



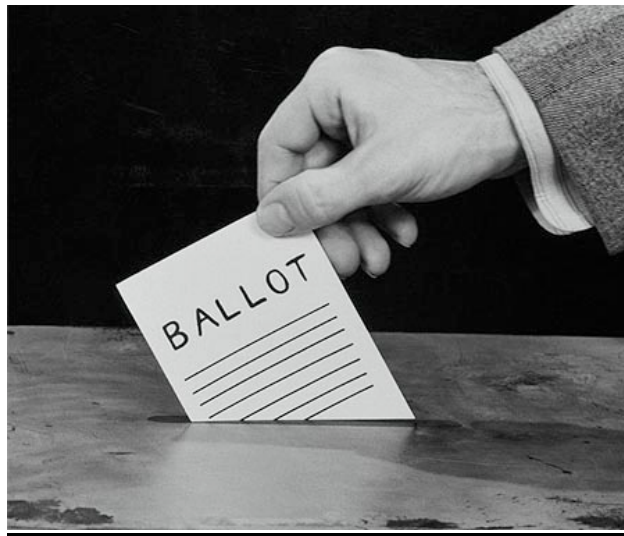
THE CONNECTICUT POLICY INSTITUTE

A non-partisan, not-for-profit research organization dedicated to developing responsible, research driven public policy for Connecticut.

Initiatives and Referenda

-Is Abstinence the Right Policy for Connecticut?-

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Introduction

More than half of all U.S. states provide for some form of “direct democracy” – the term used for governance mechanisms that allow citizens to participate directly in the legislative process.¹ Connecticut is not one of them. Stories of gridlocked government and encyclopedic, incomprehensible ballots make it easy to conclude that in some states direct democracy has gone too far. But is no direct democracy any less radical or off the mark than too much?

Connecticut has had several close looks at direct democracy, but has declined to adopt it. At the State’s 1965 constitutional convention, delegates considered but ultimately rejected various proposals to introduce direct democracy.² In a 2008 poll, 65% of Connecticut residents said that they favor ballot initiatives.³ But that same year, voters decided against holding another constitutional convention, which could have, among other things, resulted in an amendment to allow for direct democracy.⁴

Connecticut’s rejection of direct democracy can be explained, at least in part, by a broader skepticism that pervades the national discourse on the subject. Initiative and referendum processes in California have been subject to particular ridicule. *The Economist*, for instance, recently blamed California’s budget and public education problems on the state’s extensive use of direct democracy.⁵

That individual voters may not always get it right, however, does not mean that their legislatures do – a lesson that Connecticut knows as well as any state. Although Connecticut does not provide for direct democracy, it has the highest debt per capita and largest educational achievement gap of any state in the country. In these areas where California is famous for its troubles, Connecticut has not done better; it may have done worse.

¹ See Initiative & Referendum Inst., State I&R, http://www.iandrinstute.org/statewide_i&r.htm (last visited Feb. 24, 2012).

² See Ken Dixon, *State Debates Constitutional Convention*, Conn. Post Online, Oct. 27, 2008 (noting “that initiative and referendum was rejected by leaders of the 1965 convention”). For a complete list of the initiative and/or referendum resolutions proposed (but rejected) during the 1965 convention, see Conn. Office of Legislative Research, Report 2008-R-0456 (Oct. 16, 2008), available at <http://www.cga.ct.gov/2008/rpt/2008-R-0456.htm>. Although they did not pass these resolutions, the 1965 delegates did amend the state constitution to provide voters with the opportunity, at least once every twenty years, to convene a constitutional convention. See Conn. Const. art. XIII § 2.

³ See John J. Woodcock III, *People Deserve a Stronger Voice*, Conn. Post Online, Feb. 22, 2010, available at <http://www.ctpost.com/opinion/article/People-deserve-a-stronger-voice-375824.php>.

⁴ See Jacqueline Rabe Thomas, *Republicans, Independents Back Ballot Initiatives*, THE CONN. MIRROR, Aug. 25, 2010, available at <http://ctmirror.org/story/7463/ballot-initiatives>.

⁵ *The Withering Branch: How the Initiative Process Has Redistributed Power*, THE ECONOMIST, Apr. 20, 2011, available at <http://www.economist.com/node/18563620>.

The truth is that much of the skepticism towards direct democracy is grounded in myth and supposition rather than research and analysis. The purpose of this paper is to correct popular misconceptions about initiatives and referenda and to provide an overview of the different types of direct democracy tools Connecticut might consider adopting. Connecticut's policy of no direct democracy is extreme and begs the question of whether the state is missing an opportunity to improve the structure and effectiveness of its government. We make no recommendation other than that Connecticut and its legislature review and debate whether some form of direct democracy is better than none at all.

How Direct Democracy Works

Direct democracy's intellectual foundations in America date back to Thomas Jefferson.⁶ States have used referenda to ratify (and make changes to) their constitutions since the early days of the Republic.⁷ In 1857, Congress required that referenda be used to approve the constitutions of all newly-admitted states.⁸

It was not until the late 1800s, however, that states began implementing direct democracy as a regular part of the legislative process. This period coincided with the height of the Progressive and Populist movements, both of which advocated for popular government control.⁹ By 1918, over half the states had adopted direct democracy regimes.¹⁰ National enthusiasm for direct democracy waned during World War I, however, and between 1918 and 1959 – when Alaska entered the Union with initiative and referendum as part of its founding constitution – no new states instituted direct democracy processes. Since then, only four new states (Wyoming, Illinois, Florida, and Mississippi) have done so.¹¹

⁶ See, e.g., THOMAS E. CRONIN, DIRECT DEMOCRACY 40 (1989); Anthony E. Varona, *Taking Initiatives: Reconciling Race, Religion, Media and Democracy in the Quest For Marriage Equality*, 19 COLUM. J. GENDER & L. 805, 869 n.249 (2010).

⁷ See Arne R. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMP. L. REV. 1203, 1206 (1996).

⁸ *Id.*

⁹ See Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? 37 (Larry J. Sabato et al. eds., 2001) (“Populists mistrusted legislatures generally and wanted to substitute direct popular control for representative government, which they regarded as a less pure form of democracy. Progressives, by comparison, wanted voters to check the legislature, but they did not want to replace representative government altogether.”).

¹⁰ See K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1045-46 (2007).

¹¹ See STATE I&R, *supra* note 1.

Today, direct democracy is available in twenty-seven states¹² and often plays a significant role in statewide politics.

Direct democracy can take many forms, and there exists substantial variety even among those states that provide for it. The most common forms of direct democracy are initiatives and referenda. Initiatives allow citizens to draft and propose their own laws or constitutional amendments, while referenda allow citizens to approve, reject, or repeal existing laws or proposals. There are further nuances within each category, including:

- *Direct Initiatives.* Direct initiatives allow citizens to place proposed measures on the ballot simply by obtaining a minimum number of signatures and delivering them to the appropriate governmental authority. In this sense, direct initiatives “completely bypass the legislative and executive branches of the government.”¹³
- *Indirect Initiatives.* Indirect initiatives also allow citizens to propose new laws, but these laws must be submitted to the legislature for approval before they can be put to a general vote. If the legislature rejects a proposed measure or fails to act within a specified period of time, the measure may still appear on the ballot, though in some cases only after its proponents have gathered additional signatures.¹⁴
- *Mandatory Referenda.* Under mandatory referendum regimes, the legislature *must* submit certain bills to voters for their approval.¹⁵
- *Voluntary Referenda.* Under voluntary referendum regimes, the legislature *may* refer certain bills to voters (but is not required to do so).¹⁶
- *Popular Referenda.* Under popular referendum regimes, citizens themselves can force a public vote on bills the legislature has already passed by gathering a required number of signatures.¹⁷

¹² *Id.*

¹³ Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1510 (1990).

¹⁴ See PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 35-37 (1998).

¹⁵ See Eule, *supra* note 13, at 1512.

¹⁶ *Id.*

¹⁷ See J. Michael Marshall, *Close Encounters of the Referendum Kind*, 84 FLA. BAR J. 56, 56 (Nov. 2010).

Pros and Cons of Direct Democracy for Connecticut

Circumventing Special Interests

Much like the Populists and Progressives of the late nineteenth and early twentieth centuries, many modern day proponents of initiatives and referenda criticize representative politics for being susceptible to undue influence from lobbyists and special interest groups. Connecticut Citizens for Ballot Initiative, for instance, argues that direct democracy is needed to circumvent “elected officials pursuing their own agendas and those of vested special interests.”¹⁸ Other proponents similarly argue that special interests are able to dominate state legislatures by operating “secretly through committees and party leadership,” and that more “open processes of direct democracy” are needed to minimize lobbyist influence.¹⁹

Opponents of initiatives and referenda, meanwhile, maintain that these processes are no less prone to lobbyist control than traditional representative politics, as “moneyed interests frequently play a significant role in acquiring the signatures necessary to put an initiative on the ballot, in crafting the language of the [proposed] legislation, and in campaigning for or against particular measures.”²⁰ During Connecticut’s 1965 constitutional convention, delegate James Kennelly opposed the adoption of initiatives and referenda for precisely this reason. Convinced that initiatives and referenda reflect the “narrow well funded interest[s]” of “pressure groups” and lobbyists rather than the public will, Kennelly argued that the cure of direct democracy is worse than the disease.²¹

What does the evidence say about this debate? For large states like California, Kennelly’s concerns seem legitimate. Given California’s massive population, obtaining the signatures needed to put an initiative on the ballot – 5-8% percent of California’s voting public, or nearly the entire population of Connecticut – requires a significant amount of capital and political organization. In fact, those seeking to put initiatives on the ballot in California often consult signature-collection agencies, lawyers, and campaign consultants to help them do so, a phenomenon that has been dubbed the “initiative-industrial complex.”²² Some of the largest signature firms in California charge

¹⁸ CONN. CITIZENS FOR BALLOT INITIATIVE, <http://site.letourvoicesbeheard.org> (last visited Feb. 24, 2012).

¹⁹ Molly E. Carter, Note, *Regulating Abortion through Direct Democracy: The Liberty of all Versus the Moral Code of a Majority*, 91 B.U.L. REV. 305, 316 (Jan. 2011).

²⁰ Michael L. Ferguson, *Initiatives, Referenda, and the Problem of Democratic Inclusion: A Reply to John Gastil and Kevin O’Leary*, 78 U. COLO. L. REV. 1537, 1538-39 (2007) (footnote omitted); see also DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

²¹ 1 Proceedings of the Connecticut Constitutional Convention of 1965, p. 287 (remarks of delegate James J. Kennelly).

²² J. FRED SILVA, PUB. POLICY INST. OF CAL., *THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE* i (2000), available at http://www.ppica.org/content/pubs/op/OP_1100FSOP.pdf.

as much as \$2 per signature, making it cost-prohibitive for many ordinary citizens to get their bills on the ballot.²³

However, for smaller states like Connecticut – with its 3.5 million residents – Kennelly’s arguments are less compelling. In this state, proponents of initiatives or referenda could likely obtain signatures from 5% of the population (roughly 175,000 people) without large political mobilization or huge capital expenditures.²⁴ In fact, in Massachusetts, a state that resembles Connecticut in size, location, and demographics far more than California, the dominant concern is not that it is too difficult for individual citizens to place initiatives and referenda on the ballot, but that it is *too easy*.²⁵ Moreover, research by the Brookings Institution confirms that the problems associated with the “initiative-industrial complex” often do not exist in smaller states and municipalities that provide for direct democracy.²⁶

There is, on the other hand, real evidence that politicians at all levels of government are prone to capture by special interest groups. Studies by political scientists suggest that lobbying institutions have a disproportionate influence on state legislators relative to their membership.²⁷ At the same time, rampant gerrymandering insulates all but a few incumbent politicians from popular accountability.²⁸

Both of these problems are particularly acute in Connecticut, which has seen a five-fold increase in special interest lobbying since 1990 and experiences almost no turnover in its legislature.²⁹ Introducing some direct democracy to Connecticut could be a good way to

²³ CHARLENE WEAR SIMMONS, CAL. STATE LIBRARY RESEARCH BUREAU, CALIFORNIA’S STATEWIDE INITIATIVE PROCESS 10 (1997), available at <http://www.library.ca.gov/crb/97/06/97006.pdf>.

²⁴ In fact, those seeking to put an initiative on the ballot in California must obtain signatures not from 5-8% of the total population, but merely from 5-8% of those who “vote[d] for all candidates for Governor at the last gubernatorial election.” CAL. CONST. ART. II § 8(b). Roughly 1,146,000 Connecticut citizens voted in the state’s most recent gubernatorial election. Thus if Connecticut were to adopt a system similar to that of California, Connecticut citizens would need only 55,000-88,000 signatures to place an initiative on the ballot.

²⁵ See Alan Wirzbicki, *Does Mass. Make It too Easy to Put Questions on the Ballot?*, THE ANGLE BLOG (Apr. 5, 2011 04:48 PM), http://www.boston.com/bostonglobe/editorial_opinion/blogs/the_angle/2011/04/does_mass_make.html.

²⁶ See Tracy Gordon, The Brookings Institution, *Initiatives Aren’t as Bad as You Think* (Oct. 4, 2011), available at http://www.brookings.edu/opinions/2011/1004_ballot_initiatives_gordon.aspx.

²⁷ See, e.g., Virginia Gray & David Lowery, *The Institutionalization of State Communities of Organized Interests*, 54 POL. RES. Q. 265 (June 2001).

²⁸ See generally Samuel Isaacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); see also Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature To Police Itself*, 4 J.L. & POL. 653, 675 (1988).

²⁹ See Woodcock, *supra* note 3. In 2008, one-third of the state’s General Assembly races were uncontested, and 95% of incumbents were reelected. *Id.* In 2010, a difficult year for incumbents nationally, Connecticut incumbents again did extremely well. See Abbe Smith et al., *Conn.*

enhance the popular accountability of our politicians while limiting the growing influence of special interests.

Promoting Good Policy

Some groups, despite conceding that initiatives and referenda may increase democratic legitimacy, nevertheless oppose these processes on the grounds that they lead to bad policy outcomes. These opponents argue that direct democracy does not allow for the discussion, debate, and compromise needed to craft sensible legislation, and that ordinary citizens are often prone to making rash and impassioned decisions.³⁰ Former Connecticut Governor John Lodge echoed these very sentiments during the 1965 convention, arguing that initiatives and referenda present “the danger of ‘mobocracy.’”³¹ Once again, however, the evidence does not appear to bear this out.

Direct democracy opponents often worry, for instance, that citizens allowed to vote on policy measures will simultaneously support both new spending initiatives and tax cuts, thus jeopardizing the state’s long-term economic viability. By comparing the fiscal health of states with and without direct democracy, however, we can see that this worry is unfounded.

If indeed initiatives and referenda systematically led to over-spending and under-taxing, we would expect government debt per capita to be higher in states that provide for these processes than in those that do not. As figure 1 (below) shows, however, the distributions of state debt per capita are roughly the same in both types of states. Statistical analyses confirm that whether a state allows for direct democracy has no impact on its per capita government debt.³² Indeed, of the three states with the highest debt per capita – including Connecticut, which ignobly tops the list – none provides for direct democracy in any form.

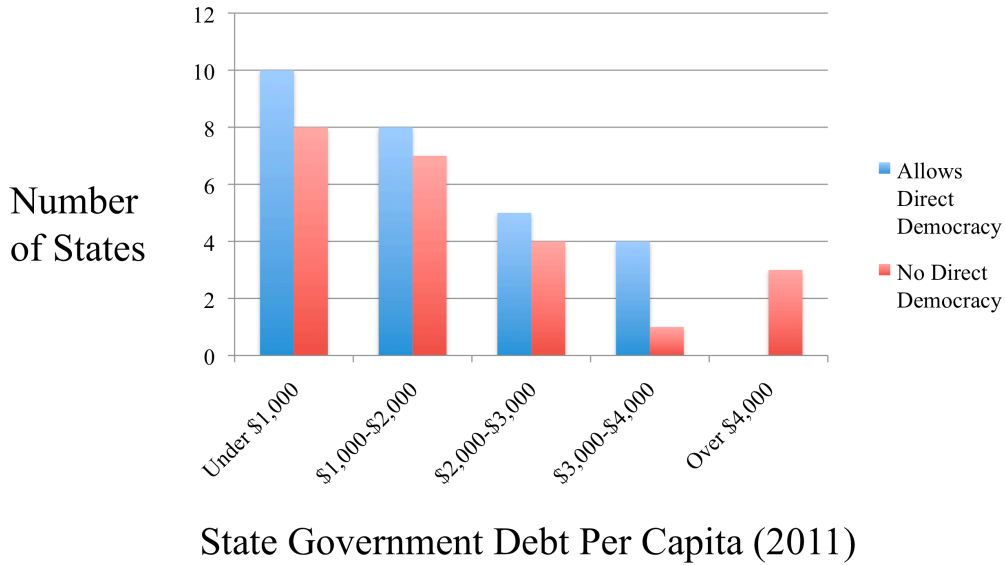
General Assembly Dem Incumbents Manage to Hold onto Seats, NEW HAVEN REGISTER, Nov. 3, 2010, available at <http://www.nhregister.com/articles/2010/11/03/news/doc4cd0dae830208286745787.txt>.

³⁰ See Eule, *supra* note 13, at 1526-27 (“Popular masses too quickly form preferences, fail adequately to consider the interests of others, and are overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders. In contrast, the deliberative process offers time for reflection, exposure to competing needs, and occasions for transforming preferences.”) (footnote omitted).

³¹ 1 Proceedings of the Connecticut Constitutional Convention of 1965, p. 290 (remarks of former governor John D. Lodge).

³² A two-sample independent t-test of unequal variances and a Wilcoxon-Mann-Whitney test both result in no statistically significant difference between the two distributions.

FIGURE 1: IMPACT OF DIRECT DEMOCRACY ON STATE BUDGETS



Data Source: debt per capita data from State Budget Solutions; direct democracy data from USC Initiative and Referendum Institute

Another outcome-driven concern about initiatives and referenda is that they can be “used unfairly as an outlet for intolerant views supported by a majority of voters but oppressive to particular minorities.”³³ Newark Mayor Cory Booker, for instance, recently opposed putting a gay marriage referendum on New Jersey’s 2012 ballot, rhetorically questioning “what would have happened if the civil rights gains, heroically established by courageous lawmakers in the 1960s, were instead conveniently left up to popular votes in our 50 states.”³⁴

Protecting minorities from intolerance is certainly an important goal. But there is little empirical evidence or theoretical support for the notion that redistributing some legislative power from politicians to the voting public will lead to less tolerance of minorities and minority views.

On the contrary, direct democracy processes – like all legislative processes in this country – are constrained by various legal safeguards designed to protect minorities from an overreaching majority. Whether passed by elected officials or directly by the people, state laws cannot circumvent the federal Constitution or preemptive federal laws. In fact,

³³ Ferguson, *supra* note 20, at 1539.

³⁴ David Giambusso, *Newark Mayor Cory Booker Blasts Proposed N.J. Gay Marriage Referendum*, NEW JERSEY REAL-TIME NEWS (Jan. 24, 2012 05:39 PM), http://www.nj.com/news/index.ssf/2012/01/newark_mayor_cory_booker_again.html.

the Civil Rights gains of the 1960s were achieved not through the actions of state legislatures – the same entities, it should be noted, responsible for enacting Jim Crow in the first place – but instead through the individual protections of the United States Constitution as well as civil rights statutes enacted by the federal government. In 1996, moreover, the Supreme Court famously overturned a Colorado ballot initiative on the grounds that it unconstitutionally discriminated against homosexuals,³⁵ and in February of this year, the Ninth Circuit Court of Appeals struck down California’s Proposition 8, an initiative passed in 2008 to prohibit gay marriage, as violating equal protection.³⁶

Whether you agree with these decisions or not, the point is that, when designed and implemented effectively, direct democracy can add legitimacy to our constitutional system without subjecting minorities to “the dangers of mobocracy” any more than traditional representative politics.

Promoting Public Participation

Finally, proponents of direct democracy maintain that just as initiatives and referenda produce laws that better reflect the public will, so too do they “promote public discussion and debate, educate voters on important policy matters, and cause voters to pay attention to the actions of their elected representatives.”³⁷ Indeed, research has shown that initiatives and referenda tend to increase voter turnout by as much as two percent.³⁸ According to proponents, therefore, direct democracy helps create a citizenry that is more willing and able to “learn about important issues,” to “discuss and debate them with each other,” and ultimately to “develop civic virtue.”³⁹

³⁵ See *Romer v. Evans*, 517 U.S. 620 (1996).

³⁶ See *Perry v. Brown*, No. 10-16696 (9th Cir. Feb. 7, 2012), available at <http://www.ca9.uscourts.gov/datastore/opinions/2012/02/07/1016696com.pdf>.

³⁷ Dale A. Oesterle, *The South Dakota Referendum on Abortion: Lessons from a Popular Vote on a Controversial Right*, 116 YALE L.J. POCKET PART 122, 123 (2006).

³⁸ See, e.g., DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 42 (2004) (“Simulating voter turnout in midterm elections, we find that each additional initiative on the ballot raises turnout by 1.2 percent.”); Daniel A. Smith, Caroline J. Tolbert, & Daniel C. Bowen, *The Educative Effects of Direct Democracy: A Research Primer for Legal Scholars*, 78 U. Colo. L. Rev. 1371, 1377 (2007) (“Using the number of initiatives on state ballots to measure campaign effects over a twenty-five year period (1980-2004), we have found that, on average, each initiative may boost a state’s turnout by almost one percent in presidential elections and almost two percent in midterm elections, all other factors held constant.”) (footnotes omitted).

³⁹ Richard Briffault, *Distrust of Democracy: Voting on Ballot Propositions in the United States*, 63 TEX. L. REV. 1347, 1348 (1985) (reviewing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984)) (footnote omitted).

Opponents counter by arguing that “direct democracy provides little incentive to work towards deliberation because each citizen votes individually and in secret,” and that “resulting measures are likely to pass or fail based on stereotypes or misinformation rather than educated debate.”⁴⁰ These opponents point to data like a 1990 poll in which California voters, by a six-to-one margin, questioned *their own* ability to “make an intelligent choice” when voting on ballot initiatives.⁴¹

Voter misinformation is a legitimate concern, and its possibility suggests that we should take a moderate approach to direct democracy that allows voters to pressure and influence legislatures without entirely circumventing our system of representative government – indirect initiatives, for example.

But it is important to recognize that voter misinformation can be just as serious a problem in candidate elections, with voters often choosing candidates based on loose thematic promises that often have little to do with the candidates’ actual voting preferences.⁴² And while it may be unrealistic to expect citizens to “develop civic culture” through the use of initiatives and referenda, the empirical data suggests that these processes do in fact enhance public discourse and increase voter turnout.

Conclusion

Much of the national skepticism towards initiatives and referenda derives from California’s difficult experience with these processes. But California’s experience should not deter Connecticut from considering direct democracy itself.

California is ten times Connecticut’s size, and its problems with direct democracy have not been shared by smaller states and municipalities that have implemented direct democracy regimes. Additionally, California makes extensive use of direct initiatives, the most radical form of direct democracy available in this country. More limited tools of direct democracy, such as indirect initiatives and referenda, can enhance democratic

⁴⁰ Carter, *supra* note 19, at 322 (footnote omitted).

⁴¹ Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 DRAKE L. REV. 971, 983 (2007) (footnote omitted).

⁴² *See id.*; see also Alec C. Ewald, *An “Agenda For Demolition”: The Fallacy and the Danger of the “Subversive Voting” Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 127 (2004) (“Most voters do not know much about the candidates for whom they vote, and even less about the issues on which the candidates disagree. Indeed, majorities of voters are ignorant of simple political facts, including the partisan positions of competing parties, and take no consistent position on important issues. Voters often support parties with whom they have very serious policy disagreements.”) (footnotes and quotation marks omitted).

legitimacy and increase public participation without entirely removing the legislature from the lawmaking process.

A better comparison for Connecticut is Massachusetts, a neighboring state closer in size and demographic makeup. Unlike California, Massachusetts does not provide for direct initiatives. Rather, through indirect initiatives and popular referenda, Massachusetts allows its citizens to participate directly in the legislative process while nevertheless ensuring a certain level of oversight from the legislature itself.⁴³ And while direct democracy may be to blame for some of California's recent struggles, it has served Massachusetts well, putting the Commonwealth above Connecticut in both fiscal health and public education.

Connecticut will not have its next mandatory vote on whether to hold a constitutional convention until 2018. Given Connecticut's place at one end of the direct democracy spectrum, we recommend the legislature begin a dialogue about whether Connecticut would benefit from adopting some aspects of direct democracy. If the result of the dialogue is affirmative, there will be nothing to stop the legislature from introducing a direct democracy constitutional amendment before 2018.

⁴³ See NAT'L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM STATES, <http://www.ncsl.org/legislatures-elections/elections-campaigns/chart-of-the-initiative-states.aspx> (last visited Feb. 24, 2012).