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Cover Page Footnote

A.B. Brown University, 1992; J.D. New York University School of Law, 1995. The author would like to thank Thomas Stoddard, Norman Dorsen, Pamela Coukos, and Evelyn Furse for their thoughtful comments, criticisms, and support. This Article is dedicated to those whose voices are not heard.

CONSENSUS OF THE GOVERNED: THE LEGITIMACY OF CONSTITUTIONAL CHANGE

*Raymond Ku**

What a government of limited powers needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its legitimacy, and its legitimacy, in the long run, is the condition of its life.¹

Our whole political system rests on the distinction between constitutional and other laws. The former are the solemn principles laid down by the people in its ultimate sovereignty; the latter are regulations made by its representatives within the limits of their authority, and the courts can hold unauthorized and void any act which exceeds those limits. The courts can do this because they are maintaining against the legislature the fundamental principles which the people themselves have determined to support, and they can do it only so long as the people feel that the constitution is something more sacred and enduring than ordinary laws, something that derives its force from a higher authority.²

INTRODUCTION

IN America, "The Law Is King,"³ but who makes that sovereign law? What procedures must "they" follow? The recent controversy

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1. Charles L. Black, Jr., *The People and the Court* 52 (1960), reprinted in John H. Garvey & T. Alexander Aleinikoff, *Modern Constitutional Theory: A Reader* 202, 207 (3d ed. 1991).

2. Walter F. Dodd, *The Revision and Amendment of State Constitutions* 253 (1910).

3. Thomas Paine, *Common Sense*, in *Political Writings* 1, 28 (Bruce Kuklick ed., 1989).

over Colorado's Amendment 2⁴ and Oregon's Measure 9⁵ highlight an important but little analyzed area of constitutional law: the amendment of state constitutions.⁶ This omission is especially glaring considering the growing importance of state constitutions in the vindication of individual rights not protected by current Supreme Court interpretations of the U.S. Constitution.⁷ The state protection of individual

4. Amendment 2 was proposed by an initiative submitted to the electorate and approved at the Colorado general election of November 3, 1992. The text of the amendment reads:

§ 30b. No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. art. II, § 30b.

5. Oregon's Measure 9 was proposed by initiative in 1992. The text of the proposal reads:

§ 41. (1) This state shall not recognize any categorical provision such as "sexual orientation," "sexual preference," and similar phrases that include homosexuality, pedophilia, sadism or masochism. Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.

(2) State, regional and local governments and their properties and monies shall not be used to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism.

(3) State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.

(4) It shall be considered that it is the intent of the people in enacting this section that if any part thereof is held unconstitutional, the remaining parts shall be held in force.

State of Oregon, Voters' Pamphlet: State of Oregon General Election November 3, 1992 (1992), reprinted in Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19, 36 n.71 (1993) [hereinafter Linde, *Campaign*].

6. Both amendments were intended to repeal existing laws protecting gays and lesbians under antidiscrimination laws and preventing the enactment of future laws. While Measure 9 was defeated at the polls by a vote of 56% to 44%, Amendment 2 passed by a vote of 53% to 47%. Jeffrey Schmalz, *Gay Areas Are Jubilant Over Clinton*, N.Y. Times, Nov. 5, 1992, at B8.

7. See, e.g., *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993) (holding that education is a fundamental right under the Massachusetts Constitution); *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987) (refusing to subject "procedures that vindicate the fundamental rights . . . to the uncertain effects that . . . will inevitably accompany the good-faith exception to the exclusionary rule"); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) (arguing that state constitutions are the appropriate vehicle for protecting individual rights).

rights beyond the boundaries established by the U.S. Constitution has been called the "New Federalism."⁸ This revolution in federalism and state constitutional law, however, has met with a significant backlash in which the Colorado and Oregon initiatives are but acts in a much larger drama. Former Chief Justice Burger once reminded state citizens that "when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law."⁹ Many interpreted this advice as applying not simply to state court decisions but to the acts of local and state governments as well.¹⁰ Having lost in legislatures or in courtrooms, groups attempted to change existing law by altering the very foundation of American law, the state constitution.¹¹ The excessively generous amendment procedures embodied in many state constitutions facilitated this counterrevolution.

The central premise of constitutional governance is that "We the People" have the power and the right to alter or abolish the form of government under which we live.¹² As one commentator argued, however, "Our constitutional mythology [suggests] that these occasions should be rare and that they should require overwhelming popu-

8. See, e.g., Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 Cal. L. Rev. 1473, 1474 (1987) (describing the "New Federalism").

9. *Florida v. Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

10. Colorado's Amendment 2 arose in response to the enactment of city and county civil rights statutes protecting lesbians, gay men, and bisexuals. Proponents of Amendment 2 sought to eliminate all pre-existing civil rights protections and preempt future statutes. See *infra* text accompanying notes 241-51.

11. In 1982, Florida voters ratified a constitutional amendment which required the state constitutional right against unreasonable searches and seizures to conform with the Supreme Court's interpretation of the Fourth Amendment to the U.S. Constitution. Fla. Const. art. I, § 12. See, e.g., D. Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, quoted in Yale Kamisar et al., *Modern Criminal Procedure* 50 (7th ed. 1990) (discussing how Proposition 8 amended California's Constitution to bring California's interpretation of the exclusionary rule in lockstep with the interpretations of the Supreme Court of the United States).

12. These principles apply equally to state constitutions and the U.S. Constitution. Some commentators have argued that state constitutions fundamentally differ from the U.S. Constitution because the power of state governments is plenary while the power of the federal government is limited. See, e.g., Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DePaul L. Rev. 269, 279-80 (1994) ("[S]tate constitutions traditionally have been available to limit the otherwise plenary power of states to make laws . . ."); Robert F. Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 178-79 (1983) (characterizing state constitutions as documents of limitation and the U.S. Constitution as a grant of specific power). This position, however, is based upon a fundamental misconception of American constitutional theory. See *infra* part III. As such, the differences between the U.S. Constitution and various state constitutions is one of form rather than function. James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 Hastings Const. L.Q. 43, 46 n.12 (1983) ("[T]he differences between the federal Constitution and state constitutions are often the result of ballot propositions, rather than their cause.").

lar agreement."¹³ Justice Marshall described this mythology in detail in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.¹⁴

Constitutional change should be rare because a constitution represents the fundamental law of government meant to endure for generations and made for "people of fundamentally differing views."¹⁵ Because the constitution represents fundamental law, the myth requires it to be established by extraordinary means, and these means are popularly understood as passage by a supermajority¹⁶ of either states or voters. If a constitution is easily changed,¹⁷ it loses its fundamental nature and the distinction between constitutional law and legislation is obliterated. As Justice Marshall stated, "A constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."¹⁸

In reality, many state constitutions have blurred, if not obliterated, the line between constitutional law and ordinary legislative acts. Amending state constitutions is often a commonplace event, and can be surprisingly simple.¹⁹ Existing procedures make it possible to

13. Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *Yale L.J.* 677, 692 (1993).

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

15. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

16. "Supermajorities" are generally defined as any requirement greater than a simple majority vote on the proposal.

17. Many commentators have considered the ease/arduousness of constitutional change primarily as a balance between various pragmatic, epistemic, and equitable concerns such as protecting the status quo, promoting deliberation, protecting minorities, and allowing government to adapt to changing circumstances. See, e.g., Schlam, *supra* note 12, at 295-96 ("The amendment and revision process . . . must be stringent enough to provide for continuity in social norms and political rights, but still flexible enough . . . to meet new circumstances."); Colantuono, *supra* note 8, at 1507, 1509-11 (stating that the difficulty in the amendment process may help to protect minorities); Lawrence G. Sager, *The Birth Logic of a Democratic Constitution* 3-4 (Feb. 9, 1995) (arguing that the procedures used to change a constitution may differ from those used to adopt one) (presented at the New York University School of Law Colloquium on Constitutional Theory, on file with the *Fordham Law Review*). The problem with state constitutional change, however, is not whether state procedures make change relatively easy or difficult, but whose views are represented in the outcomes of the procedures.

18. *Marbury*, 5 U.S. at 177.

19. See, e.g., Fischer, *supra* note 12, at 44 ("Amending state constitutions is, by comparison, an everyday occurrence.")

amend a constitution with only the support of a minority of the voters in a state.²⁰ While reforms through these generous amendment procedures have promoted the public good and protected individual liberties,²¹ they have also eliminated individual rights and served to disadvantage disfavored groups under the auspices of "higher law."²² Through this "constitutional legislation," citizens and their representatives can prevent state courts as well as current and future political majorities from meddling with their policies, principles, or programs even when the proposals are inconsistent with the public good and the rights of other citizens. This "constitutional legislation" and the procedures that make it possible are contrary to the general understanding of constitutional law.

The legitimacy of democratic government in the United States is based on two fundamental premises. First, democratic decisionmaking is legitimate because the U.S. Constitution and the various state constitutions serve as a limit upon the excesses of democracy.²³ Second, constitutions are legitimate constraints upon democratic self-governance because they represent the will of the people as a whole.²⁴ Unlike democratic legislation, however, constitutional amendments are constrained only by the amendment procedures themselves and the people's inalienable sovereign authority. In this context, constitutional legislation is illegitimate because the procedures permit constitutional amendments that do not represent the will of the people as a whole. For instance, in order to place an amendment on the ballot, Colorado requires the signature of only five percent of the total number of votes cast for all candidates for the office of Secretary of State in the last election,²⁵ and a simple majority of votes to pass the amendment.²⁶ These procedures permit constitutional change even though it may reflect only the views of a minority of the state's citizens.²⁷

This Article argues that, contrary to current practices, constitutional change is legitimate only when it commands the unanimous support of the people, or, because unanimous support is practically impossible, when it is accomplished through procedural devices (i.e., representa-

20. For example, Colorado simply requires 5% of the voters for Secretary of State in the last election to propose an initiative amendment, and a simple majority vote for ratification. See Colo. Const. art. 5, § 1.

21. For example, women's suffrage was addressed by initiative and referendum in Colorado, Oregon, Wyoming, and Arizona. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 45 (1995); see, e.g., Fla. Const. art. I, § 23 (recognizing the right of privacy); Or. Const. art. XI-H (providing for pollution control).

22. See *infra* text accompanying notes 65-70.

23. See *The Federalist* Nos. 10, 52 (James Madison).

24. See *infra* part III.B.

25. Colo. Const. art. 5, § 1.

26. Colo. Const. art. 19, § 2.

27. See *infra* text accompanying notes 56-64.

tion, ratification, and supermajority support) that safeguard minority interests in an effort to determine the public good and approximate the will of the people as a whole. Constitutional change is illegitimate when it represents only the will of a portion of the people. This Article attempts to answer the question of what makes a constitution or a constitutional amendment legitimate, and provides specific content-based norms, consistent with America's history and form of government, to evaluate the legitimacy of constitutional change.

The examination focuses on the procedural legitimacy of constitutional change rather than the substantive propriety of constitutional amendments. To argue that an amendment to a constitution is unconstitutional is hopelessly circular.²⁸ One can determine, however, whether the amendment procedures make it fair to hold individual citizens responsible for the decisions and actions of the group. In addition, this Article only briefly discusses the role that the U.S. Constitution plays in limiting the substance of constitutional amendments because many interesting issues of state law do not fall into the narrow category of rights protected by current Supreme Court interpretations of the U.S. Constitution. As a result, the discussion will focus primarily on state constitutions because their amendment procedures have actively rejected the constitutional myth and accompanying procedural devices that legitimate constitutional change. While acknowledging a constitution as a limit upon the power of government and "normal politics," many states have adopted procedures for determining what is constitutional that blur, and in some cases obliterate, any distinction between "higher lawmaking" and "normal politics."²⁹

Specifically, this Article examines and critiques the use of the initiative to amend constitutions because the initiative allows a simple majority to amend a constitution without any mechanisms for determining the will of the people as a whole or for protecting minority rights and interests. The absence of safeguards is compounded by the fact that in many instances these "majorities" may only represent a minority of the citizens in the state. However, "It is the relative ease by which state constitutions can be amended by a temporary majority that poses a challenge to state constitutional jurisprudence, not the particular method by which majoritarian views are implemented."³⁰ So while many of the examples used in this Article focus on amend-

28. *But see* Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 *Yale L. J.* 1073 (1991) (arguing that the proposed flag burning amendment would have violated principles of Natural Law embodied in the Ninth Amendment to the U.S. Constitution). Laurence Tribe has argued that some amendments may be incompatible with fundamental norms embodied within the Constitution; however, the appropriateness of an amendment should be left to Congress not the courts. Laurence H. Tribe, *A Constitution We are Amending: In Defense of a Restrained Judicial Role*, 97 *Harv. L. Rev.* 433, 440-43 (1983).

29. *See infra* note 222.

30. Fischer, *supra* note 12, at 47.

ment by plebiscite, the discussion is a general discussion of constitutional theory and legitimacy. As such, the principles described within apply equally to other procedures for constitutional change. Similarly, this Article will not discuss the legitimacy of the initiative or referendum as tools for creating "normal" legislation; others address that question.³¹ For the purposes of this discussion, this Article assumes that these procedures are legitimate for normal politics because the constitution theoretically provides sufficient safeguards.

Finally, while much of the discussion examines the Founders' words and actions and the constitutional debates following the American Revolution, this Article does not look to the intent of the Founders as some cold, dead hand of history that guides and limits modern day decisionmaking. Rather, it examines the Founders' theories of government and legitimacy because those theories form the foundation for American constitutional democracy. Most Americans would probably agree with these foundations. If these ideas, forged on the anvil of the American Revolution, are to be abandoned, however, it should not happen silently and without reflection. If the states reject the basic principles of constitutional democracy, they should do so openly. Such fundamental change should not simply be the result of years of neglect and erosion.

Part I of this Article describes existing amendment procedures and examines their justifications. Part II argues that the Founders' theory of government includes a constitution that represents the will of the people acting in their sovereign capacity. Part III examines the various procedural methods for defining the people as sovereign and determining their will. Part III concludes that constitutional change is legitimate only when it represents the will of the people as a whole, which can be determined by requiring unanimous support or by employing various procedural filters to approximate that will. Given this analysis, part IV argues that the constitutional initiative is an illegitimate procedure for constitutional change. Finally, part V outlines some possible legal theories that support the claim that existing procedures are illegal as well as illegitimate.

I. AMENDMENT PROCEDURES

All American constitutions include some procedure for amendment. As James Madison remarked, "That useful alterations will be suggested by experience," cannot be denied, "[i]t was requisite therefore that a mode for [altering the Constitution] should be provided."³²

31. See Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978); Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637 (1980); Philip J. Weiser, Note, *Ackerman's Proposal for Popular Constitutional Lawmaking: Can it Realize his Aspirations for Dualist Democracy?*, 68 N.Y.U. L. Rev. 907 (1993).

32. The Federalist No. 43, at 223 (James Madison) (Buccaneer Books 1992).

Amendment procedures recognize two basic principles. First, a constitution may need to adapt to changes in circumstance and understanding. Existing constitutions may inadequately meet the demands of future generations, or they may embody principles that society has since rejected.³³ Second, amendment provisions recognize the general power and right of the people to alter their constitution and government. While the U.S. Constitution and state constitutions share these basic understandings, the methods for implementing constitutional change vary from constitution to constitution. Even in the states that allow constitutional amendments through initiative, the procedural requirements vary in difficulty from Massachusetts, with the most stringent requirements, to states like Colorado that employ only minimal requirements.³⁴

A. Proposal Requirements

Every constitution in the United States allows the legislature to propose a constitutional amendment, and eighteen states specifically provide for constitutional amendment by initiative.³⁵ In general, most state constitutions and the U.S. Constitution require a legislature proposing an amendment to approve the amendment by a majority or

33. See, e.g., U.S. Const. art. I, § 2, cl. 3 (treating slaves as three-fifths of a person), amended by U.S. Const. amend. XIV, § 2; U.S. Const. art. I, § 9, cl. 1 (prohibiting Congress from banning slavery until 1808); U.S. Const. art. IV, § 2, cl. 3 (requiring states to return runaway slaves), amended by U.S. Const. amend. XIII, § 1.

34. Massachusetts requires the signatures of 3% of the entire votes cast for governor to submit a proposed amendment to the general court (both houses of the legislature). The proposed amendment must be approved by one-fourth of the general court in two successive sessions. If approved, the initiative is then submitted to the people who must approve the amendment with votes equal to 30% of the total votes cast at the last election and also a majority of voters voting on the amendment. See Mass. Const. amend. art. XLVIII, pt. 4, §§ 2-5. Initiatives cannot be used to amend certain provisions of the constitution including the Declaration of Rights. Mass. Const. amend. art. XLVIII, pt. 2, § 2. Colorado simply requires the signatures of 5% of the voters for Secretary of State in the last election to propose an initiative amendment and a simple majority vote on the proposal to ratify the amendment. See Colo. Const. art. V, § 1.

35. Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. See The Council of State Governments, *The Book of the States 1994-95*, at 23 (1994) [hereinafter *The Book of the States*]; Michael Colantuono, *Pathfinder: Methods of State Constitutional Revision*, 7 *Legal Reference Services Q.*, Summer/Fall/Winter 1987, at 45, 55-64. Some commentators have suggested that constitutions can be amended by methods not provided for in the text of a constitution. See Bruce Ackerman, *We The People: Foundations* (1991); Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457 (1994). While there may be nontextual methods for constitutional amendment, this Article argues that those procedures must be consistent with the principles set forth in parts III and IV of this Article.

supermajority vote.³⁶ In all but one state, the electorate must then ratify the amendment.³⁷

When a constitution provides for amendment by initiative, the amendment's proposer is required to obtain the signatures of anywhere from 3% to 15% of the total votes cast in a previous election for a particular office (i.e., Secretary of State, Governor, or President),³⁸ or in the case of North Dakota, the signatures of 4% of the state population.³⁹ If the proposer obtains the requisite number of signatures, the electorate must then vote on the ratification of the proposed amendment. Most constitutions place no limits on the subject matter of proposed amendments. Everything in the constitution is fair game, including the amendment procedures themselves.⁴⁰

B. Ratification Requirements

Constitutions also differ as to the number of votes they require to ratify a proposed amendment.⁴¹ The ratification vote has two components, the percentage requirement and the baseline by which the percentage is measured. Percentage requirements run from a vote of greater than 50% to 75%.⁴² The baseline also varies. One approach is to use the total number of votes cast on the amendment itself.⁴³ Another approach is to use the total number of votes cast at the election.⁴⁴ A third approach requires that the majority of votes cast in favor of the amendment equal at least a threshold percentage of the

36. The requirement varies from a simple majority to a three-fourths vote. See *The Book of the States*, *supra* note 35, at 21; Colantuono, *supra* note 35, at 55-61; U.S. Const. art. V, § 1.

37. Delaware requires the amendment to be approved by two-thirds of the legislature in two consecutive sessions. The Delaware Constitution does not require the amendment to be ratified by the electorate. See *The Book of the States*, *supra* note 35, at 21; Colantuono, *supra* note 35, at 56.

38. *The Book of the States*, *supra* note 35, at 23; Colantuono, *supra* note 35, at 62-64.

39. *The Book of the States*, *supra* note 35, at 23; Colantuono, *supra* note 35, at 64.

40. A few states place limits on the subject matter that may be addressed by constitutional initiative. See Mass. Const. amend. art. XLVIII, pt. 2, § 2; Ill. Const. art. XIV, § 3; *McFadden v. Jordan*, 196 P.2d 787, 797-99 (Cal. 1948) (holding that an amendment cannot entirely revise the constitution); see also Fischer, *supra* note 12, at 55 (noting that a few state constitutions have subject matter restrictions and some state constitutions limit the reintroduction of subjects for amendment by ballot); Magleby, *supra* note 21, at 25 ("Subjects excluded from the ballot in some states include naming a person to office by initiative, emergency legislation, and using the referendum to block appropriations.")

41. This is true for both constitutional amendments proposed by legislatures or by initiative. See *The Book of the States*, *supra* note 35, at 21-23; Colantuono, *supra* note 35, at 55-64.

42. *The Book of the States*, *supra* note 35, at 21-23; Colantuono, *supra* note 35, at 55-64.

43. *The Book of the States*, *supra* note 35, at 21-23; Colantuono, *supra* note 35, at 55-64.

44. *The Book of the States*, *supra* note 35, at 21-23; Colantuono, *supra* note 35, at 55-64.

total votes cast at the election.⁴⁵ Finally, Nevada requires a majority vote in two consecutive elections to ratify an amendment.⁴⁶ In the past, the baseline in several states was all the eligible voters of the state,⁴⁷ "not only those who vote, but those who are qualified yet failed to exercise the right of franchise."⁴⁸

Most states adopted the baseline of those voting on the proposal to facilitate the amendment process. Because of low voter turnout, low votes on proposed amendments, and general lack of interest, more demanding baselines made the amendment process difficult.⁴⁹ At the time, one commentator pointed out that "Persons voting at an election are usually more interested in the individual candidates than in the measures proposed . . ." ⁵⁰ As a result, he criticized the election baseline requirement⁵¹ because it "may therefore be said to make the amending process practically unworkable . . ." ⁵² The reason for his criticism was that, unless a question was of significant popular interest, proposed amendments could not ordinarily obtain a majority of all votes cast at a general election, let alone the support of a majority of the state's eligible voters.⁵³ Modern day commentators echo this sentiment,⁵⁴ and today, the difficulty many voters face in making informed decisions contributes to low voter participation.⁵⁵

By allowing amendments based upon a majority of those voting on the issue, or even a majority voting at the election, current amendment procedures allow a minority or simple majority of the eligible voters in a state to amend a constitution. Given the persistent prob-

45. Mass Const. amend. art. XLVIII, pt. 4, § 5 (requiring at least 30% of the votes cast at the election); Neb. Const. art. III, § 4 (requiring a threshold of 35% of the votes cast at the election).

46. Nev. Const. art. XIX, § 2.

47. Idaho, Indiana, Wyoming. See Dodd, *supra* note 2, at 185-86.

48. *Id.* at 186 (quoting State *ex rel.* Blair v. Brooks, 99 P. 874 (Wyo. 1909)).

49. *Id.* at 188.

50. *Id.*

51. *Id.* at 187. Most states had already abandoned the baseline of the electorate as a whole. *Id.*

52. *Id.* at 197-98.

53. *Id.* at 200.

54. See, e.g., Schlam, *supra* note 12, at 367 ("Super-majorities for voter ratification of all amendments seem a superfluous and unconstitutional impediment to the fundamental right to exercise sovereignty"); New Mexico *ex rel.* Witt v. State Canvassing Bd., 437 P.2d 143, 153 (N.M. 1968) (stating that requiring a three-quarters supermajority to amend the state constitution would be illogical); see also Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 Okla. City U. L. Rev. 3 (1992) (criticizing excessive barriers to constitutional initiatives); Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 Fordham L. Rev. 111, 162 (1993) ("Although the Framers put the Constitution largely out of the reach of 'Factions' . . . they did so at the cost of depriving the majority of meaningful control over the content of the Constitution . . .").

55. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L. J. 1503, 1508-09 (1990).

lem of low voter turnout,⁵⁶ these plans permit amendment by a minority, and, “[I]n fact amendments are usually adopted by a minority of the people and often by a very small minority.”⁵⁷ For example, Colorado’s Amendment 2, a highly publicized and controversial amendment, was ratified by only a fraction of Colorado’s citizens. The votes cast for Amendment 2 represented 50.91% of the total votes cast at the election,⁵⁸ 40.63% of registered voters,⁵⁹ 33.21% of eligible voters,⁶⁰ 30.97% of citizens eighteen years of age and older,⁶¹ and 23.49% of the total population.⁶² As Professor Walter Dodd pointed out as early as 1910,

The plan of permitting the adoption of proposed amendments if they receive a majority of the votes cast upon the question of their adoption or rejection, practically results in the adoption of any proposal to which there is no strong opposition, even though there may be little sentiment in favor of it.⁶³

Combined with the ability to propose amendments by initiative, existing procedures allow the fundamental law of a state to be amended to reflect only the view of a minority of voters in the state as long as there is no significant or effective opposition, and sometimes when there is genuine opposition.⁶⁴

While the facility with which most state constitutions can be amended should be a source of concern in general, it is especially troubling because factions have amended state constitutions against the interests of unpopular and disadvantaged groups. Colorado’s Amendment 2 and Oregon’s Measure 9 attempt to prohibit and repeal laws prohibiting discrimination against gays and lesbians.⁶⁵ Similarly, the California and Oregon Constitutions were amended to frustrate

56. The 55% voter turnout in the 1992 Presidential election ended a 30-year slide in voter turnout. See Robert Pear, *55% Voting Rate Reverses 30-Year Decline*, N.Y. Times, Nov. 5, 1992, at B4. The United States, however, still ranks as having one of the lowest rates of voter turnout of all industrialized nations. See 1 *Encyclopedia of Government and Politics* 203-04 (Mary Hawkesworth & Maurice Kogan eds., Routledge 1992).

57. Dodd, *supra* note 2, at 200.

58. There were 1,597,166 votes cast during the 1992 election. Telephone Interview with Delores Lanier, Librarian, Colorado Legislative Counsel’s Office (Apr. 25, 1995).

59. In 1992, 2,003,375 citizens registered to vote. *Id.*

60. 2,451,000 citizens were eligible to vote. *Id.*

61. According to census statistics there were approximately 2,628,000 citizens over the age of 18. U.S. Dep’t of Commerce, *Statistical Abstract of the United States 1994* (Sept. 1994).

62. Colorado’s total population during 1992 was approximately 3,465,000. *Id.*

63. Dodd, *supra* note 2, at 200 n.139.

64. See *infra* text accompanying notes 230-39.

65. See *supra* notes 4-5; see Linde, *Campaign*, *supra* note 5.

state constitutional rights to adequate education.⁶⁶ The Florida Constitution was amended to make English the official language.⁶⁷ California also amended its constitution to permit housing discrimination,⁶⁸ restrict the rights of criminal defendants protected by the state constitution,⁶⁹ and most recently, California approved Proposition 187, which denies public services to illegal aliens.⁷⁰

C. Justifications

Commentators generally consider the initiative and referendum to be the products of the Populist and Progressive movements that saw representative government as corrupted by moneyed interests and unresponsive to the people.⁷¹ The initiative and referendum were designed to counteract the political influence of moneyed elites, the general unresponsiveness of the legislature, and to reflect the genuine will of the people.⁷² The Supreme Court of Oregon, in 1910, expressed the underlying belief of the procedures' supporters that, "[T]he nearer the power to enact laws and control public servants lies with the great body of the people, the more nearly does a government take unto itself the form of a republic—not in name alone, but in fact."⁷³ The continued vitality of the tools of direct democracy also reflects an emphasis on majoritarian democracy. As one commentator noted, "Majoritarian democracy, we are constantly reminded, is the core of our constitutional system Proponents of direct democracy regularly champion the plebiscite as the means by which to hear the genuine voice of the people."⁷⁴ Adherents of this position include some of the most distinguished Justices of the Supreme Court. According to Justice Black, "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."⁷⁵ And as Justice Holmes stated in his famous dissent, "I think that the word

66. See, e.g., Cal. Const. art. XIII A, §§ 1-6 (limiting property taxes); Or. Const. art. XI, §§ 11a-11f (constitutionalizing the use of local property taxes to fund public schools).

67. Fla. Const. art. II, § 9.

68. This amendment was struck down by the Supreme Court in *Reitman v. Mulkey*, 387 U.S. 369 (1967).

69. Cal. Const. art. I, § 28 (Victim's Bill of Rights).

70. B. Drummond Ayres, Jr., *Court Blocks New Rule on Immigration*, N.Y. Times, Nov. 17, 1994, at A16.

71. See Ellis P. Oberholtzer, *The Referendum in America* (2d ed. 1912); Jonathan S. Gellman, Note, *Zoning and the Referendum: Converging Powers, Conflicting Processes*, 6 N.Y.U. Rev. L. & Soc. Change 97, 110 (1977).

72. Sirico, *supra* note 31, at 640; Magleby, *supra* note 21, at 16-17; see also James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government* (1990) (noting that progressive reforms were aimed at minimizing the role of representational intermediaries that stood between the public and its government).

73. *Kiernan v. Portland*, 112 P. 402, 405 (Or. 1910).

74. Eule, *supra* note 55, at 1513.

75. *James v. Valtierra*, 402 U.S. 137, 141 (1971).

liberty . . . is perverted when it is held to prevent the natural outcome of a dominant opinion”⁷⁶ This view is also apparent among a generation of scholars who feel a need to apologize for the “anti-democratic” nature of judicial review.⁷⁷ Liberal constitutional amendment procedures appear to be the natural outgrowth of equating popular sovereignty with majoritarian democracy⁷⁸ and a popular distrust of representative government.⁷⁹ Nevertheless, the remainder of the discussion demonstrates that majoritarian democracy is not the core of our constitutional system, and that existing procedures for constitutional amendment by initiative are inconsistent with accepted principles of constitutional governance.

II. THE FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY

To understand when constitutional change is legitimate, one must understand what a constitution represents. An examination of the principles of constitutional government developed during the founding of the U.S. government reveals the essence of a constitution. The American Revolution was “one of the greatest revolutions the world has known, a momentous upheaval that not only fundamentally altered the character of American society but decisively affected the course of subsequent history.”⁸⁰ The Revolution was revolutionary in two senses: First, it altered the control of government, and second, and perhaps more importantly, it fundamentally transformed the terms of political thought. As historian Gordon Wood remarked, “The Americans of the Revolutionary generation had constructed not simply new forms of government, but an entirely new conception of politics”⁸¹ Today, U.S. citizens take it for granted that “We the People” are the source of government power and that the constitution provides the standard by which all other laws are evaluated—“So enthralled have Americans become with their idea of a constitution as a written superior law set above the entire government against which all

76. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

77. See Woodrow Wilson, *Constitutional Government in the United States* 17-18 (1907); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 162-64 (1962); Alexander Bickel, *The Least Dangerous Branch* (1962); John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

78. See generally Schlam, *supra* note 12 (arguing that to allow for growth of state constitutional law there must be ease and frequency of textual revision to provide evidence of popular amenability to change); Amar, *supra* note 35 (arguing that “We the People” have a legal right to change the constitution through a majoritarian and populist mechanism).

79. See Arrow, *supra* note 54, at 6-15.

80. Gordon S. Wood, *The Radicalism of the American Revolution* 5 (1992).

81. Gordon S. Wood, *The Creation of the American Republic: 1776-1787* at viii (1969). In this discussion, I draw heavily from Professor Wood’s remarkable work. Readers interested in a detailed analysis of the period should read the work in its entirety.

other law is to be measured that it is difficult to appreciate a contrary conception."⁸² This section examines the theory that gave birth to this new conception of government, and what that theory has to say about the legitimacy of constitutional change. Much of the discussion appears to be straightforward and uncontroversial; however, existing state amendment procedures seem to ignore this theory or at least demonstrate how these fundamental premises of constitutional governance have fallen into disfavor.

A. *Government as Sovereign*

The concept of sovereignty was one of the principle points on which the Americans and British differed: "The idea of sovereignty, that 'in all civil states it is necessary, there should some where be lodged a supreme power over the whole,' was at the heart of the Anglo-American argument that led to the Revolution."⁸³ Prior to the American Revolution, the government in whatever form was considered sovereign, and its power was unlimited. The people were subordinate to government and subject to its power.

For example, during the Revolution, Parliament was the supreme power in Britain. All law was "subordinate and controulable at [the] pleasure of, and created, for the most part, by, parliament" including the British Constitution.⁸⁴ The British made no distinction between the constitution and law. The terms were synonymous: "For Blackstone and for Englishmen generally there could be no distinction between the 'constitution or frame of government' and the 'system of laws.' All were one: every act of Parliament was in a sense a part of the constitution, and all law, customary and statutory, was thus constitutional."⁸⁵ Given this conception of sovereignty, Parliament could not violate the constitution or the rights of the colonists. All political and civil rights owed their existence to Parliament.

Under this conception, the government granted rights. Bills and statutes securing the people's rights were agreements made between the rulers and the ruled. Documents like the Magna Carta recognized and recorded the people's rights against "a power that exists independent of their own choice."⁸⁶ The documents embodied the concessions that the people extracted from government in contracts between the sovereign and the people. As John Adams noted, "Their running in the stile of a grant is mere matter of form and not of substance.' They were reciprocal agreements, 'made and executed between the King of England, and our predecessors,' and like Magna Carta, they were the recognition, not the source, of the people's liber-

82. *Id.* at 260.

83. *Id.* at 345 (quoting John Adams' diary).

84. *Id.* at 263.

85. *Id.* at 261.

86. *Id.* at 378.

ties."⁸⁷ If the government breached its contract, the people's only redress was revolution.⁸⁸ The Founders rejected the concept that government was sovereign and that the rights of the people were subject to its will. From the 1760s through the 1780s, the colonists haltingly developed a revolutionary conception of sovereignty that would replace the medieval view that government was the supreme power over all of society.

B. *The People as the Fountain of All Power*

The American Revolution drastically reconceptualized the concepts of sovereignty and the written constitution. First and foremost, the Founders argued that the people, not government, were the supreme power. Second, they transformed the written constitution from simply another law created by government to the supreme law created by the people as sovereign. Finally, the Founders saw government power as granted by the people through the constitution and subject to its restraints. This conception of government found its roots in Enlightenment rationalism,⁸⁹ influenced by thinkers such as Locke, Rousseau, Montesquieu, and Voltaire. The colonists, however, developed a uniquely American theory of constitutional governance.⁹⁰ This theory was summed up by a commentator of the time:

The constitution should be the avowed act of the people at large. It should be the first and fundamental law of the State, and should prescribe the limits of all delegated power. It should be declared to be paramount to all acts of the Legislature, and irrevocable and unalterable by any authority but the express consent of a majority of the citizens⁹¹

Thus, the Founders envisioned an original form of government in which the people as sovereign granted power through a written constitution.

Flipping the classic conception of sovereignty on its head, the Founders maintained that the people, not government, were sovereign. Time and time again, they stated that "[T]he people are the only legitimate fountain of power."⁹² But aside from the rhetorical force of the statement, what does it mean for the people to be sovereign? During the revolution and founding, it meant that Parliament had no inherent authority to govern the colonies. Because Parliament did not derive

87. *Id.* at 269.

88. See The Declaration of Independence para. 2 (U.S. 1776).

89. Bernard Bailyn, *The Ideological Origins of the American Revolution* 22-54 (1967).

90. See generally Wood, *supra* note 81 (describing the American system of politics and its underlying assumptions as truly original).

91. Thomas T. Tucker, *Conciliatory Hints, Attempting by a Fair State of Matters, to Remove Party Prejudice* 30-31 (Charleston, 1784), *quoted in* Wood, *supra* note 81, at 281.

92. The Federalist No. 49, at 255 (James Madison) (Buccaneer Books 1992).

its authority from the colonists and did not represent their interests, the colonists were under no legal or moral obligation to obey. Today, it means that a government's authority and existence is dependent upon the people. In other words, "All authority is derived from the people at large, held only during their pleasure, and exercised only for their benefit."⁹³ Under this conception, government is not an independent creature with which the people must bargain and negotiate. Instead, legitimate government is the creation and servant of the people as a whole. It is subordinate to the supreme power—the people.

This principle of sovereignty is embodied in every constitution in the United States. For example, the Oregon Constitution states:

We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.⁹⁴

And, of course, the Preamble to the U.S. Constitution begins with the declaration that "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."⁹⁵

Having established the people as the supreme power in society, the Founders needed something to give this concept practical force. The written constitution became the vehicle for turning rhetoric and theory into political reality. As early as the 1760s the colonists had moved "toward a definition of a constitution as something distinct from and superior to the entire government including even the legislative representatives of the people."⁹⁶ As Samuel Adams wrote in 1768, "[I]n all free States the Constitution is fixed; and as the supreme Legislative derives its Power and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation."⁹⁷ This movement culminated in the conclusion that a constitu-

93. Tucker, *supra* note 91, quoted in Wood, *supra* note 81, at 281.

94. Or. Const. art. 1, § 1. See also Cal. Const. art. 2, § 1 ("All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."); Colo. Const. art. 2, § 1 ("All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."); Colo. Const. art. 2, § 2 ("The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness . . .").

95. U.S. Const. pmbl.

96. Wood, *supra* note 81, at 266.

97. Massachusetts House of Representatives to the Speakers of Other Houses of Representatives (Feb. 11, 1768), in 1 Writings of Samuel Adams 185 (Cushing ed.), quoted in Wood, *supra* note 81, at 266.

tion was no longer a regular act of government legislation, but “the fundamental law by which all people of the state are governed. It is the very genesis of government” and limits its power.⁹⁸ But what gives the constitution this power? What makes its control over government legitimate? As Bernard Bailyn stated, “In order to confine the ordinary actions of government, the constitution must be grounded in some fundamental source of authority, some ‘higher authority than the giving out [of] temporary laws.’ ”⁹⁹ The Founders recognized that “This special authority could be gained if the constitution were created by ‘an act of all’”¹⁰⁰

The understanding that the constitution is a creation of the people themselves and distinct from regular legislative acts became clear in the constitutional debates of the 1780s. With independence, many state constitutions, as well as the Articles of Confederation, were challenged because they had been adopted by legislatures rather than the people. For example, South Carolinians charged that “‘we have no such thing as a Constitution;’ the document of 1778 was ‘a mere cobweb,’ since ‘the principles of the Constitution are, at present established no otherwise than by a simple Act of the Legislature.’ ”¹⁰¹ Thomas Jefferson criticized the Virginia Constitution of 1776 for the same reasons. When passed by the legislature, the term constitution is synonymous with “statute, law, or ordinance.”¹⁰² It was absurd to think that an act of the ordinary legislature could somehow be above the power of the ordinary legislature. According to Jefferson:

To get rid of the magic supposed to be in the word *constitution*, let us translate it into its definition as given by those who think it above the power of the law; and let us suppose the convention instead of saying, “We, the ordinary legislature, establish a *constitution*,” had said, “We, the ordinary legislature, establish an act *above the power of the ordinary legislature*.” Does not this expose the absurdity of the attempt?¹⁰³

An ordinary legislature simply did not have the power or authority to proclaim the supreme law of a polity. When the Federalists were confronted with the argument that their proposed constitution violated the Articles of Confederation, it was, therefore, possible for them to argue that:

Indeed, what did it matter if the Constitution were a violation of the Articles, since the Confederation had been “adopted and confirmed without being submitted to the great body of the people for their

98. *Lance v. Board of Educ.*, 170 S.E.2d 783, 793 (W. Va. 1969) (Haymond, J., dissenting).

99. Bailyn, *supra* note 89, at 182-83.

100. *Id.* at 183.

101. Wood, *supra* note 81, at 279.

102. Thomas Jefferson, Writings 249 (The Library of America 1984).

103. *Id.*

approbation." The Confederation, it was now possible to argue, had never rested on "the principle of free governments" and had been defective and inferior to the state constitutions because it had never been a real constitution, never having obtained "a higher ratification, than a resolution of assembly in the daily form."¹⁰⁴

Because legislatures created these documents, they could change them. In fact, many of the original state constitutions were subject to the power of the state legislature.¹⁰⁵ Having differentiated between fundamental and statutory law, Americans during the founding era realized that the origins of these documents did not entitle them to the status of a constitution. A constitution only gains the status of fundamental law when it is adopted and alterable by the sovereign—the people as a whole. As the West Virginia Supreme Court noted, "Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law."¹⁰⁶ Conventions of representatives, elected by the people for the express purpose of adopting and altering a constitution, and the people themselves were considered the only legitimate means of determining the will of the people: "Only the people by either 'persons *legally authorized* by them or themselves' could create or alter a constitution. . . . 'The people are the fountain of power, and must agree if the mode is altered, the assembly cannot do it.'"¹⁰⁷ The history and development of constitutional governance during the founding period make it clear that a constitution does not derive its power and legitimacy from its title. It is not enough for the government or a group of citizens to simply call a document or certain laws a constitution. "It is not the name, but the authority which renders an act obligatory."¹⁰⁸ A constitution derives its fundamental, "higher law" status only when it represents the will of the supreme lawmaker—the people acting in their sovereign capacity.

C. *Constitutional Supremacy*

Under this regime, government action is legitimate only when it falls within the power granted by the people through the constitution. A written constitution, as the direct and basic expression of the sovereign, is "the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it, and must control as it is written until it is changed by the authority which established it."¹⁰⁹ It applies equally to all elements of govern-

104. Wood, *supra* note 81, at 534.

105. *See id.* at 274-79.

106. *Lance v. Board of Educ.*, 170 S.E.2d 783, 793 (W. Va. 1969) (Haymond, J., dissenting).

107. Wood, *supra* note 81, at 277.

108. Jefferson, *supra* note 102, at 249.

109. *Lance*, 170 S.E.2d at 794 (citing 16 Am. Jur. 2d *Constitutional Law* § 56 (1979)).

ment and to all citizens. But why should a constitution bind the legislative acts of the people's representatives or of the people themselves when they act through the mechanisms of direct democracy? Why are these bodies denied the authority to alter a constitution? It appears contradictory to argue that the people have prohibited government from establishing religion, when the people, speaking through their representatives or through a plebiscite, indicate that they wish to establish religion. For the modern theorist this problem represents the central dilemma for constitutional democracy. In some forms it has been described as a conflict between the liberty of the ancients and the liberty of the moderns.¹¹⁰ In others, it represents the heart of the claim that judicial review is undemocratic.

Before one abandons the principles of constitutional democracy because it "fails" to adequately resolve this dilemma, however, one must remember that the Founders faced this very same argument. In a probing series of articles written in the 1780s, Noah Webster criticized the developing theory of government. First, he argued that "A Bill of Rights against the encroachments of Kings and Barons, or against any power independent of the people, is perfectly intelligible; but a Bill of Rights [or constitution for that matter] against the encroachments of an elective Legislature, that is, against our *own* encroachments on ourselves, is a curiosity in government."¹¹¹ According to Webster, the Magna Carta and the English Bill of Rights made sense because "they are barriers erected by the Representatives of the nation, against a power that exists independent of their own choice."¹¹² Because no such independent power existed in the United States, "[t]he jealousy of the people in this country has no proper object against which it can rationally arm them—it is therefore directed *against themselves*, or against an invasion which they *imagine* may happen in future ages."¹¹³

Without any independent powers to struggle against, Webster argued that the concept of a binding constitution was antithetical to liberty:

In a free government, said Webster, no political or civil regulation should be perpetual, for the people "have no right to make laws for those who are not in existence." Jefferson's conviction that the Constitution of Virginia was defective because it was not created by a special convention and was thus alterable by the ordinary legislature was foolish, said Webster, and indeed, although Webster did not draw the connection, did violence to Jefferson's own concern with the tyranny of the past. Americans' efforts to fix a form of government in "perpetuity," Webster argued, supposed a "perfect

110. See John Rawls, *A Theory of Justice* 201 (1971) (citing Benjamin Constant, *Ancient and Modern Liberty* (1819)).

111. Noah Webster, *Government*, 1 *Am. Mag.*, at 140-42 (1787-88), quoted in Wood, *supra* note 81, at 378.

112. *Id.*

113. *Id.*

wisdom and probity in the framers; which is both arrogant and impudent." Indeed, "the very attempt to make *perpetual* constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia."¹¹⁴

Webster went on to argue that there was not a practical difference between constitutional conventions and legislatures. What was a convention anyway, except:

"a body of men chosen by the people in the manner they choose the members of the Legislature, and commonly composed of the same men; but at any rate they are neither wiser nor better. The sense of the people is no better known in a convention, than in a Legislature." The distinction between the two bodies was thus "without a difference," "useless and trifling." Since the people had to be represented in one body or the other, "of what consequence is it whether we call it a *Convention* or a *Legislature*? or why is not the assembly of the representatives of [the] people, at all times a *Convention*, as well as a *Legislature*?" . . . "The people will choose their Legislature from their own body—that Legislature will have an interest inseparable from that of the people—and therefore an act to restrain their power in any article of legislation, is as unnecessary as an act to prevent them from committing suicide."¹¹⁵

For Webster, the legislature and the people were one and the same. "[T]he legislature has all the power, of all the people."¹¹⁶ As such, Webster's arguments rejected any conception of a sovereign power over the legislature. While his arguments are powerful, they failed to grasp the central argument of the new American theory of government.

The Founders' reply was simple and devastating. There is a fundamental difference between the will of various people and the will of the people. As Gordon Wood pointed out, "The legislatures could never be sovereign; no set of men, representatives or not, could 'set themselves up against the general voice of the people.'¹¹⁷ Government whether in the form of kings, legislatures, or groups of citizens could never claim the authority of the people. The representatives of the people were not the people themselves: "The representation of the people, as American politics in the Revolutionary era had made glaringly evident, could never be virtual, never inclusive; it was acutely actual, and always tentative and partial."¹¹⁸ This conception of representation is also noted by Bruce Ackerman:

Publius adopts the semiotic understanding in his effort to "represent" the people of the United States by means of a written text—

114. Wood, *supra* note 81, at 378-79.

115. *Id.* at 379.

116. Webster, *supra* note 111, *quoted in* Wood, *supra* note 81, at 381.

117. Wood, *supra* note 81, at 382.

118. *Id.* at 600.

the Constitution. There can be no hope of capturing the living reality of popular sovereignty during normal politics. The text does not aim for phony realism by allowing you to suppose that Congress *is* the People. It provides a picture of government which vigorously asserts that Congress is merely a "representation" of the People, not the real thing itself.¹¹⁹

At best, representatives and groups of citizens can claim only to "represent" the people as paltry images or mere shadows of the people themselves. At worst, their interests are separate and antithetical to the general body of the people. By the 1780s, the Founders recognized that the people and their representatives were as capable of tyranny and oppression as any monarch: "An excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny, not by the traditional rulers, but by the people themselves—what John Adams in 1776 had called a theoretical contradiction, a democratic despotism."¹²⁰ The Founders had moved beyond Webster's naive conception that legislatures actually were the people, and that the interests of government and the people were always coterminous. As James Madison told Jefferson:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.¹²¹

The constitution therefore was meant to prevent despotism "whether it came from Kings, Lords or the people."¹²²

In response to Webster's charge that a constitution infringed on the liberty of future generations, the Founders' reply was again simple and devastating. As sovereign, the people always maintained the power to alter or replace the constitution. They could do this through the amendment mechanisms provided by the constitution, or by exercising their primal power as sovereign.¹²³ The ability of the people to alter their government, proclaimed Madison, "was one of the 'first princi-

119. Ackerman, *supra* note 35, at 184.

120. Wood, *supra* note 81, at 404.

121. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 The Papers of Thomas Jefferson 19 (Julian P. Boyd ed., 1958).

122. Wood, *supra* note 81, at 404 (quoting Benjamin Rush).

123. See generally Ackerman, *supra* note 35 (observing that a dualist constitution enables the people to exercise their power both directly and through their representatives in government); Amar, *supra* note 35 (arguing that the people have the legal right to change the Constitution through majoritarian and populist methods similar to the popular referendum implied in Article V); Colantuono, *supra* note 8 (listing various state procedures for constitutional amendment or revision).

ples' of the legal order."¹²⁴ The founding philosophy was summed up nicely by James Wilson:

"In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable. The only question," said Wilson, "is where that power is lodged?" Blackstone had placed it in the will of the legislature, in the omnipotence of the British Parliament. Some Americans, said Wilson, had tried to deposit this supreme power in their state governments. This was closer to the truth, continued Wilson, but not accurate; "for in truth, it remains and flourishes with the people." . . . The supreme power, Wilson emphasized, did not rest with the state governments. "It *resides* in the PEOPLE, as the fountain of government." "They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare." . . . Unless the people were considered as vitally sovereign, declared Wilson with some exasperation, "we shall never be able to understand the principle on which this system was constructed."¹²⁵

Sovereignty is not merely derived from the people and vested in government, to be momentarily reclaimed by them through revolution, it is permanently retained by the people. As such, a constitution is not antithetical to the liberty of the people, present or future.¹²⁶ It only binds the acts of government and the representatives of the people; the people as sovereign are always free to change the constitution.

As the preceding discussion makes clear, the philosophical underpinnings of American government clearly distinguish between what Professor Ackerman describes as "higher lawmaking" and "normal lawmaking."¹²⁷ The former represents the will of the sovereign people. The latter represents the will of the people's representatives whomever they may be.¹²⁸ Having outlined the twin foundations of

124. Amar, *supra* note 35, at 471. Professor Amar defines the first principles as the right of a simple majority of the people to alter their form of government. As used here, however, "first principles" represents only the right of "the people" to alter their government. Part IV discusses what constitutes "the people," and specifically rejects Professor Amar's definition.

125. Wood, *supra* note 81, at 530. See also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453-58 (1793) (Wilson, J., concurring) (stating that the doctrine of sovereign immunity was incompatible with principles of public law and with a republican form of government because the state was no more sovereign and no less subject to the law than a free man).

126. See Ronald M. Dworkin, *The Moral Reading and the Majoritarian Default* (Mar. 16, 1995) (arguing that constitutional governance is not antithetical to liberty because it guarantees the conditions that legitimate majoritarian decisionmaking) (presented at the NYU School of Law Colloquium on Constitutional Theory, on file with the *Fordham Law Review*).

127. Ackerman, *supra* note 35, at 6-7.

128. As used here, "representative" means anyone to whom the people have delegated decisionmaking authority. This includes elected and appointed officials and any portion of the people.

the American science of government—that the people are the sovereign authority in society and that the constitution as the expression of the people is the fundamental law by which all acts of government are subject—the following discussion attempts the difficult task of determining what procedures are necessary to legitimately claim that constitutional change represents the will of the people acting in their sovereign capacity.

III. DEFINING “WE THE PEOPLE”

As the preceding discussion demonstrates, American constitutional democracy is based upon the principle that the people are the fountain of all political power and authority. The people, not government, are sovereign, and a constitution is the written embodiment of their will.¹²⁹ A constitution, being the expression of the sovereign’s will, is the supreme law by which all other law and government action must be evaluated.¹³⁰ Practically no one publicly disagrees with these founding principles. In fact, defenders of existing constitutional amendment procedures may argue that the procedures are simply applications of these principles. Variations in amendment procedures simply reflect alternative methods for realizing the same goal—determining the will of the sovereign people. But what exactly does “the people” mean? As Lawrence Sager notes, “[T]o invoke *The People* is to invoke what is at best a metaphor We never have the people in a very interesting or durable sense; what we have are various mechanisms for doing the best we can to get reports and representations of the people.”¹³¹ If we accept the founding principles of sovereignty and constitutional governance, however, there is a limited range of procedural mechanisms that can be employed as legitimate methods for determining the will of the people. Before discussing these procedures in detail, this Article first addresses the claim that a simple majority can legitimately claim to speak for the people.¹³²

129. A constitution can of course be interpreted to embody and promote principles other than simply the people’s will, including natural law and justice. See, e.g., Rosen, *supra* note 28 (arguing that natural law imposes additional limits); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 Duke L. J. 1 (1993) (arguing that constitutional norms better achieve long-term public support for just policies than do moral philosophy policies or economic analysis); Sotirios A. Barber, *On What the Constitution Means* (1984) (proposing that the Constitution is open to higher political values and should be interpreted as such). This is consistent with Madison’s understanding of the constitution as well. The Federalist No. 51, at 265 (James Madison) (Buccaneer Books 1992) (“Justice is the end of government. It is the end of civil society.”).

130. Thomas Hobbes, *Leviathan* 234 (C.B. Macpherson ed., Penguin Books 1968) (“Seventhly, is annexed to the Soveraignty, the whole power of prescribing the Rules”).

131. Sager, *supra* note 17, at 21, 23.

132. I assume that the majoritarian definition of “We the People” is the justification for the more liberal state amendment practices. I am willing to concede, however, that there may be no rational justification behind those procedures at all.

A. *Simple Majorities*¹³³

Many state constitutions and some commentators suggest that a simple majority of the people has the right and power to alter a constitution. Akhil Amar describes this right of a simple majority to alter government and change the constitution as the first principle of constitutional governance.¹³⁴ There are two main arguments in favor of this position. The first, the moral position, argues that something of moral importance, liberty, and the right to self-determination, is lost or compromised whenever political decisionmaking is taken away from simple majorities. The second argument is that the "birth logic"¹³⁵ of the U.S. Constitution supports the claim that a deliberative simple majority of Americans is sufficient to amend the Constitution in the name of the people.¹³⁶

A powerful and emotionally appealing argument for simple majority rule, or what Ronald Dworkin calls the "majoritarian default," suggests that procedures requiring more than a majority compromise the community's freedom—the right of self-determination or the right of the people to govern themselves.¹³⁷ As Professor Dworkin points out, there are two conceptions of democratic collective action: statistical and communal. Collective action is statistical when it represents a simple aggregation of individual preferences and actions. Collective action is communal when it represents "individuals acting together in a way that creates or presupposes a single action that is together *theirs*."¹³⁸ A rough way of distinguishing between the two is the difference between the statement that each of us has concluded *x* and the statement that together we have concluded *x*. While the statistical conception of collective action would appear to support the claim for

133. It appears that no one has argued that constitutional change is legitimate when supported by only a minority of the people.

134. Amar, *supra* note 35, at 460. This conception of democracy is consistent with the classical definition of democracy represented by Aristotle's definition as the "rule of many." Aristotle, *The Politics* 88-89 (Stephen Everson trans., Cambridge Press 1988).

135. See Sager, *supra* note 17.

136. See generally Amar, *supra* note 35 (arguing that, although not explicitly stated in Article V, a majoritarian mechanism, analogous to a national referendum, is sufficient to amend the Constitution).

137. Dworkin, *supra* note 126, at 15. This argument was raised by Noah Webster during the founding period. See *supra* text accompanying notes 111-16.

138. Dworkin, *supra* note 126, at 14.

majority rule,¹³⁹ it is inconsistent with the concept of sovereignty of the people which requires communal action.¹⁴⁰

Liberty in the context of sovereignty of the people is not a matter of any relation between government and citizens in their statistical and individual capacities, but rather a relationship between government and the citizenry under the communal conception of collective action.¹⁴¹ Arguments for self-determination are concerned with the liberty of the people to determine the fundamental law of a polity. Before the majoritarian default can claim that the liberty of the people collectively is being infringed, however, there must be some connection between the individual and the group that makes it fair and otherwise sensible to treat her as responsible for the decisions and actions of the group. Professor Dworkin describes this as "*moral membership*, by which we mean the kind of membership that engages self-government."¹⁴² Mere membership in a community is not enough. For example, slaves in the United States, women prior to suffrage, Jews in Nazi Germany, and black South Africans under apartheid could be described as members of their respective communities, but few if any would argue that they were moral members.

At this point the argument for the majoritarian default turns against itself. Before a simple majority can claim the legitimate authority to speak for the community as a whole, the conditions for moral membership, i.e., democratic self-governance, must be satisfied. The decisionmaking procedures must make it fair and sensible to treat the outcome of the process as a decision made by every individual in the community. In the context of ordinary legislative acts, there is a presumption that the constitution guarantees these conditions. The constitutional conception of democracy, "presupposes democratic conditions: the conditions that a community must meet before it becomes true that majoritarian decisionmaking had an automatic moral advantage over all other procedures for collective decision."¹⁴³ In-

139. This is by no means clear. There is a strong argument that limits upon majority will would in fact increase the individual's freedom to control her destiny. See, e.g., Dworkin, *supra* note 126, at 15 (arguing that "constraints on majority will might well expand any particular individual's control of his own fate"); John Locke, *The Second Treatise of Government* (Library of Liberal Arts 1952) (observing that constraints upon individual liberty resulting from the social contract expand the individual's ability to control her own destiny).

140. See *supra* part III.B; *infra* part IV.C. This does not mean, however, that all collective action in a constitutional democracy must always be communal. In fact, the framework established by American constitutional governments represents a hybrid of communal and statistical action.

141. Dworkin, *supra* note 126, at 15.

142. *Id.* at 16.

143. *Id.* at 17.

cluded in these conditions are freedom of speech, the right to vote, equal protection, and due process to name just a few.¹⁴⁴

The presumption that the conditions for moral membership have been met does not exist in the context of constitutional change. Since a constitution is the fundamental law of a state, when a simple majority acts to change or replace that fundamental law there is nothing to ensure that they speak for the people as a community. Either the decisions represent the will of the people as a whole or they do not. Standing alone, simple majority rule does nothing to make it fair or sensible to treat the decisions of the majority as the decisions of the minority.¹⁴⁵ There is nothing to guarantee that the conditions for democratic self-governance are met. As such, simple majority rule only expresses the will of a group of people, not the will of the people as a whole. Absent the conditions of moral membership, simple majority rule cannot legitimately claim the authority to bind the minority in the community to the majority's will.¹⁴⁶

The second principal argument supporting simple majority rule is historical. Akhil Amar argues that the right of a simple majority to alter or abolish a constitution is evident in the founding of the U.S. Constitution.¹⁴⁷ Simple majority rule is "a self-evident corollary of popular sovereignty," and is discernible in the words and deeds of the Founders.¹⁴⁸ After a close examination of the Founders' "words and

144. See generally Ronald Dworkin, *Taking Rights Seriously* (Harvard Univ. Press 1977) (arguing that our background and institutional rights include the fundamental right of citizens to equal concern which in turn supports the rights of freedom of expression and freedom of choice in personal and sexual relations among others); Amy Gutmann, *Democratic Education* (Princeton Univ. Press 1987) (arguing that in a democracy, education must enable all children to participate effectively in the democratic process); Cass R. Sunstein, *The Partial Constitution* (1993) (arguing that education and welfare are also conditions for democratic self-governance); Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) (discussing the rights of freedom of communication and expression, political participation, religious autonomy, privacy, and equal protection); Ely, *supra* note 77, at 137 (arguing that the U.S. Constitution protects benefits, goods, and rights that are essential to political participation, and that the "duty of representation that lies at the core of our system requires more than a voice and a vote.").

145. Professor Amar concedes this point when he requires simple majority rule to be deliberative. Amar, *supra* note 35, at 501-03. "The people must talk, listen, and vote, and that takes time. (By its very nature, the people's right to alter or abolish 'at any time' cannot be *instantaneous*.) But when they do vote, a majority, however small, must in the end prevail over a minority." *Id.* at 503.

146. Another related argument is that the principle of equality demands simple majority rule. Supermajoritarian requirements are considered minority vetoes because they allow a minority to block the will of a majority. While equality may certainly argue in favor of the majoritarian default during ordinary politics, it does not support simple majority rule for defining the will of the community as a whole. In the end, the argument for equality is exactly the same as the argument for liberty and self-determination. See Dworkin, *supra* note 126, at 19-21.

147. While Professor Amar's thesis focuses on the U.S. Constitution, its principles are applicable to constitutions in general.

148. Amar, *supra* note 35, at 484.

deeds," however, it is far from clear that the Founders believed that a simple majority could legitimately claim to represent the people as a community.

As to the Founder's words, Professor Amar presents a series of quotations from different sources and periods during the founding.¹⁴⁹ The use of some of these quotations is misleading. For example, Amar cites Noah Webster for the proposition that the Federalists believed that majority rule was a universal truth.¹⁵⁰ As discussed earlier, however, not only was Noah Webster not a Federalist, he was an articulate opponent of constitutional democracy in general and a firm believer that government, not the people, is the sovereign authority in a polity.¹⁵¹ In addition, many of the quotations discussing majority rule refer to the people represented in constitutional conventions not the people participating in direct democracy.¹⁵² Rather than analyze and criticize each of the quotations Professor Amar offers, I offer several general comments. First, some of the Founders' words do support the claim that a majority of the people has the right to alter government, and this is in fact one of the "first principles" of the revolution.¹⁵³ Madison himself stated that, "the supreme authority, the federal compact may be altered by a *majority of them*; in like manner as the Constitution of a particular State may be altered by a majority of the people of the State."¹⁵⁴ This does not mean, however, that a simple majority necessarily speaks for the minority in the name of the people as a whole. Instead, it can be understood as simply another way of describing the people's sovereign right to alter and abolish government for themselves.¹⁵⁵ For example, during the debates over popular sovereignty prior to the Civil War, Abraham Lincoln argued that self-government was an "absolute and eternal right," but that right did not include the right to govern those excluded from the community. "When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism."¹⁵⁶ The right to alter government for oneself is not the right to govern another.

149. *Id.* at 481-87.

150. *See id.* at 484.

151. *See supra* text accompanying notes 111-16.

152. Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 *Yale L. J.* 1971, 1990 (1994) ("When the Framers referred to constitutional amendment by 'the people,' they were speaking of constitutional conventions.").

153. *See supra* part II.

154. Wood, *supra* note 81, at 533.

155. *Cf.* Rosen, *supra* note 28, at 1085-86 (arguing that the people's right to alter and abolish the government is conditioned upon a pattern of abuse and usurpations or breach of the social compact).

156. Stephen B. Oates, *With Malice Toward None: A Life of Abraham Lincoln* 117 (HarperCollins 1994).

Second, even if some of the Founders' words support the idea that a simple majority speaks for the people as a whole during higher law-making, contrary to Professor Amar's claim, their deeds tell a different story. Professor Amar focuses on the fact that majority rule was used to determine the outcomes at the conventions themselves.¹⁵⁷ He discounts the use of constitutional conventions and the supermajority requirements embodied in Articles V and VII of the U.S. Constitution and similar provisions in state constitutions.¹⁵⁸ The existence of these other procedural requirements, however, and the fact that they were accepted and followed, cannot be ignored. Nor can they be cavalierly dismissed as surrogates for a lack of technology which would have made it possible for genuine direct participation,¹⁵⁹ especially because the Federalists explicitly opposed constitutional plebiscites.¹⁶⁰ So even accepting Professor Amar's interpretation of the Founders' words, an apparent tension exists between their words and their deeds. Taken as a whole, the procedures the Founders employed provide an important key to understanding when the people have legitimately spoken.¹⁶¹

Third, simple majority rule has no a priori claim to pride of place in democratic governance. There are many methods or protocols that the people can employ in democratic decisionmaking. This does not mean, however, that "[T]here are no reasons sounding in the values of [constitutional] democracy for preferring one protocol of political choice over another but rather that choice of protocols must be defended, and further that the defense of a given protocol must be seen in the context of a rather thick understanding of the circumstances in which it is meant to operate."¹⁶² Simple majority rule may be legitimate in one context while not in another. Its legitimacy depends upon the circumstances in which the voting protocol is meant to operate and the principles that govern the political system. As such, Professor Amar's claim that a simple majority can legitimately alter or abolish a constitution simply begs the question. There is nothing to explain why a simple majority can claim the authority to speak for all of society when the Founders themselves were concerned with democratic despotism. The possibility that "the Founders said so" is both unsatisfying and simply insufficient.

Finally, the Founders' statements may simply reflect the political reality that a majority of people can do whatever they want through the

157. Amar, *supra* note 35, at 486.

158. *Id.* at 481-82, 486-87.

159. *Id.* at 502-03.

160. The Federalist No. 49, at 256 (James Madison) (Buccaneer Books 1992) ("The danger of disturbing the public tranquillity by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society.").

161. See *infra* part III.B.

162. Sager, *supra* note 17, at 23.

exercise of raw power. Nevertheless, simply because the majority may in reality have the numbers and the power to change government and impose their will upon the minority does not make their decisions and actions just or legitimate. The minority is under no obligation to recognize a constitution or a constitutional amendment simply because it reflects the will of the more powerful portion of the community—“[E]ven an insistent majority should not have its way, if power was the only thing to be invoked on its behalf.”¹⁶³ Constitutional change necessarily implies the legitimate right and power to bind an entire community—not simply a portion of it. Therefore, the concept of popular sovereignty does not inevitably lead to simple majority rule. In fact, the following discussion demonstrates that simple majority rule is incompatible with the principles of popular sovereignty.

B. *Democratic Despotism and the Danger of Factions*

Factions, and the tyranny that they are capable of, are the most important reasons why simple majorities and minorities cannot legitimately amend a constitution in the name of “We the People.” One of the principal reasons the Founders created the U.S. Constitution was to respond to a new evil, a new tyrant—the people themselves. In 1776, John Adams called democratic despotism a theoretical contradiction,¹⁶⁴ but since the revolution, the American experience with self-governance taught them otherwise. James Madison noted that “Complaints are every where . . . that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority.”¹⁶⁵ James Wilson echoed these sentiments, exclaiming, “Cannot you point out instances, in which the people have become the miserable victims of passions, operating on their government without restraint?”¹⁶⁶ By the 1780s, the Founders realized that the classic republican model which relied on the virtue of the majority simply did not reflect human nature. As Madison wrote to Jefferson, “[T]he invasion of private rights is *chiefly* [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”¹⁶⁷ Jefferson himself recognized this in his criticisms of the Virginia Constitution of 1776: “[One hundred and seventy-three] despots would surely be as oppressive as one;” it makes no difference that

163. Sunstein, *supra* note 144, at 19.

164. Wood, *supra* note 81, at 404.

165. The Federalist No. 10, at 42-43 (James Madison) (Buccaneer Books 1992).

166. 1 The Works of James Wilson 291 (Robert G. McCloskey ed., Harvard Univ. Press 1967) (1804).

167. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 The Papers of James Madison 295, 298 (R. Rutland & C. Hobson eds., 1977) (footnote omitted).

“they are chosen by ourselves. An *elective despotism* was not the government we fought for.”¹⁶⁸ As a result, it was no longer reasonable to assume that the interests and will of a majority of the people represented the interests of the people as a whole. Thus, the existing American constitutional model was incomplete.

The American science of government came to recognize the need to protect the people as a whole from its constituent parts. Factions were capable of undermining the entire revolutionary endeavor. Madison defined a faction as, “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁶⁹ Now that the authority of government was firmly in the hands of the people, by the 1780s, the Founders understood that factions were as significant a threat to liberty as any king, aristocrat, or foreign government. This stemmed from the recognition that people, by their very nature, were not some homogeneous entity sharing the same interests and aspirations.

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves

....

The latent causes of faction are thus sown in the nature of man

....¹⁷⁰

And, unfortunately, as Madison adroitly put it, people are not selfless angels incapable of deviating from the public good or oppressing fellow citizens:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: [y]ou must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁷¹

The Federalists recognized that if left unabated by “auxiliary precautions,” people were “much more disposed to vex and oppress each

168. Jefferson, *supra* note 102, at 245.

169. The Federalist No. 10, at 43 (James Madison) (Buccaneer Books 1992).

170. *Id.* at 43-44.

171. The Federalist No. 51, at 262 (James Madison) (Buccaneer Books 1992).

other, than to co-operate for their common good."¹⁷² History has only confirmed Madison's diagnosis.

While the "auxiliary precautions" devised by the Federalists are generally associated with controlling factions during normal politics, they are also mechanisms for controlling factions during higher law-making. A key passage from Federalist No. 10 should make this clear:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed

...¹⁷³

We learn two things from this passage. First, according to James Madison, a minority of citizens cannot legitimately amend a constitution. They should only be able to express their views by a regular vote during normal politics with the constitution mitigating the faction's adverse effects. Second, the Federalists designed the elaborate system of representation, separation of powers, and checks and balances embodied in the new Constitution to prevent simple majorities from subverting the "public good and rights of other citizens."¹⁷⁴ Because a majority can accomplish this through normal politics and potentially through higher lawmaking, safeguards against majority tyranny are required in both. Nevertheless, even if we interpret the safeguards embodied in the U.S. Constitution and subsequent state constitutions as controlling the effects of factions during normal lawmaking alone, to argue that those same factions are entitled to that power outright during higher lawmaking is absurd. The dangers presented by majority factions do not disappear when it comes to creating or altering a constitution. If anything they increase. Higher lawmaking requires protection of the Founder's vision of "We the People." Only unanimity or auxiliary precautions that ensure representation of the people as a whole can legitimate a constitution or constitutional change.

C. *The People as a Whole*

The concept that the people are the sovereign authority and source of all political power is more than mere rhetoric. As discussed above, it forms the first and fundamental principle of American constitu-

172. The Federalist No. 10, at 44 (James Madison) (Buccaneer Books 1992).

173. *Id.* at 45.

174. See Sunstein, *supra* note 144, at 21-23.

tional democracy. As James Madison stated, "It is *essential* to . . . a [republican] government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it" ¹⁷⁵ In this context, *the people* is much more than a metaphor. It means the community as a whole is sovereign, not the government or any portion of the community. Under this conception, a constitution represents collective action in a communal rather than statistical sense. ¹⁷⁶ Decisions are meant to represent the "public good" and not simply an aggregation of individual preferences. ¹⁷⁷ As the poet Francis Hopkinson described, constitution making involves "[a] whole people exercising its first and greatest power—performing an act of sovereignty, original, and unlimited." ¹⁷⁸ Therefore, constitutional change is legitimate only when it represents the will of the people as a whole. The reason for this was suggested as early as 1776:

"[I]t is absolutely necessary that the whole should be active in the matter, in order to surrender their privileges in this case, as they cannot be curtailed without," every adult male, regardless of his property-holding or the suffrage restrictions provided in the Constitution being established, was entitled to participate—since it was the society itself that was being constituted ¹⁷⁹

Massachusetts explicitly incorporated this principle in its Constitution of 1780 which "declared itself to be 'a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'" ¹⁸⁰ The communal conception of collective actions leads to two possible methods for determining the will of the people. Constitutional change is legitimate only when it actually commands the unanimous support of the people, or in lieu of unanimous support, constitutional change is legitimate if it is accomplished through procedural devices that safeguard minority rights and approximate the will of the people as a whole.

175. The Federalist No. 39, at 190 (James Madison) (Buccaneer Books 1992).

176. See *supra* text accompanying notes 137-46.

177. See, e.g., Jean Jacques Rousseau, *The Social Contract* at xxi (Hafner Publishing 1962) (1791) ("Society was for Rousseau not an 'aggregation' of individuals but an 'association' [L]iving in society represented the triumph of interests that were distinctively different from merely individual interests."); Sunstein, *supra* note 144, at 2 (stating that many Constitutional provisions require neutrality and prohibit partisanship; government decisions that interfere with individual rights must be based in the public good rather than favoritism).

178. Wood, *supra* note 81, at 535 (emphasis omitted).

179. *Id.* at 289.

180. *Id.*; see also Locke, *supra* note 139, at 48-54 (stating that when men unite to form a society they relinquish their individual executive powers and authorize society to make laws for them as the public good requires).

1. Unanimity

If government is legitimate only when it flows from the people as a whole, a simple conclusion is that decisions in the name of the people must actually command the unanimous support of the people. Unanimity is the clearest means of avoiding factional tyranny. As the Founders recognized, "Factionalism in a republic 'should be particularly guarded against, its existence as a free government depending on a general unanimity.'"¹⁸¹ A simple hypothetical illustrates this point. Suppose there are one hundred people who firmly believe in sovereignty of the people. They have gathered together to form a new government and write a constitution for themselves. In the process of constitutionmaking, they constantly require consensus. If at any point one or more members disagrees with the constitutional proposal, there are several possible outcomes. First, those in favor of the proposal may persuade the dissenters that it belongs in the constitution. Second, unable to persuade the dissenters that the proposal merits inclusion in the constitution, both groups may reach a compromise and agree to an alternative proposal. Third, the dissenters may persuade the proposal's supporters that it does not belong in the constitution, or the proposal's supporters may simply drop the proposal because the dissenters cannot be persuaded. Finally, the supporters may insist on including the proposal in the constitution despite the dissenters' objections. At this point, the dissenters leave and withdraw as members of the political community. This does not necessarily stymie the constitution-making process or bring it to a halt. It simply means that the constitution no longer reflects the will of the original community and cannot claim authority in their name. In other words, the constitution cannot legitimately govern the dissenters. The same would be true with any proposed changes to the constitution. This would appear to be constitutional governance in its most basic and ideal form.¹⁸²

The requirement of consensus is not the child of some esoteric academic theory or some abstract modern day notion of justice. It originates with the American conception of sovereignty and constitutional governance, and was expressed most recently in the debates over the ratification of the Equal Rights Amendment Extension Act.¹⁸³ Unanimity is most apparent in the Articles of Confederation and Article VII of the U.S. Constitution. Both authorities required

181. Wood, *supra* note 81, at 403.

182. Of course, the inhabitants could agree to different procedures for nonconstitutional decisions. For example, they could agree that within the limited powers established and circumscribed by the constitution, political decisions could be based on a statistical model of collective action.

183. One prominent position during the debate over the Equal Rights Amendment was that ratifications under Article V are to reflect a "contemporaneous consensus." See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 394 (1983) (arguing against absolute Congressional control over the Article V amendment process).

consent before they subjected a state to the authority of the larger community. All thirteen states ratified the Articles, and no one has ever suggested that they bound nonsignatories. In addition, the Articles required the unanimous consent of all the states to alter the document.¹⁸⁴ Similarly, the U.S. Constitution required the unanimous consent of nine states to become effective.¹⁸⁵ The assenting states could not impose their will upon the dissenting states because, "no political relation can subsist between the assenting and dissenting States."¹⁸⁶ While justice and respect for human rights would always regulate the affairs between the states, the Constitution would not legally bind dissenters.

Is unanimity necessarily required to amend a constitution? Could not our hypothetical community unanimously agree to adopt procedures that did not require unanimity to amend an existing constitution? Subject to some logical limitations, the answer is, of course, yes. Though it is by no means logically compelled, the people as a whole could delegate their power to some portion of them. That portion, however, does not have the absolute right or authority to do as they please. The right and authority of the people as a whole to alter or abolish a constitution remain vested in the people as a whole, not their delegates. That right is unalienable. As the Pennsylvania Constitution of 1776 declared, "[T]he community hath an indubitable, unalienable and infeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal."¹⁸⁷ The people's surrogates, as defined by the constitution's amendment and adoption procedures, hold their authority in trust not only for the founding generation but for future generations as well. If the surrogates pursue a course of action inconsistent with the public good or the rights of other citizens, their actions will not legitimately command the authority of the people. At best, they would represent political decisions and command the limited authority granted by the constitution; at worst, the constitution would prohibit their actions altogether. If formerly agreed upon procedures or the decisions of their delegates always bound the sovereign people, even when those procedures and decisions are inconsistent with the genuine will of the people as a whole, then the constitution would in fact infringe the right of self-determination.¹⁸⁸

In order to reduce the likelihood that a faction would claim the right to legitimately amend the constitution in the name of the people,

184. The Articles of Confederation and Perpetual Union art. XIII [hereinafter *The Articles of Confederation*].

185. U.S. Const. art. VII.

186. *The Federalist* No. 43, at 225 (James Madison) (Buccaneer Books 1992).

187. Pa. Const. of 1776, Declaration of Rights, art. V, *reprinted in* 5 *The Founders' Constitution* 7 (Philip B. Kurland & Ralph Lerner, eds., 1987).

188. *See supra* text accompanying notes 137-46.

our hypothetical community would require certain procedural safeguards to ensure that constitutional amendments are not antithetical to the will and interests of the people as a whole. Nevertheless, it may not be enough for a proposed amendment simply to be harmless. The community may require auxiliary procedures that adopt amendments which actually represented the will and interests of the people as a whole. Many of the ratification and amendment procedures embodied in American constitutions can best be understood as serving one or both of these purposes.

As Professor Amar rightly points out, the Founders did not require a unanimous vote of the citizens or their representatives to ratify either the U.S. Constitution or the several state constitutions. Instead, they employed procedural safeguards and filters. Conventions ratified constitutions, and proposed amendments were subject to a whole host of procedural requirements.¹⁸⁹ The reasons for this approach were perhaps practical, in part paternalistic, and in part unjust. The Founders' reasons were practical in the sense that it would have been logistically impossible to bring all the citizens in a state, let alone in the entire country, together to deliberate and vote on the merits of a constitution or amendment; paternalistic in the sense that the Founders may not have trusted the general body of the people to reach an enlightened decision; and simply unjust because the Founders believed that certain groups, slaves, women, and the poor in particular, were not entitled to voice their opinions.¹⁹⁰ Far from allowing simple majorities to alter constitutions as they pleased, however, the Founders employed various filters in an attempt to both screen the harmful effects of factions from the processes of constitutional change and develop an accurate representation of the will of the people.

2. Republican Filters

In lieu of unanimous support, constitutional change is legitimate if it is accomplished through procedural devices that safeguard minority rights and it represents the will of the people as a whole.¹⁹¹ The American theory of government recognizes that it is a mistake to assume that equal citizens in a democracy will always act for the public good. Experience demonstrated to the Founders that people were quite capable of sacrificing the interests of the community and oppressing other citizens. As Madison noted, "Theoretic politicians, who have patronized [pure democracy] have erroneously supposed,

189. See *supra* part I.

190. See, e.g., Thomas Jefferson, Notes on Virginia reprinted in Jefferson, *supra* note 102, at 264-67 (describing African-Americans as mentally inferior).

191. See Rawls, *supra* note 110, at 228-34. Cf. Colantuono, *supra* note 8, at 1494-95 (arguing that procedurally arduous means of achieving constitutional change are preferable to extratextual revision of state constitutions). John Rawls' original position is an example of a procedural device designed to approximate the public good while protecting the rights of minorities.

that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions."¹⁹² In an effort to shield constitutional change as well as normal politics from passions and factional tyranny, the Founders insisted upon auxiliary precautions which operated under two basic principles: deliberation and consent.¹⁹³ Madison observed that "the deliberative process offers time for reflection, exposure to competing needs, and occasions for transforming preferences. Public debate . . . ultimately leads to realization of the common good."¹⁹⁴ Consent assures that the decisions arrived at through the deliberative process are consistent with the will of the people as a whole. The various procedural devices employed by the U.S. Constitution and many of the state constitutions promote one or both of these principles.

The Federalist Papers open with the declaration that "you are called upon to *deliberate* on a new Constitution."¹⁹⁵ While the 1780s were certainly an era of broad public debate, representation was one of the principal methods for promoting deliberation and reducing the harmful effects of factions during constitutionmaking. By having the people elect a smaller group of citizens to represent them, the Founders hoped

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. Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose.¹⁹⁶

Representation was and still is generally employed at the principal moments of constitutional change—proposal and ratification. The Philadelphia Convention itself is perhaps the paradigmatic example of representation at the proposal stage, and as discussed earlier, every constitution in the United States allows the legislature or constitutional convention to propose amendments.¹⁹⁷ From the very beginning of this Nation's history, and in recent debates over several

192. The Federalist No. 10, at 46 (James Madison) (Buccaneer Books 1992).

193. The Federalist No. 38, at 182 (James Madison) (Buccaneer Books 1992). Despite his insistence on simple majority rule, Professor Amar is unwilling to allow simple majorities to amend a constitution instantaneously or for any reason. "Majority rule does not necessarily imply majority will or majority whim." Amar, *supra* note 35, at 501.

194. Eule, *supra* note 55, at 1527; see also Sunstein, *supra* note 144, at 22 (stating that "the right to instruct" provision was the antithesis to political deliberation).

195. The Federalist No. 1, at 2 (Alexander Hamilton) (Buccaneer Books 1992) (emphasis added).

196. The Federalist No. 10, at 46-47 (James Madison) (Buccaneer Books 1992).

197. See *supra* part I.

proposed amendments to the Constitution, the representation filter has been an effective means of promoting deliberation at the proposal stage.¹⁹⁸ The Constitution also employs this filter at the ratification stage of amendment. The ratification conventions of Articles V and VII of the U.S. Constitution thus served two purposes. First, the conventions served as a means of legitimizing the new constitution in the name of the people;¹⁹⁹ and second, as a filter for promoting deliberation on the public good.

Supermajority requirements and approval by successive legislatures are additional filters designed to approximate the will of the people as a whole and reduce the effects of factions. By requiring more than simple majority support, supermajority requirements theoretically promote careful consideration of the issues. Supermajority requirements accomplish this by forcing those in favor of a particular proposition to persuade a larger segment of the population. Supermajorities also lend legitimacy to the representative bodies proposing a constitutional amendment. Because representative bodies like legislatures or conventions are composed of small groups of citizens, there is always the potential that their interests will diverge from the interests of the people as a whole. As Madison noted, "Men of factious tempers, of local prejudices, or of sinister designs, may . . . betray the interests of the people."²⁰⁰ Supermajorities make it more difficult for factions to take control of the amendment process in the representative arena by forcing them to gain significant support for proposed amendments. Similarly, approval by successive legislatures not only allows representatives to carefully consider a proposed amendment, it allows the voters to express their views during the intervening election. This extended time period makes it easier for supporters and opponents of a particular measure to educate voters who can then elect officials that represent their viewpoints.

The consent of the governed for the adoption or amendment of a constitution is obtained through ratification. The principle filters for establishing consent are representation and supermajority requirements. As discussed above, representative filters like ratification conventions limit the effects of factions. They also assure that the people give informed consent. In the context of consent, supermajority requirements reduce the influence of factions by increasing the numbers of citizens involved in the decisionmaking process. The filters bring the process of constitutional change closer to the ideal of unanimity.

198. See generally *Excerpts from Debate on House Term Limits*, N.Y. Times, Mar. 30, 1995, at A20 (providing a recent example of representative deliberation); David E. Rosenbaum, *Budgetary Posturing: Substance Losing Ground to Politics*, N.Y. Times, Mar. 2, 1995, at A1 (discussing proposed balanced budget amendment); Steven A. Holmes, *Flag Amendment Sent to House Floor*, N.Y. Times, June 20, 1990, at A14 (discussing the possibility of an amendment banning desecration of the flag).

199. See *supra* part II.B.

200. The Federalist No. 10, at 47 (James Madison) (Buccaneer Books 1992).

The higher the supermajority requirement the more accurately the constitutional amendment reflects the actual will of the people as a whole. Requirements of supermajority support are found in Article V and Article VII of the U.S. Constitution and historically, in the amendment provisions of many state constitutions.²⁰¹ Even Thomas Jefferson, in later drafts of the Virginia Constitution, required super-majoritarian support, "proposing that the Constitution . . . be referred 'to the people to be assembled in their respective counties and that the suffrages of two-thirds of the counties shall be requisite to establish it,' the Constitution then being unalterable 'but by the personal consent of the people.'"²⁰²

Closely related to the supermajority requirement is the baseline for measuring votes. Despite existing state provisions, the baseline for measuring votes on an amendment should be all the eligible voters in the state. There are two important reasons for the use of this baseline. First, by expanding the number of voters that must approve an amendment to all the voters in the state, the baseline reduces the influence of factions. As Madison noted:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.²⁰³

By reducing the baseline to those voting on the proposal, states have made it much easier for a small fraction of the community to pass amendments inimical to the public interest or the rights of other citizens.²⁰⁴ While factions may still be able to oppress others under the expanded baseline of all eligible voters, it would be far more difficult. Second, the baseline is an important tool for determining the consent of the people as a whole. Amendment procedures that measure the baseline by the entire electorate in the state provide a far more accurate representation of the people as a whole than those that consider only those voting at the election or on the issue.²⁰⁵

201. See Wood, *supra* note 81, at 308-09.

202. *Id.* at 309.

203. The Federalist No. 10, at 48 (James Madison) (Buccaneer Books 1992).

204. See *infra* text accompanying notes 242-52.

205. See *supra* notes 139-40.

This leads to an important issue. When a constitution requires a particular number of votes to pass an amendment (i.e., supermajority of the eligible voters in a state, or supermajority or majority of votes at the election), how should non-votes be counted? Any ratification rule that examines more than the votes cast on a proposed amendment must account for those who choose not to vote. In general, once a baseline is defined, non-votes within that group are treated as votes against the amendment because they reduce the number of votes available to reach the required minimum.²⁰⁶ Despite the general rule, at the beginning of this century before the states liberalized their amendment procedures, several states attempted to set the default rule in favor of ratification.²⁰⁷ As one court stated, if “ten thousand qualified voters in the state . . . did not vote at all on the question Why should they be counted in the negative? These electors either have no opinion on the subject, or they have none that they care to express. Why should they be counted as having voted in the negative, when they did not vote at all on the subject?”²⁰⁸ The court viewed non-voters as implicitly consenting to whatever the voters decided. This position is based upon two arguments. The first argument is that those who vote represent the interests of nonvoters.²⁰⁹ The second is estoppel: “Vote and the choice is yours. Don’t vote and the choice is theirs.”²¹⁰ Courts treat nonvoters, because they stayed home, as if they acquiesced to the decision of those who voted.²¹¹ Existing amendment procedures that require only a majority vote of the voters on the issue or at the election appear to be based upon this position.

Neither of these arguments is sufficiently persuasive to justify treating non-votes as abstentions or as votes in favor of a proposed constitutional amendment. First, “We legitimately may question whether the full citizenry share the preferences of the subgroup who actually vote on the ballot proposition.”²¹² Studies show that nonvoters include a disproportionate number of minorities, the poor, and the un-

206. For example, if an amendment requires a majority vote of the people voting in the particular election and only 50% plus one person voting in the election vote on the amendment, each vote cast on the amendment must be for it in order for it to pass. The nonvoting people count as votes against the amendment.

207. Dodd, *supra* note 2, at 191-98.

208. Green v. State Board of Canvassers, 5 Idaho 130, 141 (1896) (quoted in Dodd, *supra* note 2, at 192).

209. Eule, *supra* note 55, at 1515.

210. *Id.*

211. See, e.g., Tinkel v. Griffin, 68 P. 859 (Mont. 1902) (“It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.” (quoted in New Mexico *ex rel.* Witt v. State Canvassing Bd., 437 P.2d 143, 154 (N.M. 1968))).

212. Eule, *supra* note 55, at 1514-15.

educated.²¹³ As such, it is far less likely that they will in fact be represented by the disproportionate number of citizens of higher social and economic status who do vote.²¹⁴ Second, arguments along the lines of estoppel are inappropriate when the voting process has built-in obstacles that make it difficult for certain voters to exercise their right. Confusing ballot language, inconvenient polling times and locations, complex voting and registration requirements, and a history of voting discrimination all contribute to low voter turnout leaving the hands of those who vote far from clean.²¹⁵ Finally, given these difficulties, when the goal is to determine the fundamental law of a state as expressed by the people as a whole, affirmative action is essential. If the people as a whole genuinely desire constitutional change, requiring them to express that desire through the affirmative act of voting is not too much to ask. As one state court commented while discussing its requirement that only a majority of the people voting at the election ratify an amendment:

This requires affirmative action. A majority of all those voting at the election must vote in favor of the proposition in order to adopt the same. The convention that framed the constitution doubtless [sic] presumed that if an amendment was necessary and really desired by the people, a majority would favor its adoption²¹⁶

When change is important enough and a genuine consensus exists, obtaining the requisite number of votes should not be an issue. In other words, a constitutional quorum should exist before the business of constitutional change can be conducted. While a combination of filters may allow a simple majority of the state's eligible voters to adopt a constitution, this does not suggest that a minority of voters in a state can legitimately amend a constitution.

While commentators have questioned the appropriateness of supermajority requirements, their critiques fail to recognize a principle justification for the requirements—they better approximate the

213. *Id.* at 1515.

214. Magleby, *supra* note 21, at 33-34 ("Voting on ballot propositions only amplifies the social class bias in participation, because those with lower incomes or less education tend to skip voting on ballot questions at much higher rates.")

215. See generally David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (1984) (discussing the process of direct legislation); Frances F. Piven & Richard A. Cloward, *Why Americans Don't Vote* (1988) (discussing how the electoral process inhibits voting by lower and working class citizens); E. E. Schattschneider, *The Semi-sovereign People* 97-113 (1960) (noting the large percentage of nonvoters and discussing the causes and effects of this phenomena); A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *Fordham L. Rev.* 1593 (1994) (describing the prevalence of racism in North Carolina electoral politics and the racist practices used to keep African-Americans from voting); Pamela S. Karlan, *Not by Money But by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 *Va. L. Rev.* 1455 (1994) (discussing the effects of vote trafficking).

216. *State ex rel. Stevenson v. Babcock*, 22 N.W. 372, 375 (Neb. 1885).

will of the people as a whole. Commentators have challenged supermajority requirements as inegalitarian because they grant the minority veto power in the decisionmaking process.²¹⁷ While the critics acknowledge these requirements' ability to protect minorities and promote both stability and deliberation, they feel that these results are outweighed by considerations of equality and various pragmatic concerns.²¹⁸ This conclusion may be appropriate under a statistical conception of collective action; however, the criticism does not apply under the communal conception.²¹⁹ Therefore, in the context of constitutional change, these arguments fail to recognize the primary role of supermajority requirements. Supermajorities provide a more accurate approximation of the will of the people as a whole. Although the protection of minority rights and the promotion of stability and deliberation are important goals, they are secondary benefits derived from a process meant to approximate the will of the people as a whole.²²⁰

In summary, constitutional change is legitimate only when it represents the will of the people as a whole. The ideal requirement for determining that will is, of course, unanimity. If all the citizens in a state agree to a proposed amendment, there is no question that "the people" have spoken.²²¹ Unfortunately, unanimity is an ideal that is practically unachievable in large communities. In lieu of unanimity, constitutional change is legitimate when accomplished through the use of a combination of procedural safeguards and filters that ensure that the adopted constitution or constitutional amendment represents the will of the people as a whole, promotes the public good, and safeguards the rights of dissenting citizens. These safeguards and filters,

217. See Schlam, *supra* note 12, at 357-67; Note, *Supermajority Voting Requirements: Possible Constitutional Objections*, 55 Iowa L. Rev. 674, 674 (1970). The Supreme Court, however, has consistently upheld the constitutionality of requiring supermajority votes against equal protection challenges. See *Town of Lockport v. Citizens for Community Action at the Local Level*, 430 U.S. 259 (1977) (upholding the requirement that proposed changes in a county charter be approved by a majority of both city and non-city voters within a county, as opposed to a simple majority of all voters within the county); *Gordon v. Lance*, 403 U.S. 1 (1971) (upholding supermajority requirements).

218. Schlam, *supra* note 12, at 363-64.

219. See *supra* text accompanying notes 137-46.

220. See *supra* part III.B.

221. The Twenty-Seventh Amendment raises the interesting question of how to determine the will of the people over time. Can an amendment legitimately be ratified by considering a combination of voters over a period of two hundred years? In a recent article, Professor Paulsen argues that the principles which govern legislation should apply to constitutional amendments. See Paulsen, *supra* note 13 (arguing that consent based upon ratification by several generations is legitimate and legal). However, the concept of the people as a whole necessarily involves some limits on the time for ratifying amendments. The ratification of constitutional amendments is supposed to represent the consent of the people, not some people today and some people long since gone. As such, a better rule would limit the validity of constitutional ratifications to the consent of the living. Any other rule would allow the constitution to be amended by portions of the community over a period of time.

representation, deliberation, supermajority and baseline requirements, enter the process at two stages: proposal and ratification. During the proposal stage these auxiliary procedures ensure that the drafting of the amendment reflects the will of the people. At the ratification stage, they assure that the proposed constitutional change commands the support of the people as a whole. Without these filters and procedural safeguards for constitutional change, the connection between those in favor of an amendment and the dissenters would not be sufficient to fairly or sensibly hold the dissenters responsible for the proponents' actions. Under certain circumstances this may be acceptable for the creation of legislation and the adoption of statutes, but it is unacceptable for the adoption and alteration of a constitution which represents the fundamental law of a state and the will of the people as a whole.

IV. EXISTING STATE PRACTICES

While most people pay lip service to the principle that a constitution represents "the people," in practice many states have returned to the medieval conception of sovereignty that pits the people against the government. The only difference is that today the sovereign is defined as the will of a majority.²²² Existing procedures for amending constitutions allow a minority of voters to alter the fundamental law of the state by defining a majority in terms of those voting on the proposed amendment, instead of as a majority of citizens in the state or even a majority of eligible voters. For these reasons, many existing state procedures for constitutional change are illegitimate. The most flagrant of these procedures is the constitutional initiative, which, in several states, virtually eliminates any distinction between statutory and constitutional law.²²³

In the name of efficiency, existing initiative procedures allow for constitutional change without unanimity or any republican filters.²²⁴

222. See *supra* part III.B.

223. In several states the procedures for adopting a statute or a constitutional amendment are identical, *see, e.g.*, Colo. Const. art. V, § 1, cl. 2 (amended 1980); or practically identical, *see, e.g.*, Or. Const. art. IV, § 1(2)(b)-(c) (requiring signatures of 6% of eligible state voters to propose a statute and 8% of the eligible state voters to propose a constitutional amendment); Cal. Elec. Code § 3524 (West 1977 & Supp. 1994) (requiring signatures of 5% to propose a statute and 8% to propose a constitutional amendment). In contrast, Massachusetts initiative procedures carefully distinguish between legislation and constitutional amendments. *See* Mass. Const. art. XLVIII, pt. IV, § 1 (defining an "initiative amendment"); Mass. Const. art. XLVIII, pt. V, § 1 (stating the legislative procedure for an "initiative petition for a law").

224. Dodd, *supra* note 2, at 200 ("Except with reference to matters of great importance, it may therefore be said that [procedural safeguards make] constitutional alteration too difficult . . ."); Schlam, *supra* note 12, at 377 ("[T]here must be, at least initially, a sufficient ease and frequency of textual revision, if for no other reason than to provide evidence of popular amenability toward change." (citation omitted)). *See also* Arrow, *supra* note 54, at 88 (constructing "a positive case for enhancement of the

This change is illegitimate because the procedures make no effort to ensure that the adopted amendment represents the will of the people as a whole. They allow a small number of citizens to draft and propose an amendment without any concern for the public good or the protection of dissenters' rights. Furthermore, a simple aggregation of a fraction of the state's citizens sharing personal preferences can then ratify the amendment.²²⁵ As one commentator noted, "Written in secret by those who share a common view of societal problems, ballot propositions eschew compromise and tend toward extremism with appalling frequency."²²⁶ Colorado's Amendment 2 is a perfect example of an amendment drafted by a private group in an effort to enforce their personal conception of morality at the expense of fellow citizens, and then ratified by a simple majority of votes on the issue.²²⁷ An initiative process with an absence of safeguards for representing the will of the people cannot legitimately effect constitutional change.

The Federalists explicitly rejected constitutional initiatives because they would play to the public's prejudices and passions, and "constitutions, in particular, need to be protected against the danger of 'interesting too strongly the public passions [by] . . . frequent reference of constitutional questions to the decision of the whole society.'"²²⁸ The initiative was inappropriate because during direct appeals to the public, "The *passions* therefore not *the reason*, of the public, would sit in judgment. But it is the reason of the public alone that ought to controul and regulate the government. The passions ought to be controuled and regulated by the government."²²⁹ Practical experience has since confirmed Madison's theoretic conclusions.²³⁰

The fact that there is little to suggest that the initiative represents an informed decision on the part of the voters compounds the problems with the initiative. As Derrick Bell noted, "Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns."²³¹ Studies on the initiative process have found that of the voters who actually vote on

popular democratic devices, most particularly, for facilitation of the state constitutional initiative"); Boudreaux & Pritchard, *supra* note 54, at 162 (stating that the Framers "depriv[ed] the majority of meaningful control over the content of the Constitution, . . . serving the efficiency goals of constitutionalism").

225. See *infra* notes 242-53 and accompanying text (discussing Colorado for Family Values' constitutional amendment initiative abolishing legal protection for homosexuals).

226. Fischer, *supra* note 12, at 66.

227. Amendment 2 was passed by approximately 54% of the vote on the issue. See Schmalz, *supra* note 6.

228. Linde, *Campaign*, *supra* note 5, at 33 (quoting The Federalist No. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1982)).

229. The Federalist No. 49, at 258 (James Madison) (Buccaneer Books 1992).

230. See *supra* notes 65-70 and accompanying text.

231. Bell, *supra* note 31, at 19.

the subject, "only fifteen percent of those surveyed felt that they consistently knew enough about initiative measures to make a wise decision."²³² Voter manipulation compounds the lack of informed decisionmaking. Advertising campaigns, and even the wording of the measure, are often designed to mislead voters.²³³ For example, during an initiative campaign to give the bus and truck industry the right to pay a flat tax in lieu of all other taxes, the supporters of the proposal, having failed to convince the public through education, distributed on billboards and leaflets the picture of a "big, fat, ugly pig" with the following slogan: "Drive the hog from the road! Vote yes on proposition number 2."²³⁴ The amendment passed overwhelmingly "because the voters thought they were voting against roadhogs."²³⁵ This kind of misinformation and prejudice has tremendous influence on the passage of constitutional initiatives.²³⁶

Money also influences the outcomes of constitutional initiatives. Spending is often the single most powerful predictor of a proposal's success at every stage in the amendment process.²³⁷ For example, "One California public relations official boasted that he could put any issue on the California state ballot for \$325,000."²³⁸ Lenient signature requirements and the use of professional signature gathering organizations have virtually eviscerated any protection signature requirements afford.²³⁹ Similarly, spending influences initiative outcomes by "manipulat[ing] the electorate and monopoliz[ing] the 'market place of ideas.'" ²⁴⁰ The initiative and referendum were tools that the pro-

232. Eule, *supra* note 55, at 1516. The study went on to discover that "[a]nother 37% claimed to know enough about the issues involved to make a wise decision on ballot measures 'most' of the time. The remaining 47% admitted to confusion on a regular basis." *Id.* at n.46 (citing Joint Project of the USC Institute of Politics and Government & Common Cause (1985)).

233. *See id.* at 1517-19; *see also* Weiser, *supra* note 31, at 925-35 (discussing how nondemocratic forces, such as low voter turnout, "the strong influence of money," and the manipulative framing of issues undermine the referendum procedure).

234. Fischer, *supra* note 12, at 67 n.118 (quoting A. Shamish & B. Thomas, *The Secret Boss of California* 37-38 (1971)) (emphasis omitted).

235. *Id.*

236. Bell, *supra* note 31, at 21.

237. Weiser, *supra* note 31, at 927 (citing Betty H. Zisk, *Money, Media and Grass-roots* 90 (1987)).

238. Bell, *supra* note 31, at 20.

239. *See, e.g.,* Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. Cal. L. Rev. 922 (1975) (discussing various defects in the signature gathering process); *see also* Bell, *supra* note 31, at 20 (criticizing the use of signature gathering companies for direct voting procedures).

240. Weiser, *supra* note 31, at 927 (quoting Daniel Lowenstein, *Campaign Spending and Ballot Proposition: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505, 608 (1982)); *see also* Bell, *supra* note 31, at 20 n.76 ("[T]he defeat of many consumer and environmental referenda is usually caused by major television campaigns which distort the issue and raise the false spectre of massive unemployment. [Ralph Nader] accused the atomic power industry and its allies of using such scare tactics promoted at a cost of millions of dollars." (citing Ralph Nader, *Direct Democracy via Referenda*, Wash. Star, Nov. 6, 1976, at C1)).

gressive movement designed to challenge representative government because it was corrupt and unresponsive to the people.²⁴¹ As it exists today, however, the initiative process has been corrupted by the very same evils it was designed to correct.

Colorado's recent experience with Amendment 2 demonstrates the constitutional initiative's deficiencies. Prior to 1992, the cities of Denver, Aspen, and Boulder, and other local governments within Colorado, enacted statutes which extended civil rights protection to lesbians, gay men, and bisexuals.²⁴² These statutes were designed to protect homosexuals from discrimination. In response, Colorado for Family Values ("CFV"), a local Colorado organization funded by prominent national religious organizations, sought to repeal these statutes and prohibit future statutes by performing an end run on the political process through the constitutional initiative.²⁴³ The organization drafted Amendment 2 in private.²⁴⁴ The initiative process does not require public debates or hearings or solicitation of comments from the general public. Like all special interest groups, CFV had little need for debate on the merits of their proposed amendment. The organization's members shared a common vision on homosexuality and proper social values.²⁴⁵ In fact, they formed the organization for the sole purpose of promoting its members' shared beliefs in Amendment 2.²⁴⁶ CFV drafted and proposed Amendment 2 without any consideration for other viewpoints, and, one may even argue, to spite those with different viewpoints.²⁴⁷

241. See *supra* note 72 and accompanying text.

242. Pamela Coukos, Recent Development, *Civil Rights and Special Wrongs—The Amendment 2 Litigation*, 29 Harv. C.R.-C.L. L. Rev. 581, 583 (1994).

243. *Id.* at 583-84.

244. Amendment 2 was apparently drafted by Will Perkins, the head of Colorado for Family Values. See Dirk Johnson, *I Don't Hate Homosexuals*, N.Y. Times, Feb. 14, 1993, at 24.

245. According to CFV, "Sexual molestation of children is a large part of many homosexuals' lifestyle—part of the very lifestyle 'gay rights' activists want government to give special class, ethnic status!" *Id.* at 584 n.18 (quoting Colorado for Family Values, STOP Special Class Status for Homosexuality 2). Similar sentiments were expressed by the proposers of the Oregon initiative who denounced homosexuality as "abnormal, wrong, unnatural, and perverse," and akin to pedophilia, sadism, and masochism. See *supra* note 5.

246. CFV was formed in 1991 in response to the successful enactment of local ordinances protecting individuals from discrimination based upon sexual orientation. Its mission was to "pro-actively lead and assist those opposing the militant homosexual attack on traditional values." See Colorado for Family Values, Amendment 2 & Beyond (1993), quoted in Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DePaul L. Rev. 841, 847 (1995). According to CFV's leader, the group will "disband if the anti-gay-rights measure was upheld in Colorado. 'Our guitar has one string.'" Johnson, *supra* note 244, at 24.

247. CFV's mission statement reads:

The mission of COLORADO FOR FAMILY VALUES is to pro-actively lead and assist those opposing the militant homosexual attack on traditional values; to act as a resource equipping grass-roots efforts through education

Colorado's ratification requirement did nothing to ensure that the amendment reflected the will of the people as a whole.²⁴⁸ CFV deceptively and inaccurately characterized the purpose of the amendment and homosexuals in general.²⁴⁹ Rather than presenting the voters with the issue of whether lesbians, gay men, and bisexuals should be protected under antidiscrimination laws, CFV successfully framed the issue of the amendment as a denial of special rights. CFV designed this misinformation to play to public fear and prejudice.²⁵⁰ As one commentator described it, "With a rallying cry of 'No Special Rights,' CFV argued that without Amendment 2, gay men, lesbians, and bisexuals would enjoy special status, including a legally protected right to commit pedophilia."²⁵¹ Through this misinformation, CFV successfully encouraged a large rural turnout and overcame the proposition's primarily urban opposition by a bare majority of the votes on the proposed amendment.²⁵² Colorado's experience with Amendment 2 clearly demonstrates how factions can manipulate the constitutional initiative to successfully propose and ratify a constitutional amendment adverse to the rights of other citizens and a far cry from representing the will of the people as a whole. Given the ease with which a faction can manipulate the amendment process in the absence of ade-

and training of like-minded organizations and individuals across America dedicated to preserving the fundamental freedoms of speech, association, assembly, belief and conscience protected by Colorado's Amendment Two; to preserve the right to disagree with and resist, in a civil and compassionate manner, the forced affirmation of the homosexual lifestyle.

Colorado for Family Values, Amendment 2 & Beyond (1993), *quoted in* Grauerholz, *supra* note 246, at 847 n.48.

248. For constitutional amendment, the Colorado Constitution requires only a simple majority ratification by the people who vote on the amendment. *See* Colo. Const. art. V, § 1.

249. For example, CFV used videos portraying gays as violent, flamboyant, and as threats to children. Johnson, *supra* note 244, at 24. The CFV video mischaracterized the purpose of the amendment:

The riot is an example of what happens when gays mobilize, the film declares, 'just one part of an aggressive nationwide offensive aimed at every segment of society to force the acceptance and approval of their chosen lifestyle.' A shot of one protester's sign declaring a 'Queer Holy War' drives the point home.

Heather Rhoads, *Cruel Crusade: The Holy War Against Lesbians and Gays*, Progressive, Mar. 1993, at 18 (1993).

250. Weiser, *supra* note 31, at 929 n.111 ("For example, Kevin Tebedo, co-founder of the CFV, testified that the CFV inaccurately and unfairly depicted homosexuals in its advertising to gain support for the amendment by portraying homosexuals as a dangerous group demanding 'special rights.'").

251. Coukos, *supra* note 242, at 584.

252. Weiser, *supra* note 31, at 929 (citing Dirk Johnson, *A Ban on Gay-Rights Laws Is Put on Hold in Colorado*, N.Y. Times, Jan. 16, 1993, at A6). *See supra* text accompanying notes 58-62. The success of Colorado's initiative prompted the leader of the Oregon anti-gay measure to vow to revisit the issue with a "Colorado-style" amendment. Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. Times, Nov. 8, 1992, at A38.

quate safeguards, the constitutional initiative is a strikingly inappropriate method for constitutional change.

The underlying purpose of a written constitution is to represent the will of the people as a whole and protect citizens from tyranny in all forms—including fellow citizens. As the Supreme Court of West Virginia stated:

The underlying purpose of written constitutions is that there may be a safe and definite harbor for the ship of state in times of tempest. Great tribulations of government do not arise in periods of administrative calm. They manifest themselves when the clouds are heavy. It is then that a constitution proves its worth in preserving for the people those fundamental principles of free government which are indispensable to the well-being of our democratic institutions.

If organic law be subverted through expediency, the basic guarantees of liberty are thereby imperiled.²⁵³

Existing state practices have apparently forgotten or rejected the basic principles of American constitutional democracy. Because the constitutional initiative permits factions to adopt measures contrary to the public good and the rights of citizens, the factions cannot claim to legitimately speak in the name of the people, and their measures cannot legitimately claim the pedigree of constitutional law.

V. SOLUTIONS

If we take seriously the Revolutionary idea that all political authority is derived from the people as a whole, and not from some inconsequential portion of them, it becomes clear that procedures that allow a constitutional proposal to represent only a portion of the community cannot legitimately claim the authority to amend the fundamental organic law of the state—the constitution. Nevertheless, does illegitimate necessarily mean illegal? Of course, deviations from the amendment procedures specified in a constitution are illegal.²⁵⁴ While a comprehensive discussion of these remedies is beyond the purview of this Article, this section briefly sketches some possible legal remedies when the amendment procedures specified by the constitution itself are illegitimate. In terms of formulating judicial standards, one should keep in mind that while evaluating various procedures for constitutional change, unanimity is the ideal condition for legitimate constitutional change. The level of scrutiny applied to amendment

253. *Berry v. Fox*, 172 S.E. 896, 903 (W. Va. 1934).

254. *Dodd*, *supra* note 2, at 212.

The authorities are thus practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of an existing constitution is a judicial question . . . [I]t is the absolute duty of the judiciary to determine whether the constitution has been amended in a manner required by the constitution . . .

Id. at 214 (quoting *McConaughy v. Secretary of State*, 106 Minn. 392, 409-10 (1909)).

procedures should correspond with the degree of deviation from the ideal.

If we allow states to serve as laboratories of democracy and radically experiment with the principles of government, federal courts must take the role of the U.S. Constitution as a means of protecting individual rights more seriously.²⁵⁵ As Justice Brennan observed:

Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.²⁵⁶

States may only experiment with democracy because the U.S. Constitution provides a secure safety net.

The most obvious federal source of protection is the Republican Guaranty Clause.²⁵⁷ While the Supreme Court has limited the scope of the Guaranty Clause,²⁵⁸ given the absence of adequate procedural safeguards, illegitimate state constitutional amendment procedures, like the initiative, provide a clear example of a justiciable claim. As Judge Wisdom wrote:

The line of judicial development of the republican guarantee, bent and broken since *Luther v. Borden*, is not beyond repair. Some day, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause. Federal courts should be loath to read out of the Constitution as *judicially* nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism.²⁵⁹

As one commentator has noted, “[C]laims under the Guaranty Clause may be justiciable where the violation of the republican norm is clear.”²⁶⁰ As the preceding discussion demonstrates, the people as a whole are the source of constitutional authority. This is the fundamental and first principle of republican government which distinguishes the republican form of government from all others.²⁶¹ Unless constitutional change represents the will of the people as a whole, it is

255. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

256. Brennan, *supra* note 7, at 502-03.

257. U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

258. See, e.g., Edward A. Stelzer, *Bearing the Judicial Mantle: State Court Enforcement of the Guaranty Clause*, 68 N.Y.U. L. Rev. 870 (1993) (discussing the Supreme Court’s position that issues arising under the guaranty clause are nonjusticiable political questions).

259. *Kohler v. Tugwell*, 292 F. Supp. 978, 985 (E.D. La. 1968) (Wisdom, J., concurring) (footnote omitted), *aff’d*, 393 U.S. 531 (1969).

260. Fischer, *supra* note 12, at 62.

261. See *supra* part II.B.

as illegitimate and inimical to liberty and the principles of constitutional government as any permanent military government.²⁶² The absence of adequate safeguards that guaranty the conditions of democratic membership make the constitutional initiative a clear example of a violation of the republican norm. Procedures for constitutional change can be seen along a spectrum of legitimacy and legality with unanimity on one end and Colorado-style initiatives on the other. While the legality of these procedures may at points become a question of degree (i.e., how many and what kinds of filters are adequate), the Supreme Court is quite capable of applying this analysis when constitutional rights are concerned.²⁶³ By undermining the principles that form the foundation of constitutional governance, existing state amendment procedures provide a clear case for Guaranty Clause protection.

The constitutional initiative and similar state amending procedures may also violate what some commentators have described as the due process of lawmaking.²⁶⁴ Under this concept, the Due Process Clause of the Fourteenth Amendment requires rationality and deliberation.²⁶⁵ One commentator also suggests that state constitutional amendments could be subject to attack based upon vagueness.²⁶⁶ Finally, the Fourteenth Amendment always provides general restraints on the substance of state constitutional amendments.²⁶⁷ As Chief Justice Burger noted, "It is irrelevant that the voters rather than a legisla-

262. *Baker v. Carr*, 369 U.S. 186, 222 n.48 (1962) (stating that the Guaranty Clause may be invoked by the judiciary in the case where a state has established a permanent military government).

263. The Supreme Court regularly applies an undue burden analysis in cases concerning constitutional rights. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (applying undue burden analysis to abortion); *United States v. O'Brien*, 391 U.S. 367 (1968) (applying undue burden analysis to free speech); *Sherbert v. Verner*, 374 U.S. 398 (1963) (applying undue burden analysis to religious freedom).

264. See e.g., Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197 (1976) (discussing what due process means as a constitutional standard for lawmaking) [hereinafter Linde, *Due Process*]; see also Lawrence G. Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enters., Inc.*, 91 Harv. L. Rev. 1373, 1418 (1978) (stating that the claim for a "due process of lawmaking" requirement is particularly strong when substantial constitutional values are in jeopardy and where judicial review of legislative enactments is largely unavailable).

265. See Linde, *Due Process*, *supra* note 264, at 222-35; see also Fischer, *supra* note 12, at 72-76 (proposing that a process of principled decisionmaking would satisfy the requirements of due process); Sunstein, *supra* note 144, at 134-35 (arguing that democracy requires that political outcomes be produced by an extended process of deliberation and discussion).

266. Fischer, *supra* note 12, at 66-69.

267. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding that a California State Constitutional amendment violated the Equal Protection Clause of the Fourteenth Amendment because the state was involved in racial discrimination); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (holding that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution), *cert. granted*, 115 S. Ct. 1092 (1995); Coukos, *supra* note 242, at 597 (arguing that Amendment 2 fails to meet the rational basis test).

tive body enacted [this law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."²⁶⁸

State courts and constitutions may also provide legal protection. State courts may examine the legality of amendment procedures under the U.S. Constitution.²⁶⁹ While the federal arguments are not without their difficulties, it is far more difficult to argue that existing state amendment procedures are illegal under the state constitution. One legal theory is that these practices violate the particular state constitution's popular sovereignty clause.²⁷⁰ State courts could also examine many existing amendment procedures under the same principles and with the same scrutiny applied to regular legislative acts under the theory that, in some cases, an amendment may not legitimately be fundamental constitutional law. This practice would explicitly recognize what many state courts have implicitly recognized for years.²⁷¹ Finally, state courts may analyze the constitutional initiative under the "ratchet principle" articulated by the Supreme Court in *Katzenbach v. Morgan*,²⁷² which would allow the initiative to expand constitutionally protected rights but not diminish them.²⁷³ If all else fails, and factions continue to abuse state constitutions and their amendment processes, there is always revolution.

CONCLUSION

In an age of growing factionalism and discord, as new and previously silent groups begin to assert themselves in the political arena, as old groups struggle to "maintain their own," we must never forget that the underlying purpose of a written constitution is to organize a government and a society in which we all can live. While at times we will disagree, we will have agreed on how to disagree. Gone are the days when brute force and raw power were sufficient to legitimate political authority. The American legacy is the principle that government must command the respect of the entire people, lest society disintegrate

268. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981).

269. See *Evans*, 882 P.2d at 1335; *Stelzer*, *supra* note 258.

270. See *supra* text accompanying note 94.

271. See, e.g., *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982) (stating that a provision's simple inclusion in the state constitution does not automatically classify it as fundamental for the purposes of equal protection analysis); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982) ("The Colorado Constitution does not restrict itself to addressing only those areas deemed fundamental. Rather, it contains provisions which are both equally suited for statutory enactment . . . as well as those deemed fundamental to our concept of ordered liberty" (citations omitted)).

272. 384 U.S. 641 (1966).

273. *Katzenbach*, 384 U.S. at 651 n.10 (1966) (arguing that Congress has the power to expand the rights recognized under the Fourteenth Amendment, but cannot reduce those rights, much like a one-way ratchet).

into warring factions and plunge us all into a nightmarish Hobbesian state of nature. A constitution represents the framework in which we memorialize the principles on which we all agree—especially the methods by which we agree to disagree. Failure to include a group or individual within this framework necessarily excludes them from the constitution's and, therefore, the government's legitimate authority.

Legitimate constitutional change is an extraordinary act, not because the procedures themselves must be difficult for the sake of being difficult, but because it reflects the magnitude of the task—arriving at the consensus of the governed. The principle that the people are the fountain of all power is the very foundation of American constitutional democracy and has been reaffirmed throughout our nation's history. This principle does not mean, however, that our constitutional governments and the rights they protect are secure, or that the actions perpetrated in the name of "We the People" are always just. Noah Webster was right when he said that "[l]iberty is never secured by such paper declarations; nor lost for want of them."²⁷⁴ And, as Bruce Ackerman eloquently noted:

There is simply no escaping the fact that the fate of the Constitution is in our hands—as voters, representatives, justices. If we allow ourselves to abuse the tradition of higher lawmaking, the very idea that the Constitution can be viewed as the culminating expression of a mobilized citizenry will disintegrate. After all, the American Republic is no more eternal than the Roman—and it will come to an end when American citizens betray their Constitution's fundamental ideals and aspirations so thoroughly that existing institutions merely parody the public meanings they formerly conveyed.²⁷⁵

The legitimacy of constitutional change is not simply an academic question. The procedures and their outcomes affect the lives of real people. The day after Amendment 2 was passed, a despondent Colorado citizen committed suicide rather than live in a state that would sanction discrimination against its citizens. Hauntingly reminiscent of Patrick Henry's bold revolutionary declaration,²⁷⁶ the suicide note read, "I refuse to live in a state where a few people can, at will, make my life a living hell."²⁷⁷ Justice and the legitimacy of constitutional governance depend upon our continued commitment to the principle

274. Wood, *supra* note 81, at 377.

275. Ackerman, *supra* note 35, at 291.

276. Patrick Henry, Speech to the Second Virginia Convention (Mar. 23, 1775) ("Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty, or give me death!"), reprinted in *The American Reader: Words that Moved a Nation 20* (Diane Ravitch ed., 1990).

277. Jana Mazanec, *Colorado Gays Say Harassment Escalating*, USA Today, Nov. 12, 1992, at 3A.

of "government of the people, by the people, for the people."²⁷⁸ Ultimately, we are responsible, individually and collectively, for the justness and continued legitimacy of our government.

278. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in The American Reader*, *supra* note 275, at 151.