stated that the 10 percent signature threshold was high, none objected to it.¹⁴⁴ They also agreed that the CIR Bill was produced in response to voter frustration with broken promises and the implementation of policies that had no mandate because they were not signalled in a government's election manifesto. In their view, support for direct democracy would have been virtually non-existent if political parties had honoured their election manifestos.

In addition, the editorials revealed the irony inherent in the CIR Bill's introduction. The *Evening Post* suggested that the CIR Bill proved that the formal lines of communications between electors and the elected had broken down. The *New Zealand Herald* reached the opposite conclusion, arguing that it showed that the system was responsive. The *Press* declared that it would make government less responsive by increasing reliance on referendums, which would be contrary to the aims of those the CIR Bill was meant to placate. It would also increase the influence of "pressure groups, . . . morals police, and behavioural gauleiters" by giving them a platform for their "propaganda campaigns."¹⁴⁵

¹⁴²The *Timaru Herald* and the *Waikato Times* also agreed that once a government was elected, the electors had to invest some faith in its representatives and leave them to implement policy unless certain conditions were met. According to the *Timaru Herald*, referendums can be a legitimate addendum to Westminster democracy, but they cannot be a substitute for it. See above editorials note 141.

¹⁴³For additional commentary in the same vein, see B Rudman "Stone Age Way of Conducting a Poll" *The Sunday Star*, New Zealand, 15 March 1992.

¹⁴⁴The *New Zealand Herald*, without judging the matter, stated that the trigger was high. However, the *Waikato Times* viewed it as acceptable. In addition, the *Gisborne Herald* argued that obtaining signatures from 10 percent of the electorate would not be difficult if emotions were running high. The *Press* declared that most referendums would be on contentious issues. The *New Zealand Herald* noted that few contentious issues lend themselves to simple questions and open and shut answers, or give precise answers. The *Press* predicted that contentious issues would be re-litigated every five years, as the CIR Bill prohibited referendums on the same subject within five years of each other. See above editorials note 141. Despite the difficulty of narrowing a question down to a yes/no answer, the Minister of Justice said he would be surprised if someone did not have a referendum up and running within the next five years. He predicted that the subject would involve a moral choice, like the death penalty, abortion, or homosexuality. Radio Pacific News (Radio Pacific radio broadcast transcript, 11 March 1992). Little did he realise that the Royal New Zealand Society for the Prevention of Cruelty to Animals would be the first to use the device to seek an end to battery egg production. See section IV in chapter nine.

¹⁴⁵The *Press*, above n 141. The reaction of the direct democracy groups to the CIR Bill was the same as their reaction to the National Party's election manifesto promise. For a discussion of their reaction to the promise, see section II.B.5 in chapter seven. For discussions of their reaction to the Bill, see eg "Referenda Bill 'Flawed'" *The Press*, Christchurch, New Zealand, 16 March 1992 (National Reform labelled the Bill as fatally flawed because of its non-binding nature and high trigger signature trigger);

III THE SELECT COMMITTEE

On the heels of this media response, the Electoral Law Select Committee began its consideration of the CIR Bill. The Select Committee system is often touted as a parliamentary innovation that has increased public participation in the legislative process.¹⁴⁶ However, Rusk, on the basis of his considerable experience within the National Party, has characterised the process in a less charitable light:¹⁴⁷

It's a bit of a play that's put on to let the public think it is actually participating in the process. Generally speaking the government of the day goes ahead and does what it intended.

His assessment was both apt and prophetic regarding the CIR Bill.¹⁴⁸

Murray McCully, who was a key player in the formation of the National Government's CIR proposal, chaired the Electoral Law Select Committee. He had also weathered the National Party's Annual National Conference direct democracy debacle in 1990. In short, he knew what to expect. Although the direct democracy

D Blanshard "MPs Reject Criticism of Bill" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 16 March 1992 (Voters Voice criticised the Bill for its non-binding nature and high signature trigger); D Blanshard "Nats Call for Binding Referendums" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 18 March 1992 (National Party Tauranga electorate organisation criticised the Bill for its non-binding nature and promised that it would submit a remit for a binding system to the Waikato divisional conference in May); D Blanshard "'Facts' Challenge Put Up on Referendums" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 20 March 1992 (National Reform challenged the Minister of Justice to prove that direct democracy has been used to oppress minorities). Anderson and Peters indicated that the CIR Bill was a positive starting point for reform and that critics should appreciate the huge step being taken. Peters, while stating that he pushed for a five percent signature threshold, noted that others were pushing for a 15 percent signature threshold. The 10 percent compromise, in his view, would not present the hurdle some claim. "MPs Reject", above. Grant Thomas, the MP for Hamilton West, came out in favour of a binding system of direct democracy. G Thomas "Public's Wish Must Wash" *Waikato Times*, Hamilton, New Zealand, 14 March 1992 (citing Walker for the proposition that there is not one recorded instance of direct democracy devices being used to oppress minorities). Colin Clark, Chairman of the Electoral Reform Coalition (ERC) stated that referendums had a place, but he doubted that the CIR Bill would achieve anything because it was non-binding. He also stated that referendums carried the risk of becoming vehicles for well-funded groups seeking to impose restrictive laws. A Stone "Poll Worth Questioned" *New Zealand Herald*, Auckland, New Zealand, 12 March 1992. Steve Withers, Secretary of the ERC, stated that the ERC did not see any incompatibility between direct democracy and proportional representation. However, he argued that if New Zealand had a binding system of direct democracy, the need for a more representative Parliament would be greater to protect minority interests. The ERC deliberately chose not to take a stand for or against direct democracy for practical reasons: All of its members supported mixed member proportional representation (MMP), but some strongly opposed direct democracy and some strongly supported it. To avoid splitting the ERC over a secondary issue, it chose to focus exclusively on MMP. The inverse occurred in the direct democracy groups: all supported direct democracy, but their membership was split regarding MMP. Letter from the ERC to Mark Gobbi (11 May 1991).

¹⁴⁶See W Iles "New Zealand Experience of Parliamentary Scrutiny of Legislation" (1991) 12 Statute L Rev 165, 169-170, 178; J Burrows and P Joseph "Parliamentary Law Making (1990) NZLJ 306.

¹⁴⁷Letter from Merv Rusk to Mark Gobbi (15 August 1991).

¹⁴⁸Compare CIR Act 1993 with CIR Bill 1992 (PCO 11/P).

advocates had managed to put aside their differences long enough to present a united front, McCully's position worked to their disadvantage. In both their written and oral submissions they argued for a binding system with a lower signature threshold. However, McCully used his procedural powers to employ a rush and delay strategy which undermined their focussed approach. In effect, he vanquished any hope that Lange entertained for a replay of the 1990 debacle.

A *Written Submissions*

A few weeks after the 10 March 1992 introduction of the CIR Bill, the Select Committee quietly called for public submissions on the CIR Bill. It set 30 April 1992 as the deadline.¹⁴⁹ The low key request for submissions combined with a five week deadline all but ensured that Select Committee hearings would not invite many newcomers to the direct democracy debate or inspire additional support for direct democracy.¹⁵⁰ Few individuals or organisations unfamiliar with the issues raised by the CIR Bill would have had the opportunity or the resources to prepare persuasive submissions under these conditions.¹⁵¹

Nevertheless, the CIR Bill generated 66 written submissions, most of which came from the main direct democracy advocates.¹⁵² Thirty-eight groups and 28 individuals, including the Clerk of the House and one quasi-governmental committee, the Legislative Advisory Committee, made submissions. Eight were in the form of petitions which, taken together, carried 1,636 supporting signatures. The main direct democracy groups produced 21 submissions: six came from divisions of the CCC, five from various incarnations of Voters' Voice, three from superannuitant organisations, two each from the ONZF and National Reform, and one each from the NZCM, the Democrats, and FAIR. Five submissions also came from officials within the National Party, all of whom were members of National Reform. Most of the

¹⁴⁹See eg Parliamentary Order Paper (28 April 1992).

¹⁵⁰A five week deadline is typical. Iles, above n 146, 169. However, this period is often inadequate. See Burrows, above n 146.

¹⁵¹See Burrows, above n 146.

¹⁵²The Department of Justice counted 59 written submissions. Department of Justice *CIR Bill: Report of the Department of Justice: Part A* (17 August 1992). The Office of the Clerk counted 58 written submission and 4 organised campaigns. Office of the Clerk *CIR Bill: Submissions Summary Report* (28 May 1992); see also Office of the Clerk *CIR Bill: Clausal Analysis of Submissions* (undated). However, the Department's 59th submission and the Clerk's 4 responses were actually a collection of 8 petitions which contained enough variation as to be counted individually. Office of the Clerk *CIR Bill: Campaign Letters/Forms* (28 May 1992). See also Submissions on the CIR Bill to the Electoral Law Select Committee (1992). According to officials at the Department of Justice, the number of submissions for the CIR Bill was above average.

individual submissions also came from people involved with or influenced by one of the main direct democracy groups.¹⁵³

Fifty-seven of these submissions expressed support for direct democracy. One expressed qualified support, while five expressed no view. Three rejected the CIR Bill because they were opposed to direct democracy in principle. Fifty-four opposed the CIR Bill because of its form. Nine did not express a view. Forty-nine submissions stated that citizens initiated referendums should be binding, however, six of these called for special majorities. Two stated that a binding system should be entrenched. Two expressly supported a non-binding system. Five argued that the CIR Bill, given its non-binding nature, was misnamed; they suggested that it should be called the "Public Opinion," "Indicative Referenda," "Government Indicative Poll," or "Public or Citizens Preference Survey" Bill.

Forty-five of the submissions complained that the signature trigger level was far too high. Thirty-six argued for a trigger between two to three percent of registered electors or 50,000 signatures, of which three suggested that signatures of 100,000 electors would be appropriate for constitutional issues. Four suggested five percent or 100,000, while one suggested 80,000. Four did not express an alternative. In correlation with a lower trigger, fourteen of the submissions argued that the time frame for the citizens initiative referendum process could be and should be shortened.

The expenditure limits that the CIR Bill imposed on advertising referendum campaigns also came under criticism. Five submissions argued that they were too low, while two argued that they were unnecessary. Another four considered them unenforceable. As a related point, most of the submissions viewed the language of the Bill as unclear. This inspired a host of suggested technical changes. One submission went so far as to submit a complete rewrite of the CIR Bill to the Select Committee for its consideration.

The requirement that the Clerk of the House must determine the precise referendum question also proved contentious. Seven submissions argued that the question should be in the exact form proposed by its promoter. Two argued that the precise question should be framed by an independent commission and one suggested that independent lawyers should frame the precise question. The Clerk recommended that this responsibility be given to the Speaker of the House.

¹⁵³This appears to be a consequence of National Reform's submission strategy. See note 309 in chapter seven.

The submissions also took issue with the unstated fee. Three stated that it should be \$200. Two said it should not be a barrier to participation. However, one argued that the fee should recover part of the cost of certification, which would be significant. In addition, three submissions addressed the topic of voter information pamphlets. They suggested that the CIR Bill should contain provisions requiring the government to supply them to the electors to ensure their access to balanced information.

Some of the submissions also considered the issue of minority rights. Four argued that citizens initiated referendums could be used to express popular prejudices, curb programs for the disadvantaged, or enforce cultural dominance.¹⁵⁴ Two of these were particularly concerned about protecting Maori Treaty rights against the rule of the majority. However, three submissions pointed out the absence of any documented evidence demonstrating that citizens initiated referendums have been used to oppress minority rights.¹⁵⁵ On a related topic, three submissions applauded the absence of subject matter limitations, while four suggested the following limitations: the budget as a whole, human rights, foreign affairs, internal security, and defence (unless it concerned a decision to rejoin ANZUS, or to join an international organisation, or the multilateral unification of law).

The submissions also raised a number of general criticisms against the CIR Bill. Eleven called it a farce. Seven opposed it because it gave control over the process to the government of the day. Six argued that it would be costly, of which one suggested that an opinion poll would be cheaper. Three thought it created too many hurdles to be useful. Three believed that the CIR Bill was drafted hastily without proper consultation with interested groups. Two viewed it as a glorified opinion poll. One stated that the National Government had not provided any justification for it. One argued that it would not make politicians more responsive while one suggested it would make them less responsive. One warned that it would fragment a government's policy direction. However, another argued that its uselessness in curbing executive power would increase the disillusionment of the electorate.

¹⁵⁴Submission from the Auckland Lesbian & Gay Lawyers Group to the Electoral Law Select Committee, 7W (undated); Submission from Joint Methodist - Presbyterian Public Questions Committee to the Electoral Law Select Committee, 44W (29 April 1992); Submission from Catholic Commission for Justice, Peace and Development to the Electoral Law Select Committee, 46 (30 April 1992); Submission from New Zealand Aids Foundation to the Electoral Law Select Committee, 57W (11 May 1992).

¹⁵⁵Submission from Michael Taylor to the Electoral Law Select Committee, 4 (undated); Submission from National Party, Otumoetai Branch of the Tauranga Electorate to the Electoral Law Select Committee (Mike Houlding, Chairperson), 13W (April 1992); Submission from National Party, Taranaki Electorate (Bruce Knowles, Chairperson) to the Electoral Law Select Committee, 18 (undated). The principal author of each of these submissions was a member of National Reform.

This irony also ran through the submissions of those who expressly opposed direct democracy. The New Zealand Aids Foundation and the Auckland Lesbian & Gay Lawyers Group both argued that the CIR Bill would enable small groups with ultra-right agendas to exert a disproportionate influence on the policy making process by playing on the fears and prejudices of the population at large.¹⁵⁶ However, the New Zealand Employers Federation came out against the CIR Bill because rejection of a crucial aspect of a government's economic policy would undermine its overall economic program because a government would be morally obliged to implement the wishes of a majority.¹⁵⁷

These groups expressed the fear that direct democracy would work against their interests. One submission suggested that these fears were baseless by pointing out that experience with binding direct democracy devices has shown that they are electorally neutral, that is, they favour neither the right nor the left.¹⁵⁸ The Department of Justice had come to the same conclusion.¹⁵⁹ The majority of the remaining comments concerned technical changes to the CIR Bill which would accommodate the concerns raised in the submissions or would give life to a particular system of direct democracy.

B Oral Submissions

The Clerks servicing the Electoral Law Select Committee completed their summary of the written submissions on 28 May 1992, four weeks after the submission deadline.¹⁶⁰ Upon receiving their report, McCully instructed them to inform all interested parties that he had selected 10 June 1992 as the date to begin consideration of the oral submissions.¹⁶¹ Thirty-one of the groups or individuals making submissions indicated that they wanted to appear before the Select Committee to argue their case; however, only 15 had the resources or the flexibility to comply with the Select Committee's Wednesday morning meeting schedule.¹⁶²

¹⁵⁶Lawyers Groups, above n 154; Aids Foundation, above n 154.

¹⁵⁷Submission from the New Zealand Employers Federation to the Electoral Law Select Committee, 53 (April 1992).

¹⁵⁸Otumoetai Branch, above n 155.

¹⁵⁹*Justice, Part A*, above n 152; see also Magleby, above n 109, 190-191; Cronin, above n 109, 200-201.

¹⁶⁰See *Summary*, above n 152.

¹⁶¹In the interim, the Department of Justice provided the Select Committee members with a summary of the CIR Bill for their consideration. Department of Justice *CIR Bill: Briefing Paper* (3 June 1992).

¹⁶²See generally Submissions, above n 152.

1 First day of hearings

McCully decided that the main direct democracy groups should appear together on the first day of the hearings.¹⁶³ He also scheduled the appearance of several opponents of direct democracy, which were positioned first, third, and eighth out of ten submissions. He set aside 3.5 hours to hear them; however, approximately 40 minutes of this time was dedicated to administrative matters, which left the submissioners standing in the hall for the first 30 minutes of the scheduled hearing time. The effect was fourfold: it unsettled further those advocates who were appearing before a select committee for the first time; it diverted the advocates from their planned arguments to a paraphrase of them given a shortage of time; it contrasted their arguments and style with the opponents of direct democracy; and, it revealed inconsistencies in their arguments.

McCully's absence also worked to the disadvantage of the direct democracy advocates. When they finally came before the Select Committee they were disappointed to discover that Marie Hasler, a first-term parliamentarian, would be chairing the proceedings. By scheduling a hearing which he could or would not attend, McCully had deprived the direct democracy advocates of their only opportunity to understand fully the National Government's opposition to their proposals, which reduced their chances of assuaging its concerns.

Paradoxically, all of the submissioners spoke against the CIR Bill. The advocates of direct democracy denounced it as insufficient, while its opponents rejected it as unnecessary, dangerous, or contrary to the recommendations of the Royal Commission. The Select Committee rarely engaged the opponents, preferring to note their concerns and to thank them for their contributions. However, it pursued a confrontational line with the advocates, which was encouraged by their predisposition and manner during the hearings. Most of the opponents were expensively-dressed, extremely courteous, and selectively-informed professionals who appear regularly before select committees as part of their work. Most of the advocates were inexpensively-dressed, slightly contemptuous, and well-informed amateurs who were personally financing their first appearance before a select committee.

Both sides were articulate. However, the advocates tended to belabour their views and to undermine their case by overselling the virtues of direct democracy.¹⁶⁴ In

¹⁶³M Gobbi, Electoral Law Select Committee Proceedings Notes (10 June 1992).

¹⁶⁴For example, several of the advocates, particularly FAIR and the CCC tried to argue that the economic success of Switzerland was attributable to direct democracy. Ryall repeatedly rejected this claim by arguing that it could not be proven as the success could be attributed to any number of other factors. Above.

addition, the Select Committee was predisposed against their arguments. The National Government MPs were not prepared to reconsider any of the policy decisions underlying the CIR Bill. One Select Committee member, Tony Ryall, the National Party MP for East Cape, was openly hostile. During the hearings he challenged the assertions of the advocates but left unquestioned similarly insupportable statements made by their opponents. The Labour Opposition had declared its animosity toward the CIR Bill during its first reading.

The National Council of Women began the hearings. It opposed the CIR Bill for three reasons: 1) women would not benefit from it because they do not constitute an organised interest group that could effectively counteract moneyed opponents using the mechanism against their interests;¹⁶⁵ 2) it promised something it could not deliver; and 3) governments were elected to govern. The NCW also argued that the CIR Bill was contrary to the principles of consultation.¹⁶⁶ It concluded that it would never support a binding system because special interests would be too influential.¹⁶⁷ However, the NCW noted its growing alarm regarding the widespread belief that governments were not sufficiently responsive to the wishes of the people.¹⁶⁸ As a result, it declared that it was exploring other ways to make government more responsive.¹⁶⁹

FAIR began with the inference that New Zealand could avoid its destiny as a third world country if it adopted a binding system of direct democracy. Sensing the futility of this argument, FAIR shifted its attention to the CIR Bill's primary failing: a non-binding system would not restore trust in the political process because it would be

¹⁶⁵It is paradoxical that a national organisation for women would claim that women do not constitute an organised interest group or that they lack the sophistication to do battle with moneyed interests.

¹⁶⁶The NCW stated that it used a canvas system, where due weight is given to size/group of comment, to determine its position; it tries to reflect membership opinion/feeling by using open questions to obtain qualitative data. Notes, above n 163.

¹⁶⁷The League of Women Voters of California reached a different conclusion in its study of the California system of direct democracy: "Direct Legislation was an idea whose time had come in California in 1911. Despite the criticisms and concerns that process is attracting, it does not appear to be an idea whose time has passed." League of Women Voters of California *Initiative and Referendum in California: A Legacy Lost? A Study of Direct Legislation in California from Progressive Hopes to Present Reality* (League of Women Voters of California, Sacramento, 1984 reprint 1987) 74. In addition, the Women's Division of the Federated Farmers of New Zealand stated that the CIR Bill had very little value and no real justification if there was no obligation on the government of the day to take further action. Submission from the Women's Division Federated Farmers of New Zealand to the Electoral Law Select Committee, 49W (April 1992).

¹⁶⁸Submission from the National Council of Women to the Electoral Law Select Committee, 15 (undated).

¹⁶⁹Jocelyn Keith and Anne Holden represented the NCW; they spoke for 10 minutes; the exchange was polite. Notes, above n 163.

perceived as an attempt to deceive the public. FAIR argued that the electors should have the right to decide, just like shareholders in a public company.¹⁷⁰

The Committee members, however, were less interested in FAIR's arguments, than in its membership and constitutional structure. Due to its regular and well-organised letter writing campaigns and its monthly newsletters, they viewed FAIR as the leading non-party advocate of direct democracy. They wanted to know what it would cost in electoral support to resist its demand for a binding system of direct democracy. Although evasive at first, FAIR stated that its membership was national and consisted of 700 to 800 paid up supporters, and that it also enjoyed the support of other organisations. FAIR also informed them that it had a central committee made up of four people, whose sole objective was to establish direct democracy in New Zealand.¹⁷¹

The New Zealand Employers Federation (NZEf) followed FAIR with arguments against direct democracy as well as the CIR Bill. In its view, direct democracy would separate representatives from their responsibility to make decisions, oversimplify issues, obstruct representative government, upset the allocation of tax money, encourage regional politics at the expense of national interest,¹⁷² and produce inconsistent government policy. The NZEF argued that the CIR Bill should not proceed, because the process could easily be abused and badly affect business confidence.¹⁷³ In addition, people who sign petitions often do not realise the consequences of their action. However, if the CIR Bill did proceed,¹⁷⁴ it should be non-binding and should exempt monetary and fiscal policy or be limited to conscience issues.¹⁷⁵

¹⁷⁰FAIR also questioned the estimated cost figures for citizens initiated referendums (approximately \$8,500,000 excluding GST). According to FAIR, it costs Australia an estimated \$2,500,000 to run its constitutionally required referendums, which involve more people over a greater geographical area. FAIR could not believe that the National Government had spent \$15 million on the September 1992 referendum. It suggested that there should be more set referendum dates each year, with no limit on the number of referendums to keep costs down. National Reform also characterised the cost estimates as extravagant. It suggested that cost could be reduced by voting by mail or voting by computer. FAIR also argued that the system should be binding, and that the trigger level should be lower because the CIR Bill would place the device out of reach for those without money or large volunteer organisations. Above.

¹⁷¹Gilich represented FAIR. He spoke for 20 minutes; the exchange was confrontational and argumentative. Above; see also Submission from FAIR to the Electoral Law Select Committee, 21 (23 April 1992).

¹⁷²The NZEF cited the Auckland Harbour sale row as an example in which a national referendum might be used to settle a local issue. Notes, above n 163.

¹⁷³Submission from the New Zealand Employers Federation to the Electoral Law Select Committee, 53 (April 1992).

¹⁷⁴The NZEF's submission compelled Ryall to defend the CIR Bill; he avoided giving it his endorsement by noting that it fulfilled an election undertaking. Notes, above n 163.

¹⁷⁵John Pask and Barbara Burton represented the NZEF. They spoke for 5 minutes; their exchange was polite. Above. The submissions from the New Zealand Aids Foundation and the Auckland Lesbian and Gay Lawyers Group could also be read as opposing referendums on conscience issues, at least as

John Mann came out in favour of direct democracy. However, he considered the CIR Bill "totally unacceptable." If it remained in its current form, its name should be changed because it was misleading.¹⁷⁶ He also attacked cost as a grounds for objecting to direct democracy. It should be judged on whether it would improve democracy in New Zealand, which he was confident it would do. In his view, direct democracy would encourage MPs to consult the electorate regularly and reduce the delegation of authority to unelected representatives, the importation of foreign laws, and international control over New Zealand. It would also attract qualified people to government as it would have an anti-patronage affect. In addition, cost could be reduced in a number of ways. For example, fixed dates for referendums could be set or computer technology could be used.¹⁷⁷

National Reform argued that the system should be binding because the fundamental purpose of direct democracy was to countermand government action that lacked a mandate. In its view, a binding system would improve the representative system, slow down the legislative process, and promote responsible and accountable government. It would also give the electors the ability to decide issues for themselves, which they should have the right to do. In addition, National Reform pointed out that all of the systems in existence are binding and they work. It also argued that the CIR Bill was a failed and ill-informed attempt to appease those calling for direct democracy. In closing, National Reform asked the Select Committee members to take the issue more seriously and encouraged them to study Walker's work to acquire the necessary factual basis for their deliberations.¹⁷⁸

The National Party's Taranaki electorate organisation characterised the CIR Bill as an expensive vote of no confidence in the intelligence of the average New Zealander. It

they affected health policy and minority rights. See Submission from the New Zealand Aids Foundation to the Electoral Law Select Committee (undated); Submission from the Auckland Lesbian and Gay Lawyers Group to the Electoral Law Select Committee (11 May 1992).

¹⁷⁶Five submissions argued that the CIR Bill should be renamed to more accurately reflect its non-binding character. Submission from John Mann to the Electoral Law Select Committee, 9 (27 April 1992) (Indicative Referenda Bill); Submission from NZCM to the Electoral Law Select Committee, 14 (undated) (Government Indicative Poll Bill); Submission from FAIR to the Electoral Law Select Committee, 21 (23 April 1992) (Public Preference Survey Bill or Citizens' Preference Survey Bill); Submission from Rusk to the Electoral Law Select Committee, 28W (undated) (Indicative Referenda Bill or Public Opinion Referenda Bill); Submission from Andrew Webber to the Electoral Law Select Committee, 40W (undated) (Public Opinion Bill).

¹⁷⁷Fletcher responded by defending the CIR Bill on the grounds that it would increase accountability and encourage greater public participation. Mann spoke for 15 minutes; the exchange was polite. Notes, above n 163; see also Submission from John Mann to the Electoral Law Select Committee, 9, 9a (27 April 1992)

¹⁷⁸Knowles represented National Reform; he spoke for 30 minutes; his exchange was confrontational. Knowles described National Reform as a one-issue lobby within the National Party that had supported binding citizens initiated referendums for the last two to three years. Notes, above n 163; see also Submission from National Reform to the Electoral Law Select Committee, 34 (April 1992).

was designed to fail, which would further frustrate the electorate. The organisation also argued that laws are useless if people have no respect for them. Accordingly, giving people the power to ratify their laws will increase their respect for the law. In addition, a binding system would provide the means to combat broken promises and to found an enduring written constitution. Further, it was not an accident that those countries with direct democracy were the most wealthy, democratic, and stable in the world. People wanted to know that their opinion counts; the future of the nation should not be left in the hands of a few people.¹⁷⁹

Surprisingly, the CCC presented the best-reasoned case for a binding system of direct democracy. It would arrest the trend of governments acting without a mandate, make governments more accountable, increase government interest in public opinion, free MPs from the yoke of the party line, reduce the number of undecided voters, and give effect to the National Party's 1989 Annual National Conference remit.¹⁸⁰ As it stood, the CIR Bill would be a cumbersome, toothless, and expensive "Heylen Poll."¹⁸¹ In addition, no country that has direct democracy has considered abolishing it. It also does not deny legislative bodies their proper legislative function. Careful study of Walker's work would reveal that the CIR Bill's restrictions were designed to overcome non-existent problems. Ironically, however, the CCC's reputation as the organiser of the enormous petition against the Homosexual Law Reform Bill was more influential than its arguments. It had the effect of confirming the need to protect the rights of minorities; hence, a non-binding system.¹⁸²

The Legislative Advisory Committee (LAC) stated that it had not reached a view regarding the merits of having direct democracy, which was ironic since its purpose is to comment on the constitutional implications of legislation before the House of Representatives. Nevertheless, it drew the Select Committee's attention to the Royal Commission's arguments against it. These arguments, however, did not represent the views of the LAC as a whole. Instead, the LAC concentrated on technical issues and

¹⁷⁹Knowles, as well as Bruce McCready and Yan Quintus, represented the National Party's Taranaki electorate organisation. Knowles spoke for 18 minutes; his exchange was still confrontational, but less intense than his submission on behalf of National Reform. Notes, above n 163.

¹⁸⁰Ryall and the CCC also debated the issue of low voter turnout. Ryall asserted that low voter turnout, which is common to direct democracy system, was a problem. The CCC disagreed, stating the underlying democratic principle was first-past-the-post which was the basis for the existing electoral system; it was a question of democratic principle, not statistics. Fletcher told the CCC that MPs have generated the most parliamentary petitions through the practice of encouraging their constituents to reverse the letters they send out. Notes, above n 163.

¹⁸¹This position ran counter to the position taken by the NZEF, which opposed direct democracy, but stated that if the National Government should decide to proceed with the Bill it should be non-binding. Above.

¹⁸²Raymond Souza, along with Max Shierlaw, Brad Eatwell, and Chris Salt, represented the CCC. Souza spoke for 35 minutes; the exchange was spirited. Above; see also Submission from the Coalition of Concerned Citizens (National Executive) to the Electoral Law Select Committee, 43 (28 April 1992)

matters of clarity, of which the following were the most important: 1) the question should be framed in neutral and balanced terms; 2) the advertising limits should be better defined to enhance their enforceability; 3) the source of funding for referendum campaigns should be disclosed; and 4) the advertising restrictions should apply to broadcasting. The LAC also indicated that the advertising limits may be too low given the length of time it may take to bring about a referendum (as long as three and a half years).¹⁸³

The Select Committee approached the ONZF as it approached FAIR, inquiring into its membership and organisational structure. The ONZF responded that it had 3,000 to 4,000 members throughout the country, held regular annual general meetings and produced a newsletter. The general reaction of its constituency toward the CIR Bill was negative, as it was seen as a Clayton's bill. The ONZF argued that a binding system with a shorter process and a lower signature threshold would assist in counteracting the feeling of powerlessness that permeated the electorate. Since the electorate pays taxes, it should be entitled to a greater say. It would also make Parliament more accountable. In addition, the ONZF declared that a binding system of direct democracy would constitute the most important advance since women got the vote; therefore, it should encourage participation by breaking the monopoly that elected representatives have over the legislative process. However, the ONZF's primary objective of establishing one law for all New Zealanders turned out to be more influential than its arguments, given its obvious implications for Maoridom.¹⁸⁴

The Select Committee also asked the NZCM about its membership and organisation. It stated that it had no paid membership, but enjoyed the financial support of 300 people who subscribe to its newsletter. The NZCM also stated that it worked with the other groups, but preferred not to join them because it wanted to work in its own way. Unlike the other groups, the NZCM was bold enough to voice its concern that the Select Committee was biased against citizens initiated referendums. It supported a binding system of direct democracy because electors have no access to the political system between elections. In its view, the country was run between elections by a small number of Cabinet members relying on the party whip system. No matter how much people complain, they were not taken seriously. A binding system would

¹⁸³Mervyn Probine, Chairman of the LAC, represented the LAC. He spoke for 6 minutes; the exchange was polite. The Select Committee members made a special point to thank the LAC for a useful and constructive submission. Notes, above n 163; see also Submission from the Legislation Advisory Committee to the Electoral Law Select Committee, 27 (24 April 1992).

¹⁸⁴Wally Boyd and A Reid represented the ONZF. Boyd spoke for 33 minutes; the exchange was even-tempered. Notes, above n 163; see also Submission from the One New Zealand Foundation to the Electoral Law Select Committee, 27 (24 April 1992).

change this, which would restore the faith of the electorate. If MPs could trust electors to elect them, they could trust them in their use of the referendum.¹⁸⁵

Aside from its probing to assess the political clout of the direct democracy groups, the Select Committee only took issue with a small number of comments. Ryall disputed as unprovable the assertion, made by FAIR and the CCC, that direct democracy produced stability and prosperity. However, he also tried to soften the NZEF's criticisms by stating light-heartedly that the CIR Bill constituted fulfilment of a National Party election manifesto promise. Pete Hodgson, a Labour MP, fell into a pointless and erroneous debate with National Reform over the proper interpretation of California's Proposition 13. Fletcher responded to John Mann's comments by arguing that the CIR Bill would increase accountability and encourage greater public participation.¹⁸⁶

2 *Second day of hearings*

On 17 June 1992 the hearings resumed.¹⁸⁷ The Select Committee heard from the Clerk of the House and the New Zealand Law Society (NZLS). The Clerk argued that he should be involved in authenticating compliance with Bill because it created a procedure to petition the House. The Select Committee agreed. However, the Clerk also argued that the Speaker of the House should determine the precise question to be put to the voters in a proposed indicative referendum, not the Clerk. He feared that the responsibility would politicise his Office.¹⁸⁸

This suggestion ran counter to McCully's view that the Speaker would be inappropriate because he was usually a member of the government, which could give the impression of bias. The Office of the Clerk, which is politically neutral, would avoid that criticism yet keep the referendum process within Parliament. The Select Committee also noted that the Speaker did not want the responsibility. In addition, if it were given to the Speaker, he would delegate it to the Clerk. The Select Committee also came to the conclusion that giving the responsibility to a quango, as suggested by some of the submissions, would be impractical.¹⁸⁹ Dissatisfied with this decision, the Clerk chose to fight it. His opposition nearly scuttled the CIR Bill later in the legislative process.

¹⁸⁵Patricia Neagle and Brian Johnston represented the NZCM. Neagle spoke for 19 minutes; the exchange was straightforward. Notes, above n 163; see also Submission from the New Zealand Citizens Movement to the Electoral Law Select Committee, 14 (undated).

¹⁸⁶Notes, above n 163.

¹⁸⁷M Gobbi, Electoral Law Select Committee Proceedings Notes (17 June 1992).

¹⁸⁸Above; see also Submission from the Clerk of the House of Representatives to the Electoral Law Select Committee, 35 (April 1992).

¹⁸⁹Notes, above n 188.

The NZLS did not take a stand on the CIR Bill.¹⁹⁰ However, it did raise several constitutional concerns: 1) the CIR Bill should expressly preserve the status of the existing petition process; 2) the Select Committee should reconsider giving corporations the power to initiate referendums, especially given their resources;¹⁹¹ 3) the CIR Bill should have a deeming provision to protect signature verification determinations from being challenged in the courts; and 4) it was debatable whether Parliament could fetter its future actions regarding the delay of referendums with a 75 percent majority requirement.¹⁹² Given the procedural delays built into the CIR Bill, the NZLS suggested opinion polls instead. It also suggested that the CIR Bill might be better if it allowed for multiple choice referendums to permit a range of answers. In addition, it considered the sanctions in the CIR Bill to be unnecessary, which prompted members of the Select Committee to disagree. The NZLS concluded that the system should remain non-binding.¹⁹³

3 *Third day of hearings*

McCully chose 24 June 1992 to hear the balance of the oral submissions. Nicky Hager, an anti-nuclear campaigner, N R McLarin, the Pahiatua Christian Fellowship, the CCC (Eketahuna), M C F Oomen, and the Catholic Commission for Justice, Peace, and Development were scheduled to appear.¹⁹⁴ However, fog had grounded most of the committee members in Auckland, which forced McCully to reschedule the hearing. He chose 22 July 1993; however, N R McLarin and the CCC (Eketahuna) were unable to attend.¹⁹⁵ Hager reserved his views on direct democracy, but stated that if the CIR Bill were to become law, his organisation would use it to counter any moves by the National Government to repeal New Zealand's anti-nuclear laws. Both Oomen, who quoted from Bolger's 1989 Canterbury Politics Club speech on direct

¹⁹⁰ Above; see also Submission from the New Zealand Law Society to the Electoral Law Select Committee, 56 (6 May 1992). Ed Wylie, an NZLS Legislation Committee member from Christchurch, represented the NZLS. Notes, above n 188; see also "Citizens Initiated Referenda Bill" 375 *Law Talk* (20 July 1992) 6.

¹⁹¹ The Department of Justice argued that refusing to extend the right to corporations would not prevent them from using the device as they would simply use a front person. *Justice, Part A*, above n 152. In other words, expressly permitting corporations to use the device would promote transparency by encouraging them to take credit for their initiatives. However, corporations that wanted to distance themselves from an initiative they wanted to promote would still use a front person.

¹⁹² The NZLS argued that it is a constitutional principle that Parliament can override its enactments by a simple majority. However, it acknowledged that it was a matter of debate whether Parliament can fetter its future actions with legislative provisions that require special majorities. Notes, above n 188; see *Law Talk*, above n 190, 6.

¹⁹³ Notes, above n 188.

¹⁹⁴ M Gobbi, Electoral Law Select Committee Proceedings Notes (24 June 1992).

¹⁹⁵ M Gobbi, Electoral Law Select Committee Proceedings Notes (22 July 1992).

democracy, and the Pahiatua Christian Fellowship called for a binding system with a signature threshold of 50,000.¹⁹⁶

The Catholic Commission for Justice, Peace, and Development, which is a national Maori Catholic organisation, reminded the Select Committee that it had an obligation to ensure that the CIR Bill was consistent with the Treaty of Waitangi. It argued that the CIR Bill should include a mechanism for ensuring that the Maori Treaty partner is formally consulted on referendum issues so that its views can be ascertained. It also supported a non-binding system for two reasons: 1) there is always a danger that the views of the majority, if acted upon, may result in tyranny over the minority; and 2) the views of Maori may not be in accord with those of non-Maori, which would eliminate the possibility of reaching the consensus necessary to satisfy the partnership principle in the Treaty.¹⁹⁷

C Consideration and Deliberation

The written and oral submissions were overwhelmingly in favour of a binding system of direct democracy with a lower signature threshold. For the most part, the advocates focussed their attention on challenging the policy choices underlying the CIR Bill, which meant that they spent very little time discussing the merits of adopting a particular direct democracy device. Although the content of the CIR Bill influenced this orientation, the limited short-term strategy adopted by the main direct democracy groups at their Hamilton and Cambridge meetings also contributed to this course of action.¹⁹⁸

The opponents, however, focussed their attention on improving the CIR Bill technically, which they could afford to do given the CIR Bill's content. This approach also found favour with the National Government members of the Select Committee because it was constructive rather than confrontational. Ironically, despite the NZLS's glowing assessment of the influence of its submission,¹⁹⁹ the Select Committee adopted very few of the suggestions made by the CIR Bill's opponents. Although it discussed some of the drafting points raised by the LAC, the Select Committee only made a few changes, which were intended to meet several technical concerns raised subsequently by the Department of Justice.

This was not surprising given the National Government's apparent reluctance to proceed with the CIR Bill at all. The CIR Bill's history indicated that it was a simply

¹⁹⁶ Above.

¹⁹⁷ Above.

¹⁹⁸ For a discussion of these meetings, see section II.B.5(f) in chapter seven.

¹⁹⁹ See *Law Talk*, above n 190, 6.

a tool to defuse the direct democracy lobby within the National Party. Although the National Government fended off criticism from the CIR Bill's opponents, ostensibly to present it as a sensible compromise, it had not seriously considered enacting the CIR Bill at this stage. McCully delayed taking decisive action on the CIR Bill until 17 August 1993, some 13 months after hearings on the CIR Bill closed.²⁰⁰ McCully would later attribute the delay to the results of the 19 September 1992 referendum on proportional representation, which gave the Electoral Law Select Committee the difficult task of finalising the bill that would eventually become the Electoral Act 1993.²⁰¹ However, the circumstances surrounding the delay suggest that he hoped that support for direct democracy would diminish in time which would make it unnecessary to report the CIR Bill back to the House of Representatives or, in the least, that time would give him a favourable opportunity to report the CIR Bill back to the House in its original non-binding form.

1 Departmental report

McCully's delaying tactics were subtle, yet effective. First, on 29 July 1992, he asked the Department of Justice for a preliminary report summarising the main issues raised in the submissions and addressing the following issues: 1) the right of corporations to trigger referendums; 2) the review procedures in the Department regarding legislation and the Treaty of Waitangi; 3) a breakdown of the American direct democracy systems according to signature thresholds and their binding or non-binding nature; 4) the commercialisation of the referendum process overseas; 5) the role of interest groups, particularly big business, labour, special lobby groups (liquor, insurance) overseas; 6) the method by which conflicts among referendums on the same issues are resolved overseas; and 7) limitations regarding advertising overseas.²⁰²

He gave the Department a little more than two weeks to prepare the report. The Department was able to meet this seemingly unrealistic deadline; however, the effort diverted its resources away from its primary task of identifying and commenting upon the technical questions raised during the course of the submission process. In addition, the Department could not seriously analyse the CIR Bill in the light of the submissions until the Select Committee expressly confirmed that it would stand by the original policy decisions underlying the CIR Bill.²⁰³

²⁰⁰M Gobbi, Electoral Law Select Committee Proceedings Notes (17 August 1993).

²⁰¹NZPD, no 86, 17608, 19 August 1993.

²⁰²File Note, LRD: 12-1-3 (29 July 1992).

²⁰³*Justice, Part A*, above n 152.

The Department delivered its report on 17 August 1992, in time for the Select Committee's last meeting before the parliamentary recess, which was held on 19 August 1992.²⁰⁴ McCully, however, chose to wait until 16 September 1992 to advise the Department of the Select Committee's response. He stated that no one had second thoughts regarding the threshold requirement. Since the process was now estimated to cost approximately \$11,500,000,²⁰⁵ the threshold had to be high to deter frivolous referendums. He also stated that the system should remain non-binding for three reasons: 1) it was a government election manifesto commitment; 2) it obviated the necessity of formulating subject matter limitations; and 3) in jurisdictions like California, unlike New Zealand, minorities had the power to challenge referendum results that violated their constitutional rights in the courts. Accordingly, McCully asked the Department to prepare a clause by clause analysis of the CIR Bill in the light of the Select Committee's reaffirmation of policy decisions underlying the CIR Bill.²⁰⁶

2 *Clausal analysis*

The Department delivered its clausal analysis on 6 October 1992 as required.²⁰⁷ It made recommendations on 39 aspects of the CIR Bill, all of which were technical in nature. However, as McCully had anticipated, the Select Committee's work was overtaken by the results of the 19 September 1992 electoral system referendum. Ironically, the result nearly cost McCully his position as chairman of the Electoral Law Select Committee. Both the media and the public were intensely suspicious of the Select Committee's composition, particularly of McCully's role as chairman, as he was known to oppose change to the electoral system.²⁰⁸ The National Government gave some thought to a reshuffle, but in the end decided to stick with McCully.²⁰⁹

Due to the Select Committee's subsequent preoccupation with preparing legislation that would, once approved by the electors, establish a proportional representation electoral system, the Select Committee did not respond to the Department's clausal analysis of the CIR Bill until 31 March 1993.²¹⁰ In the interim, Cabinet saved the

²⁰⁴ Above; File Note, above n 202.

²⁰⁵ The Department of Justice calculated the cost to be \$9,760,000, then \$12,380,000 including GST. Secretary, above n 3; Department, above n 39. However, the administrative cost for the 19 September 1992 government controlled referendum on the electoral system was approximately \$11,500,000. The education campaign for this referendum cost around \$3,500,000.

²⁰⁶ M Gobbi, Electoral Law Select Committee Proceedings Notes (19 September 1992).

²⁰⁷ Department of Justice *CIR Bill: Report of the Department of Justice: Part B* (6 October 1992).

²⁰⁸ See eg "Welch's Week" *Listener & TV Times*, 17 October 1992, 36.

²⁰⁹ Aside from Jeff Grant, the Government whip, who took an active interest in the formulation of the new electoral legislation, no one else in the National Government seemed prepared to accept a position on the Electoral Law Select Committee.

²¹⁰ M Nixon, Electoral Law Select Committee Proceedings Notes (31 March 1993).

CIR Bill from being buried in the legislative onslaught typical of the third year of a first term government. It gave the CIR Bill a priority rating that was high enough to be allocated time in the House of Representatives during the 1993 legislative year. However, the CIR Bill was tentatively scheduled to come before the House toward the very end of the parliamentary term. Since the date for the dissolution of Parliament depended on the date that the National Government set the 1993 election, the CIR Bill was placed in grave danger of falling off the legislative agenda. The Department was unsure whether it would be reported back, let alone debated again in the House. Its passage was not guaranteed. Every circumstance that placed pressure on the legislative schedule would threaten its chances of being enacted.

Regarding the Department's causal analysis, the Select Committee made four specific decisions upon Caygill's initiative.²¹¹ First, it agreed to change the commencement date of the CIR Bill to 1 February 1993 from 1 July 1992. Second, it agreed to expand the usual *Gazette* notice provision to include newspapers that the Clerk considered necessary. Third, it agreed to change the voting results provisions to provide for electorate by electorate results. Fourth, it agreed to strike out a clause that dealt with the naming of persons found guilty of any irregularity in connection with a referendum.

3 *Drafting slip*

The Department immediately conveyed the Select Committee's decisions to Walter Iles, the Chief Parliamentary Counsel. However, Iles, who usually drafted the most important legislation himself, was swamped. The Department's instructions regarding the CIR Bill reached him during the most pressing stages of his work on the 'Companies Package', the Electoral Reform Bill, and the Electoral Amendment Bills. Given the significance of the CIR Bill, he chose not to delegate the work. As a result, Iles did not produce the required drafting slip until 1 August 1993.²¹²

After receiving a copy of the slip, officials from the Department met with Iles. They concluded that the CIR Bill should be checked against the Electoral Reform Bill to eliminate any inconsistencies. The Department responded on 2 August 1993 with a list of technical changes.²¹³ Iles produce a new slip on 3 August 1993.²¹⁴ The Department replied on the same day with another set of technical changes.²¹⁵ Iles

²¹¹Above; see also File Note, LRD: 12-1-3 (20 April 1993).

²¹²See CIR Bill Slip, PCO 11/P (1 August 1993).

²¹³See Fax from Department of Justice to Chief Parliamentary Counsel (2 August 1993).

²¹⁴See CIR Bill Slip, PCO 11/1 (3 August 1993).

²¹⁵Fax from Department of Justice to Chief Parliamentary Counsel (3 August 1993).

delivered a new slip on 4 August 1993.²¹⁶ The Department replied on the same day with an additional set of technical changes.²¹⁷ Iles responded with a new slip on 5 August 1993, which the Department accepted without further comment on 6 August 1993.²¹⁸ In addition to several new matters, the final drafting slip included most of the minor technical changes that the Department had outlined for the Select Committee in its 6 October 1992 clausal analysis.²¹⁹

4 *Consideration of the drafting slip*

The Select Committee met on 11 August 1993 to consider the drafting slip and Electoral Amendment Bill No. 3.²²⁰ It tentatively decided that the changes the slip would incorporate into the CIR Bill were acceptable. It scheduled 17 August 1993 as the date to deliberate on the CIR Bill, with a view toward having it in the House in the first week after the parliamentary recess. However, McCully outlined a new problem: the Clerk had informally renewed his opposition to being responsible for determining referendum questions. He had suggested two alternatives: 1) the Speaker; or 2) the soon to be created Electoral Commission. The Committee rejected the notion of giving the responsibility to the Electoral Commission, but would consider the Speaker if the Clerk was adamant in his opposition. McCully undertook to investigate the matter further and advise the Department whether the Speaker should be given the responsibility. He did not get back to the Department.

5 *Deliberation of the CIR Bill*

The Select Committee deliberated on the CIR Bill on 17 August 1993 for 10 minutes, after spending nearly 3 hours on the Electoral Amendment Bill No. 3.²²¹ The Department advised the Select Committee that the changes reflected the matters raised in its causal analysis of 6 October 1992 and the Select Committee's decisions on 31 March 1993. Caygill asked whether the CIR Bill had been changed to make it binding, which he hoped was not the case. McCully assured him that it was still non-binding. Although pleased by the response, Caygill stated that some members of the Labour Opposition viewed the Bill with total abhorrence. Ryall and Thorne replied that some members of the National Government held the same view.

²¹⁶See Fax from Department of Justice to Chief Parliamentary Counsel (3 August 1993).

²¹⁷Fax from Department of Justice to Chief Parliamentary Counsel (4 August 1993).

²¹⁸See CIR Bill Slip, PCO 11/3 (5 August 1993).

²¹⁹Compare CIR Bill Slip, above n 218, with *Justice, Part B*, above n 207.

²²⁰M Gobbi, Electoral Law Select Committee Proceedings Notes (11 August 1993).

²²¹M Gobbi, Electoral Law Select Committee Proceedings Notes (17 August 1993).

McCully stated that the only issue was whether the Clerk of the House should be the person who determines referendum questions. He stated that the National Government had formed the view that the Clerk should. Caygill stated that would put the Clerk in some difficulty, as it would require the exercise of some political judgment, as the wording of referendums can influence their outcome. However, Caygill, like other members of the Select Committee, reasoned that the job had to be done by either the Clerk or the Speaker. Although he indicated that the Clerk would be acceptable, he stated that he might argue for the Speaker if the matter reached the floor of the House. On the whole, the Select Committee was sympathetic to the Clerk's concern, partly in deference to the Clerk's crucial role in the smooth running of a government's legislative program. However, it formed the view that the House of Representatives should retain control of the citizens initiated referendum process and that the Clerk was the appropriate parliamentary officer for administering the process, including the determination of the precise question.²²²

McCully reiterated that he would like to report the CIR Bill back to the House, although he did not expect it to be debated until after the next parliamentary recess. He stated that he wanted to report it back now because a large number of people were interested in the CIR Bill, that is, hounding him with correspondence and phone calls.²²³ McCully's new-found sense of urgency seemed paradoxical, as delaying the CIR Bill appeared to play into his hands. The first casualties of the delay were Rusk and Peters. Neither attended any of the Select Committee hearings pertaining to the CIR Bill. Rusk had originally planned to make an oral submission, despite his opinion regarding its effectiveness.²²⁴ However, family tragedy and other personal concerns diverted his attention from the direct democracy debate throughout 1992.²²⁵ Peters, who had fought earlier for a binding system of direct democracy, found himself sinking deeper and deeper into a quagmire of political infighting, culminating in his departure from the National Party.²²⁶ At the same time, Peters began to focus

²²² Above; see also Letter from Department of Justice to Minister of Justice (10 September 1993).

²²³ Notes, above n 221.

²²⁴ Rusk, above n 147.

²²⁵ Telephone Interview with Merv Rusk (12 June 1993).

²²⁶ Peters fell out with the Government over the Ka Awatea Report regarding the future of Maoridom and the Quality Inns deal, which prompted the Prime Minister to sack him as the Minister of Maori Affairs. He then became embroiled in the Bank of New Zealand saga, which led to his ejection from the National Party's Caucus. Subsequently, he resigned from Parliament, which forced a by-election, which he won. He then created the New Zealand First Party to contest the 1993 general election. See eg I Templeton "Tauranga Clash as Forerunner to MMP Races" *The Sunday Star*, New Zealand, 31 January 1993; "Caucus Kicks Out Peters" *The Evening Post*, Wellington, New Zealand, 1 October 1992; B Edwards "Bolger Reaffirms Peters Sacking" *The Evening Post*, Wellington, New Zealand, 10 October 1991, 1; B Edwards "Public Inquiry into BNZ Ruled Out" *The Evening Post*, Wellington, New Zealand, 9 October 1992, 2; Editorial "Only One Way to Resolve BNZ Saga" *The Evening Post*, Wellington, New Zealand, 16 October 1992, 4; Editorial "Winston Peters, Bribes, and the BNZ" *The Evening Post*, Wellington, New Zealand, 5 June 1992, 4.

his attention on campaigning for the introduction of a proportional representation electoral system.²²⁷

Shortly after the hearings, FAIR and the NZCM virtually imploded. Gilich became increasingly engrossed in the turmoil unfolding in his home land, Croatia.²²⁸ As a consequence, both FAIR and the non-party direct democracy advocates lost an able and energetic leader. The NZCM, went out of existence as a consequence of Tait's efforts to coordinate the main direct democracy groups.²²⁹ According to Boyd, President of the ONZF, the attempt of the direct democracy groups to work together collapsed because the groups could not agree to disagree.²³⁰ According to Tait, however, an offshoot of Voter Voice, which was controlled by the National Party (mostly likely a reference to National Reform), tried to place all the groups under its direction. The main direct democracy groups soon realised that this attempt would subvert their intentions. Rather than regrouping, they decided to go their separate ways. The move split the NZCM, which ended its existence.²³¹ In addition, the ONZF's role in the direct democracy debate waned after Boyd stepped down as its president due to health concerns.²³²

However, several other factors offset these developments. First, both Voters Voice and National Reform continued to grow in strength and influence. At one point, they combined their efforts to establish direct democracy for use in Tauranga District Council matters in July 1992.²³³ Second, National Reform stepped up its campaign to win support for the legislative referendum. In March 1992 it launched a campaign to consolidate support for "binding citizens initiative referenda" by sending a well-documented "political reform" package to the executive policy committee of each National Party electorate organisation.²³⁴ By November 1992 it was systematically

²²⁷Telephone Interview with Mike Houlding (13 September 1993).

²²⁸Above; see also Letter from Leo Gilich, National Coordinator of FAIR, to Mark Gobbi (8 February 1992); Letter from Mike Houlding of National Reform to Mark Gobbi (30 June 1993).

²²⁹Letter from Clifford Tait to Mark Gobbi (29 July 1993).

²³⁰Letter from Wally Boyd to Mark Gobbi (26 August 1993). National Reform attributed the breakdown to two factors: 1) a difference in strategy; and 2) a degree of suspicion and hostility towards the National Party that produced acrimony and time wasting. Houlding, above n 228.

²³¹Tait, above n 229. Tait subsequently become a Hamilton City Councillor. He also stood as the Alliance Candidate for Hamilton West in the 1993 general election. The Alliance invited Tait to make recommendations on the subject of direct democracy; he also had plans to remain active in this regard. Above. This development was surprising because Anderton, then Leader of the Alliance, had taken a personal position against direct democracy. See Anderton, above n 138.

²³²Boyd, above n 230.

²³³See Letter from Bruce Knowles to the Minister of Justice (4 November 1992); Houlding, above n 228; Tauranga District Council *Your Choice: Citizens Initiated Referenda* (Local Body Elections, 1992). Subsequently, the Council has held two referendums under the system, one on chemical spraying for vegetation control and other on the fluoridation of water. Tauranga District Council, above.

²³⁴Letter from National Reform to Executive of Electorate Policy Committee (7 March 1992).

lobbying parliamentarians, particularly the Minister of Justice, whose Department had primary responsibility for the CIR Bill.²³⁵

Third, CS First Boston, in a September 1992 report commissioned by the Business Roundtable, came out in favour of National Reform's binding legislative referendum proposal. This bolstered its campaign, particularly as CS First Boston came out against proportional representation.²³⁶ National Reform distributed copies of the report to all parliamentarians and leading party officials.²³⁷ It also began to emphasise that its proposal was a more effective means than proportional representation to make the governmental system more accountable to the electors.²³⁸ In April 1993, Knowles, in his capacity as Chairman of the National Party's Taranaki electorate organisation, supplied each National Party electorate chairperson with a follow up package in support of its proposal, including the CS First Boston report.²³⁹ National Reform also began to establish links with Peter Shirtcliff's anti-proportional representation organisation, the Campaign for Better Government to suggest that its legislative referendum proposal would blunt the campaign for proportional representation.²⁴⁰

Fourth, when Rusk was ready to re-enter to fray, he was able to build on their work rather than have to make up for any lost momentum. His re-emergence was quiet, but effective. As the 1993 election drew nearer, which was expected to be a closely fought contest, National Party officials began to solicit funds from their moneyed electorate organisations to help finance campaign efforts in its marginal electorates. Due to its organisational structure and leadership, the Hobson electorate organisation happened to be one of those electorates that had raised money surplus to its requirements. When approached, Rusk, as chairman of the Hobson electorate organisation, indicated that his organisation would be more than willing to contribute to the campaign war-chest for the marginal electorates if the National Government was prepared to deliver on some of its 1990 election manifesto promises, including direct democracy.²⁴¹

²³⁵See eg Letter from Merv Rusk to Minister of Justice (29 November 1992); Knowles, above n 233.

²³⁶CS First Boston *An Analysis of Proposals for Constitutional Change in New Zealand* (1992). The report also supported non-binding citizens' initiatives and binding government controlled referendums on constitutional issues. However, it opposed binding citizens' initiatives. The Business Roundtable adopted these recommendations as its position, which was at odds with the position taken by the NZEF.

²³⁷See eg National Reform *Binding Citizens Initiated Referenda* (4 December 1992).

²³⁸See National Reform *The Principles of Direct Democracy and How it Works: Binding Citizens Initiated Referenda* (5 January 1993).

²³⁹Letter from Bruce Knowles, Chairman of National's Taranaki Electorate, to National Party Electorate Chairman (26 April 1993).

²⁴⁰Houlding, above n 228.

²⁴¹Interview, above n 225.

Together, these factors conspired against McCully. They prevented him from letting the CIR Bill die quietly in the Electoral Law Select Committee. He could not dismiss Rusk or National Reform like the main direct democracy groups because of their intimate connection with the National Party and the prominent role played by Rusk and the members of National Reform. Consequently, he had to report the CIR Bill back to the House before Parliament was dissolved for the 1993 general election. Nevertheless, McCully chalked up two important victories. First, he had managed to defuse the direct democracy debate to such an extent that the media had lost interest in it.²⁴² Second, he had preserved the National Government's non-binding proposal intact.²⁴³

Caygill agreed with McCully's report back plan after debating the scope of the regulation power set out in the CIR Bill.²⁴⁴ He suggested that the clause should be redrafted because it did not define the precise limits of the law-making power conferred by Parliament or the precise implications of its reference to the Electoral Act 1956 and its regulations. The Select Committee decided not to amend the clause, primarily because parliamentarians have shown an inherent predisposition toward tinkering with electoral law. In this area, members of the Select Committee concluded that flexibility was more desirable than complying with the policy of placing defined limits on the scope of delegated legislation. Accordingly, it approved the slip, the Bill as amended, and the decision to report the CIR Bill back to the House of Representatives.²⁴⁵

IV REPORT BACK

On 19 August 1993, McCully and Caygill presented the report of the Electoral Law Select Committee on the CIR Bill to the House of Representatives.²⁴⁶ McCully attributed the lengthy delay of the report to the "intervention of the Electoral Reform Bill." He also stated that the CIR Bill remained "substantially in the form in which it was referred to the Select Committee."²⁴⁷ However, he highlighted three issues, "which were the focus of most of the submissions."²⁴⁸

²⁴²See Letter from Merv Rusk to Mark Gobbi (September 1993).

²⁴³Compare CIR Bill 1992 (introduction version) with CIR Act 1993.

²⁴⁴Notes, above n 221.

²⁴⁵Above.

²⁴⁶NZPD, above n 201, 17608-17616. For media reports, see R Laugesen "Petitions May Soon Spark Referendums" *The Dominion*, Wellington, New Zealand, 20 August 1993; "Referenda Bill May Restore Esteem: Caygill" *Daily Telegraph*, New Zealand, 20 August 1993; "Referendum Bill Praised by MPs" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 20 August 1993; 2ZB Tonight Live: "Citizens Initiated Referenda" (2ZB radio Broadcast, 25 August 1993) (transcript on file at the Department of Justice, LRD: 12-1-3). Robin Harrison interviewed Tony Ryall, as a National MP in favour of the Bill, and Steve Maharey, as a Labour MP against the Bill. Above.

²⁴⁷NZPD, above n 201, 17608.

²⁴⁸NZPD, above n 201, 17609.

A *Key Points*

First, McCully mentioned that many of the submissioners believed that the system provided for in the CIR Bill should be binding. He acknowledged that "a fairly strong lobby group" held that view and revealed that correspondence to his office had been dominated by this group from time to time. However, he stated that the National Government members of the Select Committee felt obligated to honour the National Party's election manifesto promise for a non-binding system. He also stated that a non-binding system eliminated the technical difficulties involved in formulating subject matter limitations. He also stated that if the system proved successful, those who wanted a binding system could use it to "communicate their desire for that further change in due course."²⁴⁹

Second, McCully mentioned that the Select Committee had entertained requests to lower the signature trigger level. However, it kept the 10 percent threshold for three reasons: 1) no one had presented "a particularly cogent case for a lower threshold"; 2) the cost of referendums should only be incurred on the basis of the recommendation of a sizeable proportion of the electorate; and 3) it was not unduly onerous.²⁵⁰

Third, McCully mentioned that the Clerk of the House had some misgivings about being the officer in charge of determining referendum questions. He stated that the Select Committee was confident that he could carry out the responsibility. In addition, it could not find any one who was better placed or more able to do the job. He noted that the Select Committee had considered the Speaker, but felt that he was open to the suggestion of being involved in party politics as he was an elected member of the National Government. Nevertheless, he invited parliamentarians to explore other options.²⁵¹

In conclusion, he thanked the thousands of people who had corresponded with him on the matter. He also predicted that the CIR Bill would, over time, constitute "a very important addition to the democratic fabric" of New Zealand.²⁵²

Caygill agreed with McCully's assessment of the CIR Bill's importance.²⁵³ He also addressed the same three issues, but in a less detailed fashion. He was glad that the

²⁴⁹ Above.

²⁵⁰ Above.

²⁵¹ Above.

²⁵² NZPD, above n 201, 17610.

²⁵³ Above.

Select Committee had adopted a cautious approach by adopting a non-binding system with a significant threshold requirement. In addition, he stated that the Clerk's concerns required further thought. However, Caygill warned that the system proposed in the CIR Bill required maturity from New Zealanders. Rather than engendering healthy debate in which public opinion could be meaningfully tested, the CIR could be divisive and fruitless if special interest groups were able to command public funds to test their minority opinions against the wider public opinion.²⁵⁴

Caygill's remarks, however, were more notable for what he did not say. The tenor and content of his speech signalled that the Labour Opposition had backed away from the outright opposition it expressed toward the CIR Bill during its first reading.²⁵⁵ By the time the CIR Bill had reached its third reading, Caygill was virtually characterising it as a bi-partisan measure.²⁵⁶ The change of heart may have been due to the following factors: 1) the direct democracy lobby was large and politically significant, particularly given the inclusion of NZSF and the CCC; 2) an election was just a few months away; 3) voting against an apparent increase in public participation was acknowledged as being generally unpopular in a democracy; and 4) the system was non-binding and cumbersome, meaning it might deliver the semblance of direct democracy without diminishing a government's power.

Peters, reincarnated as the leader of the New Zealand First Party, tried to reposition himself as a champion of direct democracy despite his long absence from the debate. Essentially he tried to use the report back to embarrass the National Government by voicing the suspicions of the direct democracy groups.²⁵⁷ Peters argued that the National Government chose McCully to chair the Electoral Law Select Committee because of his opposition to electoral reform. He also argued that the CIR Bill should have been taken more seriously than it had been because it was of "very great significance to a great number of New Zealanders."²⁵⁸

However, his attack failed to attract media attention for two reasons. First, he made the mistake of spending the bulk of his speaking time criticising the well-established parliamentary convention of printing bills after they are reported back. Second, Jeff Grant, National Party MP for Awarua, who was a member of the Electoral Law Select Committee, informed the House that Peters had not attended any of the Select

²⁵⁴NZPD, above n 201, 17611.

²⁵⁵See above text accompanying notes 79-110.

²⁵⁶See below text accompanying note 279.

²⁵⁷NZPD, above n 201, 17611-17613.

²⁵⁸NZPD, above n 201, 17613.

Committee hearings on the CIR Bill, which discredited Peters' bid to style himself as an advocate of direct democracy.²⁵⁹

B Reaction of the Clerk of the House

The Clerk of the House was dissatisfied with the Select Committee's decision regarding his role in the CIR process. Accordingly, he lodged a formal request with the National Government on 7 September 1993 to amend the CIR Bill. In a letter addressed to the Speaker of the House, the Leader of the House, the Minister of Justice, and McCully, the Clerk requested the following amendments: 1) divest the Clerk of all responsibility for administering the CIR Bill by giving it to the soon-to-be-established Electoral Commission; and 2) change the mechanism from a petition to Parliament to an application to the Electoral Commission.²⁶⁰

The request resulted in a meeting between the Clerk, the Minister of Justice, and the Leader of the House. The Minister of Justice, in a spontaneous gesture of goodwill, told the Clerk that he would consider amending the legislation to accommodate the Clerk if there were no technical reasons for not doing so. The Minister asked the Department of Justice whether there were any technical barriers to the Clerk's requests. The Department responded that there were none, but that the request would require a number of amendments and deletions to the CIR Bill, which could jeopardise its passage given the time constraints. It also mentioned that the Clerk's request had changed substantially and that the Select Committee had already rejected the idea, which was raised in submissions, of giving a quango the responsibility of running the citizens initiated referendum process.²⁶¹

The Minister asked the Department to advise him of the implications of the Clerk's request. The Department did so in a letter delivered to the Minister on 13 September 1993.²⁶² After outlining the history of the Clerk's opposition to the CIR Bill, the Department noted that the Clerk's latest proposal went farther than his earlier ones. It went beyond the question of divesting the Clerk of the responsibility of determining the precise question. It would divest the Clerk of all responsibility for administering the referendum petition process.

²⁵⁹NNZPD, above n 201, 17615.

²⁶⁰Letter from the Clerk of the House of Representatives to the Speaker, the Leader of the House, the Minister of Justice, and the Minister of Customs (7 September 1993).

²⁶¹File Note, LRD: 12-1-3 (9 September 1993).

²⁶²Letter from the Department of Justice to the Minister of Justice (10 September 1993).

The Department also noted that the Clerk's proposal also ran counter to the objective of retaining parliamentary control over the citizens initiated referendum process.²⁶³ In addition, it was inconsistent with the Clerk's previous submission that authentication of compliance with the CIR Bill should rest with the Clerk.²⁶⁴ Given this argument, the Clerk's proposal could only be justified if the CIR Bill were amended to change the mechanism from a petition to Parliament to an application to the Electoral Commission.²⁶⁵

The Select Committee, however, had considered and rejected a similar proposal. A number of submissions on the Bill suggested that a quango should administer the CIR Bill. The Select Committee rejected this course of action as it would negate the centrality of Parliament. This was thought inappropriate for several reasons. Removing referendum petitions from the parliamentary process would detract from their status. It would undermine Parliament's status as a focal point for legislative change. It would increase the distance between petitioners and Parliament.²⁶⁶

The Department also argued that the Electoral Commission, as envisaged by the National Government was not the appropriate body to administer the citizens initiated referendum process. The responsibility would be incompatible with its functions and funding. The National Government intended it to be an advisory body that met occasionally to register political parties, to promote public awareness on electoral matters, and to report on electoral matters referred to it. It was not envisaged that it would have the staff and the logistical support required to administer the citizens initiated referendum process.²⁶⁷

In addition, the Clerk had previously indicated that the cost of administering the citizens initiated referendum process could be absorbed into his existing budget. The Electoral Commission, however, would require funding to take over administration of the citizens initiated referendum process. It would have to establish staff to receive and process referendum petitions, even if they were few and infrequent, to comply with the CIR Bill's timing provisions. It would also have to dedicate considerable resources to acquiring the expertise already in the possession of the Office of the Clerk.²⁶⁸

²⁶³ Above.

²⁶⁴ See above text accompanying note 188.

²⁶⁵ Department, above n 262.

²⁶⁶ Above.

²⁶⁷ Above.

²⁶⁸ Above.

Given these implications, the Department sought the Minister's direction to proceed with the CIR Bill as reported back.²⁶⁹ The Minister, however, did not reply, leaving the Department in the dark as to how he would proceed. The Department had already prepared and provided the Minister with his second reading speech, which he had approved. It did not signal any changes to the CIR Bill. In fact, it was designed to justify the CIR Bill in the form in which it had emerged from Select Committee.²⁷⁰

This uncertainty was compounded by the National Government's sudden decision to reprioritise the Companies Package and its need to debate the Estimates. Before the recess, the CIR Bill was at the top of the Order Paper. However, after the recess the Estimates (which took longer than expected), the Takeovers Bill, the Financial Reporting Bill, the Companies Bill, and the Companies Ancillary Bill all came before the CIR Bill. The National Government also had to rush validation legislation through the House to prevent legal challenges to elections that were improperly carried out for the Meat and Wool Boards.

V THE FINAL MOVES

The CIR Bill was in grave danger of slipping off the legislative agenda. Time was running extremely short. The Department of Justice was unsure whether the Minister of Justice would be able to proceed with the CIR Bill, and if he did, how he would proceed. However, on 14 September 1993, after the dinner break, the House of Representatives suddenly found itself without much to do; it decided to consider the CIR Bill in all its remaining stages.²⁷¹

A *Second Reading*

The Minister of Justice commenced the second reading debate, but did not mention the role of the Clerk of the House. Instead, he concentrated on defending the non-binding nature of the system proposed in the CIR Bill and its 10 percent trigger requirement. He justified the 10 percent trigger requirement by arguing that it would "ensure that any measure that is placed before the electors is not frivolous or vexatious, but of concern to a substantial proportion of the community."²⁷² He

²⁶⁹Above.

²⁷⁰CIR Bill: Second Reading Speech Notes, LRD: 12-1-3 (undated); see also NZPD, no 88, 17951-17954, 14 September 1993 (Graham).

²⁷¹NZPD, above n 270, 17950-17965; M Gobbi, House of Representative Proceeding Notes (14 September 1993). John Carter, the Junior Government Whip, successfully sought leave to consider the Bill in all its stages in the middle of the second reading debate. NZPD, above n 270, 17961

²⁷²NZPD, above n 270, 17951.

justified the non-binding nature of the system by comparing New Zealand's constitutional system with Switzerland's and California's:²⁷³

In California, where referenda are binding, the courts have the power to render referendum results null and void if they attack fundamental rights or essential governmental powers. Our courts do not have that kind of power. We do not have a written constitution that our courts can use to strike down referendum results that violate its principles.

Although Switzerland's courts do not have that power either, the Swiss, at the federal level, can veto only newly enacted legislation or initiate constitutional referenda. The legislative veto does not prohibit the Swiss Parliament from re-legislating. The Swiss Parliament can revisit the issue regardless of the referendum result. It is, in effect, non-binding.

Constitutional initiatives can carry only if a double majority is achieved. A double majority requires an overall national majority of those who voted and a majority vote in a majority of the Swiss cantons. That double majority requirement, along with the heterogenous make-up of Switzerland, means that a constitutional initiative must have the support of a significant cross-section of Switzerland to be successful. That safeguard protects minorities from the possible tyranny of the majority. It is inherent in Switzerland's constitutional system. That safeguard does not exist in our governmental system.

. . . In summary, our constitutional system does not provide the same array of protections as California's or Switzerland's constitutional systems. Nevertheless, we desire to give our people a greater voice in the affairs of our nation. We do not want to suppress that voice with subject-matter limitations, which would be necessary if we were to establish a binding system of direct democracy. At this stage of our constitutional development, Parliament guards us against the excesses of majority rule.

The Labour Opposition did not take issue with these points. However, Caygill, as he had foreshadowed in the Electoral Law Select Committee, questioned the role of the Clerk,²⁷⁴ which set the issue as the only point of contention between the National Government and the Labour Opposition.

B Committee of the whole House

Once the CIR Bill reached the Committee of the whole House, the stage in which the MPs present and vote upon amendments to the bills that have passed their second reading, Caygill argued for giving the task of determining questions to the Speaker of the House.²⁷⁵ The Minister of Justice, relying upon the advice he had received from the Department of Justice, maintained that the Clerk of the House was the appropriate parliamentary officer for the task.²⁷⁶ Caygill's amendment failed.²⁷⁷ Consequently, the responsibility would remain with the Clerk.

²⁷³NZPD, above n 270, 17952, 17954.

²⁷⁴NZPD, above n 270, 17956.

²⁷⁵NZPD, above n 270, 17962.

²⁷⁶Notes, above n 271.

²⁷⁷NZPD, above n 270, 17956.

C *Third Reading and Assent*

By 10:30pm that evening the CIR Bill had passed its third reading. The Governor-General assented to the CIR Bill on 28 September 1993.²⁷⁸ Aside from the disagreement regarding over the role of the Clerk, Caygill's final words all but characterised the CIR Bill as a bi-partisan measure.²⁷⁹ The main line of criticism actually came from Ian Peters, a freshman National Government MP representing Tongariro, who happened to be Winston Peters' brother. During the second reading, he argued that the CIR Bill should be binding.²⁸⁰ Caygill had only one reservation. In his view, the device should be used carefully because it had the potential to be divisive.²⁸¹

D *The Fee Regulations*

The media reaction was subdued.²⁸² Rusk characterised it as a "deafening silence."²⁸³ The media, however, was not the only party to fail to appreciate what the passage of the CIR Bill meant. The direct democracy advocates also let their guard down by forgetting that the CIR Act prescribed a fee, to be set by regulation, that had to be paid to use the CIR process. Although several direct democracy advocates argued in their submissions that a fee higher than \$200 would be prohibitively high, they did not follow through by lobbying the National Government to set a low fee after the CIR Bill was passed. This error in judgment could have been disastrous as the fee could have been set at a discouragingly high level.

To determine the fee, the Department of Justice consulted those that would be involved in the CIR process, namely the Department of Statistics, the Electoral Role Centre, and the Clerk of the House.²⁸⁴ The Deputy Government Statistician determined that it would cost the Department of Statistics \$10,000 a petition to carry

²⁷⁸CIR Act 1993, Assent Green (28 September 1993).

²⁷⁹NZPD, above n 270, 17964-17965.

²⁸⁰NZPD, above n 270, 17961-17962.

²⁸¹NZPD, above n 270, 17964-17965.

²⁸²For versions of the NZPA's brief account, see "Referenda Law Passed" *The Evening Standard*, New Zealand, 15 September 1993; "Referenda May Divide Country, Caygill Says" *Northern Advocate*, New Zealand, 16 September 1993; "Referenda Arguments Predicted" *Waikato Times*, Hamilton, New Zealand, 15 September 1993; see also A Stone "Citizen's Voice Loud and Clear" *New Zealand Herald*, Auckland, New Zealand, 16 September 1993. The *New Zealand Herald* appears to be the only newspaper to publish an editorial on the passage of the CIR Bill. See Editorial, "Not So Non-Binding" *New Zealand Herald*, Auckland, New Zealand, 27 September 1993, 8 (arguing that direct democracy has its foot in the door and that the moral force of non-binding referendums will be significant).

²⁸³Rusk, above n 242.

²⁸⁴Letter from Department of Justice to Department of Statistics (14 September 1993); Letter from Department of Justice to New Zealand Post Limited (14 September 1993); Letter from Department of Justice to Clerk of the House of Representatives (16 September 1993).

out its sampling duties under the Act.²⁸⁵ The Manager of Policy and Practices of New Zealand Post Limited determined that it would cost the Electoral Enrolment Centre approximately \$345 for every 1,000 signatures it had to check for authenticity against the rolls.²⁸⁶ The Clerk of the House calculated that each petition would cost his office \$3,977.²⁸⁷

In short, for a sample of 20,000 signatures, the cost would be approximately \$16,378.11, including GST. The Planning Unit in the Department of Justice recommended a fee of \$2,000 which was substantially less than its true cost. Although Treasury normally pursues a full cost recovery policy, it endorsed a fee less than true cost given the constitutional implications of making the device inaccessible to those without lots of money. However, in its view, the fee should be sufficient to deter frivolous referendums.²⁸⁸ The Minister of Justice agreed with this assessment, as it matched advice he had already received from the Department of Justice. However, he came to the conclusion that \$2,000 was too high. Accordingly, he decided that the fee should be \$500.²⁸⁹

VI ASSESSMENT

Although disappointed in the media's low key reaction, Rusk predicted that New Zealanders would eventually understand what had been achieved by the passage of the CIR Bill.²⁹⁰ Rusk was pleased by the passage of the CIR Bill as he saw it as an initial step on the way toward first a binding legislative referendum system and then a binding legislative initiative system. As he was taking a long-term view, unlike most of the main direct democracy groups, he was able to see the CIR Act in a positive light. Accordingly, Rusk praised New Zealand's governmental process as democratic. In his view, his success in getting the National Party to pledge to introduce direct democracy in its 1990 election manifesto, even though the promise was for a non-binding system, showed how individuals could change the system.²⁹¹ However, as discussed in chapter seven, it is unlikely that Rusk would have succeeded without, the coincidence of economic hardship and widespread disillusionment with representative democracy, the ground breaking work of the main direct democracy groups, and the support provided by National Reform.

²⁸⁵Letter from Department of Statistics to Department of Justice (15 October 1993).

²⁸⁶Letter from New Zealand Post Limited to Department of Justice (13 October 1993).

²⁸⁷Letter from Clerk of the House of Representatives to Department of Justice (13 October 1993).

²⁸⁸See Fax from the Treasury to the Department of Justice (22 September 1993).

²⁸⁹Citizens Initiated Referenda (Fees) Regulations 1993, r. 2.

²⁹⁰Rusk, above n 242.

²⁹¹Stone, above n 282. Whether Rusk still holds this view is uncertain. In 1994 he quit the National Party along with the Hobson MP Ross Meurant to become chairman of Ross Meurant's Center of Right Party (ROC). Telephone Interview with Merv Rusk (October 1994).

The economic turmoil unleashed by the Fourth Labour Government was accentuated by the 1987 crash. As its policies were contrary to the expectations of the electorate at large, public confidence in elected representatives sank to an all time low. These conditions created the impetus for change, which gave rise to the main direct democracy groups.²⁹² The promotional work of these groups was indispensable to Rusk's campaign. It allowed Rusk to spend less time on educating members of the National Party and more time on organising their support, which gave him the opportunity to focus his attention on his opposition in the political wing of the National Party. Although Rusk was unable to place a pledge for a binding legislative referendum in the National Party's 1990 election manifesto, he was able to prevent the political wing from killing his idea altogether, which led to the inclusion of a pledge to introduce a non-binding citizens initiated referendum system in the National Party's 1990 election manifesto. National Reform, a by-product of Rusk's battle with the political wing of the National Party, was instrumental in preventing the National Government from abandoning the National Party's 1990 election manifesto promise to introduce and enact the CIR Bill.

However, National Reform and the main direct democracy groups were unable to influence the content and form of the CIR Bill at any time during the legislative process. For all practical purposes, the debate regarding the CIR Bill's form and content ended once the National Party's Electoral Law Reform Caucus Committee devised its citizens initiated referendum plan. As discussed in chapter seven, the political wing of the National Party had devised the plan to defuse Rusk's campaign and to water down his proposal. As a consequence, the direct democracy advocates in New Zealand were far less successful than their counterparts in Switzerland and California.

In Switzerland, the Swiss Democrats broke away from the ruling Liberal-Radical grouping and eventually took control of local then central government institutions. They used their power to introduce direct democracy, rather than rely on elected representatives who were widely perceived as serving the interests of the new industrial elite. The California Progressives took a similar approach in California, when they wrested control of government from the Southern Pacific Railroad. After winning control of key city governments, they infiltrated and refashioned the Republican Party. Using this vehicle, they managed to elect people to office who would use their power to introduce direct democracy.

The direct democracy advocates in New Zealand consciously avoided these approaches. They were largely unwilling to form their own political party or to

²⁹²It also gave rise for an organised campaign for proportional representation.

invest the time and energy required to take over an existing party, primarily as they were only interested in establishing direct democracy. The Swiss Democrats and the California Progressives, in comparison, were interested in a far greater range of issues. Direct democracy was to them a means to an end rather than an end in itself. They had every intention of breaking the nexus between privileged economic interests and elected representatives beholden to those interests. In New Zealand, the crisis of legitimacy was driven primarily by a failure of successive governments to meet the expectations of the electors rather than being a function of organised corruption.

In addition, the debate regarding the adoption of an electoral system based on proportional representation overshadowed the direct democracy debate, which diverted attention and resources away from the campaign for direct democracy. However, the direct democracy advocates were shrewd enough to position direct democracy as an alternative to proportional representation. This may have been a factor that encouraged the National Government to enact the CIR Act so close to the 1993 general election, which presented the government controlled referendum on proportional representation to the electors. Nevertheless, the public at large perceived proportional representation, not direct democracy, as the remedy for the ills besetting New Zealand's representative democracy. As a consequence, if the motivation had existed, the direct democracy advocates would probably have been unable to build the kind of political support that would have been required to convince parliamentarians that they should introduce a binding system of direct democracy or to organise the election of people who would introduce it.

Another important factor lies in the speed in which elected representatives responded to the call for direct democracy. Rather than ignore it and allow frustration to build, as was the case in Switzerland and California, the political wing of the National Party became involved in the debate and devised several stratagems to defuse the support for direct democracy within the National Party. Although the political wing was unable to quell the demand for direct democracy altogether, largely by failing to honour its 1990 election manifesto promise to repeal the Fourth Labour Government's superannuation surtax, it was able to position its non-binding alternative as a sensible compromise.

In short, the direct democracy advocates failed where it mattered the most. Unlike the Swiss Democrats and the California Progressives, they did not secure control over the legislative process. Accordingly, they found themselves in the impossible position of relying on elected representatives to put into place a system that was expressly intended to curb the power of elected representatives. Although Rusk and his supporters, particularly National Reform, were able to apply the pressure necessary to

ensure passage of the CIR Act, they were unable to alter its contents. Consequently, they had to settle for the non-binding system devised by the National Party's Electoral Law Reform Caucus Committee.

Thomas Cronin's hybrid model of representative and direct democracy does not apply in New Zealand as it does in Switzerland and California.²⁹³ The direct democracy devices in California and Switzerland have augmented the legal sovereignty of the electors by giving them the power to propose, enact, and veto laws, which has, in effect, limited the governmental power exercised by their elected representatives. The CIR Act, because it is non-binding, only gives the New Zealand electors the power to propose laws or to propose changes to laws. While it may have, in Dicey's terminology, augmented the political sovereignty of the electors, it has not diminished the legal sovereignty of Parliament. As a consequence, the CIR Act is far less significant as a check on the power of elected representatives than the direct democracy devices in Switzerland and California.

The National Government did not clearly articulate a constitutional basis for its opposition to a binding system until the Minister of Justice delivered his second reading speech in support of the CIR Bill. The speech was designed primarily to portray the non-binding system produced by the political wing of the National Party as a considered and reasonable alternative to the party wing's demand for a binding system. However, it also provides the basis for understanding the differences between New Zealand's citizens initiated referendums system and the direct democracy systems in Switzerland and California, which are considered in the next chapter.

²⁹³For a discussion of Cronin's hybrid model of democracy, see section IV in chapter two; see also section IV in chapter three and section III in chapter five.

ROLE OF DIRECT DEMOCRACY IN NEW ZEALAND

The main direct democracy groups, Merv Rusk, and National Reform drew on the Swiss and California systems of direct democracy during their campaign for direct democracy in New Zealand. They all envisioned the adoption of the legislative referendum. Most also advocated the adoption of the legislative initiative, either simultaneously with or subsequently to the legislative referendum. They believed that one or both of these devices would restore the legitimacy of the New Zealand constitutional system, primarily by making elected representatives more responsive to the electorate. The political wing of the National Party responded to their campaign by proposing a non-binding system of direct democracy, which the National Government put in place in the form of the Citizens Initiated Referenda Act 1993 (CIR Act).¹

Since the results of citizens initiated referendums are non-binding in New Zealand, they are legally less significant than the results produced by the direct democracy devices in Switzerland and California. Although the electors can use the CIR Act to propose a change in the law, they cannot use it to enact or veto law without the cooperation of elected representatives. In contrast, the Swiss and California electors can use their direct democracy devices to propose, enact, or veto law without the cooperation of elected representatives. These devices enable the Swiss and California electors to countermand or by-pass elected representatives, which, in effect, limits the legislative power of elected representatives. Although elected representatives may abide by the results of citizens initiated referendums for political reasons, the CIR Act does not, unlike the direct democracy devices in Switzerland and California, impose any legal limits on their power. In addition, as it is non-binding, it has not given the electors any legislative power.

This fundamental difference came about as a consequence of the opposition of elected representatives in New Zealand to direct democracy.² Geoffrey Q de Walker has theorised that the opposition of elected representatives to direct democracy is the result of their acceptance of political theories which maintain that only elites such as themselves, by virtue of their training or intellect, are qualified and, therefore,

¹See generally chapter seven and eight.

²See above.

entitled to exercise governmental power.³ Although chapters seven and eight provide some support for this theory, the Minister of Justice's justification for a non-binding system provides the constitutional basis for understanding the differences between the CIR Act and the direct democracy systems in Switzerland and California. Essentially, the Minister of Justice argued that Parliament is the only institution in New Zealand that has the power to safeguard minority rights; therefore, providing the electors with the means to override Parliament could jeopardise minority rights.⁴

As outlined in chapter two, minorities, not majorities, are the primary concern in the constitutional context. To be sustainable, democracy, whether representative or direct, must be based on limited majority rule.⁵ The direct democracy devices in Switzerland and California adhere to this principle. The Swiss devices are subject to procedural limitations which, in effect, protect minority rights.⁶ The California devices are subject to a host of procedural and substantive limitations which also protect minority rights.⁷ New Zealand's citizens initiated referendum system also adheres to this principle. As it is non-binding, Parliament can refuse to give effect to referendum results which would harm minority rights, particularly if they are inconsistent with New Zealand's international obligations, its human rights legislation, its parliamentary conventions, or the Treaty of Waitangi.

This chapter examines the constituent parts of New Zealand's constitutional system and attempts to ascertain their relationship to the CIR Act, which is yet to be used successfully. In doing so, it draws primarily on the work of David McGee, Philip Joseph, Raymond Mulholland, Geoffrey Palmer, Keith Jackson, and F M Brookfield, who have produced the most recent and comprehensive discussions of New Zealand's constitutional system.⁸ The purpose of this chapter is to provide some basis for

³See generally G Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies Ltd, St Leonards, 1987); see also G Walker *The People's Law: Initiative and Referendum: University of Queensland Inaugural Lecture* (delivered 3 June 1987, University of Queensland Press, St Lucis, 1988); G Walker "The People's Law: Initiative and Referendum" (1988) 15 U Queensland L J 33.

⁴NZPD, no 88, 17952, 17954, 14 September 1993 (Graham)

⁵See section III.A.2 in chapter two.

⁶See generally chapter four.

⁷See generally chapter six.

⁸D McGee *Parliamentary Practice in New Zealand* (2 ed, GP Publishers, Wellington, 1994); P Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co. Ltd, Sydney, 1993); R Mulholland *Introduction to the New Zealand Legal System* (7 ed, Butterworths, Wellington, 1990); G Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution* (2 ed, Oxford University Press, Auckland, 1987); K Jackson *The Dilemma of Parliament* (Allen & Unwin, Wellington, 1987); J Joseph *Constitutional Entrenchment and the MMP Referendum* (1994) 16 NZULR 67; F Brookfield "Parliament, the Treaty and Freedom: Millennial Hopes and Speculations" (1994) NZLJ 462; F Brookfield "A New Zealand Republic?" (1994) 8 Legis Stud 5; F Brookfield "The Monarchy and the Constitution Today: A New Zealand Perspective" (1992) NZLJ 438; F Brookfield "Kelsen, the Constitution and the Treaty" (1992) NZULR 163; F Brookfield "Constitutional Law" (1992) NZ Recent L R 231; F Brookfield "The Reconstituted Office of Governor-General" (1985) NZLJ 256; F

understanding the role citizens initiated referendums are likely to play in the New Zealand legislative process. The chapter begins with an overview of the New Zealand constitutional system, which differs conceptually from the Swiss and California systems. It then examines the division of governmental power among New Zealand's legislative, executive, and judicial branches, which is less formal than it is in Switzerland and California. The chapter then outlines how the CIR Act works and compares its operation to the direct democracy systems in Switzerland and California. It concludes that the citizens initiated referendum system provided for in the CIR Act differs from the direct democracy systems found in Switzerland and California, particularly in the manner in which it pays homage to the theory of parliamentary sovereignty,⁹ a theory which has no place in the Swiss or California constitutional systems.

I OVERVIEW OF THE NEW ZEALAND CONSTITUTIONAL SYSTEM

Mulholland describes New Zealand as a "sovereign independent unitary State with a constitutional monarchy, responsible Government and a unicameral legislature."¹⁰ Unlike Switzerland or California, New Zealand does not have a written constitution which embodies the supreme law of the land¹¹ or which is "based on or expressive of popular sovereignty."¹² According to Joseph, New Zealand's constitutional system is:¹³

embedded in the statutes of the British and New Zealand Parliaments, the common law, constitutional convention, the law and custom of Parliament, the great legal commentaries (such as those of Blackstone and Dicey), and an impressive heritage devolving from British constitutional history. New Zealand is a constitutional monarchy deriving from the oldest of all temporal sovereignties, the British Crown, whose lineage reaches beyond the Norman Conquests to Saxon times. New Zealand has the closest adaptation of the Westminster system in the British Commonwealth.

In theory, the New Zealand constitutional system is whatever Parliament proclaims it to be.¹⁴ Parliament is sovereign. Its legislative enactments are the supreme law of the

Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisdictional Approach" (1984) 5 Otago L R 603; F Brookfield "High Courts, High Dam, High Policy" (1983) NZ Recent L R 62.

⁹See section III.B.2(c) in chapter two.

¹⁰Mulholland, above n 8, 17; see also Joseph, above n 8, 7, 11. For collections of New Zealand's basic constitutional documents, see Joseph, above n 8, 875-931; see also generally M Chen and G Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993).

¹¹Mulholland, above n 8, 17; see also Jackson, above n 8, 8-13; Joseph, above n 8, 1.

¹²Brookfield "A New Zealand Republic?," above n 8, 10.

¹³Joseph, above n 8, 1.

¹⁴See eg The Constitution Act 1986. This Act is now the central document in the New Zealand constitution; however, it is not a written constitution in itself; it is merely a constitutional document. Mulholland, above n 8, 18. According to Palmer, who was the Act's principal architect, the Act is merely a "basic guide to the composition and powers of the institutions with which it deals." Palmer,

land. The courts do not have the power to declare an Act of Parliament unconstitutional.¹⁵ Nor do they have the power to force Parliament to follow its own long established conventions.¹⁶ The role of the courts is simply to determine what Parliament intended and to enforce that intention.¹⁷ According to Joseph, "[Parliament's] powers of legislation know no legal limitation."¹⁸ Consequently, "any statute which empowers governmental action has constitutional significance."¹⁹

In practice, parliamentary sovereignty is constrained by constitutional conventions, public opinion, pressure groups, the doctrine of mandate, election promises, treaty obligations, international law, and pragmatism.²⁰ For example, New Zealand has ratified the International Covenant on Civil and Political Rights and affirmed its commitment to it under the New Zealand Bill of Rights Act 1990. It has also ratified the First Optional Protocol to the Covenant, which provides New Zealand citizens with a right of petition to the United Nations Human Rights Committee for alleged violations of the Covenant. According to Joseph, "[t]hese instruments [have] injected new content into the rule of law by laying down minimum standards for national legal systems."²¹ In addition, the "rule of law supplements the principle of legality by imposing minimum standards of justice."²²

However, these standards are not easy to ascertain.²³ More importantly, they have not provided the courts with the power to declare an Act of Parliament unconstitutional. Section 4 of the New Zealand Bill of Rights Act 1990 specifically states that the courts cannot use its provisions to override any conflicting enactment. If the Act had given the courts this power, Parliament would still have had the legal power to repeal the grant as the Act is ordinary unentrenched legislation. Consequently, Parliament has the legal power to quash any of the rights guaranteed

above n 8, 3. The Act was prompted by Muldoon's reluctance to hand over power after his government was defeated in the 1984 general election; the Act, among other things, clarifies the rules regarding the transfer of power from one government to another. Mulholland, above n 8, 19.

¹⁵Joseph, above n 8, 9.

¹⁶Joseph, above n 8, 239; Palmer, above n 8, 1.

¹⁷See Joseph, above n 8, 104.

¹⁸Joseph, above n 8, 12.

¹⁹Joseph, above n 8, 16; see also Jackson, above n 8, 13 (noting that the New Zealand Parliament derives its structure from statute, unlike the British Parliament which has evolved over centuries).

²⁰See Joseph, above n 8, 446-453.

²¹Joseph, above n 8, 197-198; see also I Richardson "Public Law and Constitutional Issues" (1993) NZLJ 198, 199 (stating that "the development of public law in New Zealand is likely to be increasingly influenced by appeals to international norms"); Legal Division of Commonwealth Secretariat "The Application of International Human Rights Standards in Domestic Law" (1992) 22 VUWLR 1; J Elkind "The Optional Protocol and the Covenant on Civil and Political Rights" (1991) NZLJ 409; J Elkind "International Obligations and the Bill of Rights" (1988) NZLJ 205.

²²Joseph, above n 8, 196.

²³See above.

under the New Zealand Bill of Rights Act 1990. In short, as Jackson has noted, "constitutional safeguards in New Zealand are minimal."²⁴ In his view:²⁵

There is a tendency to equate the will of the majority party with parliament and to assume that whatever the majority says goes, thereby pushing to one side the whole question of constitutionality. It is partly because this lack of institutional restraint that Lijphart was able to regard New Zealand as an exemplar of the majoritarian model.

Although the proportional representation electoral system adopted in 1993 is yet to be tested, its introduction is unlikely to change this equation. The new electoral system is likely to produce coalition governments and more compromise among the parties in House of Representatives,²⁶ but it will not alter the essential majoritarian nature of Parliament as it does not create any external institutional mechanism by which to check Parliament's legislative power. Furthermore, calls for a written constitution have generated little interest among political parties.²⁷ Joseph has argued that:²⁸

[o]pposition to an entrenched Constitution (or a Bill of Rights) may stem from party politicians imbued with the spirit of majority rule in a unicameral Parliament. They may find it repugnant that their powers may be limited when in office. Their organised and systematic opposition is part of the reason, some contend, why the Constitution should be entrenched.

Although Joseph has suggested that New Zealand's high degree of political consensus has made a formal constitution unnecessary,²⁹ he points out that:³⁰

consensus does not necessarily replace an effective constitutional framework; the only real sanction remaining in the country is that of triennial elections based upon the simple plurality system. Given rising racial consciousness and the passing of the economic security it enjoyed as a colony, it may be that New Zealand's crude majoritarianism is now dated. Certainly the degree to which the actions of New Zealand governments are unhindered by constitutional considerations is unique. No other country in the world, claiming to be democratic, has gone so far.

The move to proportional representation is unlikely to undermine this assessment either. Although the triennial electoral sanction shifts from one based on plurality to one based on proportionality, the new system does not establish any new legal limits on Parliament's power. The likelihood of coalition government invites the possibility of political compromise, but it does not guarantee individual rights as no institution rivals the power of Parliament.

²⁴Jackson, above n 8, 13.

²⁵Above.

²⁶For a definition of the House of Representatives, see below text accompanying notes 44-52.

²⁷Joseph, above n 8, 111; see also section I.C. in chapter seven.

²⁸Joseph, above n 8, 111.

²⁹Joseph, above n 8, 103.

³⁰Above; see also Jackson, above n 8, 21-22.

II STRUCTURE OF NEW ZEALAND GOVERNMENT

Unlike the constitutional systems in Switzerland and California, New Zealand's constitutional system is based on an informal, rather than formal, separation of powers.³¹ As Palmer has observed, the political party that controls Parliament "effectively controls both the legislative and executive branches."³² However, Joseph has argued that "the distinctions between the primary functions of law-making, law-executing, and law-adjudicating cannot be abandoned, for their separability is a function of the concept of law itself."³³ Palmer has conceded this point by stating that "the theory of the separation of powers provides a useful touchstone against which to find the location of powers in the New Zealand Government and judge the propriety of the arrangement."³⁴

Joseph outlines the division of governmental power among the legislative, executive, and judicial branches as follows:³⁵

The executive embraces the administrative powers and functions of central government and includes all the government departments under ministerial control. Cabinet Ministers elected to power as "the government" are the political executive. Since historically it is His or Her Majesty's Government, "the Crown" is often used as the legal representation of executive government. The legislature is the Parliament of New Zealand and exercises the functions of law-making and holding to account the political executive. The third organ of government exercises powers for adjudicating disputes according to law, including disputes between individuals and the state. The judiciary is comprised of a hierarchy of courts - the Judicial Committee of the Privy Council, the Court of Appeal, the High Court and District Courts.

This outline provides the basis for examining the New Zealand constitutional system in more detail, and determining the role that the CIR Act is likely to play within it.

A *Parliament (Legislature)*

Parliament has full power to make laws.³⁶ Section 14 of the Constitution Act 1986 defines Parliament as consisting of the Sovereign and the House of Representatives.

³¹Joseph, above n 8, 228, 237; see also generally chapters four and six.

³²Palmer, above n 8, 6.

³³Joseph, above n 8, 237.

³⁴Palmer, above n 8, 5.

³⁵Joseph, above n 8, 5. For discussions of "the Crown," see P Joseph "The Crown as a Legal Concept (I)" (1993) NZLJ 126; Brookfield "The Monarchy and the Constitution Today: A New Zealand Perspective", above n 8; D Mathieson "Does the Crown have Human Powers?" (1992) 15 NZULR 117; N Jamieson "The Demise of the Crown" (1989) NZLJ 329.

³⁶Constitution Act 1986, s. 15.

1 *The Governor-General*

The Sovereign, who happens to be the English monarch,³⁷ is the Head of State of New Zealand and is represented by the Governor-General.³⁸ The Governor-General is appointed by the Sovereign on advice from Ministers of the Crown. As a general rule, Ministers of the Crown are senior members of the House of Representatives from the party or parties that have a working majority in the House. The Governor-General's most important task is to confer the royal assent on bills passed by the House. As David McGee, the Clerk of the House, has noted, the Governor-General's assent to a bill is essential to transmute it from a bill into an Act of Parliament and, therefore, law.³⁹

When presented with a bill, the Governor-General has three options. He or she can assent to it, refuse assent, or return the Bill to the House with proposed amendments. However, according to McGee, "[n]o bill presented to a . . . Governor-General has ever been refused the Royal Assent in New Zealand."⁴⁰ This can largely be attributed to the constitutional convention that the Governor-General generally acts only on the advice of Ministers except in the most extraordinary circumstances.⁴¹ According to Palmer, the Governor-General can act on his or her own in only three cases: the appointment of a Prime Minister, the dismissal of a Prime Minister, and the refusal of a request to dissolve Parliament for the purpose of holding a general election.⁴² Although these "reserve powers" have "never been used in modern times,"⁴³ they are likely to be used under the new proportional representation electoral system, particularly if coalition governments become the norm. The Governor-General could regularly be confronted with would-be or existing Prime Ministers unable to form or hold together coalition governments.

2 *The House of Representatives*

Members of the House of Representatives are called members of Parliament (MPs).⁴⁴ They are elected for the term of Parliament, which cannot exceed three years in length.⁴⁵ Prior to the advent of proportional representation, the House of Representatives consists of 97 constituency representatives, who were elected to

³⁷See Palmer, above n 8, 24.

³⁸Constitution Act 1986, ss. 2-3; see also Brookfield "The Reconstituted Office of Governor-General", above n 8.

³⁹McGee, above n 8, 228.

⁴⁰McGee, above n 8, 239.

⁴¹Above.

⁴²Palmer, above n 8, 29.

⁴³Above.

⁴⁴Constitution Act 1986, s. 10.

⁴⁵Constitution Act 1986, s. 17.

Parliament under a plurality system, that is, the candidate in each constituency with the most votes was elected. Although the majority of MPs generally received more than 50 percent of the vote in their constituencies, no party that won control of Parliament has received 50 percent or more of the national vote since 1954 under this electoral system.⁴⁶

In 1993, the electorate, concerned largely by the unrepresentative and unresponsive nature of Parliament,⁴⁷ voted in a government controlled referendum to change the system by which to elect MPs. Under the proportional representation electoral system, the number of MPs will be approximately 120. MPs will be elected for three year terms in one of three ways: 1) as a general constituency candidate, of which there will initially be approximately 60; 2) as a Maori constituency candidate, of which there will initially be 5; or 3) as a party list candidate, of which there will be approximately 55.⁴⁸

Increasing the number of MPs from 97 to 120 was controversial. Given the public's low regard for MPs, many proportional representation proponents feared that it would lead the electors to reject proportional representation. Once the electorate approved the move to proportional representation, a few MPs came to the conclusion that many electors would prefer proportional representation with fewer MPs. A few months after the CIR Act went into effect, several sitting MPs decided to use it to challenge the National Government's decision to offer the electors the opportunity to approve a proportional representation system with 120 MPs. Michael Law, a maverick National MP from Hawkes Bay, New Zealand First Leader Winston Peters, an all but excommunicated former National MP from Tauranga, and Geoff Braybrooke, a Labour MP from Napier, obtained approval from the Clerk of the House to circulate a petition calling for a citizens initiated referendum on the following question: "Should the size of Parliament be reduced from 120 members to 100 by reducing the number elected from party lists?" According to Laws, a referendum on this question would give the electorate a chance to choose between proportional representation with 120 MPs or 100 MPs.⁴⁹ If the question qualifies for the ballot, the electors approve the reduction, and the government of the day decides to implement the result, the number of party list seats would be reduced by 20 to approximately 35.

⁴⁶See generally C Norton *New Zealand Parliamentary Election Results, 1946-1987* (Victoria University of Wellington, Wellington, 1988); *The General Election 1990: Enrolment and Voting Statistics form the General Election Held on 27 October 1990* (1990) AJHR E.9; *The General Election and Electoral Referendum 1993* [1994] AJHR E.9

⁴⁷See generally chapters seven and eight.

⁴⁸See Electoral Act 1993, ss. 35(3)(a), 35(3)(c), 45(3)(a), and 191(7)-(8).

⁴⁹"Petition to Reduce House Proceeds" *The Evening Post*, Wellington, New Zealand, 22 August 1994, 2.

As a general rule, each MP belongs to a party to which he or she owes allegiance. According to Jackson, political parties in New Zealand have been:⁵⁰

classically majoritarian, being heavily programmatic, by inference class conscience, acting as parties of social integration rather than individual representation, and therefore highly disciplined. The development of a pluralist pressure groups system has consequently placed heavy demands upon them and over the years they have intensified this self-discipline in the face of such diverse activity.

As Jackson has noted, “the scale of ethics in parliamentary democracy today is roughly that your conscience comes last, your constituency second, and your party requirements come first.”⁵¹ This phenomenon is completely at odds with Burke’s theory of representation.⁵²

3 *Legislative process*

As the legislative history of the CIR Act showed, the legislative process consists of eight steps: drafting, first reading, select committee, report back, second reading, Committee of the whole House, third reading, and assent.⁵³ Bills are generally drafted on the instruction of the government of the day, either by a private law firm or the Parliamentary Counsel Office. Any MP may introduce a bill. However, virtually all bills that are enacted are government bills. A government bill is introduced by the Minister whose portfolio covers the subject dealt with in the bill. Once the bill is introduced, it is given its first reading, which is primarily an opportunity for the Minister in charge of the bill to explain its purpose and for other MPs, mainly those not part of the government of the day, to “raise questions about its contents so that they can be better informed about it and about the Government’s intentions.”⁵⁴

After a bill’s first reading, the bill is automatically referred to the appropriate parliamentary select committee for study and public comment unless the government of the day decides to deal with the bill under urgency or the bill is a money bill, that is deals primarily with appropriations or imprest supply. The urgency exception removes nearly 10 percent of all government bills from select committee scrutiny.⁵⁵ McGee contends that the money bill exception is of little consequence.⁵⁶ However, it

⁵⁰Jackson, above n 8, 58.

⁵¹Jackson, above n 8, 60.

⁵²See section III.B.2(d) in chapter two.

⁵³See generally chapter eight; see also W Jeffries “Parliamentary Conventions and Procedures - How Laws are Made” (1992) NZLJ 159.

⁵⁴McGee, above n 8, 259.

⁵⁵McGee, above n 8, 262.

⁵⁶Above. The government of the day generally deals with two or three appropriation bills and two or three imprest supply bills each year. McGee, above n 8, 298-299.

removes bills of a financial or budgetary nature from public comment through the normal select committee process.

Once the bill is assigned to the relevant select committee, the select committee may call for public submissions and schedule public hearings on the bill. The majority of submissions come from organisations or associations with an interest in the bill. According to Jackson, "the influence of interest groups has been, and is, a most important factor in the New Zealand political scene."⁵⁷ In addition to the influence of caucus and party organisations, he attributes the democratic control of Parliament to interest groups.⁵⁸ The select committee also considers the advice provided by the officials serving the Minister in charge of the bill.

After the select committee has considered the issues raised by the public submissions and officials, it deliberates on each clause of the bill, that is, it decides whether the clause should stand as was when introduced or be modified or deleted. Although select committees do not have the formal power to amend bills, they can and often do recommend amendments to the bill to the House, which are deemed to be adopted when the bill is read a second time.⁵⁹ The second reading takes place after the select committee reports the bill back to the House. At this stage in the legislative process the House is asked to adopt the bill in principle, that is, it has to decide whether passing the bill is desirable. Aside from putting forward arguments for and against the bill, MPs, particularly those who are not part of the government of the day, often use the second reading to signal their intention to propose amendments to the bill once it reaches the Committee of the whole House.⁶⁰

Once the bill reaches the Committee of the whole House, the bill and its proposed amendments are considered clause by clause. The ensuing debate, if any, is generally led by the Minister in charge of the bill, who is supported by officials serving the Minister.⁶¹ According to McGee, the object is to determine whether the bill's "detailed provisions properly incorporate the principle of the bill agreed to on second reading."⁶² Although the government of the day often accepts amendments to the bill

⁵⁷Jackson, above n 8, x; see also A Robinson "The Role of Pressure Groups in New Zealand" in S Levine (ed) *Politics in New Zealand* (George Allen & Unwin, Sydney, 1978).

⁵⁸Jackson, above n 8, xi-xii. Palmer has argued that lawyers who effectively represent the interests of their clients are those who understand the governmental decision-making process and are actively involved in it. G Palmer "Lawyer as Lobbyist: The Role of Lawyers in Influencing and Managing Change" (1993) NZLJ 93; G Palmer "The New Public Law: Its Province and Function" (1992) 22 VUWLR 1, 7-10 (stating the importance of "making carefully crafted arguments which can alter policies while they are in the gestation period . . . ensuring client's interests are fully taken into account within the process").

⁵⁹McGee, above n 8, 264-265.

⁶⁰McGee, above n 8, 269.

⁶¹McGee, above n 8, 274.

⁶²McGee, above n 8, 272.

that improve its drafting or eliminate technical glitches or what would be unintended consequences, it rarely accepts amendments concerning the bill's basic policy.

Once the Committee of the whole House has completed its work, the bill is submitted to a third reading. As often as not, the third reading is not debated. If it is, the debate is confined to the general principles of the bill as it has emerged from the Committee. Aside from approving the bill as it may have been changed by the Committee, the third reading provides an opportunity to record the arguments raised during the Committee's deliberations as its proceedings are not officially recorded.⁶³ After the third reading, the bill is sent to the Governor-General for the royal assent. Once the assent is given, the bill becomes law.⁶⁴

As in Switzerland and California, the passage of bills through the legislative process gives laws their legitimacy. Both Palmer and Joseph agree that this legitimacy stems from the fact that the House of Representatives is composed of elected representatives.⁶⁵ Joseph points out that representative democracy in the Westminster context brings together both the doctrine of the consent of the governed⁶⁶ and the doctrine of mandate.⁶⁷ In theory, the parties that win control of Parliament are bound by their election promises as they form the basis upon which the electors consent to be governed. As a corollary, the winning parties have a mandate to put their promises into effect. The resulting laws derive their legitimacy from the supposition that they are endorsed by most electors.

In strictly legal terms, the CIR Act does not provide a means to alter the basic character or behaviour of the legislative process, as Parliament is not obliged to give effect to referendum results. Furthermore, if Parliament were inspired by a referendum result to legislate, the CIR Act provides no guarantee that the legislation must give effect to the aspirations of those who placed a particular proposal on the ballot. In political terms, however, the CIR Act could encourage Parliament to legislate if MPs or their parties fear that failing to give effect to a referendum result would cost them the support of the electors. As the action of MPs remains vital to whether a referendum result is written into law in New Zealand, the CIR Act is unlikely to separate issues from candidates and their parties as the direct democracy systems have in Switzerland, for example.⁶⁸

⁶³McGee, above n 8, 290.

⁶⁴McGee, above n 8, 328.

⁶⁵Palmer, above n 8, 97; Joseph, above n 8, 284.

⁶⁶Joseph, above n 8, 284; see also section III.A.3 in chapter two.

⁶⁷Joseph, above n 8, 285; see also Jackson, above n 8, 30; section III.B.2(b) in chapter two.

⁶⁸See section III.B in chapter four and section II.A in chapter eight.

B *Cabinet (Executive)*

Although Part II of the Constitution Act 1986 is nominally concerned with the Executive branch, it does not describe the Cabinet system of government or how it works. According to Joseph, Cabinet is a cardinal feature of the New Zealand constitutional system yet the law takes no account of it.⁶⁹ It is largely the product of convention.⁷⁰ Nevertheless, it is the supreme decision-making body in New Zealand.⁷¹ As Mulholland has noted, "all vital decisions are either ratified by Cabinet or emanate from it."⁷² Cabinet decisions are recorded and become the source of authority for governmental action.⁷³

Cabinet is comprised of Ministers of the Crown. As in Switzerland, only MPs can be Ministers, which, according to Palmer, "is the essence of responsible government as it connects the popularly elected legislature to the executive."⁷⁴ As a general rule, Ministers are senior members of the party or parties that won control the House of Representatives in the last election.⁷⁵ The Governor-General appoints Ministers on the recommendation of the Prime Minister.⁷⁶ The Prime Minister is also appointed by the Governor-General. The Governor-General selects a person to be Prime Minister based on his or her ability to form a government, that is, to command majority support in the House. Prior to the introduction of proportional representation, the person chosen was generally the leader of the party which had obtained a majority of the seats in the House. Under proportional representation, with its tendency to produce coalition governments, the person chosen is likely to be the leader of one of the two or more parties that have decided to work together.⁷⁷

The Prime Minister wields more power than his or her parliamentary colleagues, including those in Cabinet. He or she serves as the chairperson of Cabinet.

⁶⁹Joseph, above n 8, 238.

⁷⁰Mulholland, above n 8, 30; Joseph, above n 8, 633. Cabinet is co-incidental with the Executive Council, which is a legal body set up under Royal Prerogative, and derives much of its authority from that identity. Cabinet decisions requiring legal authentication, such as regulations, are promulgated by the Governor-General on the advice of the Council and gazetted as Orders-in-Council. As Joseph has noted: "The Executive Council has the same membership as Cabinet but discharges different functions. Whereas Cabinet is an informal, deliberative body for formulating policy, government Ministers tender advice to the Governor-General in Executive Council for promulgating their decisions by Order, Proclamation, regulation, or other instrument as may be required by law. . . . Orders in Council are second only to Acts of Parliament for implementing government decisions which require the force of law." Joseph, above n 8, 641. See also *Cabinet Office Manual* (1991).

⁷¹Mulholland, above n 8, 31; Joseph, above n 8, 633; Palmer, above n 8, 10.

⁷²Mulholland, above n 8, 30-31; see also Palmer, above n 8, 34.

⁷³Palmer, above n 8, 40.

⁷⁴Palmer, above n 8, 34.

⁷⁵See Mulholland, above n 8, 30; Joseph, above n 8, 625.

⁷⁶McGee, above n 8, 66.

⁷⁷See Joseph, above n 8, 598-98; McGee, above n 8, 66.

According to Palmer, "[h]is or her opinion will carry weight on all issues, whereas individual Ministers will tend to be regarded at their most authoritative in dealing with matters inside their own portfolios."⁷⁸ As was demonstrated during the Muldoon period (1975 to 1984), the Prime Minister can possess an overwhelming concentration of power if he or she is also Minister of Finance.⁷⁹ Palmer is convinced that this combination should "never be permitted to happen again."⁸⁰ In his view:

it makes the conduct of modern Cabinet Government as it ought to work impossible. In any system of decision-making there must be safeguards and checks. For one person to hold both positions reduces the safeguards substantially and condemns other Ministers to a subordinate and somewhat inconsequential role.

Cabinet meets and deliberates in secret.⁸¹ In addition, as Joseph has noted, "Ministers reach decisions collectively under the mantle of joint responsibility."⁸² Accordingly, Cabinet's "decisions are notionally unanimous and not open to public scrutiny."⁸³ The practice is meant to encourage free debate and to allow the government of the day to present a common front to its critics and to the electorate at large. However, it also renders Cabinet's decision-making process virtually impossible to assess.⁸⁴ Furthermore, the doctrine of collective ministerial responsibility serves to mute public dissent that would otherwise come from individual Ministers. According to the doctrine, Ministers who wish to disagree publicly with a decision taken by Cabinet must resign to do so. In Palmer's words, "Cabinet must speak with one voice."⁸⁵ Joseph offers the following explanation:⁸⁶

Although the Queen in right of New Zealand is the head of state, enjoying vast statutory and common law powers, there must always be a government capable of acting, of advising the Crown and of accepting responsibility for that advice. The persons who are appointed as the Crown's advisers (the "government") are chosen from persons elected by the people, and who have the confidence of the House of Representatives. Under the party political system, the leader of the political party with the most members returned or elected at a general election is asked to form the government. The lynchpin is the convention of ministerial responsibility which requires a government to retain the support of the House, and to resign if defeated on a no confidence motion.

However, as Joseph also notes, "[i]n modern times, party discipline in the House virtually forecloses the possibility of governments being defeated on a confidence issue."⁸⁷ As Jackson points out:⁸⁸

⁷⁸Palmer, above n 8, 66.

⁷⁹Palmer, above n 8, 67.

⁸⁰Above.

⁸¹Mulholland, above n 8, 30.

⁸²Joseph, above n 8, 626.

⁸³Joseph, above n 8, 634.

⁸⁴See above.

⁸⁵Palmer, above n 8, 45.

⁸⁶Palmer, above n 8, 5-6.

⁸⁷Palmer, above n 8, 6.

. . . New Zealand has developed the most highly disciplined (albeit self-disciplined) parliamentary parties of any 'democratic' country. . . . Further, with the level of cohesion in New Zealand's political parties today, it may be argued that the most important debates which do take place are not made public, while the debates on the floor of the House become largely ritualistic. . . . It is too readily assumed that what is good for the political party must automatically be good for the country.

This party discipline, when coupled with the doctrine of collective ministerial responsibility, ensures the dominance of the Executive over the Legislature.⁸⁹ As Palmer has observed, "Parliament is highly unlikely to pass legislation or approve measures which are unacceptable to the Cabinet,"⁹⁰ particularly as the government of the day controls the legislative agenda as well as the policy underlying most of the legislation it enacts.⁹¹ In this vein, Jackson has concluded:⁹²

The pretense that Parliament somehow represents any sanction upon executive power has almost disappeared, except on rare occasions when a government has a finely balanced party majority. The only effective remaining sanctions are the triennial elections. . . . [I]n matters of moment Parliament *is* party, and very largely the majority party.

Unlike California, the Executive in New Zealand can usually be sure that its proposals will become law without being altered by compromise in the legislative process.⁹³ This process serves more to perfect the legislative form of government policy than to resolve competing political considerations. As a general rule, real give and take is confined to the policy formation process prior to Cabinet directive. Once Cabinet decides to legislate, it is rare for the final enactment to deviate from the policy underlying the decision.

In legal terms, the CIR Act does not affect Cabinet, particularly as Cabinet has the power to authorise its repeal or amendment. More importantly, the results of citizens initiated referendums are not binding. Accordingly, Cabinet is not legally obliged to take any notice of their results, let alone authorise legislation giving them effect.

In political terms, however, ignoring the results of citizens initiated referendums could prove impossible, especially if a particular referendum topic becomes an

⁸⁸Jackson, above n 8, 68.

⁸⁹See Joseph, above n 8, 281.

⁹⁰Palmer, above n 8, 9.

⁹¹See Joseph, above n 8, 281.

⁹²Jackson, above n 8, 15.

⁹³See Palmer, above n 8, 139; see also Joseph, above n 8, 288; but see B Robertson "Constitutional and Administrative Law in New Zealand" NZLJ 213, 216-217 (claiming, in a review of Joseph's book, that the Fourth Labour Government restored Parliament to its rightful place where the important issues facing the nation are debated and that government backbenchers are influential in shaping government policy).

election issue. In these circumstances, the government of the day could be faced with a serious dilemma if the result of a referendum runs counter to principles fundamental to the government's policies and election manifesto promises. For example, on 30 November 1994 a group styling itself "The Next Step Democracy Movement" re-lodged six proposed referendum questions with the Clerk of the House which threatened to re-litigate some of the key policy decisions underlying the National Government's political program. In contradiction to accepted government policy, the questions proposed free medical care; free education from pre-school through university; full employment with a livable wage for those not in paid employment; reduction of military spending by half with the savings allocated to health, education, and conservation; repeal of the controversial Employment Contracts Act 1991; and meeting the increasing demand for energy through conservation and from sources that are environmentally sustainable and do not produce carbon dioxide.⁹⁴

If a citizens initiated referendum proposal contrary to government policy qualifies for the ballot and appears likely to be approved by the electorate, the government of the day could try to undermine support for it by placing a counter proposal on the ballot. If the proposal is approved, the government, if unwilling to abandon its policy, would have to pursue evasive strategies. If the turnout is low and the vote is close, the government could try to dismiss the result as unrepresentative. This approach has its limits, however, as the National Government discovered when it failed to discount the results of its first government controlled referendum on electoral system in this manner in 1992. Furthermore, the strategy would probably be useless regarding referendums held in conjunction with general elections, as they traditionally produce high turnouts in New Zealand. Alternatively, the government could try ignoring the result or try providing some plausible reason for not giving effect to the result in the immediate future, hoping that the electors would lose interest in the issue by the time the next general election is held. In addition, the government could try legislating in a manner that gives the appearance of compliance with the result, but, in effect, preserves the status quo.

The approach taken, from complete compliance to complete rejection, will depend on whether the citizens initiated referendum coincides with a general election or a change of government. If a referendum on government policy is held between elections, the media will most likely view it as a referendum on the government of the day, even though the result will simply approve or reject a particular aspect of the government's political program. Win or lose, the political damage could be sufficient to jeopardise

⁹⁴"Citizens Initiated Referenda" (13 December 1994) 25 Parliamentary Bulletin 18-19. Next Step Democracy originally submitted these proposed questions on 20 June 1994 but withdrew them on 16 September 1994 just before the Clerk had to determine them. See "Citizens Initiated Referenda" (19 September 1994) 16 Parliamentary Bulletin 17-18.

a government's re-election hopes, particularly if the policy was controversial but necessary. If a referendum on government policy is held at a general election, the parties opposing the government will undoubtedly try use the issue to augment their electoral fortunes. If the electors do not re-elect the government and approve the referendum, the new government would probably give effect to the result. If the electors return the government but approve the referendum, the outcome is less certain as this would put the government in the novel position of having to reconcile a general mandate to govern according to its basic policies with a specific request to reject one of those basic policies. In either case, the CIR Act has the potential to re-politicise some of the more controversial decisions taken by Cabinet.

C Courts (Judiciary)

The New Zealand judicial structure consists of four levels: the District Court, the High Court, the Court of Appeal, and the Judicial Committee of the Privy Council. It is augmented by the Family Court and approximately 130 miscellaneous tribunals, ranging from the Disputes Tribunal, which covers small claims up to \$ 3,000, to the Treaty of Waitangi Tribunal, which hears grievances regarding alleged violations of Treaty rights.

Most of the judicial activity takes place in the District Court. District Court judges preside individually over most of the crime cases and, with certain exceptions, civil cases that do not exceed \$50,000. They are appointed by the Governor-General and generally serve until they retire.⁹⁵ The High Court has virtually unlimited jurisdiction. Essentially, any case outside the jurisdiction of the District Court can be commenced in the High Court. The High Court also hears appeals from the District Court as well as from many of the tribunals and specialist courts. The Governor-General appoints High Court judges, including the Chief Justice, who must retire when they turn 68.⁹⁶ High Court judges can only be removed on the grounds of misbehaviour or incapacity.⁹⁷

For the great majority of criminal and civil cases, the Court of Appeal is the final court of appeal. It does not have any original jurisdiction. It consists of six judges:

⁹⁵Mulholland, above n 8, 42-44, 47-49.

⁹⁶Mulholland, above n 8, 45-47.

⁹⁷Constitution Act 1986, s.23. Furthermore, the salary of High Court judges cannot be reduced while in office. Constitution Act 1986, s. 24. These rules, which are designed to ensure judicial independence, also apply to the Court of Appeal. See Palmer, above n 8, 183. Judicial independence is augmented by a convention that the government of the day should not exert any form of pressure on judges to make decisions in a particular way. As corollary, judges are expected to refrain from participating in political partisan activity. Palmer, above n 8, 184, 186. In addition, the courts have powerful contempt powers which they can use to punish people who make scandalous statements about Judges or make public statements calculated to influence the outcome of a trial. Palmer, above n 8, 186.

the Chief Justice *ex officio*, one High Court judge who is appointed President of the Court of Appeal, and four other High Court judges who are appointed as judges of the Court of Appeal. The quorum for the Court of Appeal is three judges. However, only two judges need to be present for the delivery of judgments or for hearings regarding leave to appeal to the Privy Council.⁹⁸

The Judicial Committee of Privy Council, which sits in London, is the final Court of Appeal. In civil cases involving amounts over \$5,000, litigants have an open right of appeal. If the amount is less, they must obtain leave of the Court of Appeal. Appeals in all criminal actions also require leave of the Court of Appeal. According to Palmer, the Privy Council usually handles no more than two or three cases a year from New Zealand. Since 1983, when the Minister of Justice suggested that this appeal was no longer required, constitutional lawyers have been debating the suggestion.⁹⁹ Although both Palmer and Mulholland appear to agree that abolishment is inevitable, largely as a natural consequence of national sovereignty,¹⁰⁰ it could amount to the elimination of a check on arbitrary Executive action. As Mulholland has observed:¹⁰¹

New Zealand has no written constitution, nor second chamber to its parliamentary system, nor Bill of Rights. The Privy Council could be seen, at least to some extent, in substitution for these institutions and assisting in upholding the rights of the individual against arbitrary conduct by the Government.

Although Parliament enacted the New Zealand Bill of Rights 1990 a few months after Mulholland published his observation, his assessment is unlikely to change as section 4 of that Act expressly denies the courts the power to strike down legislation that conflicts with the Act's provisions. As Jackson has noted, the courts "lack any capacity to declare an [A]ct unconstitutional or beyond the scope of Parliament's powers; [they] will not question the validity of what purports to be an [A]ct of Parliament."¹⁰²

Nevertheless, the New Zealand Bill of Rights Act 1990 has given the courts an additional tool by which to interpret and enforce parliamentary enactments. Section 6 of the Act requires and empowers the courts to give meaning to enactments that are, as far as possible, consistent with the rights and freedoms contained in the Bill of

⁹⁸Mulholland, above n 8, 49.

⁹⁹Mulholland, above n 8, 49-52.

¹⁰⁰Mulholland, above n 8, 50-51; Palmer, above n 8, 181.

¹⁰¹Mulholland, above n 8, 51.

¹⁰²Jackson, above n 8, 23-24; see also Joseph, above n 8, 166; Palmer, above n 8, 186, 194, 214.

Rights. This requirement is similar to the approach the courts take regarding New Zealand's international obligations. As Joseph has noted, they apply:¹⁰³

a presumption of interpretation that Parliament does not intend legislating in breach of international law or specific treaty obligations. If a statute may reasonably bear more than one meaning, a court will prefer the meaning that is consonant with international law. International comity obliges courts to take notice of an international treaty when construing a statute for implementing its terms. That obligations enures even if a statute omits to state that it is for implementing a treaty.

Aside from determining the meaning of parliamentary enactments, the courts have the power to declare subordinate legislation invalid if it is outside the scope of the authority granted by the applicable parliamentary enactment.¹⁰⁴ Furthermore, by-laws, which are generally enacted by local bodies, can be struck down on the grounds that they are unreasonable.¹⁰⁵ This power is significant as Parliament has conferred upon the Executive "wide discretionary powers in many different areas of activity."¹⁰⁶ As Palmer has stated:¹⁰⁷

numerous tribunals exist to decide specialized questions of licensing and registration. When Ministers, public servants, local authorities or tribunals act in a manner which is illegal or unfair their decision can be quashed by a Court.

According to Palmer, however, Parliament can enact legislation that expressly limits the courts ability to review Executive action.¹⁰⁸ Parliament can also pass legislation that alters or reverses the law as determined in judicial decisions.¹⁰⁹ Although parliamentary action in this respect is rarely retroactive, it can be.¹¹⁰

Accordingly, as in Switzerland but unlike in California, the role of the courts in New Zealand with respect to the CIR Act is confined to interpretation of the Act and

¹⁰³ Joseph, above n 8, 453; see also *Police v Hicks* [1974] 1 NZLR 763 at 766 per O'Regan J; *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 at 144 per Diplock LJ.

¹⁰⁴ Palmer, above n 8, 147, 194; Jackson, above n 8, 23-24; see also G Taylor *Judicial Review* (Butterworths, Wellington, 1991); G Taylor "The Limits of Judicial Review" NZULR 178; R Harrison "Judicial Review of Administrative Action: Some Recent Developments and Trends" (1992) NZLJ 200; J Fogarty "Judicial Review: A Review Article" (1992) NZLJ 88;

¹⁰⁵ Palmer, above n 8, 147, 196.

¹⁰⁶ Palmer, above n 8, 190.

¹⁰⁷ Above. Palmer asserts that the courts have a duty to ensure that Executive action is consistent with the principles of natural justice and in accordance with the rule of law as interpreted and applied correctly. Palmer, above n 8, 194.

¹⁰⁸ Palmer, above n 8, 192.

¹⁰⁹ Palmer, above n 8, 196, 200.

¹¹⁰ *Eg Clutha Development (Clyde Dam) Empowering Act 1982* (nullifying a decision regarding water rights reached via *Gilmore v National Water and Soil Conservation Authority and Minister of Energy* (1982) 8 NZPTA 298 (Casey J); *Annan v National Water and Soil Conservation Authority and Minister of Energy* (1980) 7 NZTPA 417; (1982) 8 NZTPA 396; see also *Annan v National Water and Soil Conservation Authority and Minister of Energy* (No.2)(1982) 8 NZTPA 369 (Planning Authority); Brookfield "High Courts, High Dam, High Policy," above n 8.

review of any administrative decisions carried out under the Act.¹¹¹ The courts cannot rule on the constitutional validity of the CIR Act or any of the Acts that give effect to citizens initiated referendum results. In addition, they cannot rule on Parliament's decisions to ignore or give effect to the results of citizens initiated referendums, as the results are legally non-binding. In Switzerland and California, the courts need not intervene to enforce referendum results as their effect is immediate and does not depend on the action of elected representatives. If the CIR Act is used frequently and successfully, however, the interpretation and review functions of the courts could grow in importance as opponents look for ways to delay or subvert referendum questions which are contrary to their interests.¹¹²

If Parliament were to amend the CIR Act to make the results of citizens initiated referendums binding and to include subject matter limitations, the role of the courts would expand. Subject matter limitations would give the courts the power to disallow the placement of a determined question on the ballot on the grounds that it concerns a subject exempt from citizens initiated referendums. It would also be possible to challenge results on this ground if officials failed to keep questions dealing with exempt subjects off the ballot. However, assuming that Parliament would still be required to give effect to binding citizens initiated referendum results, the courts would have to respect and uphold enactments that gave effect to a result which dealt with an exempt subject.

III CITIZENS INITIATED REFERENDA ACT 1993

Although New Zealand has had some experience with government controlled referendums,¹¹³ it has not had any experience with the elector-controlled direct

¹¹¹See *The Egg Producers Federation of New Zealand v The Clerk of the House of Representatives and The Royal New Zealand Society for the Prevention of Cruelty to Animals*, unreported, 20 June 1994, High Court, Wellington Registry, CP 128/94 (Eichelbaum CJ); see also same, unreported, 23 May 1994, High Court, Wellington Registry, CP 128/94 (Gallen J) (holding that the CIR Act 1993 did not permit the court to enjoin the promoter from collecting signatures even though the court was empowered to review the Clerk's determination of the question).

¹¹²See eg *Egg Producers*, above 111 (Eichelbaum CJ).

¹¹³Jackson, above n 8, 8, 29-30 (stating that government controlled referendums are rarely used and that they are used when the government of the day is internally divided on an issue, when the matter is a constitutional issue touching upon the entrenched clauses of the Electoral Act, or when a 'moral' question is involved, particularly gambling or liquor); see also "NZ Referendums Rare Phenomenon" *National Business Review*, 18 September 1992. For statistics on New Zealand's government controlled referendums, see J Wilson *New Zealand Parliamentary Record: 1840-1984* (Government Print, Wellington, 1985) 298-301 (summarising results of referendums from 1896 to 1984); *New Zealand Official Yearbook 1988* (93 ed, Dept of Statistics, Wellington, 1988) 74 (summarising results of referendums from 1972 to 1987); *New Zealand Gazette* (29 October 1990) 4505-4506 (summarising results in 1990); *The General Election 1990* (1990) AJHR E.9, 174-175 (same); *New Zealand Gazette* (29 October 1992) 3543-3544 (summarising results in 1992); *New Zealand Gazette* (16 December 1993) 3753-3754 (summarising results in 1993). For discussions of New Zealand's government controlled referendums, see L Watt *The Referendum: Its Uses and Abuses* (MA thesis in political

democracy devices found in Switzerland or California, that is, the constitutional initiative, the legislative initiative, or the legislative referendum. While the CIR Act gives the New Zealand electors the opportunity to gain some experience in the general procedure involved in triggering these devices, it does not provide them with any legal power to change the law independently of Parliament or their elected representatives. Proposals that win the support of the electorate will only change the law if Parliament agrees to give effect to them. This difference is consistent with theory of parliamentary sovereignty, which is one of the theories upon which the New Zealand constitutional system is based. The CIR Act sets up a citizens initiated referendum process that consists of six stages.

A *Submitting a Proposal*

To start the process, a proposer, who may be a legal or natural person,¹¹⁴ submits a written proposal to the Clerk of the House of Representatives. The proposal must include the proposer's name, the name of the proposer's representative (if any), and contact addresses for both.¹¹⁵ The proposal must also be accompanied by the prescribed fee (\$500),¹¹⁶ and a draft of the proposed indicative referendum petition, which must specify the question that the proposer would like to put to the electors.¹¹⁷ In practice, proposers submit a question together with the requisite identification information and the fee; however, as a general rule, the Clerk provides them with a model petition form as a guide.

science held by Victoria University of Wellington, 1956); J Lee *Simple on a Soap-Box* (Collins Publishers, Auckland, 1963) 250-257 (compulsory military training referendum of 1949); W Oliver *The Story of New Zealand* (Farber & Farber, London, 1960) 218-219, 275- 276 (same); K Sinclair *A History of New Zealand* (Penguin, Middlesex, 1959) 284 (same); K Sinclair *A History of New Zealand* (4 rev ed, 1991) 287 (same, but changed emphasis); J Rowe and M Rowe *New Zealand* (Ernest Benn, London, 1967) 81 (same); B Brown *The Rise of New Zealand Labour: A History of the New Zealand Labour Party from 1916 to 1940* (Price Milburn, Wellington, 1962) 30-32 (liquor prohibition); R Milne *Political Parties in New Zealand* (Clarendon Press, Oxford, 1966) 13 (general), 60 (compulsory military training), 124 (liquor prohibition), 273-286 (general); K Jackson *The New Zealand Legislative Council* (University of Otago Press, Dunedin, 1972) 193 (general); H Penniman (ed) *New Zealand at the Polls: The General Election of 1978* (American Enterprise Institute for Public Policy Research, Washington DC, 1980) 93 n 50 (liquor prohibition); J Ringer *An Introduction to New Zealand Government* (Hazard Press, Christchurch, 1991) 152-154 (general); see also N Jamieson "The Age of Referenda" (1992) NZLJ 334.

¹¹⁴See Citizens Initiated Referenda Act 1993, s. 11(2)(a)(iii). For an official outline of the citizens initiated referendum process, see *How You Can Have Your Say: The Citizens Initiated Referenda Act 1993* (Law Reform Division, Department of Justice, Wellington, 1994).

¹¹⁵CIR Act, above n 114, s. 6.

¹¹⁶CIR Act, above n 114, s. 6(2)(b); Citizens Initiated Referenda (Fees) Regulations 1993, r. 2.

¹¹⁷CIR Act, above n 114, s. 5(1)(b).

B *Determining the Question*

Once these requirements are met, the second stage begins. The Clerk advertises the proposed question in the *Gazette*, the government publication in which official notices appear, and the principal newspapers. The public is given at least 28 days from the date of publication of the proposed question in the *Gazette* to provide the Clerk with written comments on its wording.¹¹⁸ However, the Clerk can accept and consider submissions at any time before he or she determines the question, which the Clerk must do within three months of receiving the proposal.¹¹⁹

In determining the wording of the question, the Clerk must take into account the proposal, any public comments received, and his or her consultations with the proposer and others.¹²⁰ Although the Clerk is not required to consult others, in practice the Clerk generally consults those whose interests are likely to be affected by the proposal as well as government officials who advise the government on matters or administer legislation that may be affected. The Clerk also routinely seeks the views of the Legislation Advisory Committee. The public comment is available for public inspection, and the views of officials are subject to requests under the Official Information Act 1982. The Clerk, as a matter of policy, provides the proposer with copies of all submissions on the proposer's proposal.

The National Government is yet to decide whether it should issue guidelines for government officials commenting on proposed questions.¹²¹ It would appear to be appropriate for officials to comment on proposals only to the extent that it assists the Clerk in the task of clarifying proposals. Officials providing a written record suggesting changes to questions designed to preserve the status quo could expose the government of the day to accusations that it was trying to subvert the citizens initiated referendum process. In addition, comments of this nature, whether from officials or private sector opponents of a particular proposal, are superfluous to the Clerk's task. The Clerk's primary function at this stage is to determine whether the wording of the proposed question is only capable of one of two answers and shows clearly the purpose and effect of the citizens initiated referendum.¹²² In *The Egg Producers Federation of New Zealand v The Clerk of the House of Representatives and The Royal New Zealand Society for the Prevention of Cruelty to Animals*, Chief Justice

¹¹⁸CIR Act, above n 114, s.7.

¹¹⁹CIR Act, above n 114, s.11(2).

¹²⁰CIR Act, above n 114, ss. 9, 10(2).

¹²¹See CAB (94) M 31/27 (22 August 1994).

¹²²CIR Act, above n 114, s. 10(1).

Eichelbaum ruled that “the Clerk is not required or indeed permitted to turn the proposal into something it does not purport to be.”¹²³ Accordingly, he held:¹²⁴

. . . I accept the Clerk is obliged to take reasonable steps to frame the question in a neutral way. I think that follows from the arbitral role the legislation requires the Clerk to play where, as one would expect will generally be the case, those with opposing views on the issue raised by the proposal will have differing opinions or preferences regarding the form of the question. The proposition of neutrality cannot be stated in absolute terms, because the subject matter may not permit complete neutrality. While the question should try to ensure a fair contest the fact remains that the playing field has been chosen by the promoter. The question is limited to the parameters of that playing field; the Clerk cannot shift the contest to another venue.

This conclusion is supported by the almost complete lack of subject matter limitations on proposed questions. A promoter may circulate a citizens initiated referendum petition on any topic, even if it “does not concern Government or is such that no Government would take action on it,”¹²⁵ provided it does not concern the election of an MP or the way a prior citizens initiated referendum was held,¹²⁶ and does not relate to more than one question.¹²⁷ If the proposed question concerns either of these prohibited topics, the Clerk cannot determine it. The Clerk will also not determine the question if a citizens initiated referendum “to like effect” was held within the last five years, or if the proposer withdraws the question (in writing), dies or, being a corporation, is liquidated before the Clerk determines the question.¹²⁸

Once the question is determined, the Clerk will approve the petition form to be used to collect signatures.¹²⁹ Once the question is determined and placed on the approved petition form, the proposer, now called the promoter, is responsible for ensuring “that a sufficient quantity of forms is made available and that the forms are printed in accordance with the approval given by the Clerk.”¹³⁰ At this point, the Clerk publishes the question and information identifying its promoter in the *Gazette* and the principal newspapers.¹³¹

C *Signature Collection*

This begins the third stage in which the promoter collects the signatures required to trigger a citizens initiated referendum. The promoter has 12 months to collect and

¹²³*Egg Producers*, above n 111, 7 (Eichelbaum CJ).

¹²⁴*Egg Producers*, above n 111, 14.

¹²⁵*Egg Producers*, above n 111, 7.

¹²⁶CIR Act, above n 114, s. 4.

¹²⁷CIR Act, above n 114, s. 5(2).

¹²⁸CIR Act, above n 114, s. 11(2).

¹²⁹CIR Act, above n 114, s. 12(1).

¹³⁰CIR Act, above n 114, s. 14(3).

¹³¹CIR Act, above n 114, s. 13.

deliver the signatures of at least 10 percent of all eligible electors to the Clerk. Given the requirements of the signature checking procedure, this means that a signature will only be counted if it belongs to a person whose name is on the General or Maori electoral roll at the time his or her signature is checked.¹³² In short, 10 percent of all eligible electors means 10 percent of all registered electors at the time of checking, which, if carried out just prior to the 1993 general election, would have required approximately 232,000 signatures. Accordingly, a promoter may collect signatures from people who are eligible to vote, but who are not yet registered to vote, if the promoter is confident that they would be registered by the time their signatures are checked. Given the practice in Switzerland and California, the promoter is likely to collect substantially more than the required number of signatures to allow for invalid signatures. Promoters that wish to shorten the time it takes to trigger a citizens initiated referendum will endeavour to collect the signatures well before the 12 month deadline expires.

Signatures will only be counted if they appear on an approved petition form.¹³³ Electors who sign the form are required to print their full name, their electoral address, the name of the electorate (if known), and the date next to their signature.¹³⁴ They may include their birth date.¹³⁵ This information will enable the Chief Registrar of Electors to verify whether the signatures belong to people registered on the electoral rolls. Before delivering the petition to the Clerk, the promoter must identify each page on which erasures appear, identify each page that is not filled with signatures, and note on each unfilled page the number of signatures that appear on it.¹³⁶ These requirements are intended to make it easier for the Clerk to calculate the total number of unverified signatures appearing on a petition delivered to him or her, and to assess the extent to which the petition may have been altered.

D Checking the Petition and Verifying the Signatures

The fourth stage begins once the promoter has delivered the petition to the Clerk. The Clerk has 20 working days to check that each page of the petition is filled out correctly.¹³⁷

¹³²CIR Act, above n 114, ss. 2, 15(3), 18(2), 19.

¹³³CIR Act, above n 114, s. 16(3).

¹³⁴CIR Act, above n 114, s. 15(1)(a).

¹³⁵CIR Act, above n 114, s. 15(1)(b).

¹³⁶CIR Act, above n 114, s. 15(2).

¹³⁷CIR Act, above n 114, s. 16(1).

1 *Mistakes*

If there are mistakes, the Clerk may return the entire petition or the incorrect pages to the promoter to be corrected.¹³⁸ In either case, the promoter has two months to make the necessary corrections.¹³⁹ If the promoter is late in returning a corrected petition, the promoter is given an additional two months to collect more signatures and return the petition to the Clerk.¹⁴⁰ Failure to meet this last deadline or to obtain enough valid signatures will end the process.¹⁴¹ If the promoter is late in returning corrected pages, signatures on these pages will not be counted.¹⁴² The Clerk then has two months to decide if the returned pages, if any, and the rest of the petition have enough valid signatures.¹⁴³ If they do not, the promoter is given another two months to collect more signatures and return the petition to the Clerk.¹⁴⁴ If the promoter returns the petition late or it still does not have enough valid signatures, the process will end.¹⁴⁵

2 *No mistakes*

If each page of the petition is correctly filled out, the Clerk has two months to determine whether the petition has enough valid signatures.¹⁴⁶ If it does not, the promoter will be given two additional months to collect more signatures and return the petition to the Clerk.¹⁴⁷ The process will end if the promoter returns the petition late or if it still does not have enough valid signatures.¹⁴⁸

3 *Verification of signatures*

To verify whether the promoter has obtained the requisite number of valid signatures, the Clerk is required to take a sample of the signatures in accordance with a statistical sampling technique devised by the Government Statistician and to provide the sample to the Chief Registrar of Electors. The Chief Registrar of Electors will check the validity of each signature in the sample, that is, whether the signatures belong to electors registered on either the General or Maori electoral rolls. The Clerk, with the assistance of the Government Statistician, uses the result of this check to

¹³⁸CIR Act, above n 114, s. 16(2).

¹³⁹CIR Act, above n 114, s. 17(1).

¹⁴⁰CIR Act, above n 114, s. 17(3), 20(1).

¹⁴¹CIR Act, above n 114, s. 20(2).

¹⁴²CIR Act, above n 114, s. 17(2).

¹⁴³CIR Act, above n 114, s. 18(1).

¹⁴⁴CIR Act, above n 114, s. 20(1).

¹⁴⁵CIR Act, above n 114, s. 20(2).

¹⁴⁶CIR Act, above n 114, ss. 18, 19.

¹⁴⁷CIR Act, above n 114, s. 20(1).

¹⁴⁸CIR Act, above n 114, s. 20(2).

determine whether the petition has met the 10 percent signature requirement.¹⁴⁹ If the petition has enough valid signatures, the Clerk certifies it and presents it to the Speaker of the House of Representatives who then presents it to the House.¹⁵⁰

E Setting the Referendum Date

The fifth stage begins at this point. The Governor-General has a month from the date the petition is presented to the House to set a date for the referendum.¹⁵¹ The referendum must take place within 12 months of the petition's presentation to the House.¹⁵² However, the House can defer the date for up to an additional 12 months if 75 percent of all MPs agree.¹⁵³ The House, by simple majority, can also vote to change the date of the referendum to coincide with a general election if that election will take place within 12 months of the petition's presentation.¹⁵⁴ If the government of the day calls a snap election, the Governor-General can reset the referendum date to coincide with the snap election.¹⁵⁵ In addition, there is no limit on the number of citizens initiated referendums that may be held at one time.¹⁵⁶ These rules are designed to provide the government of the day with the means to reduce the costs of administering the system by consolidating citizens initiated referendums or holding them in conjunction with general elections.

F Results

The sixth stage involves announcing the result of the citizens initiated referendum, which the Returning Officer in each electorate is required to do as soon as the result becomes known. The Chief Electoral Officer is responsible for announcing the national result.¹⁵⁷ The result in each electorate can be questioned by applying to the District Court for a recount¹⁵⁸ or by filing a petition of inquiry with the High Court.¹⁵⁹ If the High Court finds that some irregularity materially affected the result in the electorate, it must declare the result void, which requires the Returning Officer for that electorate to restage the referendum in that electorate within 30 days of being notified of the finding.¹⁶⁰ The government of the day is not obliged to give effect to

¹⁴⁹CIR Act, above n 114, s. 19.

¹⁵⁰CIR Act, above n 114, s. 21.

¹⁵¹CIR Act, above n 114, s. 22(1)-(2).

¹⁵²CIR Act, above n 114, s. 22(3).

¹⁵³CIR Act, above n 114, s. 22(4)(a).

¹⁵⁴CIR Act, above n 114, s. 22(4)(b).

¹⁵⁵CIR Act, above n 114, s. 22.

¹⁵⁶CIR Act, above n 114, s. 55.

¹⁵⁷See CIR Act, above n 114, s. 24.

¹⁵⁸CIR Act, above n 114, s. 38.

¹⁵⁹CIR Act, above n 114, s. 48.

¹⁶⁰CIR Act, above n 114, s. 51.

the result, as it simply “indicate[s] the views held by the people of New Zealand on specific questions but will not be binding on the New Zealand Government.”¹⁶¹

G *Advertising Restrictions*

The process is subject to media advertising restrictions. It is an offence for promoters or supporting organisations to spend more than \$50,000 on published or broadcast advertisements “in relation to an indicative referendum petition.”¹⁶² As an “indicative referendum petition” only comes into being after the Clerk determines the question and approves the petition form, this restriction only applies during the period in which the promoter is collecting signatures.¹⁶³ However, it is also an offence for promoters or supporting organisations to spend more than \$50,000 on published or broadcast advertisements promoting an answer to a citizens initiated referendum.¹⁶⁴

Both advertising restrictions include expenditures that promoters knowingly make “in combination with others.”¹⁶⁵ In practice the “in combination with others” aspect of the limitation could prove to be unenforceable. In the least, the inherent vagueness of the phrase is an invitation for litigation. The maximum penalty for overstepping each advertising restriction is \$100,000, which means that a person overstepping both restrictions could be fined up to \$200,000.¹⁶⁶ Promoters are required to record the amount of money they or supporting organisations spend on advertising in relation to a petition or a referendum and to report it to the Returning Officer in their electorate.¹⁶⁷ The maximum penalty for making a false report is \$70,000.¹⁶⁸ The reports are open to public inspection.¹⁶⁹ In addition, every advertisement in connection with a petition, or promoting an answer to the referendum, must include the true name and contact address of the person responsible for the advertisement.¹⁷⁰ The maximum fine for not doing this is \$70,000.¹⁷¹

Although these provisions are meant to neutralise the advantage of money, they are likely to render an effective national campaign by small groups all but impossible to conduct without media interest. They could also prove to be a boon to large grassroots organisations with plenty of committed volunteers. Opponents without this

¹⁶¹CIR Act, above n 114, Title.

¹⁶²CIR Act, above n 114, s. 42(a).

¹⁶³See CIR Act, above n 114, ss. 5, 6, 11, 12, 14.

¹⁶⁴CIR Act, above n 114, s. 42(b).

¹⁶⁵CIR Act, above n 114, s. 42.

¹⁶⁶Above.

¹⁶⁷CIR Act, above n 114, s. 43(1).

¹⁶⁸CIR Act, above n 114, s. 43(2).

¹⁶⁹CIR Act, above n 114, s. 45.

¹⁷⁰CIR Act, above n 114, s. 41(1).

¹⁷¹CIR Act, above n 114, s. 41(2).

resource will not be able to counter a referendum that threatens their interests with a well-financed media campaign.¹⁷² Although a *prima facie* violation of the freedom of expression,¹⁷³ the advertising restrictions are consistent with the approach taken under the Electoral Act 1993, which limits the amount that candidates standing for the House of Representatives may spend in their campaigns. However, the restrictions are inconsistent with the approach taken by the National Government with respect to government controlled referendums. For example, the Campaign for Better Government, an organisation against proportional representation, was permitted to spend as much as it could afford in its failed effort to overcome the campaign in favour of proportional representation led by the Electoral Reform Coalition, which enjoyed an organisational advantage but was poorly-financed in comparison.

IV ASSESSMENT

If direct democracy is understood to be a means by which to obtain “some measure of popular control over the government” which would alleviate “the sense of powerlessness and disillusionment that many New Zealanders feel concerning their government and their political system,”¹⁷⁴ then it would be inappropriate to classify New Zealand’s citizens initiated referendum system as a direct democracy device. Despite procedural similarities with the direct democracy devices in Switzerland and California,¹⁷⁵ New Zealand’s citizens initiated referendum system is fundamentally different because it is non-binding. Governments in New Zealand, unlike those in Switzerland and California, can avoid giving effect to referendum results that are unfavourable to their policies.¹⁷⁶

The decision to make the citizens initiated referendum system non-binding essentially stemmed from a hostile reaction of the political wing of the National Party to a well-supported National Party remit calling for a binding legislative referendum system. Despite its self-serving power-preserving basis, however, the decision is consistent with the constitutional principles underlying the New Zealand constitutional system, particularly the theory of parliamentary sovereignty. As discussed in chapter two, the

¹⁷²Helena Catt, Paul Harris, and Nigel Roberts have suggested that the CIR Act’s advertising limits are unlikely to limit the influence of those who wish to spend large sums on promoting or denigrating a citizens initiated referendum proposal. H Catt, P Harris, and N Roberts *Voter’s Choice: Electoral Change in New Zealand?* (The Dunmore Press, Palmerston North, 1992) 141.

¹⁷³New Zealand Bill of Rights Act 1990, s. 14. However, the infringement is arguably justifiable in a free and democratic country. Bill of Rights Act, above, s. 5; see eg *R v Blake* (1988) 42 CCC (3d) 271 (Man Prov Ct) (holding that the advertising expenditure limits imposed on candidates by the Manitoba Elections Finance Act did not violate the freedom of expression as protected under the Canadian Charter); see also *Reform Party of Canada v Canada (Attorney-General)* [1993] 3 WWR 139, 136 AR 1, 13 CRR (2d) 107 supplementary reasons *loc cit* WWR at 171, CRR at 137, 7 Alta LR (3d) 34 (QB).

¹⁷⁴Catt, above n 172, 140.

¹⁷⁵See section III in chapter four and section III in chapter six.

¹⁷⁶See Catt, above n 172, 140; see also FAIR Newsletter No. 18 (Jan 1994).

theory holds that Parliament is supreme and that its powers cannot be circumscribed by any institution including itself. Its enactments are, in effect, constitutional law. The Prime Minister or Cabinet cannot unilaterally veto parliamentary enactments and the courts cannot strike them down as unconstitutional.

Under a binding system, Parliament would have neither the power to ignore citizens initiated referendum results nor the power to repeal or amend legislation enacted by the electors. Parliament would be required to give effect to referendum results, which would remain in effect until the electors decided otherwise. This would place the New Zealand elector on a par with the electors in California and Switzerland, who are constitutionally recognised in these jurisdictions as being the source of legislative power.

In some respects, the New Zealand constitutional system is similar to the Swiss constitutional system. The Federal Council does not have the power to veto the Federal Assembly's enactments. In addition, the Federal Tribunal cannot invalidate the Federal Assembly's enactments. However, the constitutional basis for these common elements of the Swiss and New Zealand constitutional systems is entirely different. In Switzerland, the electors are sovereign rather than Parliament. If the Swiss electors do not like an enactment they can use the legislative referendum to veto it or the constitutional initiative to replace, modify, or repeal it. If the electors do not attack and reject an enactment in this fashion, the enactment is presumed to have been sanctioned by them. As the Swiss electors are ultimately the legal sovereign, neither the Federal Council nor the Federal Tribunal has the power to overrule any legislative enactment that the Swiss electors are deemed to have approved. The binding nature of Switzerland's direct democracy devices is consistent with this underlying constitutional principle.¹⁷⁷

The California constitutional system, in contrast to the Swiss system, does not have any features that may suggest that the theory of parliamentary sovereignty applies. The Governor of California has the power to veto legislative enactments. The California Judiciary, unlike its Swiss and New Zealand counterparts, has the power to declare legislative enactments unconstitutional. The California constitutional system emphasises a formal separation of governmental power, primarily to ensure that "no governmental agency can be dictatorial and successfully refuse to serve the will of the people,"¹⁷⁸ particularly as the electors are ultimately the legal sovereign. Accordingly, the Executive and the Judiciary operate as a check on the power of the Legislature in California. California's constitutional initiative, legislative initiative,

¹⁷⁷See generally chapter four.

¹⁷⁸*Constitution of the State of California* (California State Senate, Sacramento, 1961) 351

and legislative referendum are consistent with this approach. These devices contribute to the diffusion of responsibility for governmental decisions among different branches and levels of government primarily by adding another locus of decision-making or check to balance the system. The binding nature of California's direct democracy devices is consistent with this underlying constitutional principle.¹⁷⁹

As shown in chapters four and six, the exercise of legislative power by elected representatives in California and Switzerland is not absolute, either in theory or practice. In contrast, the legislative power of the New Zealand Parliament is absolute in theory if not in practice. As Joseph has observed:¹⁸⁰

Few lay people would appreciate the absolutism of Westminster parliamentary sovereignty. Under the Westminster doctrine, Parliament enjoys unlimited and illimitable powers of legislation. Parliament's word can be neither judicially invalidated nor controlled by earlier enactment; its collective will, duly expressed, is law.

The ultimate, if not only, legal check on this power appears to be the triennial general election.¹⁸¹ Accordingly, the underlying safeguard limiting the majoritarian character of the New Zealand constitutional system is nothing more than political instinct.¹⁸² The English Parliament came into being and evolved to moderate the absolute power of the English Sovereign. However, for all practical purposes, this power is exercised in New Zealand by the New Zealand Parliament at the direction of Cabinet, which is the decision-making centre of the Executive and is composed of parliamentarians who vote in the House of Representatives. Consequently, the House of Representatives plays a far less crucial role in moderating the exercise of governmental power by the executive branch in New Zealand than the Federal Assembly does in Switzerland or the Legislature does in California.

In Switzerland and California, representative democracy is defined in terms of limited majority rule. By contrast, the New Zealand constitutional system is "highly majoritarian, with few curbs upon executive authority and party dominance omnipresent."¹⁸³ As Jackson has noted its "almost total lack of safeguards is unique" among those countries classified as democracies.¹⁸⁴ A binding citizens initiated referendum system would affect this constitutional milieu by breaking the monopoly that elected representatives and their parties have over the legislative process by giving the electors the power to propose, enact, or veto laws, as the direct democracy devices in Switzerland and California have done.

¹⁷⁹ See generally chapter six.

¹⁸⁰ Joseph, above n 8, 418.

¹⁸¹ Jackson, above n 8, ix.

¹⁸² See Joseph, above n 8, 267.

¹⁸³ Jackson, above n 8, 174.

¹⁸⁴ Jackson, above n 8, ix.

In practice, the theoretical omnipotence of Parliament, if not its majoritarian character, is limited, which suggests that a binding system could be incorporated into the New Zealand constitutional system with little practical difficulty. The most important limitation is the desire of the ruling party to be re-elected. Failing to meet the expectations of the electors can result in the loss of power, as the Fourth Labour Government discovered in its devastating 1990 defeat, which is one reason why the government of the day generally takes into account the views of the better organised and well-resourced interest groups during the legislative process. The views of these groups are taken seriously if they can demonstrate expertise that rivals or surpasses that provided by government officials or if they can demonstrate that they can deliver significant electoral support. As Jackson has noted, "[p]ressure groups are likely to have as much influence as an opposition party and it is with the former that the various compromises take place, usually behind close doors."¹⁸⁵

Government officials also play a role in moderating the content of legislation, depending on the quality or nature of their advice. For example, the Department of Justice vets all bills for compliance with the New Zealand Bill of Rights Act 1990. In most cases, the Department or Ministry developing a bill will modify infringing provisions in the draft bill to avoid having the Attorney-General report to the House that it infringes the Act. Government officials also rely on international agreements in many cases to direct legislative aspirations. On a wide range of issues, international standards or obligations constrain or dictate Cabinet's decision-making. Intercourse with other countries requires co-operation on matters as diverse as "postage, civil aviation, weather information, communications, customs, diplomatic and consular relations, visas, trade rules, banking obligations, money exchange, the movement of people, refugees, [and] extradition."¹⁸⁶ As Palmer has noted:¹⁸⁷

Many of these matters are regulated through international treaties and conventions and some have international organizations to look after them. All those obligations place substantial restraint upon the freedom of action of the New Zealand Government.

In 1994, for example, after taking advice from government officials, Cabinet directed government officials to prepare legislative enactments to comply with New Zealand's obligations under the GATT Agreement, namely the Layout Designs Act 1994, the Copyright Act 1994, and the GATT (Uruguay Round) Act 1994. Although "Parliament may legislate notwithstanding the 'comity of nations' and binding

¹⁸⁵Jackson, above n 8, 16.

¹⁸⁶Palmer, above n 8, 21; see also Jackson, above n 8, 185 (stating that New Zealand's Closer Economic Relations agreement with Australia "has introduced some limitations of freedom to manoeuvre in the economic sphere").

¹⁸⁷Palmer, above n 8, 21-22.

international agreements,”¹⁸⁸ New Zealand governments, as Joseph has noted, “seldom legislate in defiance or disregard of international obligations.”¹⁸⁹

The Treaty of Waitangi, which is an agreement between the Maori and the English Crown that provides the English Crown with the right to govern in New Zealand in exchange for protecting the rights accorded to the Maori, has also served as a constraint on the government of the day. Palmer believes that:¹⁹⁰

The legitimacy of the system of government we have in New Zealand owes much to the Treaty of Waitangi entered into between the Crown and the Maori in 1840. The Treaty is a short document but it symbolizes the rights of the Maori and the undertakings which were given to them when the Crown assumed authority. In one sense New Zealand's right as a nation to make laws, to govern and to dispense justice can be said to spring from the compact between the Crown and the Maori in 1840.

The Treaty of Waitangi Act 1975 set up a Tribunal to hear grievances arising under the Treaty and to make recommendations to the government of the day regarding their resolution. Palmer contends that governments have generally accepted the Tribunal's recommendations.¹⁹¹ In practice, the Tribunal's recommendations are studied and analysed by the Treaty of Waitangi Policy Unit within the Department of Justice, which then advises the government of the day as to the appropriate response given the realities of resource constraints and competing political considerations.

The lack of financial resources can serve as a major constraint on government policy.¹⁹² In the decade following 1984, for example, the Treasury was successful in convincing successive Labour and National Governments to adopt a fiscal policy intended to overcome the negative effects of years of deficit spending. The new approach abolished or modified many of the laws regulating the economy and the provision of social services. Ironically, the reaction to this restructuring largely gave rise to the push for direct democracy and proportional representation. By and large, the electors perceived the Treasury's influence to be greater than theirs, and therefore, undemocratic.

¹⁸⁸Joseph, above n 8, 452 (citing *Theophile v Solicitor-General* [1950] AC 186 at 195 (HL, per Lord Porter) and *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 (Eng CA, per Diplock, LJ)); see also *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) (holding that the 1965 International Covenant on the Elimination of All Forms of Racial Discrimination could not deprive the Minister of his statutory authority under the Immigration Act 1964 to grant the entry permits to rugby players from South Africa).

¹⁸⁹Joseph, above n 8, 253.

¹⁹⁰Palmer, above n 8, 19; see also P Rikys “Trick or Treaty” (1991) NZLJ 370. Joseph has argued that claims that the Treaty is a founding or basic document are insufficient to elevate it to the status of supreme law or law simpliciter as it lacks entrenchment or statutory adoption and lacks any judicial recognition as fundamental law. Joseph, above n 8, 13.

¹⁹¹Palmer, above n 8, 20.

¹⁹²Palmer, above n 8, 113.

According to Joseph, parliamentarians also observe a general convention which amounts to a rule that "Parliament must not exploit its sovereign powers for tyrannical or oppressive legislation."¹⁹³ However, as Joseph admits, this rule is difficult to apply as "what may be oppressive or unacceptable to some may be socially or economically desirable to others."¹⁹⁴ Its application appears to be defined by extra-legal limits on the sovereignty of Parliament, that is, "the pressure of public opinion, passive and active resistance, and ultimately revolution."¹⁹⁵ However, this convention, as well as any other, "risks being flouted from time to time."¹⁹⁶ For example, the actions of the Fourth Labour Government (1984-1990) seriously undermined the mandate theory.¹⁹⁷ David Lange, who led the Labour Party during the 1984 and 1987 elections, has stated that the Labour Party's 1984 election manifesto was "gloriously unspecified on economic policy."¹⁹⁸ The Labour Party went one step further in the 1987 election by publishing its election manifesto after the election.¹⁹⁹ The logic appears to have been as follows: if vague promises are difficult to break, then no promises must be impossible to break. A government, however, cannot claim to have a mandate for a particular action and expect to enjoy the legitimacy it confers if it has not given the electors an opportunity to signal their support for the act.

In the lead up to the 1990 election, the subsequent National Government attacked the Fourth Labour Government for its failings in this regard by publishing a detailed election manifesto. Ironically, the strategy served to undermine the mandate theory further, as the manifesto contained a highly publicised promise that the National Government was unable to keep. Prior to the election, Jim Bolger, the Leader of the National Party, promised to remove the Fourth Labour Government's unpopular surtax on superannuation. As Prime Minister, however, Bolger "claimed that fiscal restraints required his government to increase rather than remove the surcharge."²⁰⁰ The outcry was deafening.²⁰¹

¹⁹³Joseph, above n 8, 241.

¹⁹⁴Above.

¹⁹⁵Joseph, above n 8, 253.

¹⁹⁶Joseph, above n 8, 267.

¹⁹⁷Joseph, above n 8, 285, 450-451; see also section III.B.2(b) in chapter two.

¹⁹⁸Joseph, above n 8, 450-451.

¹⁹⁹Above.

²⁰⁰Joseph, above n 8, 451. According to Joseph, "the record of recent government leaves much to be desired. Governments have legislated hastily, with little consultation or regard for parliamentary procedure, and made promises they could not keep." Joseph, above n 8, 4.

²⁰¹See eg M Munro "Caucus Revolt on Super Growing" *The Dominion*, Wellington, New Zealand, 7 August 1991; R Long "Cabinet Yielding to Super Pressure" *The Dominion*, Wellington, New Zealand, 6 June 1991; R Long "U-turn on Pensions Will Cost \$200 Million" *The Dominion*, Wellington, New Zealand, 4 October 1991, 1; J Clifton "Pension Surtax May Rise Only 10%" *The Dominion*, Wellington, New Zealand, 5 October 1991, 1; R Laugesen "Super Fiasco Blamed on the Balancing Act" *The Evening Post*, Wellington, New Zealand, 21 October 1991, 7; "Superannuitants' Hopes Rise"

These events helped to produce the political climate that made the introduction of proportional representation and the CIR Act possible, by blunting “the symbolism of representative government” and generating “much of the scepticism held about New Zealand’s governmental institutions.”²⁰² According to the Heylen polling service, 33 percent of those polled in 1975 had faith in Parliament; in 1981, 14 percent did; and, in 1987, 8 percent. By 1989, the figure had sunk to 4 percent.²⁰³ A nationwide crisis of confidence in the most important governmental institution in the country could only help the cause of constitutional reform, as it threw “into question Parliament’s ability to discharge its bedrock function of legitimising representative government,”²⁰⁴ which generated electoral support for proportional representation and the CIR Act, despite the opposition of most parliamentarians.

In short, there are a host of political factors that serve to restrain Parliament’s absolute power of law-making. A binding citizens initiated referendum system would be not be at odds with these political limitations. However, a binding system would nevertheless amount to a diminution of parliamentary sovereignty in constitutional terms, which would present a number of complex constitutional issues. For example, for the diminution of parliamentary sovereignty to be secure, some means must be found to entrench the Act creating the binding system. Otherwise, the government of the day could use its majority in Parliament to repeal or amend that Act to attack results it was unprepared to accept. As discussed in chapter two, Parliament may not have the legal power to bind itself, as Dicey and his followers have argued. However, it appears to have the legal power to create procedural hurdles which would make the exercise of its legislative power difficult, as manner and form theorists have argued. Joseph has summarised the position as follows:²⁰⁵

Parliament may, by legislation, validly reconstitute itself or reformulate its legislative procedures, but it cannot alter the rules affecting area of power. Statutes for the former purposes bind Parliament, those for imposing legislative vacuums do not.

Accordingly, Parliament could make the repeal or amendment of an Act creating a binding system conditional upon a super-majority vote of all members of the House of Representatives. This entrenching condition would itself have to be entrenched to avoid the possibility that the condition could be removed by a simple majority vote.

The Evening Post, Wellington, New Zealand, 21 October 1991, 13; Editorial “Searching for a Super Policy” *The Evening Post*, Wellington, New Zealand, 8 November 1991.

²⁰²Joseph, above n 8, 285; see also J Caldwell “Election Manifesto Promises: The Law and Politics” (1989) NZLJ 108 (concluding that electors who feel aggrieved by any subsequent departure from announced policies have little prospect of legal redress).

²⁰³Joseph, above n 8, 285; see also Jackson, above n 8, 42.

²⁰⁴Joseph, above n 8, 285.

²⁰⁵Joseph, above n 8, 460.

In addition, the doubly entrenched Act would have to be approved by a super-majority to avoid the possibility that the courts would refuse to enforce it on the grounds that a mere political majority in the House would be an insufficient expression of the will of the people to prevent a future Parliament from repealing the Act by simple majority.²⁰⁶ Judging from the hostile reception parliamentarians gave to the CIR Bill, however, the National Government would have been unable to meet the super-majority requirements if it had chosen to establish a binding system of direct democracy.

A binding system would also have entailed the consideration of subject matter limitations. If Parliament is bound by the results of citizens initiated referendums and the courts have no power to strike down legislative enactments, the system would lack any of the anti-majoritarian safeguards that are built into the Swiss and California direct democracy systems. For example, Maori interests would be threatened, as Maori issues could be decided by a simple majority vote, in which the great majority of the electors would be non-Maori, without reference to the principles of the Treaty of Waitangi. A binding system could be subject to the Treaty of Waitangi and the New Zealand Bill of Rights Act 1990 to provide broad-based protection for minority rights. It could also include geographical requirements to protect regional interests by adopting a double majority system similar to Switzerland's or by requiring a certain number of signatures to be collected from designated regions. In addition, it could specify that the electors may not use the system to abolish a fundamental governmental power, such as the power to tax, but may use it to exercise a fundamental governmental power, such as repealing or imposing taxes.

Providing the courts with the power to declare legislation unconstitutional has consistently met with resistance in New Zealand. Parliamentarians rejected the idea when considering whether to entrench the Bill of Rights Act in the late 1980s²⁰⁷ and to

²⁰⁶See Joseph, above n 8, 104 (stating that Robin Cooke, the President of the Court of Appeal, believes that "the efficiency of entrenchment would depend on 'a value judgment by the courts, based on their view of the will of the people'" (citing R Cooke "Practicalities of a Bill of Rights" *F S Dethridge Memorial Address* (1984), reproduced in (1984) 112 Council Brief 4); see also *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A6, 57 (stating that the courts would be unlikely to uphold entrenchment enacted by a simple majority).

²⁰⁷See generally P Rishworth "The Potential of the New Zealand Bill of Rights" (1990) NZLJ 68; B Harris "A Changing Perception of the Law-making Powers of Parliament? (1988) NZLJ 394; R Martin "A Bad Idea to Give Judges Wide Charter Powers" (1987) NZLJ 136; D Stuart "Now the Positive Impact of Judges' Charter Decisions" (1987) NZLJ 138; D Dugdale "Common Sense about the Bill of Rights: A Criticism of Geoffrey Palmer's Super-law" (1986) NZLJ 127; P Joseph "The Challenge of a Bill of Rights: A Commentary" (1986) NZLJ 416; K Keith "A Bill of Rights for New Zealand?" (1985) NZULR 307; K Keith "The Bill of Rights: Reply to a Criticism" (1985) NZLJ 270; P East "The Proposed Bill of Rights" (1985) NZLJ 268; "Bill of Rights Auckland Seminar Commentaries" (1985) NZLJ 230; B Harris "Bill of Rights: Redistribution of Power" (1985) NZLJ 49. For some post-enactment discussions of the Bill of Rights, see P Fitzgerald "Section 7 of the New Zealand Bill of Rights Act 1990: A Very Practical Power or a Well-intended Nonsense" (1992) 22 VUWLR 135; A

establish a written constitution as the supreme law of the land in the early 1960s.²⁰⁸ However, in the case of direct democracy, the power of the courts to declare legislation unconstitutional could be restricted to legislation that would be put in place as a result of a citizens initiated referendum. This would allow the courts to invalidate legislation proposed and approved by the electors, but would give them no power to invalidate legislation proposed and approved by elected representatives. The Privy Council cases dealing with direct democracy in Canada could, however, present some difficulty in this regard.²⁰⁹ If Parliament must enact a referendum result for it to take effect, as the Privy Council cases suggest, then the courts would in effect be reviewing a parliamentary enactment if Parliament has given effect to the result. In theory, however, citizens initiated referendum proposals that conflict with any subject matter limitation would not reach the electors as they would be disallowed by the Clerk or challenged in the courts before the referendum were held.

A non-binding citizens initiated referendum system avoids the necessity having to grapple with these complex constitutional issues, particularly those inherent in deciding which subjects should be exempt from citizens initiated referendums. In addition, a non-binding system allows Parliament, rather than the courts, to serve as a safeguard “against hasty and ill-considered referenda.”²¹⁰ If Parliament decides to give effect to a referendum result, it is free to legislate in a manner that can take into account its international obligations, its human rights legislation, or the principles of Treaty of Waitangi, among other things. If referendum results were binding, Parliament would not have this freedom.

Parliament, however, cannot be relied upon to protect minority rights, particularly if the government of the day lacks the “political courage that might be needed in the face of strong popular opinion backed by a majority in a referendum.”²¹¹ Consequently, whether Parliament puts a citizens initiated referendum result into effect could depend on the re-election aspirations of MPs rather than on the

Frame “Fundamental Rights in the Realm of New Zealand: Theory and Practice” (1992) 22 VUWLR 85, 93-96; J McLean “The Impact of the New Zealand Bill of Rights on Administrative Law” (1992) Legal Research Foundation 62; J McGarth “The Bill of Rights and the Legislative Process” (1992) Legal Research Foundation 98; A Shaw “The New Zealand Bill of Rights Comes Alive (I)” (1991) NZLJ 400; A Butler “The New Zealand Bill of Rights and Private Common Law Litigation” (1991) NZLJ 261; N Jamieson “The New Look Legislation” (1991) NZLJ 24; P Rishworth “Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases” (1991) NZ Recent L R 337.

²⁰⁸See generally *Report of Public Petitions M to Z Committee 1961 on Draft Constitution for New Zealand* [1961] AJHR 1.2A, 1-66; L Cleveland and A Robinson *Readings in New Zealand Government* (AH&W Reed, Wellington, 1972) 220-270.

²⁰⁹For a discussion of these cases, see section III.B.2(c) in chapter two.

²¹⁰Catt, above n 172, 140-141.

²¹¹Catt, above n 172, 141.

application of well-thought out subject matter limitations, which does not bode well for the principled protection of minority rights.

New Zealand's citizens initiated referendum system also differs from Switzerland's and California's direct democracy devices in several other important respects. In Switzerland and California, the wording of a proposition put before the electors is entirely in the hands of its promoter. In New Zealand, the Clerk of the House has the power to determine proposed referendum questions. Although the Clerk cannot use this power to subvert the intent of those who wish to put a particular question on the ballot,²¹² he or she can strip a question of non-essential language which is designed to generate support. For example, the Royal New Zealand Society for the Prevention of Cruelty to Animals (SPCA) proposed that the *inhumane* production of eggs from battery hens be prohibited. The Clerk eliminated the word *inhumane*. The Clerk's determination role was justified in terms of making citizens initiated referendums cost-effective. Given the expense of holding referendums, the question should be clear. However, the safeguard appears to be unnecessary as unclear questions are unlikely to garner the necessary signatures to qualify for the ballot as the confusion they would cause would make them difficult to promote or support, or to enact if approved. Furthermore, neither Switzerland nor California have found it necessary to make sure that questions are clear.

In addition, New Zealand's citizens initiated referendum system is geared toward producing simple questions for the electors to consider rather than providing them with detailed legislative proposals for consideration, which is typically the case in California and Switzerland. However, the CIR Act does not limit the length of a question or prescribe its form. Accordingly, a promoter in New Zealand should be able to present the electors with a detailed legislative proposal if it is prefaced with a question. For example, the promoter could ask the electors whether a particular legislative proposal providing for free medical care should be enacted and then present the proposal. Alternatively, an entire legislative proposal could be framed as a question.

The New Zealand system also does not require the government of the day to provide any information to the electors regarding citizens initiated referendums, either by way of official publicity or elector information pamphlets. In contrast, Switzerland and California provide the electors with information pamphlets to ensure that promoters and their opponents have the same opportunity to reach the electors with their views and that the electors have access to the main arguments for and against a question on the ballot.

²¹²*Egg Producers*, above n 111 (Eichelbaum CJ).

In addition, the CIR Act, unlike the direct democracy devices in California, does not have any significant subject matter limitations. The National Government concluded that they would be unnecessary as the system is non-binding. However, this decision could permit divisive and polarising debates regarding fundamental right at the expense of minority groups or could place the government of the day in the position of being unable, for political reasons, to resist giving effect to an oppressive citizens initiated referendum result.

Another distinguishing feature is the CIR Act's signature requirement. On a per capita population basis, the requirement is more onerous than the signature requirements in Switzerland and California.²¹³ The National Government justified the high requirement on the grounds that it would demonstrate convincing support for placing a proposal on the ballot. However, it appears to be designed to make the CIR Act difficult to use.

Regarding government controlled referendums, Jackson has observed that "the referendum in New Zealand has scarcely been tested as a serious democratic device and does little to abridge parliament's powers."²¹⁴ Although the CIR Act has the potential to be a fruitful testing ground, it does not abridge the powers of Parliament either. The SPCA's question to phase out battery egg production could provide Parliament with its first opportunity to refuse to give effect to a citizens initiated referendum result on the grounds that it impairs minority rights. Madison's concern regarding majoritarianism stemmed from his fear that those without property would deprive those with property of their property.²¹⁵ Higher egg prices would effect most electors, but the vast majority of them are not engaged in battery egg production. If the battery egg question qualifies for the ballot and carries, the government of the day will have to decide whether or not it will protect the property interests of a small number of battery egg producers.

However, if the government of the day regularly refuses to give effect to citizens initiated referendums, the system will be "no better than a large and expensive public opinion poll."²¹⁶ Given this possibility, New Zealand's citizens initiated referendum system cannot be placed into the same class as the direct democracy devices in Switzerland and California. It is fundamentally different because it does not constitute a legal limitation on the legislative power of elected representatives by

²¹³See note 224 in chapter six.

²¹⁴Jackson, above n 8, 30.

²¹⁵A Koch "Introduction" in *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (2 rev ed, Ohio University Press, Athens, 1985) xix.

²¹⁶Catt, above n 172, 141.

providing the electors with the power to veto or enact laws. In this regard, New Zealand's constitutional system does not fit Thomas Cronin's hybrid model of democracy.²¹⁷ Nevertheless, the shift to proportional representation, particularly its tendency to produce coalition governments, could affect the political importance of the system. The electors will only use the system if the government of the day does not respond to their demands through traditional political channels. If the government of the day is more responsive under proportional representation, the citizens initiated referendum system could fall into disuse. If not, the system could threaten the stability of coalition governments if the result of a citizens initiated referendum concerns an issue on which the coalition cannot agree.

In any case, the citizens initiated referendum system is unlikely to be removed from the statute books. In effect, its creation can be compared to the extension of the voting franchise. Once a democratic right is conferred, it is enormously difficult to rescind. As the experience in Switzerland and California indicates, few MPs are likely to see any political advantage in repealing the CIR Act, particularly as the system is non-binding. The risk of being branded "anti-democratic" is not worth the effort. Whether the system will be made binding is difficult to predict, given the prevailing principles underlying New Zealand's constitutional system. However, if New Zealand were to become a republic with a written constitution, a metamorphosis which Brookfield suggests is inevitable,²¹⁸ the probability of establishing a binding system would increase because the change would undermine the justifications for a non-binding system, such as they are.²¹⁹

²¹⁷For a discussion of Cronin's hybrid model of democracy, see section IV in chapter two; see also section IV in chapter three, section III in chapter five, and section VI in chapter eight.

²¹⁸See Brookfield "A New Zealand Republic?", above n 8, 11; see also generally Brookfield, "Parliament, the Treaty and Freedom", above n 8 (arguing for a written constitution in New Zealand on the grounds that it would secure the protection of Maori Treaty rights and individual rights and freedoms by eliminating the threat to these rights and freedoms posed by parliamentary sovereignty).

²¹⁹For additional discussions of the binding/non-binding issue, see A Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University of Wellington, Wellington, 1992).

PART V: CONCLUSION

CONCLUSION

The direct democracy systems in Switzerland, California, and New Zealand are not the same, nor could they be, given the unique forces that contributed to the formation and practice of constitutional law in these jurisdictions. When Simon Deploige predicted that other countries would eventually consider adopting Switzerland's direct democracy system, few believed that it could be done without importing other parts of the Swiss constitutional system. However, the experience of California during the Progressive Era and of New Zealand during the early 1990s have proven otherwise. Not only has direct democracy taken root outside of Switzerland's unique constitutional environment, but constitutional considerations peculiar to each jurisdiction have made its adaptation unavoidable.

This conclusion is based on a comparative study of the origin and role of direct democracy in Switzerland (Part II), California (Part III), and New Zealand (Part IV) which drew on the constitutional principles underlying representative and direct democracy and the conceptual differences between American and Westminster constitutionalism (Part I). Constitutional law in representative democracies is concerned primarily with the limits on the exercise of governmental power. In Switzerland, California, and New Zealand, which are representative democracies, constitutional law provides the means for determining whether the exercise of governmental power is legitimate, that is, whether it was exercised properly and fairly with respect to awarding benefits to, or imposing burdens on, individuals or groups. The very existence of democracy in these jurisdictions depends on the willingness of minorities to abide by decisions made by majorities.

The constitutional systems found in Switzerland, California, and New Zealand have adopted, in one form or another and to a greater or lesser extent, institutional arrangements or conventions that provide minorities with the right of opposition, that is, the means by which they can maintain respect for and safeguard their rights. Essentially, the exercise of governmental power in these jurisdictions is legitimate if it creates generally accepted obligations rather than a set of prescriptive norms that require force to ensure widespread compliance. In all representative democracies this acceptance is expressed in periodic elections which allow the electors, in a generalised form, to provide some indication of their approval or disapproval of the exercise of governmental power. However, in Switzerland, California, and, to a lesser extent,

New Zealand, direct democracy has provided the electors with the means to voice their approval or disapproval more frequently and with greater precision.

Direct democracy raises the fundamental political question of whether the electors should play a greater role in the exercise of governmental power, especially as it manifests itself in the legislative process. Switzerland, California, and, New Zealand, albeit less emphatically, have answered this question in the affirmative by institutionalising various direct democracy devices. On the federal level, Switzerland has the constitutional initiative and the legislative referendum, which are integral to the Swiss constitutional system. California has the constitutional initiative, the legislative initiative, and the legislative referendum, which have become deeply rooted components of the California constitutional system. New Zealand has the so-called citizens initiated referendum, which, being untested and non-binding (unlike the direct democracy devices in Switzerland and California), is not yet an integral or deeply rooted component of the New Zealand constitutional system. The constitutional importance of the direct democracy devices found in Switzerland, California, and New Zealand is a function of the factors that gave rise to the demand for direct democracy and shaped its form in these jurisdictions.

Switzerland, California, and New Zealand established their respective direct democracy devices in reaction to periods of sustained economic hardship which coincided with widespread disillusionment with representative democracy. Switzerland, after a long and celebrated history of local autonomy emphasising direct participation in the exercise of governmental power, experimented with a pure representative democracy on the federal level as a means of securing economic advantage through unity while preserving cantonal sovereignty. The experiment floundered in the wake of the industrial revolution, when industrialists like Escher used their wealth and position to gain control over Switzerland's representative institutions and to use their power to further their interests, irrespective of the plight of their less fortunate compatriots. The failure of Escher and his ilk to address the dislocation problems produced by the industrial revolution, coupled with a native orientation toward direct participation, gave rise to the Swiss Democrats, who advocated the adoption of direct democracy as a means of breaking the hold of privileged elites on the exercise of governmental power. After proving successful in the cantons, the Swiss eventually established the legislative referendum in 1874 and the constitutional initiative in 1891 on the federal level.

In California, during the late 1800s, industrialisation was accompanied by economic turmoil, the concentration of wealth and political power, and widespread political corruption. As in Switzerland during the heyday of Escher, representative democracy

in California was under the control of a few extremely wealthy individuals who used their power to further their personal economic interests, particularly the Big Four (Stanford, Huntington, Crocker, and Hopkins), who controlled the Southern Pacific Railroad Corporation. At the zenith of its power, the Southern Pacific was, in essence, the government. It used its power to advance and protect its interests, rather than solve the problems that the industrial revolution had created for those living in California. The excesses of the Southern Pacific gave rise to the California Progressives. Inspired by the use of direct democracy in Switzerland to break the hold of industrialists on the exercise of governmental power, they fought for and established the constitutional initiative, the legislative initiative, and the legislative referendum in 1911 after these devices proved successful in the main city centres.

In New Zealand, the Citizens Initiated Referenda Act 1993 (CIR Act) was a reaction to the Fourth Labour Government's decisions to dismantle New Zealand's welfare state and to deregulate the economy. The structural changes ushered in by these decisions created high unemployment and fuelled a speculative stock market boom which crashed in October 1987, causing many companies to fold and thousands of people to lose a great deal of money, which compounded unemployment. As these decisions lacked a specific electoral mandate, the economic shock was accompanied by a psychological one, which produced an overwhelming demand for constitutional reform that was sustained by the subsequent National Government's surprising decision to "stay the course" mapped out by the Fourth Labour Government, particularly with respect to superannuation. The lengthy period of hardship and disappointment gave rise to a number of direct democracy groups who, inspired by the use of direct democracy in Switzerland and California, due largely to the timely work of Geoffrey Q de Walker, believed that direct democracy would deliver representative democracy from the clutches of unresponsive representatives. Their message was picked up by Merv Rusk, then a well-established and long serving member of the National Party, and his supporters. His decision to embrace direct democracy as a necessary constitutional reform to cure the ills besetting representative democracy in New Zealand led to the enactment of the CIR Act in 1993, but without experimentation on the local level.

In each case, the demand for direct democracy arose because the legitimacy of the constitutional system was at issue. The Swiss Democrats, the California Progressives, and the direct democracy advocates in New Zealand had come to the conclusion, as had many of their respective compatriots, that representative democracy had failed to live up to its promise. In their view, elected representatives were subservient to privileged elites or political parties interested in perpetuating their hold on governmental power rather than being dedicated to giving effect to the

'general will'. Consequently, they saw pure representative democracy as being incapable of fairly regulating the competing interests in society. They believed that direct democracy would restore the legitimacy of their constitutional systems by eliminating the problems associated with representative democracy, primarily by providing the electors with the means to ensure that the exercise of governmental power conforms with their expectations, that is, the power propose, enact, and veto legislation. If elected representatives failed to act on behalf of the electors, then the electors could use direct democracy devices to obtain the result they desired irrespective of the disposition of their representatives. They embraced direct democracy as a means of improving, not displacing, representative democracy.

The opponents of direct democracy, however, see it as a means of destroying legitimacy by undermining the virtues of representative democracy, particularly the established safeguards constitutional systems supporting representative democracy typically provide for the protection of minority rights, least of all the deliberative judgment of elected representatives as originally articulated by Burke and later refined by Madison. Consequently, the practical constitutional concern is whether, and to what extent, direct democracy can be established in a representative democracy without significantly impairing minority rights.

The experience in Switzerland and California shows that direct democracy can be established without significant impairment of minority rights. Indeed, as a consequence of the struggle faced by reformers in Switzerland and California, direct democracy was tested locally before it was applied on the national or state level. The Swiss Democrats experimented with direct democracy in the cantons before the Swiss approved the incorporation of the constitutional initiative and the legislative referendum into the Constitution of 1874. The California Progressives experimented with direct democracy in California's main city centres before Californians approved the inclusion of the constitutional initiative, the legislative initiative, and the legislative referendum in the California Constitution.

The experience with direct democracy on the local level in Switzerland and California showed that it could be used to break the nexus between elected representatives and privileged elites. For example, Escher's vaulted position collapsed in Zurich with the introduction of direct democracy in that canton. Similarly, its introduction in Los Angeles and San Francisco undermined the ward system that the political machines depended upon to maintain their control of these city governments. These practical successes with direct democracy gave the electors in Switzerland and California the basis upon which to evaluate the theoretical arguments for and against direct democracy, which was important as they were the ones who approved in referendums

the inclusion of direct democracy in the Constitution of 1874 and the California Constitution.

In addition, the direct democracy devices in Switzerland and California are subject to safeguards that limit their majoritarian potential. In Switzerland and California, the legislative referendum is conservative in its effect. If employed successfully, the enactment subject to its operation is vetoed, which results in the preservation of the status quo. Although the device can be used to veto the creation of new rights, it cannot be used to eliminate any pre-existing statutory or constitutional rights. Furthermore, legislation that is required as a matter of urgency is exempt from the veto power of the legislative referendum in both Switzerland and California. In California, tax levies or appropriations for the usual expenses of the State are also exempt. Moreover, California's legislative referendum cannot be used to veto federal legislation. Consequently, the legislative referendum is not susceptible to many of the traditional arguments against direct democracy, particularly the lack of protection for minority rights.

The constitutional initiative and the legislative initiative, however, are potentially more dangerous than the legislative referendum in terms of affecting existing rights. They provide the electors with the power to propose and enact laws without recourse to their elected representatives or exposure to the moderating influences of the legislative process. In Switzerland, which does not have the legislative initiative on the federal level, the majoritarian potential of the constitutional initiative is limited in two important respects. First, extreme measures, whether radical or reactionary, have virtually no chance of being accepted by the Swiss electorate. Second, constitutional initiatives must be approved by a double majority, that is, a simple majority of the electors voting and a majority vote in more than half of the cantons. Few constitutional initiatives have been able to satisfy Switzerland's complex mix of local interests and minority concerns to win approval under this unique double majority system.

In California, the constitutional initiative cannot be used to encroach upon any of the powers reserved to the federal government. This removes subjects like defence, foreign affairs, interstate commerce, and federal taxation from their reach. More importantly, it cannot be used in any way that impinges upon the rights protected by or granted pursuant to the United States Constitution, particularly the Bill of Rights. The legislative initiative is subject to these limitations as well. In addition, it cannot be used in any way that impinges upon the rights protected by or granted pursuant to the California Constitution. The courts will invalidate any impinging constitutional or legislative initiative.

Whether the CIR Act will operate to impair minority rights in New Zealand is not as clear as the system is yet to be tested. Unlike Switzerland and California, New Zealand adopted the CIR Act without local experimentation. As a consequence, those engaged in the direct democracy debate did not have the benefit of practical experience that would have provided some indication as to how direct democracy would operate on the national level in New Zealand. As a result, the debate centred on theoretical arguments derived from Jefferson, who had faith in the electorate at large and distrusted those in positions of power, and Madison, who believed that elected representatives had the ability to make wise and deliberative decisions in the best interests of the nation. The lack of local experience also encouraged proponents and opponents of direct democracy to draw on Swiss and California examples to support their theoretical arguments, which proved unsatisfactory given their tendency to overlook the unique constitutional conditions in those jurisdictions and the differences between the various direct democracy devices.

In addition, the New Zealand electors, unlike their Swiss and California counterparts, were not given the opportunity to decide in a referendum whether they supported the adoption of direct democracy, let alone the non-binding system created by the CIR Act. However, given the lack of local experience, they, like their elected representatives, were not in the same position as the Swiss or California electors to decide whether the practical virtues of direct democracy outweighed its practical vices, that is, whether the adoption of direct democracy would significantly impair minority rights. With the notable exception of the Minister of Justice, those engaged in the debate, by and large, did not acknowledge that the direct democracy devices in Switzerland and California are subject to safeguards that operate to protect minority rights.

The CIR Act's principle safeguard is its non-binding nature. Parliament, unlike the legislatures in Switzerland and California, can reject citizens initiated referendum proposals approved by the electors, primarily by simply refusing to give effect to them. Furthermore, if Parliament decides to give effect to a particular citizens initiated referendum result, it is free to legislate in a manner that can take into account its international obligations, the principles of the Treaty of Waitangi, and the principles embodied in its human rights legislation, particularly the New Zealand Bill of Rights Act 1990. In short, Parliament has the legal power to quash citizens initiated referendum results that threaten minority rights. However, whether Parliament will exercise this legal power fairly and consistently is uncertain as the government of the day could lack the political courage to reject results that infringe minority rights. The decision to give effect to such results could depend on the re-

election aspirations of MPs rather than on the application of well-thought out subject matter limitations. This does not bode well for the principled protection of minority rights.

The courts, like those in Switzerland, do not have the power to strike down legislation that gives effect to the results of citizens initiated referendums. However, the constitutional basis for this similarity is not the same. In New Zealand, Parliament is sovereign; its enactments are, in effect, constitutional law, that is, the supreme law of the land. Accordingly, the courts cannot invalidate parliamentary enactments. In Switzerland, the electors, due to the historical emphasis on cantonal autonomy, are ultimately sovereign, both politically and legally. Consequently, any enactment approved by the Swiss electors, either directly through their direct democracy devices or indirectly through their elected representatives, cannot be overturned by the courts.

Furthermore, the majoritarian potential of the direct democracy devices in Switzerland, California, and New Zealand is limited to an extent that is consistent with the constitutional principles underlying representative democracy in these jurisdictions. In Switzerland, the electors are sovereign. Accordingly, the results produced by its direct democracy devices are binding and cannot be invalidated by the courts. However, the double majority requirement for constitutional initiatives ensures that people living in small sparsely-populated cantons cannot be dominated by those living in large densely-populated cantons. In California, the California Constitution is subordinate to the United States Constitution, which is the supreme law of the land. In addition, due to the formal separation of governmental power in the California constitutional system, the courts are designed to operate as a check on the exercise of governmental power, particularly as it manifests itself in the legislative process. Accordingly, the results produced by California's direct democracy devices are binding insofar as they do not violate constitutional law. In New Zealand, Parliament is sovereign, that is, no other institution can rival its power. Accordingly, the results produced by the CIR Act are non-binding. In addition, Parliament must draft and enact the legislation necessary to give effect to citizens initiated referendum results, which means that it would be exposed to the moderating influences of the legislative process, unlike the results of initiatives in Switzerland and California which do not require any legislative action to take effect.

The constitutional systems in Switzerland, California, and New Zealand also influenced the reform strategies of the direct democracy advocates in these jurisdictions, which ultimately affected the result they achieved. Switzerland was, by and large, a one party state in Escher's heyday. The Radical-Liberal grouping

controlled nearly every representative body in the country, including the federal government. The Swiss Democrats came into being when younger, better educated, but less influential members of this grouping were frustrated by party bosses in their attempts to address the plight of their compatriots. Aside from contesting and winning elections, the Swiss Democrats successfully challenged the ruling party by using the revision referendum clauses in cantonal constitutions and the Constitution of 1848 to establish direct democracy in Switzerland. In short, they took the issue out of the hands of elected representatives and gave it to the electors to decide. The electors voted in favour of binding direct democracy devices largely because they were consistent with their ancient desire for local autonomy and their long history of direct participation in the exercise of governmental power.

California was nominally a two-party state. However, during its reign the Southern Pacific controlled both the Republican and Democratic parties. The California Progressives, rather than attempting to overcome the difficulty associated with achieving electoral success with a third party under California's plurality electoral system, chose to concentrate on taking over one of the established political parties. They formed the Lincoln-Roosevelt League which eventually took control of the Republican Party. Once in control of the Republican Party, they began to select candidates that were wedded to progressivism rather than to furthering the interests of the Southern Pacific. With the success of these candidates, particularly Hiram Johnson, the California Progressives won control of the State government. They used the California Constitution's provision for constitutionally required referendums to provide the electors with the opportunity to establish direct democracy in California. The electors voted in favour of binding direct democracy devices, largely because they wanted to be sure that no individual or group would ever again be able dominate the exercise of governmental power as the Southern Pacific did when it managed to circumvent the separation of powers doctrine.

The direct democracy advocates in New Zealand did not pursue the approach taken by the Swiss Democrats or the approach taken by the California Progressives. The latter approach would have been logical as New Zealand, like California, was primarily a two-party state during direct democracy debate. Rather than securing power and using it to introduce direct democracy themselves, they chose to rely on elected representatives to give effect to their demand for direct democracy. They were largely unwilling to form their own political party or to invest the time and energy required to take over an existing party, primarily as they were only interested in direct democracy. The Swiss Democrats and the California Progressives, in comparison, were interested in a far greater range of issues. Direct democracy was to them a means to an end rather than an end in itself. They had every intention of

breaking the nexus between privileged economic interests and elected representatives beholden to those interests. In New Zealand, the crisis of legitimacy was driven primarily by a failure of successive governments to meet the expectations of the electors rather a function of organised corruption.

Essentially, the direct democracy advocates in New Zealand failed where it mattered the most. Unlike the Swiss Democrats and the California Progressives, they did not secure control over the legislative process. Accordingly, they found themselves in the impossible position of relying on elected representatives to put into place a system that was expressly intended to curb the power of elected representatives. They also had to contend with the campaign for proportional representation, which diverted resources and the attention of elected representatives from the campaign for direct democracy. Although Rusk and his supporters, particularly National Reform, were able to apply the pressure necessary to ensure passage of the CIR Act, they were unable to alter its contents or to elevate its constitutional status. Consequently, they had to settle for the non-binding system devised by the National Party's Electoral Law Reform Caucus Committee, a system which was calculated to preserve the sovereignty of Parliament, that is, the monopoly elected representatives have on the exercise of governmental power.

In short, the Swiss Democrats and the California Progressives, unlike the New Zealand direct democracy advocates, belonged to reform parties that won control over the exercise of governmental power. They used that power to give the electors the opportunity to approve the introduction of direct democracy in the form of entrenched constitutional provisions, which has contributed to the importance of the direct democracy devices in Switzerland and California. Although an innovative addition to the New Zealand constitutional system, the CIR Act is ordinary unentrenched legislation that came into being as a result of interest group politics. Accordingly, the CIR Act is not as securely rooted as the direct democracy systems in Switzerland and California. The Electoral Act 1993, which was approved in a government controlled referendum on proportional representation, is an example of what could have been done to plant the CIR Act more securely within the New Zealand constitutional system. As the Electoral Act 1993 was endorsed by the electors, it has a greater aura of legitimacy than the CIR Act.

An attempt to abolish the direct democracy devices in Switzerland or California, would undoubtedly be perceived as an attack on the Swiss or California constitutional system. In New Zealand, a proposal to abolish the CIR Act would not, at this stage at least, be seen in the same light. However, the CIR Act is unlikely to be abolished, primarily because it confers a democratic right and it is non-binding. Whether the

CIR Act flourishes will depend largely on the extent to which elected representatives are able to meet the expectations of the electors, the quality of citizens initiated referendum questions, the frequency of citizens initiated referendums, the circumstances in which they are held, and the reaction of the electors toward governments that refuse to give effect to citizens initiated referendum results.

In conclusion, the direct democracy systems in Switzerland, California, and New Zealand are different. The differences are attributable to variations in the constitutional principles underlying representative democracy in these jurisdictions. These principles vary largely because constitutional law in each jurisdiction is a unique and intricate confluence of law, politics, history, economics, and cultural expectations. Despite these differences, reformers in Switzerland, California, and New Zealand embraced direct democracy as a means of improving, not displacing, their particular brand of representative democracy. Thomas Cronin has articulated a hybrid model of democracy that can be used to explain why reformers in Switzerland, California, and New Zealand chose this path. In his view, people value representative institutions and want their representatives to make the vast majority of laws. However, they also want to vote occasionally on policy issues, particularly on matters that concern them directly. In addition, they value majority rule, yet generally understand the need to protect minority rights.

These observations explain the general support for both representative and direct democracy where they co-exist, the acceptance of limitations on the majoritarian potential of direct democracy devices, and the general lack of interest in creating systems that enable routine public participation. It also reconciles the competing philosophical traditions upon which most of the arguments for and against direct democracy are based. Provided minority rights are protected sufficiently, Jeffersonian-inspired advocates of direct democracy should not offend adherents of representative democracy, whether Burkeian or Madisonian in its conception. It is hoped that direct democracy advocates in the years ahead, wherever they may be, will bear this in mind.

BIBLIOGRAPHY

BOOKS

Adams, F and Cunningham, C. *The Swiss Confederation*. Macmillan & Co, London, 1889

Barber, B. *Strong Democracy: Participatory Politics for a New Age*. University of California Press, Berkeley, 1984

Barber, B. *The Death of Communal Liberty: A History of Freedom in a Swiss Mountain Canton*. Princeton University Press, Princeton, 1974

Barber, L. *New Zealand: A Short History*. Century Hutchinson NZ Ltd, Wellington, 1989

Bassett, M. *Three Party Politics in New Zealand: 1911-1931*. Historical Publications, Auckland, 1982

Beck, W and Williams, D. *California: A History of the Golden State*. Doubleday, Garden City, New York, 1972

Blackstone, W. *Commentaries on the Laws of England*. Vol. 1, reprint 1st ed, London, 1966

Bogdanor, V, ed. *Representatives of the People?* Gower, Hartshire, 1985

Bonjour, E, Offler, H and Potter, G. *A Short History of Switzerland*. Oxford University Press, London, 1952

Boyer, J. *Lawmaking by the People: Referendums and Plebiscites in Canada*. Butterworths, Toronto, 1982

Brown, B. *The Rise of New Zealand Labour: A History of the New Zealand Labour Party from 1916 to 1940*. Price Milbourn, Wellington, 1962

Butler, D and Kitinger, U. *The 1975 Referendum*. Macmillan Press, London, 1976

Butler, D and Ranney, A, eds. *Referendums: A Comparative Study of Theory and Practice*. American Enterprise Institute for Public Policy Research, Washington, DC, 1978

Catt, H, Harris, P, and Roberts, N. *Voter's Choice: Electoral Change in New Zealand?* Dunmore Press, Palmerston North, 1992

Chen, M and Palmer, G. *Public Law in New Zealand: Cases, Materials, Commentary and Questions*. Oxford University Press, Auckland, 1993

Cleveland, L and Robinson, A. *Readings in New Zealand Government*. AH&W Reed, Wellington, 1972

Codding, G. *The Federal Constitution of Switzerland*. Houghton, Mifflin Co, Boston, 1961

Constitution of the State of California. California State Senate, Sacramento, 1961

Cronin, T. *Direct Democracy: The Politics of Initiative, Referendum, and Recall*. Harvard University Press, Cambridge, 1989

Crouch, W. *The Initiative and Referendum in California* (Haynes Foundation, Los Angeles, 1950)

Current, R, Williams, H, and Freidel, F. *American History: A Survey*. Alfred Knopf, New York, 1961

Dandliker, K. *A Short History of Switzerland*. Swan Sonnenschein & Co Ltd, London, 1899

de Rougemont, D and Muret, C. *The Heart of Europe* (1941)

de Salis, F. *Switzerland and Europe: Essays and Reflections*. Translated by A & E Henderson. Oswald Wolff, London, 1971

Deploige, S. *The Referendum in Switzerland*. Translated by C Trevelyan. Longmans, Green & Co, London, 1898

Dicey, A. *Introduction to the Study of the Law of the Constitution*. 10 ed, Macmillan, London 1965

Dicey, A. *Introduction to the Study of the Law of the Constitution*. 9 ed, Macmillan, London 1952

Dixon Jr, R. *Democratic Representation: Reapportionment in Law and Politics*. Oxford University Press, London, 1968

Douglas, C. *Social Credit*. rev 3 ed, Eyre Spottiswade, London, 1937

Ekrich, A. *Progressivism in America: A Study of the Era from Theodore Roosevelt to Woodrow Wilson*. New Viewpoint, New York, 1974

Fehrenbach, D. *A Basic History of California*. Van Nostrand, Princeton, 1964

Fogelson, R. *The Fragmented Metropolis: Los Angeles 1850-1930*. Harvard University Press, Cambridge, Massachusetts, 1967

Fritz, E. *European Switzerland: Historically Considered*. Fretz & Wasmuth Ltd, Zurich, 1951

- George, H. *Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and the Increase of Want with Increase in Wealth: The Remedy*. 25 ann ed, Doubleday, Page & Co, New York, 1925
- George, S. *An Awkward Partner: Britain in the European Community*. Oxford University Press, Oxford, 1990
- Gillett, N. *The Swiss Constitution: Can it Be Exported?* Yes Publications, Bristol, 1989
- Goodhart, P. *Full-Hearted Consent: The Story of the Referendum Campaign - and the Campaign for the Referendum*. London, 1976
- Goodhart, P. *Referendum*. Tom Stacey, London, 1971
- Gould, L. *The Progressive Era*. Syracuse University Press, Syracuse, 1974
- Hardy, C. *California Government*. 4 ed, Canfield Press, San Francisco, 1973
- Hamer, D. *The New Zealand Liberals: The Years of Power, 1891-1912*. Auckland University Press, Auckland, 1988
- Herold, J. *The Swiss Without Halos*. Columbia University Press, New York, 1948
- Hofstadter, R. *The Age of Reform: From Bryan to F.D.R.* Alfred Knopf, New York, 1956
- Hofstadter, R (ed). *The Progressive Movement*. Prentice-Hall, Englewood Cliff, New York, 1963
- Hogg, P. *Constitutional Law of Canada*. 2 ed, Carswell, Toronto, 1985
- Hughes, C. *Federal Constitution of Switzerland*. Claredon Press, Oxford, 1954
- Hughes, C. *Switzerland*. Ernest Benn, London, 1975
- Hyink, B, Brown, S, and Thacker, E. *Politics & Government in California*. 8 ed, Thomas Y Cromwell Company, New York, 1973
- Jackson, K. *The Dilemma of Parliament*. Allen & Unwin, Wellington, 1987
- Jackson, K. *The New Zealand Legislative Council*. University of Otago Press, Dunedin, 1972
- James, C. *The Quiet Revolution: Turbulence and Transition in Contemporary New Zealand*. Allen & Unwin/Port Nicholson Press, Wellington, 1986.
- Jesson, B. *Fragments of Labour: The Story Behind the Labour Government*. Penguin Books, Auckland, 1989

- Joseph, P. *Constitutional and Administrative Law in New Zealand*. Law Book Co, Sydney, 1993
- King, A. *Britain Says Yes: The 1975 Referendum on the Common Market*. American Enterprise Institute for Public Policy Research, Washington, DC, 1977
- Koch, A, ed. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*. 2 rev ed, Ohio University Press, Athens, 1985
- Kohn, H. *Nationalism and Liberty: The Swiss Example*. Greenwood Press, Westport, Connecticut, 1979
- Kramer, D. *Participatory Democracy*, Schenkman, Cambridge, Massachusetts, 1972
- Lavender, D. *California: A Bicentennial History*. W W Norton, New York, 1976
- League of Women Voters of California. *Initiative and Referendum in California: A Legacy Lost? A Study of Direct Legislation in California from Progressive Hopes to Present Reality*. League of Women Voters of California, Sacramento, 1984 reprint 1987
- Lee, J. *Simple on a Soap-Box*. Collins Publishers, Auckland, 1963
- Levine, S, ed. *Politics in New Zealand*. George Allen & Unwin, Sydney, 1978
- Levine, S and Robinson, A. *The New Zealand Voter - A Survey of Public Opinion and Electoral Behavior*. Price Milburn, Wellington, 1976
- Magleby, D. *Direct Legislation: Voting on Ballot Propositions in the United States*. John Hopkins University Press, Baltimore, 1984
- Madison, J. The Federalist No. 10
- Marshall, G. *Constitutional Theory*. Oxford University Press, London, 1971
- Martin, W. *Switzerland: From Roman Times to the Present*. Elek Books, London, 1971
- McCracken, W. *The Rise of the Swiss Republic*. New York, 1908.
- McGee, D. *Parliamentary Practice in New Zealand*. 2 ed, GP Publishers, Wellington, 1994
- McGuigan, P. *The Politics of Direct Democracy in the 1980s: Case Studies in Popular Decision Making*. Institute for Government and Politics, Washington, DC, 1985
- McIntyre, W and Gardner, W. *Speeches and Documents on New Zealand History*. Clarendon Press, Oxford, 1971

- McKenna, G. *American Populism*. Capricorn Books, GP Putnam & Sons, New York, 1974
- Meier, H. *Friendship Under Stress: U.S. - Swiss Relations 1900-1950*. Herbert Lang & Co, Bern, 1970
- Meyers Grosses Handlexikon*. Bibliographisches Institut Mannheim, Wien/Zurich, 1985
- Milne, R. *Political Parties in New Zealand*. Clarendon Press, Oxford, 1966
- Modern Switzerland*. The Society for the Promotion of Science and Scholarship, Palo Alto, 1978
- Mowry, G. *The California Progressives*. Quadrangle Books, Chicago, 1963
- Mulgan, R. *Democracy and Power in New Zealand: A Study of New Zealand Politics*. Oxford University Press, Auckland, 1984
- Mulholland, R. *Introduction to the New Zealand Legal System*. 7 ed, Butterworths, Wellington, 1990
- Nagal, J. *Participation*. Prentice-Hall, Englewood Cliffs, 1987
- Norris, F. *The Octopus: A Story of California*. New American Library, New York, 1964
- Norton, C. *New Zealand Parliamentary Election Results, 1946-1987*. Victoria University of Wellington, Wellington, 1988
- Oberholtzer, E. *The Referendum in America*. Charles Scribner's Sons, New York, 1900
- Oechsli, W. *History of Switzerland: 1499-1914*. Cambridge University Press, Cambridge, 1922
- Olin, S. *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911-1917*. University of California Press, Berkeley, 1968
- Oliver, W. *The Story of New Zealand*. Farber & Farber, London, 1960
- Oxford Illustrated History of New Zealand* (Oxford University Press, Auckland, 1990)
- Palmer, G. *Unbridled Power: An Interpretation of New Zealand's Constitution*. 2 ed, Oxford University Press, Auckland, 1987
- Palmer, G. *Unbridled Power? An Interpretation of New Zealand's Constitution and Government*. Oxford University Press, Wellington, 1979

- Penniman, H, ed. *New Zealand at the Polls: The General Election of 1978*. American Enterprise Institute for Public Policy Research, Washington DC, 1980
- Penniman, H, ed. *Switzerland at the Polls: The National Elections of 1979*. American Enterprise Institute for Public Policy Research, Washington, DC, 1983
- Rappard, W. *Collective Security in Swiss Experience: 1291-1948*. George Allen & Unwin, London, 1948
- Riker, W. *Liberalism Against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice*. W H Freeman & Co, San Francisco, 1982
- Ringer, J. *An Introduction to New Zealand Government*. Hazard Press, Christchurch, 1991
- Robins, L. *The Reluctant Party: Labour and the EEC, 1961-1975*. G W & A. Hesketh, Lancashire, 1979
- Robinson, O, Fergus, T and Gordon, W. *An Introduction to European Legal History*. Professional Books Ltd, Abingdon, Oxon, 1985
- Rousseau, J. *On the Social Contract with Geneva Manuscript and Political Economy*. St Martin's Press, New York, 1978
- Rowe, J and Rowe, M. *New Zealand*. Ernest Benn, London, 1967
- Sartori, G. *The Theory of Democracy Revisited*. Chatham House Publishers, Chatham, 1987
- Schlessinger, P and Wright, R. *Elements of Government in California*. Holt, Rinehart & Winston, New York, 1962
- Schmid, C. *Conflict and Consensus in Switzerland*. University of California Press, Berkeley, 1981
- Siegfried, A. *Switzerland: A Democratic Way of Life*. Jonathan Cape, London, 1950
- Sigg, O. *Switzerland's Political Institutions*. 3 ed, Pro Helvetia, Zurich, 1988
- Simpson, A, ed. *Referendums: Constitutional and Political Perspectives*. Victoria University of Wellington, Wellington, 1992
- Simpson, T. *A Vision Betrayed: The Decline of Democracy in New Zealand*. Hodder and Stoughton, Auckland, 1984
- Sinclair, K. *A History of New Zealand*. Penguin, Middlesex, 1959 4 rev ed 1991
- Sinclair, K. *A History of New Zealand*. Penguin, Middlesex, 1959

Sinclair, K. *The Liberal Government, 1891-1912: First Steps Toward a Welfare State*. Heinemann Educational Books, Auckland, 1967 reprint 1972

Steinberg, J. *Why Switzerland?* University of Cambridge Press, Cambridge, 1976

Steiner, J. *Amicable Agreement Versus Majority Rule: Conflict Resolution in Switzerland*. rev ed, University of North Carolina Press, Chapel Hill, 1974

Steiner, J, ed. *Das Politische System der Schweiz*. Piper, Munich, 1971

Steiner, J, and Dorff, R. *A Theory of Political Decision Modes: Intraparty Decision Making in Switzerland*. University of North Carolina Press, Chapel Hill, 1980

Street, H and Brazier, R, eds. *de Smith Constitutional and Administrative Law*. 4 ed, Penguin Books, London, 1981 reprint 1983

Switzerland: People State Economy Culture. Kummerly & Frey, Berne, 1989

Tallian, L. *Direct Democracy*. People's Lobby, Los Angeles, 1977

Taylor, G. *Judicial Review*. Butterworths, Wellington, 1991

Temple, P. *Making Your Vote Count: A Guide to Electoral Reform*. John McIndoe, Dunedin, 1992

Thurer, G. *Free and Swiss: The Story of Switzerland*. Oswald Wolff, London, 1970

Toffler, A. *The Third Wave*. Pan Books, London, 1981

Vincent, J. *State and Federal Government in Switzerland*. John Hopkins Press, Baltimore, 1891

Walker, G. *Initiative and Referendum: The People's Law*. The Centre for Independent Studies Ltd, St Leonards, 1987

Walker, G. *The Rule of Law: Foundation of Constitutional Democracy*. Melbourne University Press, Melbourne, 1988

Wilson, J. *New Zealand Parliamentary Record: 1840-1984*. Government Print, Wellington, 1985

Ziegler, J. *Switzerland Exposed*. Allison & Busby, London, 1978

THESES

McGovern, T. *Parliamentary Reform in New Zealand*, BA (Hons) thesis in political science held by Otago University, 1990

Watt, L. *The Referendum: Its Uses and Abuses*, MA thesis in political science held by Victoria University of Wellington, 1956

JOURNALS

- Allan, T. "The Limits of Parliamentary Sovereignty" (1985) Public L 614
- Bachman, K and Goldberg, L. "Property: Land Use Decision-Making" 1977 Annual Survey American Law 399
- Ballew, S. "The Constitutionality of Budgeting by Statewide Statutory Initiative in California" (1978) 51 Southern California Law Review 847
- Barber, B. "Participation and Swiss Democracy" (1988) 23 Government and Opposition 31
- Bell, D. "The Referendum: Democracy's Barrier to Racial Equality" (1978) 54 Washington Law Review 1
- Berg, L and Holman, C. "The Initiative Process and its Declining Agenda-setting Value" (1989) 11 Law and Policy 451
- Bhatia, K. "Republican Reform of Government" (1993) Columbia Law Review 1300
- "Bill of Rights Auckland Seminar Commentaries" (1985) New Zealand Law Journal 230
- Bogdanor, V. "Federalism in Switzerland" (1988) 23 Government and Opposition 69
- Brestoff, N. "The California Initiative Process: A Suggestion for Reform" (1975) 48 Southern California Law Review 922
- Brookfield, F. "A New Zealand Republic?" (1994) 8 Legislative Studies 5
- Brookfield, F. "Constitutional Law" (1992) New Zealand Recent Law Review 231
- Brookfield, F. "High Courts, High Dam, High Policy" (1983) New Zealand Recent Law Review 62
- Brookfield, F. "Kelsen, the Constitution and the Treaty" (1992) New Zealand Universities Law Review 163
- Brookfield, F. "Parliament, the Treaty and Freedom: Millennial Hopes and Speculations" (1994) New Zealand Law Journal 462
- Brookfield, F. "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 Otago L R 603.
- Brookfield, F. "The Monarchy and the Constitution Today: A New Zealand Perspective" (1992) New Zealand Law Journal 438

- Brookfield, F. "The Reconstituted Office of Governor-General" (1985) New Zealand Law Journal 256
- Butler, A. "The New Zealand Bill of Rights and Private Common Law Litigation" (1991) New Zealand Law Journal 261
- Burrows, J and Joseph, P. "Parliamentary Law Making" (1990) New Zealand Law Journal 306
- Caldwell, J. "Election Manifesto Promises: The Law and Politics (1989) New Zealand Law Journal 108
- Caldwell, J. "Judicial Sovereignty - A New View" (November 1984) New Zealand Law Journal 357
- Castello, J. "The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure" (1986) 74 California Law Review 491
- Chander, A. "Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights" (1991) 101 Yale Law Review 457
- Chapman, R. "A Political Culture Under Pressure: The Struggle to Preserve a Progressive Tax Base for Welfare and the Positive State" (1992) 44 Political Science 1
- Chen, M. "The Introduction of Mixed-member Proportional Representation in New Zealand - Implications for Lawyers" (1994) 5 Public Law Review 104
- Christenson, K. "Interpreting the Purposes of Initiatives: Proposition 65" (1989) 40 Hastings Law Journal 1031
- Church, C. "The Swiss Way of Change: Politics Since the 1987 Election" (1989) 45 The World Today 117
- Collins, M. "Judicial Intervention in the Preelection Stage of the Initiative Process: A Change of Policy by the California Supreme Court" (1984) 15 Pacific Law Journal 1127
- Conacher, D. "Power to the People: Initiative, Referendum, Recall and the Possibility of Popular Sovereignty in Canada" (1991) 49 University of Toronto Faculty Law Review 174
- Cooke, R. "Fundamentals" (May 1988) New Zealand Law Journal 158
- Cooke, R. "Practicalities of a Bill of Rights" (1984) 112 Council Brief 4
- DeBenedictis, D. "Voters Limit Politicians' Terms" (January 1993) American Bar Association Journal 26

- Dicey, A. "Ought the Referendum be Introduced into England?" (1890) 57 Contemporary Review 489
- Dicey, A. "The Referendum" (March 1894) National Review 65
- Dicey, A. "The Referendum and Its Critics" (1910) 212 Quarterly Review 538
- Downey, P. "A Second Chamber" (1990) New Zealand Law Journal 421
- Downey, P. "Constitutional Arrangements" (1990) New Zealand Law Journal 341
- Dugdale, D. "Book Review" (1992) New Zealand Law Journal 364
- Dugdale, D. "Common Sense about the Bill of Rights: A Criticism of Geoffrey Palmer's Super-law" (1986) New Zealand Law Journal 127
- East, P. "The Proposed Bill of Rights" (1985) New Zealand Law Journal 268
- Elkind, J. "International Obligations and the Bill of Rights" (1988) New Zealand Law Journal 205
- Elkind, J. "The Optional Protocol and the Covenant on Civil and Political Rights" (1991) New Zealand Law Journal 409
- Eschet-Schwarz, A. "La democratie semi-directe en Suisse: entre la theorie et la realite: 1879-1987" (1989) 22 Revue canadienne de science politique 739
- Fitzgerald, P. "Section 7 of the New Zealand Bill of Rights Act 1990: A Very Practical Power or a Well-intended Nonsense" (1992) 22 Victoria University of Wellington Law Review 135
- Fogarty, J. "Books: Constitutional and Administrative Law in New Zealand" (1993) New Zealand Law Journal 212
- Fogarty, J. "Judicial Review: A Review Article" (1992) New Zealand Law Journal 88
- Fountaine, C. "Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative" (1988) 61 Southern California Law Review 733
- Frame, A. "Fundamental Rights in the Realm of New Zealand: Theory and Practice" (1992) 22 Victoria University of Wellington Law Review 85
- Fitzgerald, P. "Section 7 of the New Zealand Bill of Rights Act 1990: A Very Practical Power or a Well-intended Nonsense" (1992) 22 Victoria University of Wellington Law Review 135
- Gillette, C. "Plebiscites, Participation, and Collective Action in Local Government Law" (1988) 86 Michigan Law Review 930

Glenn, P. "State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments" (1978) 51 Southern California Law Review 265

Gobbi, M. "The Trial of Socrates: A Matter of Conscience (Is the Party Whip System Justifiable?)" (December 1988) New Zealand Law Journal 451

Goldberg, S. "Who's Afraid of Derrick Bell? A Conversation on Harvard, Storytelling and the Meaning of Color" (Sept 1992) American Bar Association Journal 56

Gray, H. "The Sovereignty of Parliament and the Entrenchment of Legislative Process" (1964) 27 Modern Law Review 705

Gray, H. "The Sovereignty of Parliament Today" (1953) 10 University of Toronto Law Journal 54

Greenberg, D. "The Scope of the Initiative and Referendum in California" (1966) 54 California Law Review 1717

Gunn, P. "Initiatives and Referendums: Direct Democracy and Minority Interests" (1981) 22 Urban Law Annual 135

Haeflger, A. "The Hierarchy of Constitutional Norms and Its Function in Protecting Human Rights" (1992) 13 Human Rights Law Journal 81

Harris, B. "A Changing Perception of the Law-making Powers of Parliament? (1988) New Zealand Law Journal 394

Harris, B. "Bill of Rights: Redistribution of Power" (1985) New Zealand Law Journal 49

Harris, B. "Parliamentary Sovereignty and Interim Injunctions: Factortame and New Zealand" (1992) 15 New Zealand Universities Law Review 55

Harrison, R. "Judicial Review of Administrative Action: Some Recent Developments and Trends" (1992) New Zealand Law Journal 200

Hsiao, D. "Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic" (1992) 41 Duke Law Journal 1267

Hunting, C. "Pre-Election Review of Voter Initiatives - *American Federation of Labour-Congress of Industrial Organisations v Eu*, 36 Cal 3d 687, 686 P2d 609, 206 Cal Rptr 89 (1984)" (1985) 60 Washington Law Review 911

Iles, W. "New Zealand Experience of Parliamentary Scrutiny of Legislation" (1991) 12 Statute Law Review 165

"Limitations on Initiative and Referendum" (1951) 3 Stanford Law Review 467

- Jamieson, N. "The Age of Referenda" (1992) New Zealand Law Journal 334
- Jamieson, N. "The New Look Legislation" (1991) New Zealand Law Journal 24
- Jamieson, N. "The Demise of the Crown" (1989) New Zealand Law Journal 329
- Jeffries, W. "Parliamentary Conventions and Procedures - How Laws are Made" (1992) New Zealand Law Journal 159
- Joseph, P. "Constitutional Entrenchment and the MMP Referendum" (1994) 16 New Zealand Universities Law Review 67
- Joseph, P. "The Challenge of a Bill of Rights: A Commentary" (1986) New Zealand Law Journal 416
- Joseph, P. "The Crown as a Legal Concept (I)" (1993) New Zealand Law Journal 126
- Jordan, D. "Constitutional Constraints on Initiative and Referendum" (1979) 32 Vanderbilt Law Review 1143
- Katz, R. "Dimensions of Partisan Conflict in Swiss Cantons" (1984) 16 Comparative Political Studies 505
- Keith, K. "A Bill of Rights for New Zealand?" (1985) New Zealand Universities Law Review 307
- Keith, K. "The Bill of Rights: Reply to a Criticism" (1985) New Zealand Law Journal 270
- Kotchka, M. "Residential Zoning by Voter Participation: A Democratic Means to an Inequitable Result" (1977) 46 Cincinnati Law Review 539
- Legal Division of Commonwealth Secretariat. "The Application of International Human Rights Standards in Domestic Law" (1992) 22 Victoria University of Wellington Law Review 1
- "Limitations on Initiative and Referendum" (1951) 3 Stanford Law Review 467
- Longdin, L. "Executive Lapdog or Parliamentary Watchdog? The Controller and Auditor-General" (1989) New Zealand Law Journal 132
- Lowe, C. "Public Safety Legislation and the Referendum Power: A Reexamination" (1986) 37 Public Safety Legislation 591
- Lowenstein, D. "California Initiatives and the Single-Subject Rule" (1983) 30 University of California Los Angeles Law Review 936

- Magleby, D. "Legislatures and the Initiative: The Politics of Direct Democracy" (1986) 59 Journal of State Government 31
- Martin, R. "A Bad Idea to Give Judges Wide Charter Powers" (1987) New Zealand Law Journal 136
- Mathieson, D. "Does the Crown have Human Powers?" (1992) 15 New Zealand Universities Law Review 117
- McGarth, J. "The Bill of Rights and the Legislative Process" (1992) Legal Research Foundation 98
- McLean, J. "The Impact of the New Zealand Bill of Rights on Administrative Law" (1992) Legal Research Foundation 62
- McNellie, E. "The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation" (1989) 89 Columbia Law Review 157
- Michael, D. "Preelection Judicial Review: Taking the Initiative in Voter Protection" (1983) 71 California Law Review 1216
- Moore, J. "Election Day Lawmaking" (17 September 1988) 20 National Journal 2296
- Mosk, S. "*Raven* and Revision" (1991) 25 University of California Davis Law Review 1
- Mowlam, M. "Popular Access to the Decision-making Process in Switzerland: The Role of Direct Democracy" (1979) 14 Government and Opposition 180
- "Notes: State and Local Limitations on Ballot Measure Contributions" (1981) Michigan Law Review 1421
- O'Brien, F. "*Baker v Carr* Abroad: The Swiss Federal Tribunal and Cantonal Elections" (1962) 72 Yale Law Journal 46
- O'Brien, F. "Swiss Law and Subversive Groups" (1967) 18 Northern Ireland Legal Quarterly 302
- Olin, S. "Hiram Johnson, The Lincoln-Roosevelt League, and the Election of 1910" (September 1966) The California Historical Society Quarterly 225
- Oren, C. "The Initiative and Referendum's Use in Zoning" (1976) 64 California Law Review 74
- Palmer, G. "Lawyer as Lobbyist: The Role of Lawyers in Influencing and Managing Change" (1993) New Zealand Law Journal 93

- Palmer, G. "The New Public Law: Its Province and Function" (1992) 22 Victoria University of Wellington Law Review 1
- Paris, J. "The Proper Use of Referenda in Rezoning" (1977) 29 Stanford Law Review 819
- Ray, S. "The California Initiative Process: The Demise of the Single-Subject Rule" (1983) 14 Pacific Law Journal 1095
- Richardson, I. "Public Law and Constitutional Issues" (1993) New Zealand Law Journal 198
- Richman, S. "Election Law: Political Expression by Artificial Persons in Referendum Campaigns" (1979) Annual Survey American Law 285
- Rikys, P. "Trick or Treaty" (1991) New Zealand Law Journal 370
- Rishworth, P. "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" (1991) New Zealand Recent Law Review 337
- Rishworth, P. "The Potential of the New Zealand Bill of Rights" (1990) New Zealand Law Journal 68
- Robertson, B. "Constitutional and Administrative Law in New Zealand" (June 1993) New Zealand Law Journal 213
- Sager, L. "Insular Majorities Unabated: *Warth v Seldin* and *City of Eastlake v Forest City Enterprises, Inc.*" (1978) 91 Harvard Law Review 1373
- Schrag, P. "California II: Initiative Madness" (22 August 1988) 199 *The New Republic* 18
- Shamir, M. "Are Western Party Systems 'Frozen'?" 17 Comparative Political Studies 1 (1984)
- Shaw, A. "The New Zealand Bill of Rights Comes Alive (I)" (1991) New Zealand Law Journal 400
- Shockley, J. "Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?" (1985) 39 University of Miami Law Review 377
- Sidjanski, D. "The Swiss and Their Politics" (1976) 11 Government and Opposition 294
- Sirico Jr, L. "The Constitutionality of the Initiative and Referendum" (1980) 65 Iowa Law Review 637

Slonim, M and Lowe, J. "Judicial Review of Laws Enacted by Popular Vote" (1979) 55 Washington Law Review 175

"State Constitutional Law - Constitutional Revisions - California Supreme Court Upholds Term Limitation Initiative - *Legislature of California v Eu*, No. So19660, 1991 Cal. LEXIS 4529 (Oct. 10, 1991)" (1992) 105 Harvard Law Review 953

Steck, Jr, E. "California Legislation: Sources Unlimited" (1975) 6 Pacific Law Journal 536

Steinberg, J. "Imitation of Switzerland: Historical Reflections" 23 Government and Opposition 13

Stuart, D. "Now the Positive Impact of Judges' Charter Decisions" (1987) New Zealand Law Journal 138

Symposium on Campaign Finance Reform (1994) 94 Columbia Law Review 1125

Synder, J. "The Proposed National Initiative Amendment: A Participatory Perspective on Substantive Restrictions and Procedural Requirements" (1981) 18 Harvard Journal of Legislation 429

Taylor, G. "The Limits of Judicial Review" New Zealand Universities Law Review 178

Walker, G. "The People's Law: Initiative and Referendum" (1988) 15 University of Queensland Law Journal 33

Whitehall, L. "Direct Legislation: A Survey of Recent Literature" (1985) 5 Legal Reference Services Q 3

Wilmar, M. "Judicial Limitations on the Initiative and Referendum in California Municipalities" (1966) 17 Hastings Law Journal 805

Zimmerman, J. "Populism Revived" (1986) 58 State Government 172

CASES

Annan v National Water and Soil Conservation Authority and Minister of Energy (No.2) (1982) 8 NZTPA 369

Annan v National Water and Soil Conservation Authority and Minister of Energy (1980) 7 NZTPA 417

Ashby v Minister of Immigration [1981] 1 NZLR 222

Attorney-General (NSW) v Trethowan [1932] AC 526

Attorney-General of Trinidad and Tobago v McLeod [1984] 1 WLR 522

Blotter v Farrell, 270 P 2d 481, 42 Cal 2d 804 (1954) *dismissed* 427 US 901 (1976)

Brosnahan v Brown 651 P 2d 274, 32 C 3d 236, 186 Cal Rptr 30 (1982)

Buckley v Valeo 424 US 1 (1976)

Chaffers v Goldsmid [1894] 1 QB 186

Citizens Against Rent Control (CARC) v City of Berkeley 614 P 2d 742, 27 Cal 3d 819, 167 Cal Rptr 84 (1980) *prob juris noted* 101 S Ct 1344 (1981) (No. 80-737)

Citizens for Jobs & Energy v the Fair Political Practices Commission 16 Cal 3d 671 (1976)

Collins v City & County of San Francisco 247 P2d 363, 112 CA 2d 719 (1952)

Dare v Lakeport City Council 91 Cal Rptr 124, 12 CA 3d 864 (1970)

Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590; [1934] All ER 385

Fair Political Practices Commission v Superior Court 599 P 2d 46, 157 Cal Rptr 855 (1979)

Farley v Healey 431 P 3d 650 67 Cal 2d 325 62 Cal Rptr 26 (1967)

First National Bank of Boston v Bellotti 435 US 765 (1978)

Fishman v City of Palo Alto 150 Cal Rptr 326, 86 CA 3d 506 (1979)

Fitzgerald v Muldoon [1976] 2 NZLR 615

Fletcher v Peck 6 Cranch 87 (1810)

Geiger v Board of Supervisors 48 Cal 2d 832, 313 P 2d 545 (1957)

Gilmore v National Water and Soil Conservation Authority and Minister of Energy (1982) 8 NZPTA 298

Hardie v Fong Eu 556 P 2d 301, 18 C 3d 71, 134 Cal Rptr 201 certiorari denied 97 S Ct 1652, 430 US 969, 52 L Ed 2d 360 (1976)

Harris v Donges [1952] 2 SA 428, [1952] 1 TLR 1245

Hollister v Kingsbury 129 Cal App 420, 18 P 2d 1006 (1933)

In Re The Initiative and Referendum Act [1919] AC 935; [1919] 3 WWR 1, 48 DLR 18

In Re The Initiative and Referendum Act (1916) 27 Man R 1; [1917] WWR 1012, 32 DLR 148 (Man CA)

James v Valtierra 402 US 141 (1971)

Kadderly v Portland 44 Or 118 (1903)

Legislature v Deukmejian 669 P 2d 20, 24 Cal 3d 666, 194 Cal Rptr 784 (1983)

Marbury v Madison 1 Cranch 137, 2 L Ed 60 (1803)

McFadden v Jordon 196 P 2d 787, 32 C2d 330, certiorari denied 69 S Ct 640, 336 US 918, 93 L Ed 1080 (1948)

Mulkey v Reitman 413 P 2d 825, 64 Cal 2d 529, 50 Cal Rptr 881 (1966) *aff'd* 387 US 369 (1967)

Myers v City Council of City of Pismo Beach 50 Cal Rptr 402, 241 ACA 316 (1966)

NZ Maori Council v Attorney-General [1992] 2 NZLR 576

Pacific States Telephone and Telegraph Company v Oregon 223 US 118 (1912)

Perry v Jordon 207 P 2d 47, 24 C 2d 87 (1949)

Police v Hicks [1974] 1 NZLR 763

R v Blake (1988) 42 CCC (3d) 271 (Man Prov Ct)

R v Nat Bell Liquors [1922] 2 AC 128; [1922] All ER 335

Reform Party of Canada v Canada (Attorney-General) [1993] 3 WWR 139, 136 AR 1, 13 CRR (2d) 107, supplementary reasons *loc cit* WWR at 171, CRR at 137, 7 Alta LR (3d) 34 (QB)

Runanga o Wharekauri Rekohu Inc v Attorney-General (CA 297/92, 3/11/92)

Salomon v Customs and Excise Commissioners [1967] 2 QB 116

San Diego Bldg. Contractors Ass'n v City Council 529 P 2d 570, 13 Cal 3d 205, 118 Cal Rptr 146 (1974)

Simpson v Hite 222 P 2d 225, 36 C 2d 125 (1950)

Stockburger v Jordon 10 Cal 2d 636, 76 P 2d 671 (1938)

The Bribery Commissioner v Ranasinghe [1964] 2 WLR 1301, [1964] 2 All ER 785

The Egg Producers Federation of New Zealand v The Clerk of the House of Representatives and The Royal New Zealand Society for the Prevention of Cruelty to Animals, Wellington, CP 128/94 (20 June 1994)

The Egg Producers Federation of New Zealand v The Clerk of the House of Representatives and The Royal New Zealand Society for the Prevention of Cruelty to Animals, Wellington, CP 128/94 (23 May 1994)

Theophile v Solicitor-General [1950] AC 186

Vauxhall Estates v Liverpool Corp [1932] 1 KB 733

Weaver v Jordon 411 P 2d 289, 64 Cal 2d 235, 49 Cal Rptr 537 cert denied 385 US 844 (1966)

STATUTES

Bundesgesetz uber die politischen Rechte (Swiss)

California Election Code (West Supp 1993)

California Government Code (West Supp 1993)

Citizens Initiated Referenda Act 1993

Citizens Initiated Referenda (Fees) Regulations 1993

Clutha Development (Clyde Dam) Empowering Act 1982

Constitution Act 1986

Electoral Act 1993

Electoral Act 1956

New Zealand Bill of Rights Act 1990

Term Poll Act 1990

Verordnung uber die politischen Rechte (Swiss)

OFFICIAL DOCUMENTS

A Bill of Rights for New Zealand: A White Paper [1985] Appendix to the Journal of the House of Representatives A6

Cabinet, CAB (94) M 31/27, 22 August 1994

Cabinet, CAB (91) M 51/15, 9 December 1991

Cabinet Legislation Committee, LEG (91) M 36/3, 5 December 1991

Cabinet Legislation Committee, LEG (91) 160, 4 December 1991

Cabinet Office Manual, 1991

California Ballot Pamphlet: General Election, 3 November 1992

Chief Electoral Officer to Secretary of Justice, 29 July 1991

"Citizens Initiated Referenda" (13 December 1994) 25 Parliamentary Bulletin 18

"Citizens Initiated Referenda" (19 September 1994) 16 Parliamentary Bulletin 17

Citizens Initiated Referenda Act 1993, Assent Green, 28 September 1993

Citizens Initiated Referenda Bill 1992

Citizens Initiated Referenda Bill, PCO 115/4, 5 December 1991

Citizens Initiated Referenda Bill, PCO 115/3, 4 December 1991

Citizens Initiated Referenda Bill, PCO 115/P, 8 November 1991

Citizens Initiated Referenda Bill, PCO 11/P

Citizens Initiated Referenda Bill Slip, PCO 11/3, 5 August 1993

Citizens Initiated Referenda Bill Slip, PCO 11/1, 3 August 1993

Citizens Initiated Referenda Bill Slip, PCO 11/P, 1 August 1993

Clerk of the House of Representatives to Department of Justice, 13 October 1993

Clerk of the House of Representatives to the Speaker, the Leader of the House, the Minister of Justice, and the Minister of Customs, 7 September 1993

Constitution (Direct Democracy) Bill, Draft No. 3, 8 April 1988

Constitution of California

Department of Justice. *CIR Bill: Briefing Paper*, 3 June 1992

Department of Justice. CIR Bill - Drafting Instructions, LRD 27-1-9 [Draft], June 1991

Department of Justice. CIR Bill - Drafting Instructions, LRD 27-1-9 [Draft], May 1991

Department of Justice. *CIR Bill: Report of the Department of Justice: Part A*, 17 August 1992

Department of Justice. *CIR Bill: Report of the Department of Justice: Part B*, 6 October 1992

Department of Justice. CIR Bill: Second Reading Speech Notes, LRD: 12-1-3, undated

Department of Justice. Draft Cabinet Legislation Committee Paper re CIR Bill, LEG 27-1-9, 2 December 1991

Department of Justice. File Note: CIR Bill: Discussion with Minister of Justice - 16 April 1991, LEG 27-1-9, 17 April 1991

Department of Justice. File Note, CLC, LEG 27-1-9, 5 December 1991

Department of Justice. File Note, LEG 27-1-9, 10 December 1991

Department of Justice. File Note, LRD: 12-1-3, 9 September 1993

Department of Justice. File Note, LRD: 12-1-3, 20 April 1993

Department of Justice. File Note, LRD: 12-1-3, 29 July 1992

Department of Justice. Minute Sheet, CIR Bill - Bill of Rights Vetting, 2420Y, LEG 7-5-27, 28 November 1991

Department of Justice. Minute Sheet, LEG 27-1-9, 15 April 1991

Department of Justice. Minute Sheet, LEG 27-1-9, 1 April 1991

Department of Justice. Minute Sheet, LEG 27-1-9, 19 February 1991

Department of Justice. *Minutes of Meeting with Minister of Justice*, LEG 27-1-9, 22 March 1991

Department of Justice. *Minutes of Meeting with Minister of Justice*, LEG 27-1-9, 7 December 1990

Department of Justice. Notes of Meeting with Chief Registrar of Electors, LEG 27-1-9, 30 July 1991

Department of Justice. Note regarding responses, LEG 27-1-9, undated

Department of Justice to Chief Parliamentary Counsel, 4 August 1993

Department of Justice to Chief Parliamentary Counsel, 3 August 1993

Department of Justice to Chief Parliamentary Counsel, 2 August 1993

Department of Justice to Chief Parliamentary Counsel, 4 March 1992

Department of Justice to Clerk of the House of Representatives, 16 September 1993

Department of Justice to Department of Statistics, 14 September 1993

Department of Justice to Department of Statistics, 10 March 1992

Department of Justice to Department of Statistics, 3 July 1991

Department of Justice to Minister of Justice, 10 September 1993

Department of Justice to Minister of Justice, 26 November 1991

Department of Justice to Minister of Justice, 3 July 1991

Department of Justice to Minister of Justice, 9 April 1991

Department of Justice to Minister of Justice, 19 December 1990

Department of Justice to New Zealand Post Limited, 14 September 1993

Department of Justice to Parliamentary Counsel Office, 3 July 1991

Department of Statistics to Department of Justice, 15 October 1993

Department of Statistics to Department of Justice, 16 December 1991

Department of Statistics to Department of Justice, 24 July 1991

Department of Statistics to Department of Justice, 20 May 1991

Federal Constitution of Switzerland

Focus on Switzerland: The Historical Evolution; Political Institutions. 2 ed, Swiss Office for the Development of Trade, Lausanne, 1982

"How a Bill Becomes a Law" (23 August 1993) 19 Parliamentary Bulletin, backcover.

How You Can Have Your Say: The Citizens Initiated Referenda Act 1993. Law Reform Division, Department of Justice, Wellington, 1994

Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper: A Bill of Rights for New Zealand [1987] Appendix to the Journal of the House of Representatives I.8A

New Zealand Official Yearbook. Department of Statistics, Wellington, 1992

New Zealand Official Yearbook. Department of Statistics, Wellington, 1988

New Zealand Official Yearbook. Government Printer, Wellington, 1969

New Zealand Official Yearbook. Government Printer, Wellington, 1968

New Zealand Gazette (16 December 1993) 3753-3754

New Zealand Gazette (29 October 1992) 3543-3544

New Zealand Gazette (29 November 1990) 4505-4506

New Zealand Post Limited to Department of Justice, 13 October 1993

Office of the Clerk. *CIR Bill: Campaign Letters/Forms*, 28 May 1928

Office of the Clerk. *CIR Bill: Clausal Analysis of Submissions*, undated

Office of the Clerk. *CIR Bill: Submissions Summary Report*, 28 May 1992

Office of the Clerk of the House of Representatives to Secretary of Justice, 30 August 1991

Parliamentary Order Paper, 28 April 1992

Parliamentary Order Paper, 10 March 1992

Popular Initiatives Bill. Bills Thrown Out (1984)

Popular Initiative and Referendum Bill. Bills Thrown Out (1918-1919)

Referendum Bill. Bills Thrown Out (1893-1905)

Report of the Electoral Law Committee: Inquiry into the Report of the Royal Commission of the Electoral System. Government Print, Wellington, 1988

Report of Public Petitions M to Z Committee 1961 on Draft Constitution for New Zealand [1961] Appendix to the Journal of the House of Representatives 1.2A

Royal Commission on the Electoral System. *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*. Government Print, Wellington, 1986

Schedule of Petitions Presented. Journal of the House of Representatives, 1963-1994

Secretary of Justice to Minister of Justice, 5 April 1991

Statistisches Jahrbuch der Schweiz 1994 - Separatdruck Kapitel 17 Politik. Federal Office of Statistics, Berne, 1994

Statistisches Jahrbuch der Schweiz 1993 - Separatdruck Kapitel 17 Politik. Federal Office of Statistics, Berne, 1993.

Statistisches Jahrbuch der Schweiz 1992 - Separatdruck Kapitel 17 Politik. Federal Office of Statistics, Berne, 1992

The General Election and Electoral Referendum 1993 [1994] Appendix to the Journal of the House of Representatives E.9

The Electoral Referendum 1992 [1993] Appendix to the Journal of the House of Representatives E.9

The General Election 1990 [1990] Appendix to the Journal of the House of Representatives E.9

The General Election and Electoral Referendum 1993 [1994] Appendix to the Journal of the House of Representatives E.9

Treasury to the Department of Justice, 22 September 1993

Treasury to Department of Justice, 2 December 1991

Treasury to Department of Justice, 22 November 1991

58 California Attorney General Opinion 830, 6 November 1975

100 Jahre Eidgenössische Volksinitiative. Swiss Federal Chancellery, Berne, 1991

[1990] Appendix to the Journal of the House of Representatives I.17, 3

[1990] Appendix to the Journal of the House of Representatives A.5, 255

[1987] Appendix to the Journal of the House of Representatives I.27, 4-5

(1987-90) Journal of the House of Representatives 2418

(1984-1985) Journal of the House of Representatives 1030

(1901) Journal of the House of Representatives 1901

PARLIAMENTARY DEBATES

Referendum Bill

NZPD, vol 80, 358, 2 August 1893, 564-569, 10 August 1893

NZPD, vol 85, 274-303, 29 August 1894

NZPD, vol 87, 16, 21 June 1895, 642-664, 17 July 1895

NZPD, vol 93, 437-443, 23 July 1896

NZPD, vol 105, 145, 19 October 1898, 768, 4 November 1898

NZPD, vol 106, 156, 30 June 1899

NZPD, vol 112, 67-68, 20 July 1900

NZPD, vol 116, 212-225, 9 July 1901, 266-268, 10 July 1901, 363-364, 12 July 1901, 393, 16 July 1901, 491, 18 July 1901, 495-507, 19 July 1901, 669-671, 26 July 1901

NZPD, vol 117, 1-12, 30 July 1901, 79-81, 31 July 1901, 139-143, 1 August 1901, 174-175, 2 August 1901

NZPD, vol 122, 571-601, 24 September 1902

NZPD, vol 127, 311-312, 3 November 1903, 352-372, 4 November 1903, 550-571, 13 November 1903, 715, November 1903, 1052, 24 November 1903

NZPD, vol 128, 41, 30 June 1904, 106-121, 1 July 1904

NZPD, vol 129, 460, 16 August 1904

NZPD, vol 131, 249-250, 19 October 1904, 373-374, 24 October 1904, 424-428, 25 October 1904, 468-474, 26 October 1904, 486-519, 27 October 1904, 643-651, 1 November 1904

NZPD, vol 133, 543, 9 August 1905, 724, 17 August 1905

NZPD, vol 136, 502, 12 September 1906

Popular Initiative and Referendum Bill

NZPD, vol 182, 204, 13 April 1918, 214, 15 April 1918

NZPD, vol 184, 320-328, 9 September 1919

Popular Initiatives Bill

NZPD, vol 455, 4746-4757, 9 December 1983

NZPD, vol 458, 1313-1325, 6 November 1984

NZPD, vol 464, 5971-5972, 25 July 1985

NZPD, vol 467, 7746-7752, 5 November 1985, 8069-8068, 13 November 1985

Citizens Initiated Referenda Act 1993

NZPD, vol 522, 6703-6724, 10 March 1992

NZPD, no 86, 17608-17616, 19 August 1993

NZPD, no 88, 17950-17965, 14 September 1993

Miscellaneous

NZPD, vol 507, 1873-1874, 30 May 1990

NZPD, vol 502, 13500, 14 November 1989

NZPD, vol 467, 7732, 9 October 1985

NZPD, vol 466, 6978, 24 August 1985

MEDIA

"A Say for the Public" *Timaru Herald*, Timaru, New Zealand, 16 March 1992

"A Victory for Term Limits and California Voter Initiative Limiting Legislators' Terms is Upheld" *Wall Street Journal*, New York, USA, 11 October 1991

"An Illusion of Participation" *The Dominion*, Wellington, New Zealand, 17 March 1992

"Anti-Immigrant Group on Rise in Geneva" *The New York Times*, New York, USA, 10 November 1985

Armstrong, J. "Government Grapples with Another Promise" *New Zealand Herald*, Auckland, New Zealand, 14 March 1992

Armstrong, J. "McCully Catches Verbal Lashing" *New Zealand Herald*, Auckland, New Zealand, 23 July 1990

Bancroft, A. "S.F. Lawyer's Initiative: Long Vacations - By State Law" *San Francisco Chronicle*, San Francisco, USA, 29 July 1991

Benjamin, D. "The Swiss Army Gets Knifed" (11 December 1989) *Time* 61

Blanshard, D. "'Facts' Challenge Put Up on Referendums" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 20 March 1992

Blanshard, D. "MPs Reject Criticism of Bill" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 16 March 1992

Blanshard, D. "Nats Call for Binding Referendums" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 18 May 1992

"Bill Allows Petitions to Force Referendums" *The Evening Post*, Wellington, New Zealand, 11 March 1992

"Bill Backs Referenda: But Gov't Will Insist on Veto Clause" *Daily News*, New Zealand, 11 March 1992

"Bill to Allow Referenda Introduced" *Timaru Herald*, Timaru, New Zealand, 11 March 1992

"Bolger Backs Petition Over Referendums" *New Zealand Herald*, Auckland, New Zealand, 12 September 1989

"Bolger Proposes Petition System" *The Northern Advocate*, New Zealand, 12 September 1989

Bolger, J. "Case for Citizen's Initiative" *New Zealand Herald*, Auckland, New Zealand, 26 September 1989

Bolger, J. "Upper House" *Otago Daily Times*, Dunedin, New Zealand, 19 September 1988

By-Election Results" *The Evening Post*, Wellington, New Zealand, 17 February 1992

"Caucus Kicks Out Peters" *The Evening Post*, Wellington, New Zealand, 1 October 1992

Chiang, H, and Gunnison, R. "State High Court OKs Term Limits for Legislators: Judges Rule that Prop 140 Initiative Protects Against 'Entrenched, Dynastic Bureaucracy" *San Francisco Chronicle*, San Francisco, USA 11 October 1991

"Citizens Initiated Referenda Bill" *375 Law Talk*, 20 July 1992

"CIR End for Splinter Groups" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 4 May 1991

Clark, C. "Proportional Representation Abolishes 'Elected Dictators'" *The Evening Post*, Wellington, New Zealand, 16 January 1992

Clark, H. "No to PR, Yes to Parliamentary Reform" *The Evening Post*, Wellington, New Zealand, 6 January 1992

Clifton, J. "Bolger Faces Revolt over Electoral Reform" *The Dominion*, Wellington, New Zealand, 5 July 1990

Clifton, J. "Coalition Dismayed at Bolger's 'Lack of Faith'" *The Dominion*, Wellington, New Zealand, 7 July 1990

Clifton, J. "Electoral Reform Policy Best Left to MPs, Says Bolger" *The Dominion*, Wellington, New Zealand, 6 July 1990

Clifton, J. "Graham to Introduce Referendum Trigger" *The Dominion*, Wellington, New Zealand, 5 December 1990

Clifton, J. "MP Sticks to Promise on Power Abuse" *The Dominion*, Wellington, New Zealand, 1 June 1990

Clifton, J. "Ombudsman Protests" *The Dominion*, Wellington, New Zealand, 23 October 1992

Clifton, J. "Pension Meeting Futile - Muldoon" *The Dominion*, Wellington, New Zealand, 15 June 1991

Clifton, J. "Pension Surtax May Rise Only 10%" *The Dominion*, Wellington, New Zealand, 5 October 1991

Clifton, J. "Referendum Call Tests Nat MPs on Policy" *The Dominion*, Wellington, New Zealand, 19 August 1989

Clifton, J. "Referendums to the Rescue" *The Dominion*, Wellington, New Zealand, 11 March 1992

Collins, S. "Electoral Poll Will Offer Clear Choice" *New Zealand Herald*, Auckland, New Zealand, 2 April 1991

Collins, S. "Government Reviews Referendum" *The Dominion*, Wellington, New Zealand, 19 August 1991

Corvitz, L. "Lawmakers Sue for Their Jobs - Another Reason for Term Limits" *The Wall Street Journal*, New York, USA, 19 June 1991

Crisp, L. "Harvest of Hate" *The Bulletin*, 4 April 1989

Daly, M. "Electoral Reform Debate Gets Nod" *Northern Advocate*, New Zealand, 21 July 1990

Daly, M. "Scepticism Rife in National, Claims Hobson" *Northern Advocate*, New Zealand, 19 July 1990

Dawson, D. "Elderly Voice Criticism" *The Dominion*, Wellington, New Zealand, 25 November 1991

Devine, G. "State's Taxation System May Already Be in Jeopardy" *San Francisco Chronicle*, California, USA, 22 October 1991

"Don't Bet the Farm on Electoral Change Yet" *The Press*, Christchurch, New Zealand, 26 September 1992

Editorial. "An Admission in Fear" *New Zealand Herald*, Auckland, New Zealand, 14 March 1989

Editorial. "Bolger Seen in New Light" *The Dominion*, Wellington, New Zealand, 9 July 1990

Editorial "Dithering on Referendums" *New Zealand Herald*, Auckland, New Zealand, 13 September 1989

Editorial. "Execution by Referendum?" *New Zealand Herald*, Auckland, New Zealand, 9 June 1988

Editorial "Mistaken Messages" *The Evening Post*, Wellington, New Zealand, 18 July 1992

Editorial, "Not So Non-Binding" *New Zealand Herald*, Auckland, New Zealand, 27 September 1993

Editorial "Only One Way to Resolve BNZ Saga" *The Evening Post*, Wellington, New Zealand, 16 October 1992

Editorial. "Parliament's Answer" *New Zealand Herald*, Auckland, New Zealand, 13 March 1992

Editorial. "Searching for a Super Policy" *The Evening Post*, Wellington, New Zealand, 8 November 1991

Editorial. "The Swiss Draw Back" *The New Zealand Herald*, Auckland, New Zealand, 10 December 1992

Editorial "Winston Peters, Bribes, and the BNZ" *The Evening Post*, Wellington, New Zealand, 5 June 1992

Edwards, B. "Bolger Reaffirms Peters Sacking" *The Evening Post*, Wellington, New Zealand, 10 October 1991

Edwards, B. "Public Inquiry into BNZ Ruled Out" *The Evening Post*, Wellington, New Zealand, 9 October 1992

"Election Petition" *The Dominion*, Wellington, New Zealand, 10 August 1991

"Electoral Reform Debate Push" *Daily News*, New Zealand, 16 July 1990

"Geneva Rightest Party Gains No Council Seat" *The New York Times*, New York, USA, 12 November 1985

"'Get Real' Over Electoral Reform" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 10 April 1991

"Giving Us a Say in a Way" *Waikato Times*, Hamilton, New Zealand, 11 March 1992

"Government Introduces Referendum Bill" *The Press*, Christchurch, New Zealand, 11 March 1992

"Groups Supports Paper for Citizens' Referenda" *Daily News*, New Zealand, 2 June 1990

Hofmann, P. "The Swiss Reputation for Clockwork Perfectionism is Being Disrupted by Young Rioters Discontented with the Country's Materialism" *The New York Times Magazine*, New York, USA, 8 February 1981

"Immigrants Rushing to Beat Swiss Deadline" *The New York Times*, New York, USA, 20 December 1987

Inman, B. "Juggling with the Legality of Prop. 13" *San Francisco Examiner*, California, USA, 10 November 1991

Kamm, H. "Pope Asks Swiss to Welcome the Foreign Workers" *The New York Times*, New York, USA, 17 June 1984

Kershner, V. "Fate of Prop. 13 Remains with Supreme Court" *San Francisco Chronicle*, California, USA, 13 June 1991

Kershner, V. "Fewer Initiatives Expected in Next Election" *San Francisco Chronicle*, San Francisco, USA, 6 May 1991

Kershner, V. "Supreme Court Agrees to Rule on Prop. 13" *San Francisco Chronicle*, California, USA, 10 August 1991

Kershner, V. "U.S. High Court Agrees to Rule on Proposition 13" *San Francisco Chronicle*, California, USA, 4 June 1991

Laugesen, R. "How MPs Vote on Electoral Reform" *The Dominion*, Wellington, New Zealand, 5 August 1992

Laugesen, R. "Petitions May Soon Spark Referendums" *The Dominion*, Wellington, New Zealand, 20 August 1993

Laugesen, R. "Super Fiasco Blamed on the Balancing Act" *The Evening Post*, Wellington, New Zealand, 21 October 1991

Lacayo, R. "Green Ballots vs. Greenbacks" (19 November 1990) *Time* 44

Long, R. "Cabinet Yielding to Super Pressure" *The Dominion*, Wellington, New Zealand, 6 June 1991

Long, R. "U-turn on Pensions Will Cost \$200 Million" *The Dominion*, Wellington, New Zealand, 4 October 1991

Long, R and Kilroy, S. "Shipley 'Loser' in Caucus Briefing" *The Dominion*, Wellington, New Zealand, 5 June 1991

Luke, P. "Don't Bet the Farm on Electoral Change Yet" *The Press*, Christchurch, New Zealand, 26 September 1992

Luke, P. "Gov't Not Bound by Outcome of Polls" *The Press*, Christchurch, New Zealand, 11 March 1992

- McGregor, A. "Swiss Debate Scrapping Their Army" *The Times*, London, England, 20 November 1989
- McLoughlin, D. "Nine Years After the Revolution: Why Won't the Economy Fly?" *North and South*, July 1993
- McMillan, N. "Bolger Wants Change" *Northern Advocate*, New Zealand, 4 October 1989
- McMillan, N. "Electoral Reform Promises of the Government Nearly Ready for Parliament" *Taranaki Daily News*, Taranaki, New Zealand, 22 April 1991
- "Meurant Appeals to MPs" *Northern Advocate*, New Zealand, 25 May 1990
- "More Common Sense and There Would Be No Need for Referenda" *Gisborne Herald*, Gisborne, New Zealand, 17 March 1992
- Munro, M. "Caucus Revolt on Super Growing" *The Dominion*, Wellington, New Zealand, 7 August 1991
- Munro, M. "MPs Lock Horns with Dilemma" *The Timaru Herald*, Timaru, New Zealand, 16 March 1992
- Munro, M. "Non-binding Vote Cooked Up" *The Waikato Times*, Hamilton, New Zealand, 16 March 1992
- Munro, M. "Referendum Bill Introduced - With Several Conditions" *The Dominion*, Wellington, New Zealand, 11 March 1992
- Munro, M. "Spirited Debate in a Back Room" *Waikato Times*, New Zealand, 23 July 1990
- Munro, M. "The Voice of the People May Not Be Powerful" *The Dominion*, Wellington, New Zealand, 16 March 1992
- Naef, A. "Legacy of Mistrust of Foreigners" *The New York Times*, New York, USA, 3 May 1987
- "National Endorses Hobson Proposal" *The Northern Advocate*, New Zealand, 14 August 1989
- "National to Debate Northland Proposal for 'Voter Veto'" *The Northern Advocate*, New Zealand, 24 May 1989
- "Nats Move of Vote Reform" *Northern Advocate*, New Zealand, 23 July 1990
- "Nats Plan to Scupper Referendum - Claim" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 19 September 1990

Netter, T. "Swiss Coalition Presents Petition on Referendum to End Army" *The New York Times*, New York, USA, 14 September 1986

Netter, T. "Swiss Voters Back Curb on Refugees" *The New York Times*, New York, USA, 6 April 1987

Ninnes, R. "Disappointment Quite Likely" *Daily News*, New Zealand, 16 July 1990

"NZ Referendums Rare Phenomenon" (18 September 1992) *National Business Review*

"Ombudsman Calls for 'Credibility'" *The Press*, Christchurch, New Zealand, 23 October 1992

"Ombudsman Hits Back at Politicians" *The New Zealand Herald*, Auckland, New Zealand, 23 October 1992

Paltridge, A. "Referenda Plans Criticised" *The Daily News*, New Zealand, 28 May 1991

"Parliamentary Reform" *Stratford Press*, New Zealand, 6 June 1990

"Peters Wants Poll Reform by 1993" *The Dominion*, Wellington, New Zealand, 1 June 1991

"Peters Runs Ahead on Moral Issue" *New Zealand Herald*, Auckland, New Zealand, 17 April 1989

"Petition to Reduce House Proceeds" *The Evening Post*, Wellington, New Zealand, 22 August 1994

"Petitions May Force Polls" *Nelson Evening Mail*, Nelson, New Zealand, 11 March 1992

Radio Pacific News, *Interview of Douglas Graham, Minister of Justice*, 11 March 1992

Raine, G. "Can Voters Set Political Term Limits?: California Supreme Court Ready to Hear Proposition 140 Challenge Seeking Curbs on Legislature" *San Francisco Examiner*, San Francisco, USA, 8 September 1991

Ramsay, C. "Referendum Bill on Way" *The Evening Post*, Wellington, New Zealand, 28 November 1990

"Referenda Arguments Predicted" *Waikato Times*, Hamilton, New Zealand, 15 September 1993

"Referenda Bill 'Flawed'" *The Press*, Christchurch, New Zealand, 16 March 1992

"Referenda Bill May Restore Esteem: Caygill" *Daily Telegraph*, New Zealand, 20 August 1993

"Referenda Law Passed" *The Evening Standard*, New Zealand, 15 September 1993

"Referenda May Divide Country, Caygill Says" *Northern Advocate*, New Zealand, 16 September 1993

"Referendum Bill a Futile Exercise" *Daily Post*, New Zealand, 11 March 1992

"Referendum Bill Praised by MPs" *Bay of Plenty Times*, Bay of Plenty, New Zealand, 20 August 1993

"Referendum Draft Holds Catch" *Daily Post*, New Zealand, 11 March 1992

"Referendum Results" *National Business Review*, Auckland, New Zealand, 25 September 1992

"Referendum Trigger" *Waikato Times* Hamilton, New Zealand, 4 March 1992

"Referendum Trigger Level Too High: Expert" *Daily News*, New Zealand, 17 September 1990

"Referendums an Extra Communication Line" *Waikato Times* Hamilton, New Zealand, 13 March 1992

"Referendums Bill a Hollow Gesture" *The Evening Post*, 18 March 1992

"Right-Wing Party Gains In Geneva Election" *The New York Times*, New York, USA, 16 October 1985

"Rioting Zurich Youths Attack Elegant Shopping Area" *The New York Times*, New York, USA, 6 September 1980

"Risks of Referendums" *The Press*, Christchurch, New Zealand, 14 March 1992

Rudman, B. "Stone Age Way of Conducting a Poll" *The Sunday Star*, New Zealand, 15 March 1992

Thomas, G. "Public's Wish Must Wash" *Waikato Times*, Hamilton, New Zealand, 14 March 1992

Sharon Crosbie Show: Interview of Douglas Graham, Minister of Justice. National Radio broadcast, 23 January 1992

Sigerist, H. "Swiss Democracy Excellent Model" *New Zealand Herald*, Auckland, New Zealand, 16 December 1989

Sigerist, H. "Two-Party System in a World of its Own" *New Zealand Herald*, Auckland, New Zealand, 6 June 1989

Sigerist, H. "Way Open for Minority Groups" *New Zealand Herald*, 12 June 1989

Stone, A. "Citizen's Voice Loud and Clear" *New Zealand Herald*, Auckland, New Zealand, 16 September 1993

Stone, A. "Gov't Can Ignore Citizens' Referendum" *New Zealand Herald*, Auckland, New Zealand, 11 March 1992

Stone, A. "Poll Worth Questioned" *New Zealand Herald*, Auckland, New Zealand, 12 March 1992

Stone, A. "Support for Voters' Veto Grows Among Nationals" *New Zealand Herald*, Auckland, New Zealand, 25 May 1989

Stone, A. "Voters' Veto Plan on Path for National Policy" *New Zealand Herald*, Auckland, New Zealand, 28 August 1989

"Superannuitants' Hopes Rise" *The Evening Post*, Wellington, New Zealand, 21 October 1991

"Swiss Asylum Limited By Vote in Parliament" *The New York Times*, New York, USA, 5 June 1986

"Swiss Reject Plan to Enhance Foreign Workers' Status" *The New York Times*, New York, USA, 6 April 1981

"Swiss Vote on Proposal to Set Limit on Foreigners" *The New York Times*, New York, USA, 13 March 1977

"Swiss Voters Approve Antiriot Measures" *The New York Times*, New York, USA 7 June 1982

"Swiss Voters Turn Down Proposals on Military Exemptions and Taxes" *The New York Times*, New York, USA, 5 December 1977

"Swiss Voters Uphold National Conscription" *The New York Times*, New York, USA, 27 February 1984

"Swiss Voters Weigh Alternative Service for Conscientious Objectors" *The New York Times*, New York, USA, 4 December 1977

Supplementary Material from the New York Times and the Associated Press, *The New York Times*, New York, USA, 25 September 1978, 24 (ap-ny-09-24 1613EST)

Tait, C. "Controlling Parliament" *Waikato Times*, Hamilton, New Zealand, 24 May 1991

Tait, C. "Leadership Questioned" *Waikato Times*, Hamilton, New Zealand, 22 March 1991

Tait, C. "Referenda the Solution" *Waikato Times*, Hamilton, New Zealand, 23 May 1991

Templeton, I. "Tauranga Clash as Forerunner to MMP Races" *The Sunday Star*, New Zealand, 31 January 1993

"The Secret of Switzerland" (10 October 1986) *National Review* 47

"Turnouts Topped 60 per cent in Some Electorates" *New Zealand Herald*, Auckland, New Zealand, 9 October 1992

"Two Cheers for Polls" *New Zealand Herald*, Auckland, New Zealand, 12 March 1992

Upton, S. "An Electoral System for All Seasons" *The Dominion*, Wellington, New Zealand, 28 September 1992

"Welch's Week" *Listener & TV Times*, 17 October 1992

"What, Leave the Alps Naked?" (25 November 1989) *The Economist* 60

"Youths Smash Windows Along Main Zurich Avenue" *The New York Times*, New York, USA, 3 November 1980

2ZB Tonight Live: "Citizens Initiated Referenda" 2ZB radio broadcast, 25 August 1993

"1,389 Applied for Swiss Asylum" *The New York Times*, New York, USA, 7 February 1979

INTERVIEWS

Interview with Wayne Eagleson, Director of National's Parliamentary Research Unit, in Wellington, 16 November 1992

Interview with Wayne Eagleson, Director of National's Parliamentary Research Unit, Wellington, 25 March 1991

Interview with Hugo Hoffmann, Senior Legal Adviser, New Zealand Department of Justice, Wellington, 19 May 1992

Interview with Fran Wilde, MP for Central Wellington, in Wellington, 24 June 1991

Telephone interview with Wally Boyd, President of the One New Zealand Foundation, 28 September 1991

Telephone interview with Wally Boyd, President of the One New Zealand Foundation, 24 July 1991

Telephone interview with Ruth Dyson, President of the New Zealand National Party,
3 May 1991

Telephone Interview with Mike Houlding, 13 September 1993

Telephone Interview with Merv Rusk, October 1994

Telephone interview with Merv Rusk, 12 June 1993

SUBMISSIONS

Petition of the Coalition of Concerned Citizens (Eketahuna) to the House of
Representatives, undated, EL/88/730, Box 1988/15

Submissions on the Citizens Initiated Referenda Bill to the Electoral Law Select
Committee, 1992

Submissions to the National Party Caucus Committee on Electoral and Parliamentary
Reform, 1990

1-7 New Zealand: The Royal Commission on the Electoral System: Submissions,
1986

LETTERS

Jim Bolger, Leader of the Opposition, to B Daly, National Director of New Zealand
League of Rights, 11 July 1989

Jim Bolger, Leader of the Opposition, to FAIR, 17 May 1989

Jim Bolger, Leader of the Opposition, to J Wright, 18 July 1989

Jim Bolger, Prime Minister, to National Party Member, 1 August 1991

Wally Boyd to M Gobbi, 26 August 1993

Wally Boyd, President of the One New Zealand Foundation, to M Gobbi, 9 July 1991

Wayne Eagleson, National Parliamentary Research Unit, to M Gobbi, 19 June 1991

Wayne Eagleson, Private Secretary to J Bolger, Leader of the Opposition, to D
McKenna, 23 January 1990

Wayne Eagleson, Private Secretary to J Bolger, Leader of the Opposition, to M Rusk,
Chairman Hobson Electorate Policy Committee (30 April 1990)

Electoral Reform Coalition to M Gobbi, 11 May 1991

Leo Gilich, National Coordinator of FAIR, to J Bolger, Leader of the Opposition, 17
July 1989

Leo Gilich, National Coordinator of FAIR, to M Gobbi, 8 February 1992

Leo Gilich, National Coordinator of FAIR, to M Gobbi, 25 June 1991

Leo Gilich, National Coordinator of FAIR, to M Gobbi, 30 April 1991

Vere Harvey-Brain of Voter's Voice to M Houlding of National Reform, 21 June 1991

Mike Houlding, National Reform, to M Gobbi, 30 June 1993

Mike Houlding of National Reform to M Gobbi, 15 June 1991

Mike Houlding of National Reform to M Gobbi, 8 May 1991

National Reform to Executive of Electorate Policy Committee, 7 March 1992

Bruce Knowles, Chairman of National's Taranaki Electorate, to National Party Electorate Chairman, 26 April 1993

Bruce Knowles, National Reform, to CIR Supporters, 8 June 1991

Bruce Knowles, National Reform, to M McCully MP, Chairman of the Electoral Reform Caucus Committee, 20 June 1991

Bruce Knowles to the Minister of Justice, 4 November 1992

Chris Leitch, President of the New Zealand Democratic Party, to M Gobbi, 24 May 1991

Murray McCully, MP for East Coast Bays, to M Rusk, Chairman Hobson Electorate Policy Committee, 3 May 1990

Fred Milner, President of the Auckland Provincial Council of Senior Citizens and Chairman of the Combined Committee of Retired Persons Organisation, to M Gobbi, 14 May 1991

National Reform to Members of the National Party (7 May 1992)

Merv Rusk to J Bolger, Leader of the Opposition, 23 April 1990

Merv Rusk to M Gobbi, September 1993

Merv Rusk to M Gobbi, 15 August 1991

Merv Rusk to M McCully, 26 April 1990

Merv Rusk to Minister of Justice, 29 November 1992

Clifford Tait to M Gobbi, 29 July 1993

Cliff Tait to A Ladley, 10 June 1991

Michael Taylor of National Reform to FAIR, *et al*, 23 May 1991

Letter from Geoffrey Q de Walker, Dean of the University of Queensland School of Law, to M Gobbi, 23 July 1991

Geoffrey Q de Walker, Dean of University of Queensland School of Law, to M Gobbi, 22 May 1991

ADDRESSES

Bolger, J. *Politics, Parliament and the People: A Case for Reform*. University of Canterbury Politics Club, Christchurch, 11 September 1989

Laws, M. *"What's Wrong with Parliament?" The Case for Parliamentary Reform: A Backbencher's Lament*. Commonwealth Press Editors' Conference, Wellington, 6 June 1991

Peters, W. *Church and State: The Quest for Balance*. Otumoetai Baptist Church Congregation, Tauranga, 16 April 1989

Peters, W. *Electoral Reform - Why it is Needed*. Business Network, Wellington, 11 June 1991

Peters, W. *'The Crisis in Confidence in New Zealand Politics' - An Examination of the Crisis and Possible Solutions*. Taradale Rotary Club Dinner, Napier, 8 February 1990

Walker, G. *The People's Law: Initiative and Referendum: University of Queensland Inaugural Lecture*. University of Queensland Press, St Lucis, 1988

von Schenck, M. *700 Years of Swiss Democracy*. Institute of International Affairs, Wellington, 7 November 1991

OTHER

Advertisement. "NZ Political System in Chaos" *The Dominion*, Wellington, New Zealand, 28 August 1991

Armiger, L. *FAIR Chairman's Report*, 22 February 1991

Book of the Year: Events of 1991. Encyclopedia Britannica, Chicago, 1992

Carter, H. *Voters' Veto: The Voice of the People*. Logos Forum, Toomwoomba, Queensland, 1988

CS First Boston. *An Analysis of Proposals for Constitutional Change in New Zealand*, 1992

Eagleson, W. *Exemptions to Initiative Referenda*, 5 June 1990

Evlidge, C. *What is Social Credit? A Background to Financial Policy*. rev ed, NZSCPL Publications Committee, Social Credit Information Centre, Auckland, 1981

FAIR Newsletter No. 1, September 1988

FAIR Newsletter No. 6, September 1989

FAIR Newsletter No. 7, December 1989

FAIR Newsletter No. 10, September 1990

FAIR Newsletter No. 11, October 1990

FAIR Newsletter No. 12, January 1991

FAIR Newsletter No. 13, March 1991

FAIR Newsletter No. 14, July 1991

FAIR Newsletter No. 18, January 1994

FAIR Proposal for CIR, preliminary draft, 21 June 1991

GRP, ed "Switzerland" 28 Encyclopedia Britannica, Encyclopedia Britannica, Chicago, 1988

Gilich, L. *Citizens Initiative But What About Referendum?* 27 September 1989

Gobbi, M. Electoral Law Select Committee Proceedings Notes, 17 August 1993, 11 August 1993, 19 September 1992, 22 July 1992, 24 June 1992, 17 June 1992, 10 June 1992

Gobbi, M. House of Representative Proceeding Notes, 14 September 1993

Houlding, M. "'National Reform' Who are They? What is It?" 6 Electoral Newsletter No. 3, 14 June 1991

Keane, M. *FAIR Chairman's Report*, 10 April 1989

"Lawyer as Lobbyist" in *1993 New Zealand Law Conference: Law and Politics Papers*, Vol 2, 267, March 1993

Memorandum from Murray McCully to the Electoral Law Reform Caucus Committee re US Trip, 5 July 1990

Memorandum from Wayne Eagleson, Secretary, to Members of the Electoral Law Reform Caucus Committee, 11 July 1990

National Party. "Improving New Zealand's Democracy" *National's Policy on Electoral Reform*, 11 September 1990

National Party. *Minutes of the Electoral Law Reform Caucus Committee*, 15 August 1990, 25 July 1990, 6 July 1990, 7 June 1990, 30 May 1990, 19 April 1990

National Party. Remit 2, Background Notes for Delegates to Remit Committee 4, 1989

National Party. *Report of the Electoral Law Reform Committee to Caucus*, September 1990

National Party. "Resolutions" *Seminar on Parliament and Electoral Reform* held for the Wellington Divisional Policy Committee at Wellington, 13-14 April 1991

National Reform *Binding Citizens Initiated Referenda*, 4 December 1992

National Reform. *Citizens Initiated Referenda*, undated

National Reform. *Citizens Initiated Referendum Gives You A Say*, 10 April 1991

National Reform Newsletter, 16 June 1991

National Reform. *The Principles of Direct Democracy and How it Works: Binding Citizens Initiated Referenda*, 5 January 1993

New Zealand Citizens Movement Newsletter, June 1991

New Zealand Citizens Movement Newsletter [Citizens' Roundtable], undated

New Zealand Citizens Movement. *With Citizens Initiated Referenda This Stranglehold Will Be Broken*, undated

New Zealand Democratic Party. *NZ Democrats: Opportunity with Justice*. NZDP, Auckland, 1985

Nixon, M. Electoral Law Select Committee Proceedings Notes, 31 March 1993

One New Zealand Foundation Press Release, 13 November 1989

One New Zealand Foundation. *What Is Voters Referendum*, undated

Peters, W. *Paper on Initiative Referenda for the Electoral Law Caucus Committee*, undated

Rusk, M. *A Positive Strategy for National to Preserve Democracy*, 7 February 1989

Rusk, M. Hobson Remit No. 17, Committee Two Background Notes, January 1989

"Serving Our Nation: Our People's Welfare is Our Concern - And Yours" *Coalition Courier*, Vol 5, No 2, June/July 1990

Social Credit Party. *Social Credit '78 Election Manifesto: Bold New Policies to Get New Zealand Working towards a Better Tomorrow*, 1978

Summary of the Electoral Reform Forum held at the New Zealand National Party Conference on 22 July 1990, 25 July 1990

Tauranga District Council *Your Choice: Citizens Initiated Referenda*, Local Body Elections, 1992

The National Government in Office - Promises and Performance: An Update on the Progress Made by the Government in Implementing Its Manifesto Commitments, 31 July 1991

Voters' Voice *Voters' Voice (Citizens Initiated Referendum)*, undated