

POLITICAL RESPONSES TO SUPREME COURT DECISIONS*

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I. REPRESENTATIVE DEMOCRACY AT THE CONSTITUTIONAL CONVENTION

Direct democracy, as Professor Clark has pointed out, is not necessarily the people talking.¹ Quite appropriately, he has focused on the ways in which representative democracy—the republican form of democracy—works.² This Essay will make a separate point, which ties in with the Framers' original intent in choosing republicanism over direct democracy. If one refers to the notes of the debates at the Constitutional Convention—as opposed to relying solely on the Federalist Papers, which were, after all, in significant part propaganda to obtain ratification—one discovers that when the Framers gathered in Philadelphia for the Constitutional Convention they were not very fond of “the people.”³ They thought of the people as an unruly mob, incapable of being corralled to attain the larger public good.⁴

* A general note on terminology: the words “popular” and “unpopular” have many connotations that are not always in opposition. A popular decision can mean that the people as a whole approved of a result, that a majority of the people approved the result, or that the people were simply involved in reaching the result. An unpopular decision can be one that everyone dislikes, a majority dislikes, or a vocal minority dislikes. These various definitions were used interchangeably during the Twenty-Seventh Annual National Federalist Society Student Symposium, entitled “The People and the Courts.” To avoid this confusion, this Essay focuses on the differences in the structure of decision-making between “direct” and “representative” democracy, and avoids the terms “popular” and “unpopular.”

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1. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 435–37, 478–79 (1998).

2. See *id.* at 473–78.

3. Compare THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he sense of the people should operate in the choice of the [President] . . .”), and *id.* at 413 (“[T]he executive should be independent for his

The Convention was not only *not* a populist movement, it was also deeply suspicious of the capacities of the people to even elect public leaders, let alone decide matters of public policy. Roger Sherman of Connecticut, for example, stated that “[t]he people . . . [immediately] should have as little to do as may be about the Government.”⁵ Sherman insisted that Congress should be elected by the state legislatures and opposed election by the people on the grounds that their lack of information made them easily susceptible to deception.⁶ Elbridge Gerry of Massachusetts added: “The evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended patriots.”⁷ Colonel George Mason of Virginia rejected direct election of the President as follows: “The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.”⁸

The Framers sought a way to repair the republican form of democracy that had been codified by the Articles of Confederation and that had failed so spectacularly. This, our first constitution, was an abject failure.⁹ Our second constitution—the one we employ today—was decidedly more successful, and that success is due in part to the Framers’ tinkering not with populism or direct democracy, but with representative democracy. The Articles were seen as a failure because they had not yielded high-minded representatives or legislatures that operated to serve the public good. Instead, state legislatures had become bastions of corruption.¹⁰

continuance in office on all but the people themselves.”), with 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., 1911) [hereinafter FARRAND] (“The people . . . [immediately] should have as little to do as may be about the Government. They want information and are constantly liable to be misled.” (brackets in original) (statement of Roger Sherman)).

4. See *infra* notes 5–8 and accompanying text.

5. 1 FARRAND, *supra* note 3, at 48 (brackets in original) (statement of Roger Sherman).

6. See *id.*

7. *Id.* (footnote omitted) (statement of Elbridge Gerry).

8. 2 *Id.* at 31 (statement of George Mason).

9. See Kenneth W. Starr, *The Court of Pragmatism and Internationalization: A Response to Professors Chemerinsky and Amann*, 94 GEO. L.J. 1565, 1582 (2006) (“In 1787, America knew that the Articles of Confederation had failed badly . . .”).

10. See 2 FARRAND, *supra* note 3, at 288 (“What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States.” (statement of John Mercer)).

II. CAN DIRECT DEMOCRACY AND
REPRESENTATIVE DEMOCRACY COOPERATE
TO ACHIEVE A COMMON PURPOSE?

For the Framers, representative democracy was intended to filter faction—what today we would call interest groups—because when narrowly focused groups act unilaterally, they can undermine the public good.¹¹ The Framers wanted to create a system that would enable representatives to operate as independent decision makers who would take interests and factions into account as they looked toward the larger public good.¹²

If we agree that the representative constitutional order is intended to move decision making away from factional-centered goals toward objectives that take into account the larger good, the question for direct democracy is whether it can perform the same horizon-altering function. In other words, however popular decision making happens—whether through town hall meetings, referenda, or initiatives—the question is whether the process is capable of framing factional interest in a way that moves public decision making beyond the view of the narrow group.

The short answer is that we have not yet studied direct democracy processes sufficiently to pose a certain, or near certain, answer to the question. Although direct democracy has existed in the United States since the late nineteenth century,¹³ it is

11. See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–02 & n.23 (2003).

12. See Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 24 (1997) (“The framers . . . realized that the real world legislature would often diverge from an ideal one. Accordingly, they constructed an institutional structure designed to constrain the influence of factions and to encourage deliberation . . .”); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 523–32 (1994) [hereinafter Hamilton, *Discussion and Decisions*] (arguing that the Framers intended that elected representatives exercise independent judgment with a view toward the common good while at the same time always remaining accountable to the people, from whom they receive their power and authority); Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 8–10 & nn.34 & 40 (1997) (“The Constitution frees representatives from direct control by the people during the term of representation so that they may make the decisions that are in the country’s best interest.”).

13. See Garrett, *supra* note 12, at 17 (explaining that many “mechanisms of direct democracy” originated in the populist and progressive movements at the turn of the twentieth century); Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 537 (2004) (“The initiative is . . . a device that was championed by the late

mostly a creature of our Western states and today remains largely under-examined.¹⁴

III. PROBLEMS POSED BY THE DIRECT DEMOCRACY PROCESS

The notion of direct democratic decision making as “the people” making public policy is a romantic ruse for what is actually a much more complicated process. In many circumstances, the people do not have a meaningfully more significant role in direct democracy processes than they do in the representative process.¹⁵

Their role in both boils down to pulling a lever in the voting booth. Yet there is also a radical difference between the two situations. In the representative process, the voter is choosing an individual who will be held accountable for public policy decisions in many policy areas. The voter delegates decision-making authority based on the premise that the representative will serve the larger good.¹⁶ In the direct process, the voter is choosing a public policy itself without having to account to others for those choices. This immediately raises the specter of self-interested decision making on the part of the individual who can cast a secret ballot without ever having to disclose the content of the vote or the reasons for it. This is not to say that representatives do not act out of self-interest; obviously, they do. The point, rather, is that the danger of self-interested voting is simply higher with individuals than with publicly scrutinized representatives.¹⁷

nineteenth and early twentieth century Progressives as a counterweight to what the Progressives saw as corrupt back-room politics.”).

14. See Garrett, *supra* note 12, at 18 (“Very little scholarly attention has been directed to the appropriate method of interpreting laws passed by direct democracy.” (footnote omitted)); Schwarzschild, *supra* note 13, at 537 (indicating that the initiative process exists in about half of the states, most of which are west of the Mississippi).

15. See Garrett, *supra* note 12, at 18 (arguing that “special interests, not ordinary citizens,” wield a disproportionate influence in both “[t]raditional lawmaking and direct lawmaking”).

16. See Hamilton, *Discussion and Decisions*, *supra* note 12, at 523–27 (explaining that, under the delegated authority model, “the . . . legislator . . . was supposed to be seeking the ideal common good, not listening to a daily cacophony”).

17. Cf. Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES 411, 416, 452 (2004) (arguing that part of the Framers’ intent in selecting a representative form of government was to curb self-interest in favor of the common good).

Furthermore, direct democracy does not wash interest groups or factions out of the process. Thus, bringing more people into the decision-making process does not necessarily lead to the conclusion that the larger public good is being served. Interest groups play a rather significant role in both choosing what will be an initiative or a referendum and deciding how it will be framed.¹⁸ They also frequently determine how the proposal will be explained to the public.¹⁹ Unlike an election to choose a representative—which revolves around a candidate’s character and stance on a variety of issues—the direct democracy process singles out one issue, which is introduced and sold to individual voters by interest groups, political parties, or both.²⁰

What is more, individual voters are poorly positioned to coordinate taxation and spending when they vote on issues one at a time and ultimately are not responsible for balancing the state budget. Initiatives tend to decrease *state* spending by shifting costs to local government.²¹ And although some initiatives decrease taxes, initiatives are more likely to increase taxes and initiate more public services.²²

18. See Garrett, *supra* note 12, at 18–23 (“Special interests have a comparative advantage in determining both what questions are placed on the ballot for popular decision and how those questions are drafted.”); see also David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 46 (1995) (arguing that many proposals blocked in the legislature by “powerful interests . . . run into the same phalanx of interest groups in the [ballot] election campaign”).

19. See Garrett, *supra* note 12, at 23 (“[T]he salience of issues for public debate and decision in both [direct democracy and representative democracy] turns largely on how organized interests spend their money to influence the media, to pay for advertising, and to put issues before the public.” (footnote omitted)).

20. See Glenn C. Smith, *Solving the “Initiatory Construction” Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257, 265 (2007) (arguing that “initiative sponsors” campaign “through simplistic, and, at times, misleading, slogans in short, emotional advertisements and in media ‘sound bites’” (footnote omitted)).

21. See John G. Matsusaka, *Fiscal Effects of the Voter Initiative in the First Half of the Twentieth Century*, 43 J.L. & ECON. 619, 641 (2000) (concluding that “initiative states decentralized expenditure (from state to local governments) more than noninitiative states”).

22. See *id.* at 639–40 (evaluating empirical data in three states and finding that “21 initiatives were approved that increased spending, taxes, or borrowing compared to 11 initiatives that reduced spending, taxes, or borrowing”); see also Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 973 (2005) (discussing the Colorado initiative “FasTracks,” which passed in November 2004 and appropriated increased funds for mass transit).

In sum, there are three principal concerns about the direct democracy process itself. The first concern is the potential for interest groups to control public policy without needing to account for their actions. That is, there is no element in the process to filter the self-interest of the group seeking to create the law. The second concern is rank majoritarianism. A primary reason that we have republicanism is a fear of majoritarianism—or the mob in the thoughts of the Framers.²³ Numbers do not necessarily dictate good policy. The third concern is that direct democracy processes lack the benefits that stem from deliberation in the legislature. There is a frequent and not too inaccurate characterization of legislation as sausage, which is an intentionally ugly picture. Otto von Bismarck is reported to have said that “[l]aws are like sausages. It’s better not to see them being made.”²⁴ Whether or not one likes sausage, no one thinks of it as a particularly pretty thing, but legislative sausage—created through deliberation and compromise—can be a healthy byproduct of the lawmaking process.

When citizens vote in an initiative or referendum, they vote either “yes” or “no,” an either-or choice that political parties or interest groups have crafted. Legislators, on the other hand, are not automatically forced into an either-or position. If legislators do their job, they ask questions about pending legislation and, preferably, hard questions that expose the weaknesses in a proposal or bill. This deliberative process typically alters the proposal to take into account concerns not even apprehended when the bill was drafted.²⁵ Legislators have the power to question and to study a proposal in depth. Thus, enacted legislation

23. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 110 (1970) (contrasting populist majoritarianism against the Framers’ system of complex checks and balances among countervailing groups and factions); Hamilton, *supra* note 17, at 452 (“The mob was a vivid image for the Framers, and they crafted the Constitution . . . to restrain mobs and factions from violence and law-making against the public interest.” (footnote omitted)).

24. 1,911 BEST THINGS ANYBODY EVER SAID 232 (Robert Byne ed., 1988) (quoting Otto von Bismarck). Despite the truth of the quotation, it may be apocryphal and it has appeared in different versions. In 1958, the Florida Supreme Court attributed a different version of the same quotation to Bismarck: “[T]o retain respect for sausages and laws, one must not watch them in the making.” *In re Graham*, 104 So. 2d 16, 18 (Fla. 1958).

25. See Clark, *supra* note 1, at 477 (arguing that representative government not only identifies popular will but also modifies and improves it through the deliberative process).

can reflect a wide range of considerations and, like sausage, often ends up a mixture of different elements. The resulting legislation may be *better* than the proposal because, in Professor Clark's description, it may well take into account other legislative concerns and, in the best of all possible worlds, reflect an even better idea.²⁶ There is something intrinsically good about discussion, deliberation, and research on complex issues. Yet individual voters rarely have the capacity to engage in such review themselves, making them more likely to be misled at the voting booth by an interest group's artfully crafted proposal.²⁷

Admittedly, only when our elected representatives are doing their jobs do they vindicate the legislative improvement theory of deliberation. Elected representatives do not always ask the hard questions that lead to an increase in the public good. The focus here, however, is on the inherent differences in *structural* decision making between representative and direct democracy.

IV. LEGISLATIVE AND CITIZEN-INITIATED RESPONSES TO TWO MALIGNED SUPREME COURT CASES

Let us now examine how the republican and direct democratic processes responded to two widely criticized Supreme Court cases, beginning with *Kelo v. City of New London*.²⁸ *Kelo* was an obvious test case chosen for the purpose of going to the Supreme Court.²⁹ It involved, to speak colloquially, a little old lady in her longtime home and a thoughtless local government intent on making her move out, which means eminent domain was being

26. See *id.* at 476–82.

27. See Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 608 (1982) (“[T]he power of some groups to raise enormous sums of money to oppose ballot propositions . . . seriously interferes with the ability of other groups to use the institutions of direct democracy for their intended purpose.”); cf. James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 892 (1984) (asserting that people often vote irrationally by casting their vote “on the basis of incomplete information, or without understanding election issues, or in response to factors unrelated to the candidates’ fitness for office” (footnotes omitted)).

28. 545 U.S. 469 (2005).

29. See Jonathan Zasloff, *Left and Right in the Middle East: Notes on the Social Construction of Race*, 47 VA. J. INT’L L. 201, 228 (2006) (relating that *Kelo* was selected as a test case by the Institute for Justice).

wielded in a particularly brutal way.³⁰ When the Supreme Court held in favor of the local government,³¹ there was a large public outcry responding to the facts as the media framed them.³² The public was told that the Supreme Court had made a dramatic change in the law,³³ but that assessment is not accurate.³⁴

What is interesting about *Kelo* is the truth: The holding was not really newsworthy in terms of doctrine, which up to that moment had not been great for homeowners.³⁵ Yet *Kelo* created a moment of education. So regardless of whether the decision accurately reflected the Court's precedent, it suddenly caused the people, the interest groups, and the States to pay attention.

Good questions followed: Had we gone too far down the wrong path with respect to eminent domain? Had we created a

30. See *Kelo*, 545 U.S. at 475.

31. *Id.* at 489.

32. See, e.g., Tim Cavanaugh, *Property Seizures and the New London Tea Party*, REASON, Nov. 2005, at 25 ("Few events in the last 25 years have prompted a national uproar over a specifically libertarian issue. Fewer still have produced as much outrage as the U.S. Supreme Court's June ruling in *Kelo v. City of New London*."); Kenneth R. Harney, *Court Ruling Leaves Poor at Greatest Risk*, WASH. POST, July 2, 2005, at F1 ("In brief: The court's decision leaves you in a weaker position, at least under federal law, than you might imagine."); Adam Karlin, *A Backlash on Seizure of Property*, CHRISTIAN SCI. MONITOR, July 6, 2005, at 1 ("[*Kelo*] is fueling a nationwide backlash . . ."); Elizabeth Mehren, *States Acting to Protect Private Property*, L.A. TIMES, Apr. 16, 2006, at A1 (discussing the "landslide of legislation" that *Kelo* spurred); Mark Steyn, *Eminent Case of Domain Poisoning*, WASH. TIMES, July 3, 2005, available at <http://www.washingtontimes.com/news/2005/jul/03/20050703-101101-4646/> ("On this Independence Day weekend, the people might wish to give some thought as to how they might reclaim their independence from the godlike Supremes.").

33. See, e.g., Marie Price, *Their Way or the Highway*, TULSA WORLD, Nov. 21, 2005, at A11; Dimitri Vassilaros, Editorial, *This Won't Protect Property*, PITT. TRIB.-REV., Dec. 23, 2005, at A15.

34. See Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663, 683 (2006) ("Perhaps the only surprising part of [*Kelo*] was Justice Sandra Day O'Connor's scathing dissent . . ."); John M. Zuck, Note, *Kelo v. City of New London: Despite the Outcry, the Decision is Firmly Supported by Precedent—However, Eminent Domain Critics Still Have Gained Ground*, 38 U. MEM. L. REV. 187, 187–88, 192 (2007) (relating that despite the Supreme Court's adherence to precedent in *Kelo*, "[n]ewspapers and magazines exploded with reaction and analysis").

35. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244–45 (1984) (sustaining the constitutionality of the taking at issue and adding that the "Court long ago rejected any literal requirement that condemned property be put into use for the general public"); *Berman v. Parker*, 348 U.S. 26, 35–36 (1954) (upholding government's use of the taking power to condemn blighted areas, including parcels of well-kept properties lying within designated blighted areas).

doctrine that was actually bad for the people? It was an excellent moment in American democracy—not necessarily because of the decision itself, but rather because of the valuable debate the ruling ignited. In this case, the United States Supreme Court stimulated an increase in state activity. Many states reacted through state initiatives and referenda.³⁶ The response to *Kelo* called into action the fifty-state experiment, a process that furthers policymaking by encouraging states to follow their own paths while watching and assessing the paths of others. That was a good result.

Thus, although *Kelo* was widely criticized and probably deserved it—even if the case did not depart very far from preceding doctrine—it was good for the country to be spurred to discuss a topic few would naturally debate or discuss. Some out-of-favor Supreme Court decisions are extremely important, because they educate the public and instigate meaningful debate. If a state rejects a Supreme Court ruling without crossing constitutional barriers, its decision to do so is not a bad result. It is an especially felicitous result if the public discussion generates a variety of answers, because the fifty-state experiment works best when there are a relatively large number of different experiments.

Another broadly criticized Supreme Court decision is a religion case, *Employment Division v. Smith*, which held that neutral, generally applicable laws do not violate the Free Exercise Clause when applied to religiously motivated actions.³⁷ The history following *Smith* shows how rapidly *legislatures* can act in response to Supreme Court decisions, thus demonstrating that initiatives and public responses are not the only ways our system responds quickly to disliked decisions.

Three years after the *Smith* decision, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA)³⁸ which spoke directly and quite negatively to that decision.³⁹ Later, thirteen state legislatures passed what are called mini-RFRAs.⁴⁰ Regard-

36. In 2006, thirteen states included takings initiatives on their ballots. See Bill Want, *The Lucas Case: The Trial Court Strategy and the Case's Effect on the Property Rights Movement*, 27 STAN. ENVTL. L.J. 271, 294 (2008).

37. 494 U.S. 872, 878–82, 890 (1990).

38. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

39. See 42 U.S.C. §§ 2000bb.

40. ALA. CONST. amend. DCXXII; ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2004); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01–.05 (West 2005); IDAHO CODE ANN. §§ 73-401 to -404 (2006); 775 ILL. COMP. STAT.

less of the merits of the RFRA legislation,⁴¹ it is a great example of the ability of legislators and legislatures to respond to maligned decisions just as quickly as either public movement or initiatives can respond.

V. THINKING BEYOND—OR BETWEEN—REPRESENTATIVE
DEMOCRACY AND DIRECT DEMOCRACY

Professor Elizabeth Garrett has chosen a very helpful name for the American system: “hybrid democracy.”⁴² We do not have fully republican democracy. We do not have direct democracy. We have a hybrid democracy, with different mixes in each state. Accepting that ours is a hybrid democracy enables one to move beyond merely defending one or the other pure form of democracy and thus promotes a more meaningful discussion of the goals of government. The focus should be on whether our system is reaching the kinds of checks and balances needed to achieve the larger public good.

The key problem for republicanism and republican democracy is the corruptibility of representatives. Anyone holding power will abuse that power. That is the fundamental Calvinist perspective of the Constitutional Convention.⁴³ From this standpoint, to the extent direct democracy curbs abuses of power by legislators, it is a positive development.

Some states have amended their state constitutions in an effort to increase the accountability of their elected representatives and thereby reduce the opportunities for corruption. Two examples of such reforms are, first, rules requiring three read-

35/1–35/99 (2006); MO. ANN. STAT. §§ 1.302, 1.307 (West Supp. 2008); N.M. STAT. ANN. §§ 28-22-1 to -5 (LexisNexis 1978); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2008); 71 PA. CONS. STAT. ANN. §§ 2401–07 (West Supp. 2008); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (Vernon 2005).

41. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 10 (2005) (identifying RFRA as “the grand blind exemption of all time”).

42. Elizabeth Garrett, *Hybrid Democracy*, 73 *GEO. WASH. L. REV.* 1096, 1097 (2005) (defining a “hybrid democracy” as a government that is “neither wholly representative nor wholly direct, but rather a complex combination of both at the local and state levels, which in turn influences national politics”).

43. See Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 293, 293 (Michael W. McConnell et al. eds., 2001) (describing the Calvinist perspective as a “marriage of distrust in individuals but hope in properly structured institutions”).

ings of a bill so that a legislator cannot secretly push a bill through the legislature, and, second, rules that require titles to reflect content so that the legislature cannot pass a bill entitled “We Love You” when actually it is a tax increase.⁴⁴ These measures—aimed at correcting perceived shortcomings in the representative process—are evidence that departing from representative democracy may not always be the best solution; there may be “fixes” for the representative system that keep its best parts intact while weeding out the temptations that lead to corruption.

VI. CONCLUSION

Although these state-level advancements are a step in the right direction, there has generally been a lack of originality in thinking about, or a lack of will in supporting, constitutional amendments to increase accountability at the federal level and in many states. We have never enacted a structural amendment intended to increase accountability in Congress, other than direct election of the Senate⁴⁵—and there is a good debate on whether that actually increased the Senate’s accountability.⁴⁶ Although direct democracy is just as susceptible to capture as representative democracy, it is nevertheless an effective tool in limiting a legislature. I would like to call for more serious thinking about what we can do, beyond direct democracy, to make legislatures more accountable.

44. See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 335 (2003) (explaining that states enacted these rules “with the expectation that greater transparency in the legislative process would deter abuses or at least increase accountability for them” (footnote omitted)); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798–99 (1987) (citing examples of procedural limitations).

45. See U.S. CONST. amend. XVII.

46. See, e.g., Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 567–69 (1997) (arguing that state legislatures were, and are, better able to hold senators accountable than the people at large); Sean Gailmard & Jeffery A. Jenkins, *Agency Problems and Electoral Institutions: The 17th Amendment and Representation in the U.S. Senate 1–2* (Feb. 2008), <http://www.gmu.edu/departments/economics/bcaplan/jenkins.pdf> (arguing that by doing away with “the informed selection and monitoring of U.S. Senators by relative political experts, [namely] state legislators,” the Seventeenth Amendment decreased the Senate’s standard of accountability).