

A Republic Subverted

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At the start of a new century and millennium a new form of government is spreading in the United States. It is alien to the spirit of the Constitution and its careful system of checks and balances. Though derived from a reform favored by Populists and Progressives as a cure for special interest influence, this method of lawmaking has become the favored tool of millionaires and interest groups that use their wealth to achieve their own policy goals-missing a lucrative business for a new set of political entrepreneurs.

Exploiting the public's disdain for politics and distrust of politicians, it is now the most uncontrolled and unexamined arena of power politics. It has given the United States something that seems unthinkable, not a government of laws but laws without government. The initiative process, an import now just over one hundred years old, threatens to challenge or even subvert the American system of government in the next few decades.

To be sure, change is the order of the day in the United States and elsewhere in the advanced countries of the world. The computer and the Internet are revolutionizing the economy. The speed of communications and the reduction in barriers to trade are making national boundaries less and less meaningful. The end of the Cold War has brought an outbreak of ethnic warfare and has heightened awareness of the dangers of terrorism by extremist groups on every continent.

Amid these changes, American life looks like an island of strength and stability. One reason in addition to the vitality of our business and entrepreneurial culture, the incredible productivity of our farms, the quality of our great research universities, and the energy and vigor of our people is the time tested solidity and flexibility of our system of government. The United States Constitution, in this third century of our national life, continues to provide a durable foundation for our governing institutions. The presidency, Congress, the Supreme Court, the federal system, the rule of law, have been tested by many challenges. Twice in the twentieth century we fought world wars. Twice we faced efforts to impeach and remove our chief executive. We overcame the Great Depression and led the reconstruction of Europe. Repeatedly we wrestled with the terrible legacy of the almost indelible

moral stain left by slavery. And we have managed to absorb and integrate waves of immigration from lands far distant from our European roots, giving this nation a richer variety of ethnic and racial groups than ever before.

But even as the system of government invented by the founders-a system based on the separation of powers and a complex matrix of procedures designed to require the creation of consensus before the enactment of laws-has proved its worth in crisis after crisis, public impatience with "the system" has grown. Some argue that the science of public opinion and the speed of electronic communications make the political arrangements of the eighteenth century Constitution as outdated as the one horse shay. With journalism focused on the foibles in the private lives of political leaders, disdain for those in government has mounted with each new scandal. Political campaigns have become demolition derbies, in which even the winners emerge with ruined reputations. The trust between governors and governed, on which representative democracy depends, has been badly depleted. Polls consistently show an alarmingly small percentage of Americans believe the government in Washington will do what is right all or even most of the time. With the end of the Cold War, that distrust of Washington has brought about a significant shift in political power. Fewer of the decisions that determine the quality and character of our lives and communities are being made in Washington, D.C. Responsibilities are being transferred to state capitols and city halls. Except for Social Security and Medicare, federal spending is smaller than that of state and local governments. Only 13 percent of public employees are on the federal payroll. And states have become the innovators in vital areas of domestic policy, from welfare to education to growth policies.

In half our states-including the giant of them all, California-and in hundreds of municipalities, from New York City to Nome, policies are being made not by government but by initiative. In a single year, 1998, voters across America used the initiative process to pass laws or to amend state constitutions, achieving a wide variety of goals. They ended affirmative action, raised the minimum wage, banned billboards, decriminalized a wide range of hard drugs and permitted thousands of patients to obtain prescriptions for marijuana, restricted campaign spending and contributions, expanded casino gambling, banned many forms of hunting, prohibited some abortions, and allowed adopted children to obtain the names of their biological parents.

At the local level, things were even busier. No less than 226 conservation measures-for parks and greenways, open space, zoning, land use and "smart growth" regulations-were on local ballots, and 163 of them were approved. That was a 50 percent increase over 1996 and committed more than a billion dollars in local revenues. Voters in New York tried to force a referendum on building a new Yankee Stadium, and Cincinnati voted on the location of its own new ballpark. The ballpark issue was also put to a vote in Round

Rock, Texas, while Kenosha, Wisconsin, voters decided on a proposed gambling initiative. Nude dancing and thong bathing suits were the issues in Seminole County, Florida. And in August of 1999, voters in Beverly Hills decided on an initiative promoted by animal rights advocates that would have required fur shops on Rodeo Drive, and other swank venues, to place on each garment a tag saying it was "made with fur from animals that may have been killed by electrocution, gassing, neck breaking, poisoning, clubbing, stomping, or drowning and may have been trapped in steel jaw leg hold traps." Backers, including Sid Caesar, Jack Lemmon, and Buddy Hackett, raised \$75,000 and distributed 5,000 videotapes of hidden camera scenes in which merchants assured customers the animals had died humanely. But the fur makers, bolstered by the city council and the Beverly Hills Chamber of Commerce, spent even more—\$81,000. It was the only issue in an election that cost the city \$60,000, and it failed, 3,363 to 1,908, with barely more than a quarter of the registered voters participating.

Not one of these decisions was made through the time-consuming process of passing and signing bills into laws—the method prescribed by the Constitution, which guaranteed the nation and each of the states "the republican form of government." Rather, they were made by the voters themselves or whatever fraction of them constituted the majority on Election Day. This is the new form of government—an increasingly popular one.

Government by initiative is not only a radical departure from the Constitution's system of checks and balances, it is also a big business, in which lawyers and campaign consultants, signature gathering firms and other players sell their services to affluent interest groups or millionaire do-gooders with private policy and political agendas. These players often not even residents of the states whose laws and constitutions they are rewriting have learned that the initiative is a far more efficient way of achieving their ends than the cumbersome process of supporting candidates for public office and then lobbying them to pass or sign the measures they seek.

The process had its roots in the beginning of the last century, when Populist and Progressive reformers promoted the initiative use along with its cousin, the referendum; popular primaries; direct election of senators; and recall of errant officeholders as a remedy for the corruption rampant in the legislatures, the state capitols, and the city halls of their day. The initiative let voters, by petition, place legislation or constitutional amendments of their own devising on the ballot. The referendum made enactments of the legislature subject to up-or-down votes by the public. . . .

The great defense of [our original] scheme of government can be found in *The Federalist* papers, written to persuade the states and their people to ratify the new Constitution. In *Federalist* 10, James Madison, one of the principal architects of the Constitution, gave the classic argument for its careful effort to balance democratic impulses with safeguards against heedless majorities.

He wrote:

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true.

Their reading of history had convinced them that the Greek city states had failed because they had tried to govern themselves by vote of the people. Madison further wrote:

It may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

They also argued that while direct democracy might be appropriate for a small, compact civil society, it would be impractical, let alone inconvenient, in a nation the size of the United States. Yet, as children of the Enlightenment and believers in natural law, they were convinced that individual rights preceded the formation of the state and were superior to the edicts and laws of any ruler. Thus, they wanted the government they were creating to derive its powers from "the consent of the governed."

Translating that phrase into reality became the great work of the Constitutional Convention. No one there argued for direct democracy. Instead, their solution was representative government based on election of officials who would exercise power within the limits set forth by the constitutions of the nation and the states and under the discipline of frequent elections, which would require them to defend their actions to their constituents and allow the people to replace them if they abused their power or exercised it in ways that did not meet public approval. As Madison said at the 1788 Virginia ratifying convention, "I go on the great republican principle that the people will have the virtue and intelligence to select men of virtue and wisdom."

In *The Federalist*, he wrote:

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended. The effect of the first difference is, on the one hand, 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 interest 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.

Madison conceded that there was a risk that "men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption or by other means" come to office and abuse their powers. But that risk, he said, is reduced by the size and diversity of the American Republic. "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. . . . Hence, it clearly appears that the same advantage which a republic has over a democracy in controlling the effect of faction is enjoyed by a large over a small republic. . . [and] is enjoyed by the Union over the states composing it."

Thus, the rationale for making the United States a republic, rather than a democracy, rested on a healthy apprehension of the dangers of direct democracy and the manifold risks of relying on simple majority rule. Direct democracy, Fisher Ames of Massachusetts wrote, "would be very burdensome, subject to factions and violence; decisions would often be made by surprise, in the precipitancy of passion. . . . It would be a government not by laws but by men." The threats, as the founders envisaged them, ranged from raids on the treasury and shifting of tax burdens from one constituency to another, to the infringement of civil liberties, the submersion of minority viewpoints and interests, and even the destabilization of the entire political order.

All of those effects except the last can be seen in a number of California initiative campaigns. Proposition 13, for example, relieved many businesses and almost all apartment owners of property taxes and shifted the cost of government on to those with more transient addresses. Other initiatives commandeered high percentages of the state budget for education, requiring stringent economies in health and welfare programs that might otherwise have competed for available funds. In 1994, Proposition 187 denied education and health benefits to the families of illegal immigrants, a relatively weak minority group. And in 1996, Proposition 209 ended affirmative action, or racial and gender preferences for minorities and women, restricting education opportunities for those groups and closing down job and contract opportunities for them.

What the founders never could have foreseen, however, was the growth of a lucrative initiative industry, in which a variety of firms make handsome profits from drafting the language, collecting the signatures, managing the campaigns, and creating the media that result in the passage or defeat of these ballot measures.

A review of records for the 1998 election cycle-not one of the busiest of recent years-discloses that more than a quarter billion dollars was raised and spent on this unevenly regulated and fitfully reported arena of politics. Even more than candidate elections, initiative campaigns have become a money game, where average citizens are subjected to advertising blitzes of distortion and half truths and are left to figure out for themselves which interest groups pose the greatest threats to their self-interest.

It is a far cry from the dream of direct democracy cherished by the early nineteenth century reformers who imported this peculiar institution and installed it in this country, hoping it would cleanse our politics. They might be the first to throw up their hands in horror at what their noble experiment has produced.

Is it compatible with our form of government. . . or an alien growth? One answer comes from the distinguished historian Charles A. Beard, who was a great advocate of popular democracy in all its forms. In a book on the initiative, which he published with Birl E. Shultz in 1912, *Documents on the StateWide Initiative, Referendum, and Recall*, Beard wrote that "it is idle to speculate whether [the framers of the Constitution] would have regarded a system of initiative and referendum, such as now existing in Oregon, as repugnant to the republican form. They were not called upon to consider any such proposition."

But Beard immediately went on to quote the warnings Madison and other Founding Fathers voiced in Philadelphia about what Elbridge Gerry called "the excess of democracy." Beard wrote:

In the face of such evidence, which may easily be multiplied by citations from the records of the convention, the *Federalist*, and other writings of this period, no one has any warrant for assuming that the founders of our federal system would have shown the slightest countenance to a system of initiative and referendum applied either to state or national affairs. If some state had possessed such a system at that time, it is questionable whether they would have been willing to have compromised with it, as they did with the slave states, in order to secure its adherence to the Union. Democracy, in the sense of simple direct majority rule, was undoubtedly more odious to most of the delegates to the convention than was slavery.

When the judges of the Supreme Court are called upon to interpret the "re_ publican" clause of the Constitution as applied to a system of initiative and referendum, it is evident they cannot discover what was the intention of the Fathers, for the latter can scarcely be said to have had any intention about a matter which had not yet come within their ken in anything approaching the form which it has now assumed. If the court, however, wishes to apply the spirit of the federal Constitution as conceived by its framers, it can readily find justification in declaring a scheme of statewide initiative and referendum contrary to the principles of that great instrument.

Beard hastened to write that such a verdict "hardly seems possible," because in a number of cases the Supreme Court said that it was up to Congress, in exercising its authority to admit states to the Union, and not to the Court, to determine whether the state constitution was satisfactory. As early as 1912, in a pair of cases challenging the constitutionality of the initiative process, *Pacific States Telephone and Telegraph v. Oregon* and *Kiernan v. City of Portland*, the justices held this was a political question, not subject to judicial review. Over the decades courts have overturned numerous individual initiatives as violating rights guaranteed by state constitutions or the Constitution. But the process itself remains constitutionally protected. And Congress has admitted to the Union states such as Oklahoma and Alaska which had the initiative process in their original constitutions.

Some legal scholars have argued that the Supreme Court rulings do not relieve state supreme courts of the right or responsibility to weigh whether the initiative process is compatible with a republican form of government, but so far no court has taken up their challenge.

The growing reliance on initiatives in the half of the country where they are available is part of the increasing alienation of Americans from the system of representative government that has served this nation for over two hundred years. As the new century begins, the reputation of elected officials at all levels has rarely been worse. Our citizens always have had a healthy skepticism about the people in public office; the whole Constitution rests on the assumption that the exercise of power is a dangerous intoxicant; hence, those in authority must be checked by clear delineation of their authority and balanced against one another, lest anyone commandeer too much power.

But what we have in the country today goes well beyond healthy skepticism to a pervasive distrust of those we ourselves have elected to exercise temporarily the authority we have given them. As a young woman attending a session of the North Carolina Institute of Political Leadership-a wonderful skills training program for community leaders who are preparing to enter elective politics-told me in 1999, "The reaction I get from people I've known for years is, 'You're such a nice person. Why would you want to go into politics?'"

The general disdain for politics and politicians is especially fierce when it comes to legislatures (including Congress) and their members. While many voters are prepared to exempt their own representative from the blanket indictment, the pervasive attitude is that our lawmakers are selfish, self-centered partisans, controlled by special interests and constantly on the lookout for ways to line their own pockets and payoff their pals and

political sponsors.

One expression of that disdain has been the term-limits movement, which swept across the country during the last two decades, usually implemented by the mechanism of the initiative campaign. In that combination of initiatives and term limits, we have seen the clearest expression of the revolt against representative government. It is a command to "Clear out of there, you bums. You're none of you worth saving. We want to clean house of the lot of you. And we'll take over the job of writing the laws ourselves."

Many Americans and presumably many of those who read this will heartily endorse those sentiments and shout "Good riddance!" to the ousted legislators. In every state I visited in my reporting, the initiative process was viewed as sacrosanct. In most of them, the legislature (even though term-limited) was in disrepute.

[My] argument. . . is that representative government is not something to be discarded quite so casually. We need to examine what really happens in direct legislation by initiative. And we must ask ourselves about the implications of a weakening of our republican form of government. Is California the model we want for the nation? Or is there enduring wisdom in the founders' design?