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Emily Calhoun

University of Colorado Law School

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INITIATIVE PETITION REFORMS AND THE FIRST AMENDMENT

EMILY CALHOUN*

Contrary to popular understanding, the initiative petition process does not embody a type of petitioning that is constitutionally guaranteed.¹ Colorado's initiative petition and the First Amendment petition for redress of grievances could not be more different. In these comments, I will explain my understanding of those differences in order to shed light on how we ought to think about proposed changes to Colorado's initiative process.² In particular, I hope to show why we should not adopt "reforms" like those embodied in Colorado's proposed, but defeated, Amendment 12.³ Such reforms would incapacitate

* Professor of Law, University of Colorado School of Law.

1. *Cf., e.g., American Constitutional Law Found., Inc. v. Meyer*, No. 93-1467 (D. Colo. filed July 14, 1993), denial of interlocutory appeal *aff'd*, 33 F.3d 62 (10th Cir. 1994) (affirming denial of preliminary injunction because it is not clear that state initiative process has First Amendment stature).

2. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

My evaluation of proposals to reform Colorado's initiative petition process is based on research into the First Amendment right to petition the government for redress of grievances. My comments here are based on a longstanding interest in the relationship of the First Amendment to voting rights. *See, e.g., Emily Calhoun, Voice in Government: The People*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427 (1994) [hereinafter Calhoun, *Voice in Government*]; Emily Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549 (1985) [hereinafter Calhoun, *The First Amendment*]. The former article should be consulted for a more extensive explanation of the ideas offered in these comments.

3. Amendment 12, insofar as it relates to initiative petitions and other forms of direct democracy, was described on the ballot as:

An amendment to . . . restrict public resources used in ballot issue campaigns; to require a mandatory fine for willful violations of the campaign contribution, public expenditure, and petition provisions; to extend petition powers to residents of all political jurisdictions; to allow judges to be recalled and bar recalled judges from any future judicial position; to limit petition ballot titles to 75 words and to revise other procedural and substantive petition provisions for the initiative, referendum, and recall; to limit the annual number of bills that governments may exclude from referendum by petition; to limit the reasons for invalidating petition signatures; to repeal changes in state petition laws or regulations adopted after 1988 unless voter-approved; to prevent elected officials from changing certain voter-approved laws; and to

the government from fulfilling its responsibility to act as a trustee for all of the people of the state.

Other articles in this issue discuss how the initiative petition process works, so I will turn immediately to the First Amendment petition for redress of grievances. The principle that there is a fundamental right to petition government for redress of grievances has a long history.⁴ It was recognized in the Magna Carta in 1215, and in subsequent centuries its importance was repeatedly reaffirmed. The principle was transported to America, in part via charters for colonial government, where it became firmly embedded in the American political and legal system. Petitioning was a primary source of bills in pre-constitutional America.⁵ For example, fifty-two percent of the acts passed in Pennsylvania between 1717 and 1775 originated in petitions to the government.⁶ In the colonies, petitioning was used to insist that public matters that might otherwise be ignored were included on legislative agendas, to bring problems to the attention of government, and simply to provide information to government.⁷ Petitioning even seems to have been accorded a status superior to that of free speech and press; the latter rights received derivative protection largely because they would ensure that petitioning would be meaningful and effective.⁸

authorize individual, class action, or district suits to enforce the amendment.

LEGISLATIVE COUNCIL OF COLORADO GENERAL ASSEMBLY, AN ANALYSIS OF 1994 BALLOT PROPOSALS, Res. Pub. No. 392, 20 (1994). See Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 75 n.142, 77 n.145, 99 n.245 (1995), for a more detailed description of the Amendment's provisions.

4. My brief historical discussion is generally based on the accounts of EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988); David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113 (1991); Norman B. Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986). Where appropriate, below, I have indicated specific page references to these authorities.

5. Higginson, *supra* note 4, at 144.

6. MORGAN, *supra* note 4, at 229.

7. Higginson, *supra* note 4, at 144-55.

8. See, e.g., Frederick, *supra* note 4, at 115-16 (asserting the general point); Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 333 n.135 (noting that some constitutional commentaries used stronger wording for petition rights than for speech rights generally); Smith, *supra*

Despite the fact that petitioning rights (and the corollary right of the people to assemble) were historically extremely important, there was debate about whether a petition right should be included in the Constitution and, if so, what form that petition right should take.⁹ Some believed that a form of petitioning should be adopted that would enable voters to "instruct" (or bind) their representatives to vote in a particular way on a given issue.¹⁰ James Madison, however, strongly disagreed. He advocated a version of the First Amendment right to petition government that he believed would not undermine the purposes of the representative form of government generally embodied in the Constitution.¹¹ Madison's version of the right of petition preserved the citizen's right of direct access to government but gave to elected representatives the ultimate power and responsibility for debating, adopting, or rejecting a particular petition.

Madison rejected a petition right of instruction in favor of the First Amendment right we now enjoy because he adhered to a familiar theory of government and understanding of human nature. Madison believed that representative government (for all practical purposes an inevitable feature of decisionmaking, including initiative decisionmaking)¹² should be structured to guard against the possibility that "factions" of citizens might take control of government and abuse its powers. According to Madison, factions are composed of "a number of citizens, whether amounting to a majority or a 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."¹³

note 4, at 1153 (asserting the general point); Higginson, *supra* note 4, at 166 n.98 (referring to Madison's beliefs).

9. Frederick, *supra* note 4, at 117 (noting that "[d]espite the importance of petitions in the colonies, the inclusion of a right of petition in the Constitution was no certainty").

10. For general discussions of the proposed right of instruction, see THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 24-26 (1989); 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1091-1103 (1971); GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 42-43, 223-24 (1981).

11. Madison drafted the original version of the First Amendment right of petition. For further background, see Smith, *supra* note 4, at 1175; Higginson, *supra* note 4, at 155.

12. See *infra* p. 309.

13. WILLS, *supra* note 10, at 193-94.

Madison feared any group of citizens—minority or majority—driven by self-interest to the exclusion of the interests of other citizens or the interests of the public good and the community as a whole. In the system of government advocated by Madison, representatives were obligated by their office to exercise judgment on behalf of the common good, after deliberation and debate. Representatives could not fulfill these obligations if a faction—even a majority faction—of voters had a petition right of instruction that would bind representatives to a particular position.¹⁴

These arguments were grounded in part in a principle of government trusteeship.¹⁵ According to the trusteeship principle, government has a trust relationship with all of its citizens. As trustee of the *res publica*, government is obligated to act for the general public good rather than in a partial or self-serving manner. An instruction right would make it impossible for representatives to take into account the public good before adopting public policy; it would enable factions to bind representatives to positions that served only the interests of some voters, contrary to the trusteeship principle.

The trusteeship principle has firm roots in political philosophy.¹⁶ It was an essential part of John Locke's writings on government.¹⁷ It was incorporated into many post-Revolution charters of state government.¹⁸ Most importantly, the principle of government trusteeship was familiar to and accepted by a broad range of people instrumental to the framing of the Constitution. Even those who were more skeptical of elected representative government than Madison—for example, Thomas Jefferson—believed in the principle.¹⁹ One cannot doubt that this principle influenced the decision to favor the

14. CRONIN, *supra* note 10, at 28-29.

15. *Id.* at 27.

16. For example, Jean-Jacques Rousseau and Edmund Burke are both associated with the idea, *see* CRONIN, *supra* note 10, at 27, 39, as are the classical philosophers influencing advocates of contemporary civic republicanism. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1560-61 (1988); *cf.* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992) (discussing the concept of betrayals of trust responsibilities that occur when public officials act under color of authority).

17. PETER C. HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 73-74 (1990).

18. *Id.* at 78-79.

19. *See* Calhoun, *Voice in Government*, *supra* note 2, at 432-34.

First Amendment version of the petition right over a petition right of instruction.

During the early years of our country's existence, the nature of the right to petition Congress was vigorously and publicly debated, particularly when abolitionists began heavily using the petition in the early 1800s.²⁰ In the last one hundred and fifty years, however, there has not been much public debate in the United States about the First Amendment right of petition. There are only a few Supreme Court decisions that discuss the kind of petitioning the Framers thought worthy of constitutional protection.²¹ What does exist in Supreme Court opinions, however, confirms ideas that recur in the historical record of public debate.²²

The Supreme Court Petitions Clause cases²³ tell us that the constitutional petition right was adopted to ensure that citizens could make their wishes known to government and that government, in turn, could be responsive to the will of the people. In Petitions Clause parlance, the will of the people is not a phrase that describes how a majority of people feel at any given moment about any given issue. Rather, the will of the people is an aspirational concept, posited as something that government strives to discern in the multitude of views—majority, minority, or special interest—presented to it.

20. For a discussion of abolitionist petitioning, see Calhoun, *Voice in Government*, *supra* note 2, at 436-39; Frederick, *supra* note 4, at 120. The debaters argued about issues such as whether Congress had an obligation to reply to petitions or even to receive them.

21. Only the following Supreme Court opinions include what I would describe as discussions of the right of petition, and most of these discussions tend to be rather brief: *Meyer v. Grant*, 486 U.S. 414 (1988); *McDonald v. Smith*, 472 U.S. 479 (1985); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Adderley v. Florida*, 385 U.S. 39 (1966); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Thomas v. Collins*, 323 U.S. 516 (1945); *Bridges v. California*, 314 U.S. 252 (1941); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *United States v. Cruikshank*, 92 U.S. 542 (1875).

22. In addition to the ideas that informed constitutional debate on petitioning and the right of instruction, *see supra* notes 9-20 and accompanying text, the ideas put forth during the early nineteenth-century debates on abolitionist petitions are especially interesting. Regarding the latter debates, *see sources cited supra*, note 20.

23. An extended analysis of the Petitions Clause cases can be found in Calhoun, *Voice in Government*, *supra* note 2, at 440-52.

The Supreme Court's Petitions Clause cases tell us that a will of the people cannot be formed if some speakers are excluded from government processes or public debate. A will of the people cannot be formed even if those who are excluded are in an extreme minority that can never hope to win a political contest and can never hope to persuade a majority of citizens to accept its views.

Because the Petitions Clause will of the people should transcend mere majority preference, this will cannot be formed when minority views are excluded. It is because the Petitions Clause will of the people reflects the trusteeship principle that government is accountable to *all* the people—not merely to a majority or minority faction.²⁴

This view of the will of the people is reinforced by the imagery and metaphors used by the Supreme Court in discussing the constitutional right of petition. The Petitions Clause cases are strikingly devoid of the adversarial, competitive marketplace metaphors used in other First Amendment cases. Instead, the Petitions Clause cases talk about how petitioning works to promote collective action, assembly, communication for common achievement, consultation with others respecting public affairs, and the ability of all people to enter into transactions and pacts with other people.

The right to petition the government is more than an adversarial right of access to or control of government. Rather, according to the Supreme Court, First Amendment rights, presumably including the petition right, comprise a "charter for government."²⁵ The petition right ensures that government will act as it is supposed to act, with the integrity and attitude of a trustee for the people. It protects against government processes that are corrupted because captured by minority or majority factions.

24. Compare the Supreme Court's treatment of representative obligations in contemporary voting rights analysis. Because in our constitutional system an elected representative is charged with taking into account the interests of all of the people, not merely the interests of the majority that elected her, political structures that send a message that elected officials need represent only the interests of some voters are constitutionally disfavored. See, e.g., Emily Calhoun, *Shaw v. Reno: On the Borderline*, 65 U. COLO. L. REV. 137 (1993) (discussing *Shaw v. Reno*, 113 S.Ct. 2816 (1993), and *Davis v. Bandemer*, 478 U.S. 109 (1986)).

25. *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

The First Amendment petition right is a necessary incident of citizenship in a government that can compel all citizens to act to support its decisions—not merely those who voted for its decision. It flows inexorably from the principle that government is created as a trusteeship for more than mere fluid majorities. It helps ensure that a will of the people will be reflected in the adoption of policies that can be justified—and are accountable—to all of the people.

Colorado's initiative petition process is designed to serve values fundamentally different from the values and principles served by the First Amendment petition right.²⁶ At the risk of repeating what may be obvious, I will elaborate on a few differences that I find especially significant in thinking about proposals for reform of the initiative process.

First, the Colorado initiative process is not designed to facilitate cooperative transactions or pacts among citizens. Rather, it is quintessentially adversarial from its beginning to its end. It is not structured to promote the formation of a will of the people that transcends factional interests.

Unless initiative proponents voluntarily choose to consult with others early on, the initiative petition will embody proposals for public policy driven by a single point of view. Colorado law does not require deliberative debate in the formation or refinement of proposals prior to their presentation to voters. There is always, of course, debate about whether voters should adopt a given proposal, but the public debate—conducted primarily through broadcast media—has the quality of salesmanship. It is not the kind of deliberative debate that classical political philosophers believed was essential to a discussion of public policy and “the fate of peoples.”²⁷

I am addressing an issue of structure. Madison's design for representative government and the First Amendment petition right took into account the tendency of people to organize themselves into factions and interposed structures that would

26. See Collins & Oesterle, *supra* note 3, at 55-63; David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 15-21 (1995).

27. See EDWARD P. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 516 (3d ed. 1990) (“Of the three types of oratory defined by the ancients . . . the political was esteemed most highly, because it dealt with the loftiest of issues; namely, the fate of peoples, rather than of individuals.”).

operate as a check on that tendency even when—perhaps especially when—the faction consisted of majorities. The First Amendment petition right was intended to help ensure that government would not neglect its trust relationship to all of the people.

The Colorado initiative process, however, was not designed with this end in mind. To be sure, an initiative process can protect groups of voters from being entirely ignored by a legislature. When used with discretion, it can be a powerful check on a legislature determined to ignore its trust responsibilities to all of the people. But there is a significant difference between initiative petitioning and First Amendment petitioning.

Even if a First Amendment petition itself embodies the views of powerful factions (which it well may),²⁸ First Amendment petitioning leaves the final decision on public policy to elected officials formally and informally constrained to act with due regard to the trusteeship principle. In contrast, an initiative petition (which is frequently captured by powerful, special interest factions) gives a final decision on public policy to voters who have no reason to take anything but private, factional interests into account. The initiative process is not internally structured to guard against the possibility that public policy will be captured by factions and voters oriented only by their own self-interest.

Unlike representatives, initiative voters who make final decisions about public policy are neither formally nor informally constrained by the responsibilities of a trustee. Initiative voters

28. It is important to recognize that the initiative petition itself is no more and no less subject to exploitation by powerful interests than the petition for redress of grievances. For example, the petition for redress of grievance came to be used in England as "a favorite weapon in contests among the few for control of the government. . . . [They] came from the top down, from parties within the government contending against each other and seeking public support in the contest." MORGAN, *supra* note 4, at 227. According to Morgan, "[P]etitions . . . [could be used as] one of the rituals of popular government, messages in which it . . . [would be] difficult to distinguish the giver from the receiver, the supplicant from the sovereign." *Id.* at 230. In the United States, petitions were used less frequently by representatives themselves to gain leverage with colleagues, but nonetheless the powerful often used them. The Virginia Statute of Religious Liberty, drafted by Jefferson, was adopted only after Madison solicited petitions from citizens for its approval (in response to a bill calling for a general state tax to support religion). *Id.* at 229. Petitions to Congress became a weapon exploited by powerful political interests and speakers in the debates over slavery preceding the Civil War. See sources cited *supra* note 20.

are not constrained by oath of office to think of all the people or about whether measures will be sufficiently impartial that the people in general will consent to their implementation. They are not practically constrained by a need to explain or justify their vote to their constituents. They can adopt policies without worrying whether other members of government will be able to implement those policies consistent with their oaths of office and trust responsibilities. As Jane Mansbridge has commented in a slightly different context, it would be remarkable were preferences formulated under these conditions to tend toward anything other than the private.²⁹

As a practical matter (and contrary to the myth favored by its extreme advocates), the initiative process is a form of representative decisionmaking about public policy. Through the initiative, only some of all registered voters decide on policies affecting themselves and other voters of the jurisdiction. But the policies also affect significant numbers of non-voters who live, work, or own property within the jurisdiction. These non-voters might include, among others, people under the age of 18, citizens like the mentally disabled who cannot qualify to vote, people qualified to vote who for some reason do not vote (perhaps many elderly or low income citizens), people who live in the community for a significant portion of the year but who choose to vote elsewhere, people whose work brings them to the community and on whom the community depends for its well-being, or people who own commercial property in the community but vote elsewhere.

All of these persons are part of the community: they contribute to it and their well-being depends on the policies adopted for it. In a real-world sense, they are involved in the *res publica*. In the initiative process, however, their interests

29. JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 301 (1983). As conducted today, voting is essentially a very private activity. Mansbridge describes the essentially private nature of voting the following way (and if we are honest, most of us will recognize our own behavior in this description):

Citizens file into a curtained box, mark a preference, and file out. In special circumstances, if a big-city political machine is at work or if the community is small, they may see someone they know on the way in and out of the box, smile, and exchange a triviality. Most voters see no one they know. They sit in their homes; they consume information; they determine a preference; they go to the polling place; they register their preference; they return to their homes.

Id.

will be represented—if at all—only by the small percentage of eligible voters who actually vote.³⁰

The trusteeship principle and governing structures that promote it are—as the Constitution's Framers understood—a necessary prerequisite to the legitimacy of representative government. The initiative form of representative decision-making, however, ignores these principled and structural prerequisites of legitimacy. Initiative structures place final decisions respecting public policy in the hands of some (representative) voters who are not constrained to take any account of the trust obligations that a representative owes to the collective people. Indeed, the initiative process actually enhances the likelihood that final decisions on public policy will ignore trustee responsibilities.

Were initiatives the only—or even the primary—way of governing in Colorado, we would have a system of representative government devoid of essential, legitimizing structures and operating principles. Proposals for reforming the initiative process need to be evaluated with this fact in mind.

To date, Colorado's initiative process has not been the dominant process for making final decisions about public policy. The initiative process has generally functioned in tandem with conventional structures of representative government without abrogating the trusteeship principle of the First Amendment. But what would proposed reforms do both to the existing balance between conventional and initiative forms of representative decisionmaking and to the trusteeship principle? To restate Professor Magleby's concern about the effects of the initiative on representative government: Would these reforms enhance or diminish the possibilities for government to act as a trustee?³¹

Some reforms would simply make the initiative process a better or a fairer adversarial process, without compromising other governmental structures. Reforms that promote voter understanding of the substance of an initiative and of the people, organizations, and money that support it, and that limit the ability of special interests to hide self-serving measures deep in the verbiage of lengthy proposals make the adversarial process fairer. These sorts of reforms seem perfectly appropri-

30. Collins & Oesterle, *supra* note 3, at 52; Magleby, *supra* note 26, at 32-34.

31. Magleby, *supra* note 26, at 45.

ate and there should be no objection to them. If citizens find that the legislature is ignoring its trusteeship responsibilities, or that their voices and issues of importance to them are systematically excluded from the legislative agenda, they may well need an adversary process like the initiative. And if some citizens need an adversary process in such circumstances, we should give them—and all citizens—the fairest adversary process possible.

Other reforms would basically transform the initiative process. That would be the result, for example, of changing the Colorado initiative process to conform to the Swiss model that Professors Collins and Oesterle describe.³² Reforms of this sort would suit someone who objects to the initiative petition process per se, which I do not. I see no reason to eliminate the initiative entirely or to change its essentially adversarial character. Used sparingly, in tandem with conventional processes and as a check against the possibility that elected officials might themselves ignore trustee responsibilities to all of the people, the initiative process can promote realization of the trusteeship principle.

Among proposed reforms to the initiative process, however, are those that threaten to disrupt the balance between the initiative and other representative processes of government. At their worst, these reforms would enable factions to dominate the formation of public policy, eclipsing other processes essential to having a government that *can* act as a trustee for all the people. The most worrisome of this sort of reform was embodied in proposed Amendment 12.³³

32. Collins & Oesterle, *supra* note 3, at 80.

33. Another, less troublesome, proposal is the suggestion that the legislature should become involved in “drafting” initiative petitions proposed by others. Collins & Oesterle, *supra* note 3, at 79. Legislative involvement in “drafting” is no substitute for the type of legislative involvement that would serve First Amendment petition values and the trusteeship principle. Drafting will likely not reflect a broad range of views, will probably not be done publicly, and legislators will not be asked to take a public position to which they will be held accountable by their constituents. The very term—“drafting”—accurately describes in what legislators will be involved: a bureaucratic task.

Unfortunately, although legislative involvement in drafting does not actually serve the trusteeship principle or First Amendment petition values, it may very well be *taken* to serve them. Voters may be encouraged to believe that a proposal emanating from legislative halls has some kind of legislative imprimatur when, in fact, it has none. Voters may mistakenly believe that initiative measures have been endorsed or reviewed with the interests of all the people in mind. Whatever

My purpose, here, is not to describe the provisions of Amendment 12. Others have done so. I simply recommend an evaluation of Amendment 12's proposals in light of the following assertions.

Under Amendment 12, conventional processes of public policy decisionmaking—processes structured to help ensure that public policy will reflect more than factional interests—would have been subordinated to the initiative, a process most frequently used without regard to the trusteeship principle. The provisions of Amendment 12 would have made it almost impossible for representative bodies to formulate or implement public policy that serves all of the people and fulfills the trust obligation of government. They would have made it easier for factions to capture public policy. They would have deprived citizens of an ability to hold accountable the promoters of policies that serve only majority or minority factions. Even judicial checks on special interest factions would have been compromised by new recall provisions.

The bulk of Amendment 12's "reforms" would not have served values that had constitutional significance for the Framers of our Constitution. As Jane Mansbridge said, "To maintain its legitimacy, a democracy must have both a unitary and an adversary face."³⁴ Proposed Amendment 12 contained provisions that would have removed our government's legitimating, unitary face, a face represented by conventional governing structures that offer at least some realistic hope that public policy will be based on the trusteeship principle. If these conventional structures are not working well, the solution is not to adopt so-called reforms like those of Amendment 12 which will only exacerbate the situation; the solution is to become serious about reforming conventional structures of representative government.

As for reforming the initiative process itself, let me add to my colleagues' suggestions one additional, simple reform proposal. I propose that each initiative measure on the election ballot should be preceded by the following reminder.³⁵

clarity might arguably be gained through legislative drafting, that gain does not compensate for the danger in the proposal.

34. MANSBRIDGE, *supra* note 29, at 300.

35. The proposed reminder is intended to alert citizens who act as direct lawmakers to their trust responsibilities. Cf. JOHN RAWLS, *POLITICAL LIBERALISM* 219-20 (1993) (arguing that public reason demands that we reconceptualize voting

REMINDER

WHEN YOU CAST YOUR VOTE YOU WILL ACT AS A REPRESENTATIVE OF OTHER CITIZENS AFFECTED BY THIS ISSUE OF PUBLIC POLICY. PLEASE TAKE SERIOUSLY YOUR REPRESENTATIVE RESPONSIBILITY TO ACT ON BEHALF OF ALL OF THE PEOPLE WHEN YOU VOTE. YOUR VOTE SHOULD NOT BE CAST IN FAVOR OF THIS PROPOSAL UNTIL YOU HAVE FIRST CONSIDERED WHETHER IT WORKS FOR THE COMMON GOOD OR ONLY PARTIALLY, FOR SOME FACTION OF THE PEOPLE.

This initiative measure was formulated without formal representative deliberation by _____ whose financial support comes primarily from _____.

You should vote against this measure EITHER if you believe it does not serve the common good OR if you believe that alternatives to this proposal—alternatives that might better work for the people as a whole—have not been fully considered.

If you vote no because you believe alternatives have not been sufficiently considered and you wish to have the proposal referred to the legislature for such consideration, please check the box below.

A reminder of this sort will not guarantee that people who participate in an initiative election will act appropriately as representative voters. It will, however, offer at least some hope that the initiative process will work better, both to provide citizen access when government ignores its trust responsibilities and in tandem with conventional processes that—unlike the initiative—are inherently structured to fulfill trust responsibilities.

to be something other than a purely private activity which can be engaged in without regard to the interests of the public good).

