THE POPULAR REFERENDUM DEVICE AND EQUALITY OF VOTING RIGHTS — HOW MINORITY SUSPENSION OF THE LAWS SUBVERTS "ONE PERSON-ONE VOTE" IN THE STATES

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INTRODUCTION

Americans have always been ambivalent about the legitimacy of their government. On the one hand, the holy writs of the Declaration of Independence and the U.S. Constitution are items of pietistic reverence;[1] on the other, few have actually read these revered and sacred texts,[2] and fewer still understand their historic and contemporary significance.[3] Similarly, Americans rhetorically honor elections and representative government while almost half of them don't bother to vote; nonetheless, they tend to hold the actual occupants of elective and representative office in vituperative contempt.[4] This contempt and distrust of governmental institutions is not confined to the United States, nor is American respect for governmental institutions necessarily less than in other democratic countries.[5] What is, however, rather unique to the American scene is the ingenious ways in which institutional arrangements are designed. On the one hand, both the separation-of-powers and checks-and-balances systems, at both the federal and state levels, are designed to hedge and qualify the majority rule principle; on the other hand, there is a contradictory impulse to expand the majority rule principle, especially at the state

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1 RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION 12-13 (1974).

2 HERBERT MCCLOSKY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983).

3 *Id.* at 52-53; Bob Baker, *Times Poll: Nation Divided On What The Law Should Allow*, L.A. TIMES, Dec. 14, 1991, at 28.

4 Ronald Brownstein, *Survey of Political Leanings Sees 3rd Party Idea Gaining*, L.A. TIMES, Sept. 21, 1994, at 1, 16; NORMAN LUTTBEG & MICHAEL GANT, AMERICAN ELECTORAL BEHAVIOR, 1952-1992, 131-51 (1995).

5 G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17, 18-20 (1986).

ple, especially at the state level, through the direct democratic devices of initiative and popular referendum.[6]

This paper's central thesis is that the popular referendum process[7] perverts the majority rule principle of democratic government because, in most states, a successful petition drive to force a referendum vote also suspends the law in question until the public has voted on it. Specifically, this paper argues that such suspension is a legislative act, and as such, it should be required to adhere to the same constitutional standards and restrictions that apply to actions taken by elected and representative legislative bodies. Just as our constitutional system would not tolerate an institutional arrangement permitting a minority of state legislators or local government officials to enact new laws (or suspend existing laws previously approved by a full majority), we should not allow a minority of "the People," through the referendum process, to act as if they were the majority.

Although this paper focuses primarily on the constitutional issues surrounding the popular referendum, it is important to note that referendum and initiative ride together theoretically and practically. The initiative process permits the placement of a proposed law or constitutional amendment upon the election ballot once supporters have gained the required number of petition signatures as specified by state law. In addition, the initiative device may be used to repeal an existing law; but unlike the popular referendum, initiative petitions cannot suspend a law prior to a public vote of approval or repeal.[8] Currently, twenty-one states provide for lawmaking by initiative, and seventeen permit constitutional amendments by the initiative process.[9]

Twenty-four states provide for the popular referendum (also called a petition for referendum);[10] in twenty of these states, the contested law is suspended once the referendum petition has received the required number of signatures.[11] The suspension of an enacted law is generally accomplished by obtaining either the signatures of a small minority of eligible or registered voters, or the number of signatures equivalent to a

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6 JOSEPH F. ZIMMERMAN, PARTICIPATORY DEMOCRACY: POPULISM REVIVED 35-40, 68-71 (1986).

7 In short, the referendum process permits a minority of voters to petition the state to place on an election ballot for public vote the question of whether an already-enacted law should be repealed.

8 ZIMMERMAN, *supra* note 6, at 45-46.

9 DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 38-39 (1984).

10 *Id.* at 38-39; David Magleby, *Taking The Initiative*, 21 POL. SCI. & PUB. POL. 600-01 (1988).

11 ALEXANDER BOTT, HANDBOOK OF ELECTION LAWS AND PRACTICES 280-82 (1990).

small percentage of the votes cast for governor in the last general election.[12]

Unlike the initiative, the popular referendum has been used infrequently.[13] A principle reason for this rare usage is that those who wish to force a suspension and public vote are constrained by short time deadlines in gathering the required number of signatures.[14] In most states, petitions with the required number of signatures must be filed with the county clerk between 60 and 90 days after a legislative enactment, whereas time frames for filing initiative petitions are usually much longer, often one to two years.[15]

Nevertheless, in 1993, Montana's referendum-suspension process was used successfully to suspend a major tax reform bill that imposed a flat rate income tax and provided approximately $70 million dollars in general fund revenue to balance the state's budget for the biennium.[16] This successful petition drive forced Governor Marc Racicot to call the Legislature into special session at the end of the year in order to rebalance the state budget by cutting appropriations.[17] Between the announcement of the drive to suspend the tax and the final resolution of the budget shortfall, a lawsuit was filed challenging the constitutionality of Montana's popular referendum process on the grounds that it violated provisions of both the United States and Montana constitutions.[18] The issues raised in *Nicholson v. Cooney*[19] are the central points of discussion in this paper:

- Does suspension of a duly enacted state law by a referendum petition signed by a minority of voters constitute a violation of the "one person-one vote" requirement of the Fourteenth Amendment under *Reynolds v. Sims*[20] and subsequent Equal Protection Clause voting cases?
- May a law be suspended even though the effects of such a suspension clearly violate other relevant requirements of a state's constitution (e.g., requiring a balanced budget)?

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12 Ken S. Choi, *Financing State and Local Elections: Trends and Issues*, *in* 1992-1993 BOOK OF THE STATES 283, 337 (1993).

13 David Magleby, *Direct Democracy in the United States*, *in* REFERENDUMS AROUND THE WORLD 225-27 (David Butler & Austin Ranney eds., 1994).

14 Choi, *supra* note 12, at 337.

15 *Id.* at 331-32.

16 Plaintiffs' Brief In Support of Motion For Partial Summary Judgement at 6-12, Nicholson v. Cooney, 877 P.2d 486 (Mont. 1994) (No. 93-657).

17 *Id.* at 11-12.

18 *Id.* at 12-13.

19 877 P.2d 486 (Mont. 1994).

20 377 U.S. 533 (1964).

- May a minority of voters, in signing a petition to suspend state law, accomplish a result that, if it had been attempted by the state legislature, would have been a clear violation of federal and state constitutional requirements?

The political implications of the referendum-suspension provisions found in the Montana constitution (and in many other state constitutions) go well beyond the legal questions raised in *Nicholson*. The suspension of a state tax in one rural state is not a single, isolated incident. Rather, it represents one small piece of a nationwide movement to stop new taxes, prevent tax increases, or reduce existing taxes, and thereby cripple the capacity of state and local governments to govern effectively.[21] Since the successful drive in 1978, led by the late Howard Jarvis and Paul Gann, to limit property taxes in California, the tax protest movement has often been successful in using the initiative process to roll back existing tax rates, to prohibit the imposition of specific taxes (e.g., sales taxes and income taxes), and to place caps on state government spending and revenue growth.[22]

Now, many people have discovered the suspension-referendum process as a means to thwart legislative efforts to provide revenue sufficient to cover government's obligatory provision of goods and services. If suspension by a minority of voters is held to be constitutional, one can expect energetic use of this device by anti-tax groups. Perhaps more importantly, once the suspension option is fully appreciated, legislatures may simply refrain from even attempting to raise existing taxes or to impose new ones, given that suspension and a confirming public vote is likely.

In 1994, four ballot measures (out of ten in circulation) qualified for statewide ballots. These measures called for either 1) a required public vote of approval for any tax increase or imposition of a new tax at the state or local level, or 2) required a supermajority (usually a two-thirds vote) of the legislature and other local units as the voting threshold to increase existing taxes or impose new ones.[23] Of these, one measure was approved.[24] Consequently, Nevada state legislators now need a supermajority vote in order to raise taxes,[25] thus joining Arizona, Colo-

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21 Scott Mackey, *Fiscal Issues Crowd November Ballots*, STATE LEGISLATURES, Nov. 1992, at 29.

22 Scott Mackey, *Initiative State Voters Have Their Say,* STATE LEGISLATURES, Dec. 1992, at 14.

23 Major Garrett, *No Taxation Without A Vote?: It's Coming Soon*, WASH. TIMES, Jul. 21, 1994, at A10; Robert Pear, *Debate on Who is Heard in Initiatives*, N.Y. TIMES, Nov. 7, 1994, at B11.

24 *Voters Rebel Against Status Quo*, STATE LEGISLATURES, Jan. 1995, at 18.

25 *Id.*

rado, Oklahoma, and Washington, which already have such requirements.[26]

THE REFERENDUM-SUSPENSION PROCESS

As previously indicated, 24 states (most in the West and Midwest) provide for the right of the people to petition for a public vote on a bill enacted by the state legislature.[27] To accomplish this task, objectors must be sufficiently organized and dedicated to convince a relatively small percentage of voters to sign the petitions and then submit them to county clerks and recorders within a deadline established by law ranging from 60 days to six months after legislative adjournment.[28] See Table 1.

The percentage of signatures required to force a public vote on a contested bill, which may also have to be distributed across a specific proportion of state legislative districts or counties, ranges from a minimum level equivalent to one percent of the population of the state (North Dakota) or 10 percent of the eligible voters statewide, to a height of ten percent in each of at least three-quarters of the state's counties (New Mexico).[29]

Finally, the successful petition to mandate a public vote may or may not suspend the contested law pending the general election referendum. Four states do not stipulate suspension prior to a public vote (Alaska, Nevada, North Dakota, and Oregon).[30] See Table 2.

In most of the remaining 20 states, the contested law is automatically suspended once the requisite signatures for the public vote have been certified as valid and sufficient, but in some states, additional signatures are required to suspend the contested law.[31] In Montana, a public vote will occur if petitions are signed by a number of registered voters equivalent to 5 percent of the vote for governor in the last election with a distribution requirement of signatures equivalent to 5 percent in at least one-third of the State's 100 legislative districts.[32] To suspend, the total petition count (on the same petition) must be 15 percent of the vote for governor in a majority of legislative districts (there is no statewide requirement for suspension).[33] Nebraska and New Mexico also have additional signature requirements for suspension. See Table 1.[34]

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26 *Id.*

27 Choi, *supra* note 12, at 329.

28 *Id.* at 337.

29 *Id.*

30 ALASKA CONST. art. XI, § 5; NEV. CONST. art. IXX, §§ 1(2), 2(1); N.D. CONST. art. III, §§ 1, 4, 5; OR. CONST. art. IV, § 1(3).

31 BOTT, *supra* note 11, at 280.

32 MONT. CONST. art. III, §§ 5(1-2).

33 *Id.*

34 NEB. CONST. art. III, § 3; N.M. CONST. art. IV, § 1.

Table 1: Popular Referendum, Signature Requirements, and Deadlines

State	Public Vote	Suspension	Deadline
Alaska	10% TV, 2/3 ED	n.a.	90 days
Arizona	5% VG	same	90 days
Arkansas	6% EV	same	90 days
California	5% VG	same	90 days
Colorado	5% VSS	same	90 days
Idaho	5% VG	same	60 days
Kentucky	5% VG	same	4 months
Maine	10% VG	same	90 days
Maryland	3% VG*	same	90 days
Massachusetts	15,000 EV	same	90 days
Michigan	5% VG	same	90 days
Missouri	5% VG, 2/3 ED	same	90 days
Montana	5% VG, 2/3 ED	15% VG, 51 ED	6 months
Nebraska	5% VG, CO	10% VG, 2/5 CO	90 days
Nevada	10% EV	n.a.	120 GE
New Mexico	10% EV, 3/4 CO	25% EV, 3/4 CO	4 months GE
North Dakota	2% TP	n.a.	90 days
Ohio	6% EV	same	90 days
Oklahoma	5% VH	same	90 days
Oregon	4% VG	n.a.	90 days
South Dakota	5% VG	same	90 days
Utah	10% VG	same	90 days
Wyoming	10% TV, 2/3 CO	same	90 days

Source: BOOK OF THE STATES, *supra* note 12; various state constitutions.

Key to Symbols:

EV = total eligible voters
TP = total population
TV = total voters in last general election
VG = total vote for governor
*VG** = no more than half from Baltimore
GE = total vote in last general election
VH = total vote for highest office
VSS = total vote for secretary of state
ED = state legislative districts
CO = counties

Of the 20 states that permit suspension of a disputed law, 19 except certain subjects from the popular referendum and suspension process.[35] See Table 2. The most commonly excepted subjects are statutes designated as "emergency" laws (16 states) and those concerning appropriations (14 states).[36] California and Ohio are the only two states that except general revenue measures from the popular referendum, while only Kentucky excludes property taxes.[37] See Table 3.

In contrast to the renewed popularity of the initiative, evidence suggests that state-level popular referendums have been used sparingly since

35 BOTT, *supra* note 11, at 282.

36 *Id.*

37 CAL. CONST. art. II, § 9(a); OHIO CONST. art. 1, § 1(d).

Table 2: States With Popular Referendum and Constitutional Restrictions

A. No Suspension Pending a Public Vote, No Subject Matter Restrictions:
Nevada
Oregon

B. No Suspension Pending a Public Vote, Subject Restrictions:
Alaska
North Dakota

C. Suspension Pending a Public Vote, No Subject Restrictions:
Idaho

D. Suspension Pending a Public Vote, Subject Restrictions:

Arizona	Massachusetts	Oklahoma
Arkansas	Michigan	South Dakota
California	Missouri	Utah
Colorado	Montana	Washington
Kentucky	Nebraska	Wyoming
Maine	New Mexico	
Maryland	Ohio	

the benchmark year of 1978 when Californians approved the property tax-slashing Proposition 13. For example, in 1988 there were 230 questions on state ballots.[38] Of these, only 54 had been placed there by voter petition, and of this number only 4 were popular referendum questions.[39] In Montana, the popular referendum device has been in place since 1907, but was used only 10 times prior to the summer of 1993. The last time it was used occurred in 1958 when the voters refused to repeal an increase in the state liquor tax.[40]

But the threat of a popular referendum has served as a brake on legislative discretion, especially with regards to tax legislation. Montana remains one of five states that does not have a retail sales tax.[41] In 1971, the legislature submitted a 2 percent sales tax bill to the people for consideration in a special election.[42] It was soundly defeated, as were some of its prominent legislative sponsors in the next general election.[43] As a

38 Austin Ranney, *Elections '88: Referendums*, PUBLIC OPINION, Jan./Feb. 1989, at 15.

39 *Id.*

40 ELLIS WALDRON & PAUL B. WILSON, ATLAS OF MONTANA ELECTIONS, 1889-1976, at 215 (1978).

41 U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 36-37 (1994).

42 WALDRON & WILSON, *supra* note 40, at 256.

43 MICHAEL MALONE, ET AL., MONTANA: A HISTORY OF TWO CENTURIES 394-95, 397 (1991).

Table 3: Items Excluded from Suspension by Popular Referendum

A. "Emergency" laws (Those deemed "immediately necessary for the preservation of public peace, health, and safety."):

Arizona	Massachusetts**	Oklahoma
Arkansas*	Missouri	South Dakota
California	Nebraska	Washington
Colorado	New Mexico	Wyoming
Maine**	North Dakota	
Maryland**	Ohio**	

* = emergency must be declared in the bill.
** = extraordinary majority required to declare an emergency bill.

B. Appropriations

Arizona	Michigan	North Dakota
California	Missouri	Ohio
Colorado	Montana	South Dakota
Maryland	Nebraska	Wyoming
Massachusetts	New Mexico	

C. Taxes

California
Kentucky (property taxes only)
Ohio

D. Other Subjects

Courts (MA)
Election laws (CA)
Local and special legislation (NM, WY)
Relating to religious institutions and practices (MA)
School laws (NM)
Any law enacted by 2/3 of each house (UT)

consequence, the sales tax option remained largely a dead letter because any potential introduction of a sales tax bill was threatened by the certainty of a successful effort to suspend it.[44] For example, in the wake of the drubbing handed the sales tax option in 1971, no sales tax bills were introduced in the Montana Legislature until 10 years later.[45] In the following years, 23 bills were introduced. However, only one bill, permitting local incorporated cities statutorily designated as "resort communities" to enact a local option sales tax if approved by the voters, was enacted.[46]

44 Charles S. Johnson, *Sales Tax Won't Last Without Constitutional Change, Legislator Says*, GREAT FALLS TRIB., Sept. 10, 1988, at 12A.

45 *See* LEGISLATIVE COUNCIL, HISTORY & FINAL STATUS OF BILLS AND RESOLUTIONS — FIFTY-THIRD MONTANA LEGISLATIVE ASSEMBLY, Jan. 4, 1993 to Apr. 24, 1993 (1993) and earlier reports of same series.

46 *Id.*

THE MONTANA EXAMPLE

Montana's budget shortfalls and its heavy reliance on the personal income tax and property tax prompted a second look. In April, 1993, the Montana legislature enacted a 4 percent sales tax to be submitted to a public vote in a June 1993 special election.[47] (The threat of suspension gave them no other option.) The proposed sales tax sought to reduce income and property taxes while providing an additional $85 million to balance the budget.[48] But the legislature, in its wisdom, stipulated that if the sales tax referendum failed, the income tax reform bill would automatically take its place and have the same fiscal effects.[49] The voters were not given a clear choice between one or the other, but offered only the sales tax. The majority of voters did not know that a comprehensive income tax reform bill was quietly waiting in the wings should the sales tax fail.[50] The actual ballot language read:

> FOR imposing a 4 percent sales tax and use tax as part of comprehensive tax reform.
> AGAINST imposing a 4 percent sales tax and use of tax as part of comprehensive tax reform.[51]

In order to find out about the income tax alternative to the sales tax referendum, the truly dedicated voter had to move beyond the simplified ballot language and read the 31 pages of closely packed legal text in the information pamphlet. Even there, one would only find very obscure references to the income tax bill.[52] Unlike Michigan, which offered voters the right to chose between one of two taxes without the option of refusing all taxes, Montana's legislators, perhaps inadvertently, did not give the voters a clear message that they had a choice in the manner used to raise the desperately needed revenue.[53] The sales tax proposal was dead-on-arrival. In the June 1993 special election, 75 percent voted against the sales tax. The proposition won a majority in only four of the state's 956 electoral precincts.[54]

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47 *Id.*

48 VOTER INFORMATION PAMPHLET FOR THE JUNE 8TH SPECIAL ELECTION ON LEGISLATIVE REFERENDUM 111, at 2 (1993) [hereinafter VOTER INFORMATION PAMPHLET].

49 *Id.*

50 Peter Johnson, *6 Out Of 10 Unaware Of Alternative To Sales Tax Plan*, GREAT FALLS TRIB., MAY 30, 1993, at 1A, 4A.

51 VOTER INFORMATION PAMPHLET, *supra* note 48, at 2.

52 *Id.* at 31.

53 For insightful comment on giving voters a rational choice on ballot issues, see Alan Ehrenhalt, *Let the People Decide Between Spinach and Broccoli*, GOVERNING, Jul. 1994, at 6-7.

54 Mike Dennison, *Final Tally: Tax Vote Was A Rare Shutout*, GREAT FALLS TRIB., June 17, 1993, at 1B; Jerry W. Calvert, *The Tyranny Of The Minority*, MONTANA PROFESSOR, Spring 1994, at 23.

Some of those who had most vigorously opposed the sales tax had already threatened to suspend the income tax as well, and they proceeded immediately to act on that threat.[55] The Montana Constitution explicitly gives individuals the opportunity to do this.[56] Led by Professor Rob Natelson of the University of Montana School of Law, a group called Montanans for Better Government circulated a petition throughout the state which read in part, "We, the undersigned Montana voters, propose that the secretary of state place the attached House Bill Number 671, passed by the Legislature on April 24, 1993, on the November 8, 1994 general election ballot and that House Bill Number 671 be suspended until the election is held."[57]

Considerable controversy attached to this petition drive. First, Professor Natelson suggested that HB 671 imposed a general increase in taxes on almost everyone, directly contradicting estimates offered by the Montana Department of Revenue. Second, Professor Natelson, citing the Census Bureau as his source, claimed that Montana was a high tax state.[58] But subsequent evidence, including the Census Bureau's own data, suggested quite the opposite. When it was pointed out that his figures were wrong and that Montana, in fact, ranked in the bottom two-fifths in per capita tax collections,[59] he acknowledged his error; however, he subsequently continued to claim that Montana was a high-tax state.[60]

Third, those seeking to suspend HB 671 had a semi-hidden agenda — to reduce state spending and thereby influence a redirection of state government appropriations.[61] Since the state constitution explicitly ex-

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55 Mike Dennison, *Anti-Tax Petition Sent To Helena For Review*, GREAT FALLS TRIB., June 2, 1993, at 1B.

56 The Montana Constitution states:

> (1) The people may approve or reject by referendum any act of the legislature *except an appropriation of money.* A referendum shall be held either upon the order of the legislature or upon *petition signed by at least five percent of the qualified electors in each of at least one-third of legislative representative districts. The total number of signers must be at least five percent of the qualified electors of the state.* A referendum petition shall be filed with the secretary of state no later than six months after the adjournment of the legislature which passed the bill.
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> (2) *An act referred to the people is in effect until suspended by petitions signed by at least 15 percent of the qualified electors in a majority of representative districts.* If so suspended the act shall become operative only after it has been approved at the election, the result of which shall be determined and declared as provided by law.

MONT. CONST. art III, §§ 5(1-2) (emphasis added).

57 MONTANA SECRETARY OF STATE, PETITION TO PLACE REFERENDUM NO. 112 ON THE ELECTION BALLOT AND SUSPEND HOUSE BILL NO. 671 (1993) (on file with author).

58 Mike Dennison, *Do Natelson's Claims Hold Up? Sometimes*, GREAT FALLS TRIB., June 14, 1993, at 1,4.

59 U.S. CENSUS BUREAU, STATE GOVERNMENT FINANCES: 1992 at 50 (1992); *See also Natelsonés Numbers Flawed*, BOZEMAN DAILY CHRON., Oct. 21, 1993, at 1.

60 *Natelson Sticks by His Guns*, BOZEMAN DAILY CHRON., Oct. 22, 1993, at 1.

61 *See* MONTANANS FOR BETTER GOVERNMENT, WHY WE SHOULD VOTE ON THE INCOME TAX HIKE (H.B. 671), WHAT HOUSE BILL 671 WILL COST YOU, QUESTIONS AND AN-

cepts appropriations from the initiative and referendum process, Professor Natelson took some pains to avoid saying explicitly that suspension was a central engine in his plan to "reinvent" Montana government, a plan which called for giving parents tax vouchers to send their children to private schools, including the religiously affiliated, and to sharply reduce if not eliminate funding for higher education to be replaced by direct financial support to students who would then take their vouchers to attend the school of their choice.[62]

Montanans for Better Government began circulating the referendum petitions in July. By early September, the group had gathered the signatures of the five percent needed to place Referendum 112 on the ballot.[63] Later that month, the group achieved the fifteen percent threshold for suspending HB 671. As a result, on September 23, Professor Natelson announced, "Today, I am formally announcing the suspension of House Bill 671."[64] Four days later, Secretary of State Mike Cooney informed Governor Racicot that he had certified sufficient signatures to suspend HB 671.[65]

A total of 89,663 Montanans signed the petition for Legislative Referendum 112, equivalent to 22 percent of the vote for governor in 1992.[66] Further, the 15 percent threshold had been passed in 90 out of the 100 state representative districts.[67] This was a significant accomplishment; some knowledgeable observers, including the author, believed that Natelson's group would have difficulty attaining the 15 percent threshold within the six months allowed.[68] But the Natelsonites proved themselves dedicated and organized, and utilized the help of other groups, including the Montana chapter of the Perot organization, United We Stand America.[69]

Suspension of HB 671 put the state's biennial budget out of balance, and the Governor called the Legislature into special session to rebalance

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SWERS ABOUT THE PETITION (1993) (three one page flyers issued by Montanans for Better Government in June, 1993) (on file with author).

62 Jim Granbery, *Natelson Offers More Ideas*, BILLINGS GAZETTE, Nov. 9, 1993, at 1, 8.

63 David Fenner, *Natelson's Odds Are Better*, BILLINGS GAZETTE, Sept. 20, 1993, at 1B, 5B; *Anti-tax Petition Earns Spot on Ballot*, BOZEMAN DAILY CHRON., Sept. 5, 1993, at 7.

64 David Fenner, *Natelson Knocks Off Tax Boost*, BILLINGS GAZETTE, Sept. 25, 1993, at 1.

65 *Tax Increase Suspended*, BOZEMAN DAILY CHRON., Sept. 28, 1993, at 1.

66 *Bradley: Block Income Tax Suspension*, BILLINGS GAZETTE, Oct. 23, 1993, at B1.

67 MONTANA SECRETARY OF STATE, STATUS OF SIGNATURES GATHERED FOR INITIATIVES: SIGNATURES GATHERED FOR PETITION NO. IR 112 (Oct. 22, 1993) (on file with author) [hereinafter STATUS OF SIGNATURES].

68 Mike Dennison, *Natelson's Petition: Not Necessarily A Done Deal*, GREAT FALLS TRIB., July 10, 1993, at 1, 8.

69 Gail Schontzler, *Petition Backers Tout 2,000 County Signatures*, BOZEMAN DAILY CHRON. Aug. 30, 1993, at 3.

it.[70] Since raising replacement revenue through any new tax or increasing an existing tax was not an option (these also could be easily suspended), the Legislature had no choice but to cut spending by approximately $47 million, of which 65 percent came from cuts in funding to the public schools and the state university system.[71] The bulk of the remaining 35 percent came from programs that serve the poor.[72]

THE CONSTITUTIONAL ISSUES ARE RAISED

On October 19, 1993, Alan Nicholson, the author, and several other plaintiffs filed suit in state district court challenging the referendum-suspension process as it applied to HB 671.[73] The legal issues raised may be summarized as follows:

- The people, in their capacity as lawmakers under the initiative and referendum process, are bound by the same constitutional constraints as the state legislature. Just as the state legislative majority is expressly prohibited from acting with the clear effect of unbalancing the state budget; the people are similarly prohibited.
- The state constitution excepts "appropriations" from the initiative and referendum process. A general revenue bill explicitly designed to pay for ongoing general fund appropriations is so interwoven with appropriations that it must be off limits to the petition process.
- Suspension of a legislative act by a minority of voters constitutes rule by the minority in violation of the "one person-one vote" rule under the Equal Protection Clause of the U.S. Constitution's 14th Amendment.
- A public vote on a challenged law like HB 671 is appropriate. But a negative public vote may permissibly have only a prospective effect, since having a retroactive effect would violate the constitutional prohibition against unbalancing the budget.

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70 STATE OF MONTANA PROCLAMATION: CALL FOR THE 53RD LEGISLATURE FOR A SPECIAL SESSION (Oct. 8, 1993).

71 Mike Dennison, *Session Stressed Spending Cuts, Not Reinvention*, GREAT FALLS TRIB., Dec. 21, 1993, at 1,8.

72 *Id.*

73 *Suit Filed to Undo Suspension Of Tax*, BILLINGS GAZETTE, Oct. 19, 1993, at 3B.

THE STATE CONSTITUTIONAL ISSUES

Forty-eight states have either a constitutional (35 states) or statutory (13 states) requirement that the state operate with a balanced budget.[74] Of these, 36 states require that the legislature enact a balanced budget.[75] Of the 20 states permitting suspension by referendum, 15 require that the legislature enact a balanced budget;[76] of the five remaining states, the burden rests with the governor to submit a balanced budget.[77] Most importantly, 39 states require that the fiscal year-end budget must be in balance, and eighteen of the twenty states providing for the referendum-suspension process require an end of the year balanced budget.[78] Thus, it is clear that legislatures (and sometimes governors) are limited in their budgetary discretion. They may not purposefully submit an unbalanced budget and, by implication, they may not take later actions which have the effect of unbalancing the budget. To do so would be inimical to their constitutional responsibilities.[79]

However, in Montana and 24 other states, laws duly enacted by elected representatives can be suspended by a referendum petition pending a statewide election.[80] In Montana, the suspension of HB 671 had the immediate effect of unbalancing the budget.[81] The petitioners in *Nicholson* argued that the people may not do what the legislature is forbidden to do under the state and Federal constitutions.[82] If, for example, the legislature 1) called itself into special session (or was called into being by the governor), 2) explicitly suspended an existing tax, reduced taxes, or increased spending without providing the revenue to pay for it, and then 3) adjourned, the outcome would be clear — the legislature would have acted in an unconstitutional manner and would be called to account in the courts of the state.[83]

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74 GENERAL ACCOUNTING OFFICE, BALANCED BUDGET REQUIREMENTS: STATE EXPERIENCES AND IMPLICATIONS FOR THE FEDERAL GOVERNMENT 10 (1993) [hereinafter BALANCED BUDGET REQUIREMENTS]; Choi, *supra* note 12, at 336-37.

75 BALANCED BUDGET REQUIREMENTS, *supra* note 74, at 15; Choi, *supra* note 12, at 336-37.

76 BALANCED BUDGET REQUIREMENTS, *supra* note 74, at 15; Choi, *supra* note 12, at 336-37.

77 BALANCED BUDGET REQUIREMENTS, *supra* note 74, at 15; Choi, *supra* note 12, at 336-37.

78 BALANCED BUDGET REQUIREMENTS, *supra* note 74, at 17; Choi, *supra* note 12, at 336-37.

79 BALANCED BUDGET REQUIREMENTS, *supra* note 74, at 21.

80 Choi, *supra* note 12, at 336-337.

81 STATE OF MONTANA PROCLAMATION, *supra* note 70.

82 Calvert, *supra* note 54, at 24; Plaintiffs' Brief In Support of Motion For Partial Summary Judgement, *supra* note 16, at 15-19.

83 Plaintiffs' Brief In Support of Motion For Partial Summary Judgement, *supra* note 16, at 5-6, 13, 14.

Alternatively, imagine a system that would allow a small minority of the legislature to convene itself by voluntary self-selection, enact laws that unbalanced the budget, and then go home. Such action could not withstand legal challenge. Yet, the analogous happened in Montana, and can happen in other states by virtue of the suspension-by-referendum process. Through this process, a minority of voters, acting in their capacity as citizen-legislators, can sign petitions which suspend a state law and thereby unbalance the budget contrary to the constitutional requirements imposed on the legislature.

It is a well-established principle in constitutional law that "the People" are bound by the same constitutional limitations imposed on the legislature.[84] Consider the following example: Suppose that, by referendum, the people enacted a law denying civil rights to homosexuals. Courts would view such a group-defined denial as a clear violation of the 14th Amendment's Equal Protection Clause.[85] In *Hunter v. Erickson*, the U.S. Supreme Court declared, "[T]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remained unrepealed."[86] Additionally, in *Kennedy Wholesale v. State Board of Equalization*, California's high court said, "[N]either the legislator nor the voters may enact a law of the nature that exceeds a limitation on the state's lawmaking power, such as the right of free speech."[87]

Nonetheless, as Professor Eule has pointed out, state constitutions which provide for direct democratic devices proceed from a perspective different from that of the Federal Constitution.[88] In those state constitutions which say "the people reserve to themselves the powers of initiative and referendum," there is an implication that "the People" have greater legislative authority than the legislators themselves.[89] But Eule has concluded on this point that "state courts generally articulate the view that state constitutional challenges to voter legislation are subject to the same standard of review applied to laws passed in the ordinary manner."[90] Therefore, just as the legislature may not unbalance the state's budget, neither may the people.

As noted above, most states providing for the suspension of a contested legislative enactment also except certain kinds of laws from this process. The most common exemptions are legislatively-declared

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84 ZIMMERMAN, *supra* note 6, at 54, 82-83; MAGLEBY, *supra* note 9, at 49-51.

85 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

86 393 U.S. 385, 392 (1969).

87 806 P.2d 1360, 1364 (Cal. 1991).

88 Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1545-48 (1990).

89 *Id.* at 1545 (citing CAL. CONST. art. IV, § 1).

90 *Id.* at 1548.

"emergency" laws and appropriations.[91] Montana and thirteen other states except appropriations from referendum petition.[92] Ironically, only two states (California and Ohio) fence off revenue measures as well.[93] Thus, at least twelve states are in the position of having their general funding decisions modified by subsequent petition drives which can suspend the revenues upon which those appropriations depend.

Consequently, anti-tax and "government-is-bad" zealots have an opportunity to cut the size of government by denying it expected revenues. Legislatures faced with the suspension of expected income and an unbalanced budget may be called into a special session to fix the problem. They will have three options with which to proceed:

- Replace the challenged revenue measure with another one; this outcome is highly unlikely given the political realities.
- Re-enact the challenged revenue measure in amended version specifying that it is designed to pay for specific general fund appropriations; again, political problems exist.
- Cut appropriations to rebalance the budget; this is the most likely choice for legislators to make.

Given the actual effect of suspension of a major tax designed to pay for general fund appropriations (an unbalanced budget), and given political reality (legislators dare not defy the "will" of the voters by reimposing the revenue), the practical effect of tax suspension is to change appropriations by the referendum process which is prohibited by the constitutions of 14 states, including Montana.[94] Plaintiffs in *Nicholson v. Cooney*[95] raised this issue by arguing that:

> The Constitution excepts appropriations measures from the popular initiative and referendum process. Yet the current referendum measure, by eviscerating the general revenue act upon which numerous appropriations were based, did just that — it inevitably resulted in a modification of appropriations — an area off limits to the popular referendum under Article III, § 5 of the Montana Constitution.[96]

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91 BOTT, *supra* note 11, at 282.

92 *Id.*

93 CAL. CONST. art. II, § 9(a); OHIO CONST. art. 1, § 1(d).

94 Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, *supra* note 16, at 15-27.

95 877 P.2d 486, 491 (Mont. 1994).

96 Appellants' Opening Brief at 26-27, Nicholson v. Cooney, 877 P.2d 486 (Mont. 1994) (No. 93-657).

Since there is no Montana case directly on point regarding whether a general revenue bill is off limits if designed to pay for general fund appropriations, plaintiff-appellants cited to cases from Maryland and Michigan.[97] In *Dorsey v. Petrott*, Maryland's highest court said:

> [R]evenue measures to raise the public funds to pay for appropriations of the Budget Bill are excepted from the operation of the Referendum Amendment, although the revenue thus procured is disbursed by the Treasury through the provisions of the Budget without any express authorization in the money bill for its disbursement.[98]

The Maryland example is analogous to the situation involving the Montana legislature's income tax bill suspended by Referendum 112. While the word "appropriation" is not mentioned, the plain purpose of the bill was to pay for general fund appropriations and provide for a balanced budget.[99] To further bolster their argument, the plaintiffs cited the following language from the Legislative Fiscal Analyst's office in their brief before the Montana Supreme Court:

> The 1993 Legislature faced an extremely difficult financial situation. Four of the major accounts in state government were projected to have combined deficits of 280.3 million dollars by the end of the 1995 biennium. Through budget reductions, revenue increases, and revenue estimate revisions, the legislature addressed the projected deficits in all four accounts and adopted a balanced budget for the 1995 biennium.[100]

Plaintiffs told the Montana Supreme Court:

> The 1993 legislature passed appropriations bills and HB 671 for a singular purpose — to provide for state government while balancing the budget. Thus, like the acts considered [in Maryland and Michigan], those acts must be read *in pari materia*, and revenue bills which fund current appropriations, like H. B. 671, must be exempt from the revenue process. Doing so prevents abuse of the referendum process by those who wish to use the process indirectly to cut appropriations, and prevents use

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97 *Id.* at 37-40.
98 *Id.* at 38 (quoting Dorsey v. Petrott, 13 A.2d 630 (Md. 1940)).
99 *Id.* at 33, 41.
100 *Id.* at 6, n.10.

> of the referendum process to force an unconstitutional unbalancing of the State's budget.[101]

The plaintiffs' final state constitutional argument was that suspension of the state income tax bill by the petition process violated Article VIII, § 2 of the Montana Constitution which states: "The power to tax shall never be surrendered, suspended, or contracted away."[102] Articles III, Sec. 5 (2) and VIII, § 2 are in apparent contradiction since both mention "suspension."[103] Thus Nicholson and other petitioners asserted:

> That term [suspend] obviously must be interpreted to mean the same thing in both of those articles. Thus, while the Montana referendum provides generally for suspension of legislation, *tax measures* may not be suspended. As noted above, there are good reasons for this exception. The ability of a small minority of voters to suspend a tax measure would seriously handicap government's ability to provide for general operations and could, as here, result in a substantial budget deficit.[104]

THE EQUAL PROTECTION ARGUMENT

The central argument in *Nicholson* involves the 14th Amendment and its relevance to the referendum-suspension process in the twenty states that permit it — especially those that fence off appropriation bills, but not revenue bills from a public petition, suspension, and general election vote. In Montana, to qualify for a general vote, the referendum petition must gather signatures equivalent to five percent of the vote for governor in the last election and get them in at least one third of the state house districts.[105] But due to what may have been an oversight on the part of state constitution framers, there is no statewide percentage requirement to suspend a contested law.

Thus, those who object to a law need only gather the requisite number of signatures (15 percent of the vote for governor in each of 51 districts) to successfully suspend it.[106] And since the total vote for governor varied considerably in aggregate across the 100 house districts, the 15 percent threshold varied accordingly, ranging from 378 to 1,030 signatures across the 100 house districts.[107] According to estimates made by the Secretary of State's office, a well-organized petition drive that

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101 *Id.* at 41.
102 *Id.* at 42-43.
103 *Id.* at 43.
104 *Id.* (emphasis in orginal).
105 MONT. CONST. art. III, §§ 5(1-2).
106 *Id.*
107 STATUS OF SIGNATURES, *supra* note 67.

concentrated on the 51 house districts with the smallest aggregate vote for governor could qualify suspension with only 25,914 valid signatures, equivalent to only 6.4 percent of the statewide vote for governor in the 1992 election.[108]

Further, the state constitution provides no remedy in the process for those who wish to object. There is no provision for a counterpetition drive to prevent suspension by a small minority of voters, and thus appellants argued that:

> There is no practical remedy available to the majority to undo the damage of the suspension. Once the petitioners present 15 percent of the signatures from the requisite 51 districts, suspension is automatic and immediate. No counter-suspension petition is possible, be it by an equivalent 15 percent minority or even by a majority of voters. They indeed become the "silent majority," completely disenfranchised in this process.[109]

The practical disenfranchisement of the majority under Montana's suspension-by-referendum petition process is the central and most significant constitutional issue raised *Nicholson.* In this case, Alan Nicholson and the other appellants asked the Montana Supreme Court to break new constitutional ground by applying the 14th Amendment's "one person-one vote" rule to the suspension process of a state law by a minority of voters.[110] The appellants also asked the Court to apply the strictest scrutiny to the state's defense in demanding that the state show a compelling interest in justifying its defense of minority rule.[111]

In 1963 and 1964, the U.S. Supreme Court, in a series of landmark decisions, interpreted the Equal Protection Clause of the 14th Amendment as applying to the districting and apportionment of electoral districts.[112] In the leading case, *Gray v. Sanders*,[113] the Court struck down a Georgia electoral law which gave disproportionate weight to rural counties in the state's primary election. Reasoning that Equal Protection implies equality in the value of the votes of all the state's citizens, the Court asked:

> How then can one person be given twice or ten times the voting power of another person in a statewide election

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108 *As Few As 25,914 Signatures Could Suspend Tax*, BOZEMAN DAILY CHRON., May 25, 1993, at 1.

109 Appellants' Opening Brief, *supra* note 96, at 21-22.

110 *Id.* at 17-24.

111 Appellants' Reply Brief, Nicholson v. Cooney, 877 P.2d 486 (Mont. 1994) (No. 93-657).

112 BOTT, *supra* note 11, at 187-88.

113 372 U.S. 368 (1963).

> merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographic unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.[114]

The Court stated that "state power" may not be "used as an instrument for circumventing a federally-protected right" and concluded that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote."[115] In *Wesberry v. Sanders*,[116] the majority opinion clearly stated that the right claimed was fundamental saying, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[117]

In *Reynolds v. Sims*,[118] the Court addressed a common state practice of granting counties equality of representation in the upper house, and failing to base lower chambers completely upon the principle of representation of people, either by simple failure to redistrict after the census or by giving each county a minimum of one representative. The former tends to give disproportionate voting power to rural voters while the later results in additional representatives for the more populous counties. In both instances, the result undervalued the votes of urban dwellers and overvalued those living in rural areas.[119] In this Alabama case, the Court noted that the population variances from largest to smallest counties ranged from sixteen-to-one, in the state house, to forty-to-one in the state senate.[120] For the Court, these facts meant patent violation of the principle of "one person-one vote," saying, "[T]he right of suffrage can be

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114 *Id.* at 379-80.

115 *Id.* at 381 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

116 376 U.S. 1 (1964).

117 *Id.* at 17.

118 377 U.S. 533 (1964).

119 *Id.* at 545-48.

120 *Id.* at 545.

denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise,"[121] and that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."[122]

The key principle in *Reynolds* is that purposive institutional arrangements which ensure rule by a minority clearly violate the equal protection requirements of the 14th Amendment.[123] One person-one vote, rather than being an abstract ideal of equality which governments must honor, is a practical political requirement for a functioning democracy.[124] The Court asserted:

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a state could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.[125]

The Court has not been hesitant in extending the reasoning established in *Reynolds* to other elections. In *Hadley v. Junior College District*, Justice Black, writing for the majority opinion, reasoned:

> If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. . . . It might be suggested that equal apportionment is required only in 'important' elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another.[126]

Finally, Justice Stevens, concurring in an opinion requiring that New Jersey use every reasonable means to create districts equal in population, summarized the implications of equal protection and voting equality this way:

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121 377 U.S. at 555.

122 *Id.* at 563.

123 Appellants' Reply Brief, *supra* note 111, at 7 (citing Reynolds v. Sims, 377 U.S. at 565).

124 *Id.* at 7-8.

125 377 U.S. at 565.

126 397 U.S. 50, 55 (1970).

> The Equal Protection Clause requires every state to govern impartially. When a State adopts rules governing its election machinery or defining its electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment — whether racial, ethnic, religious, economic, or political — that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.[127]

The key assertion made by appellants in *Nicholson* is that the majority has been effectively disenfranchised by the state constitutional language which permits a small minority of voters to suspend a law they object to and whose suspension attempt faces no countervailing possibility of a counter-petition. What Article III, § 5, cl. 2 does is give greater weight to those who sign the petition — the minority — than to those who do not. What is key here is that suspension is a legislative act, as fully effective as if the legislature had itself met and suspended the contested law, but the difference is that the legislature does in a formal sense represent the majority, at least in two ways: first, requiring the legislature to decide by majority, and second, requiring, following the principle established in *Reynolds*, that legislative majorities at least reasonably represent population majorities.

Thus, the discriminatory effect inherent in the suspension process is that greater weight is given to those who vote "no" by signing a petition compared to those who might vote "yes" were they to have the opportunity to do so (which they do not). It does no good to say that the "yes" voters will have their chance at a later date, in this instance fourteen months after the fact.

In Montana, the damage from cuts in appropriations had already occurred, making the actual vote on HB 671 on November 8, 1994 a dead letter.[128] Budgets for education and social services were cut, and in a result that must have been particularly painful given the relatively favorable support that R112 enjoyed in rural areas, most drivers' license exam stations in rural counties were closed as well.[129]

Those challenging the suspension provisions of the Montana Constitution reiterated again and again that the act of signing a petition to suspend a legislative act is a "vote" because if the requisite threshold is

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127 Karcher v. Daggett, 462 U.S. 725, 748 (1983).

128 Appellants' Opening Brief, *supra* note 96, at 22-24.

129 David Fenner, *Bill Would Cut License Stations*, BILLINGS GAZETTE, Dec. 10, 1993, at B6; Charles Johnson, *Session Ends With No Tax Relief*, GREAT FALLS TRIB., Dec. 19, 1994, at 1, 13.

achieved the "vote" suspends the act.[130] Since the right to vote is deemed to be a fundamental right,[131] any alleged undermining of that right by state action warrants strict scrutiny in which the government must show a "compelling interest" — in this case, that those opposing an enacted law be given greater weight than those who either support the law or those who may be neutral toward it.[132] In short, just as race, gender, and geographic locale are suspect classifications, a voting scheme that gives greater weight to the "votes" of those who sign a petition (by definition a small numeric minority) and lesser weight to the majority who have not, would appear to be of dubious constitutionality under the one person-one vote principle.

Yet the U.S. Supreme Court appeared to depart from the principle of "one person-one vote" in the troubling case of *Gordon v. Lance*.[133] In this case, the Court upheld as not violative of the Equal Protection Clause a West Virginia requirement that an extraordinary majority vote is required to pass local bond issues.[134] In this case, a favorable majority of 51.55 percent had been obtained, but under the rule requiring an extraordinary majority of 60 percent, the bond issue failed.[135] Citing the fact that extraordinary majority requirements are imbedded in the U.S. Constitution to achieve certain kinds of enactments, e.g., to propose and ratify amendments to the U.S. Constitution, the Court in *Gordon* reasoned that a supermajority threshold, because it was not intended to discriminate against any particular race, class, or gender, did not violate the Equal Protection Clause.[136]

But, in *Gordon*, the Court erred. There is an identifiable class of citizens that is disadvantaged. The majority of voters who voted "yes" had been disenfranchised because their votes were given less weight than those who had voted "no."[137] Perhaps in recognizing that, in this case, they had gone out on a limb in relation to the one person-one vote principle, the Court stated, "We intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group. Nor do we decide whether a State may, consistently with the Constitution, require extraordinary majorities for the election of public officers."[138]

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130 Appellants' Opening Brief, *supra* note 96, at 17-24.

131 *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

132 Appellants' Reply Brief, *supra* note 111, at 12 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665-67 (1966)).

133 403 U.S. 1 (1971).

134 *Id.* at 7.

135 *Id.* at 3.

136 *Id.* at 5-7.

137 William L. Bruning, Comment, *Extraordinary Majority Requirements in Municipal Bond Elections*, 19 KAN. L. REV. 263, 273-74 (1971).

138 403 U.S. at 8, n. 6.

In the Montana case, the suspension language of the constitution gives "veto power to a very small group."[139] The small group may be motivated by a wish to cut taxes or to cut government; or it may be motivated by other reasons, e.g., to suspend a law protecting homosexuals against discrimination, to attack the sovereign authority claimed by Native American tribes, or to broaden the grounds under which a woman might elect to chose an abortion. In theory, the motivation behind the veto does not matter; in practice, it should. A small minority can hold the state's financial health in peril or deny civil rights protections to specific and vulnerable segments of the population because it has the authority to suspend any new tax or tax increase enacted.

THE STATE ANSWERS

On March 24, 1994, the State responded to the appellants' brief, as required by the state constitution.[140] Their response may be briefly summarized as follows. First, while acknowledging that the budget was imbalanced by the suspension of HB 671, the State argued that the legislature has the duty to adjust the budget to correct for "unanticipated revenue declines" brought on by "factors which cannot always be foreseen with even a reasonable degree of accuracy."[141]

Second, the State argued at great length that since HB 671 did not mention "appropriation," it was therefore not excepted as an "appropriation" measure under the Montana Constitution.[142] Rather it was "a pure revenue-raising measure" because "it contains no provision for expenditures."[143]

Third, counsel for the respondent Cooney argued that since "the people," acting through their legislative capacity, may do all that the legislature can do, the voters (in this instance a small group of them) may, like the legislature, suspend or repeal a tax. Furthermore, in so doing, the tax power of the state has not been suspended or surrendered away.[144] Rather, it is the case that a particular tax measure has been temporarily suspended pending a final vote. Again, the failure to address the central issue of whether the people may do what the legislature may not, unbalance the budget, was not explicitly addressed in the State's reply.

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139 Appellants' Reply Brief, *supra* note 111, at 11.

140 Brief of Respondent and Cross Appellant Mike Cooney, Nicholson v. Cooney, 877 P.2d 486 (Mont. 1994) (No. 93-657).

141 *Id.* at 24-25 (quoting State *ex rel.* Tipton v. Erickson, 19 P.2d 227, 230 (Mont. 1933)).

142 *Id.* at 8-12.

143 *Id.* at 14.

144 *Id.* at 19-25.

Finally, in response to the 14th Amendment arguments raised by plaintiff-appellants, the State's response was limited to two counter-assertions. First, "one person-one vote" only applies to the districting and apportionment of legislative seats with the purpose of ensuring that each person's vote does not weigh more or less than any other voter's, and that the suspension process did not cause "disparate treatment of different classes of people."[145] Missing from the State's reply was acknowledgment that "one person-one vote" was not the *end* of Equal Protection, but rather the *means* to achieve a result — that a majority of people can elect and be represented by a majority of legislators. And, as asserted above, the suspension language of the Montana Constitution can only lead to disparate treatment in which "no" votes are given greater weight than "yes" votes.

In reply, appellants addressed all objections raised by the state. In particular, appellants devoted considerable attention to the Equal Protection issues raised in the case. Arguing from *Reynolds,* Nicholson asserted that denial of equal voting power through the suspension device warranted "strict scrutiny" because the right to vote was fundamental.[146] Thus, the State had to establish a compelling interest justifying minority rule, which it could not do:

> In this case, there is no important or overriding state interest in allowing a small minority of voters to undo legislation passed by representatives elected by the majority. The interest of the State in protecting the referendum power does not require allowing such minority control of the fate of legislation duly passed by the majority via that majority's elected representatives.

Allowing such tyranny by the minority does not even meet the rational basis test. The right of referendum may be exercised rationally since it provides for a vote by all of the electorate on a particular bill. There is no rational reason that a bill must be suspended pending that vote. The rational approach, instead, would be to allow the legislature to pass bills and have those bills remain unaffected until a referendum vote, in which all the electorate has a chance to participate, repeals or upholds them.[147]

THE DECISION OF THE MONTANA SUPREME COURT

On June 30, 1994, the Montana Supreme Court voted 5 to 2 in favor of the State, upholding the State's referendum-suspension processes in

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145 *Id.* at 26-29.

146 Appellants' Reply Brief, *supra* note 111, at 12-13.

147 *Id.* at 12-13.

all particulars.[148] The result was not surprising. Oral argument had been held in May in the city of Billings in a large auditorium to allow local schoolchildren to watch the majesty of the judicial process.[149] There, as the attorneys' arguments echoed in the high-ceilinged chamber and as many junior high children tried to listen politely in what was probably total bafflement (much to their credit), the line of questions from the Bench clearly signaled that no new legal ground was to be broken by the court majority that day or in their subsequent written opinion.[150]

First, the Court majority, speaking through Justice John Harrison, ruled that the balanced budget requirement does not place limits on the voters:

> Article VIII, § 9 places a restriction on the legislature, not on the people. . . . The reaction of the executive and legislative branches in calling a special session of the legislature to deal with an unforeseen decline in revenue (or increases in expenditures) might have been prompted by a number of causes. Calling a special session to reconcile expenditures with anticipated revenues was entirely proper. The purpose of the balanced budget provision is therefore fully compatible the operation of the referendum process.[151]

Second, the Court agreed with the State that HB 671 was not an "appropriation" measure and therefore was not excepted from the initiative and referendum process because the tax bill did not explicitly say that the anticipated revenue was tied to general fund expenditures.[152]

Regarding the contention that a suspension constituted the State's suspension and surrender of its taxing power, the Court majority replied:

> Plaintiffs fail to distinguish between a tax measure and the taxing power. There has been no surrender or suspension of the taxing power; Referendum 112 has merely resulted in the suspension and referral of one measure by which the taxing power is exercised. . . . The State of Montana is still collecting taxes, and will continue to do so, under Chapter 634 [House Bill 671] if the voters approve it, or under the law in existence prior to

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148 Nicholson v. Cooney, 877 P.2d 486 (Mont. 1994).

149 Jim Granbery, *Did The Petition Drive Trample Rights?*, BILLINGS GAZETTE, May 14, 1994, at 1, 14.

150 The writer's observation at the Supreme Court hearing is that the justices for the most part were not interested in exploring new ground, especially as it related to the Equal Protection Clause.

151 877 P.2d at 491 (footnote omitted).

152 *Id.*

> the legislative enactment of Chapter 634 if the voters reject it.[153]

Finally, in its response the Equal Protection issue, the Court espoused the narrow view offered by the State that "one person-one vote" only applies to reapportionment cases and cases involving the segregating of a "class or segment of the population."[154] The court continued, "Here, the majority, through a constitutional referendum provision, has affirmatively granted certain powers to a minority. The majority retains the power to eliminate the referendum provision from the Montana Constitution or to amend it to increase the numbers of signatures needed to put a referendum on the ballot."[155]

This interpretation of Equal Protection by the Court majority was achieved in the body of two type-written pages of text, citing only two cases, *Reynolds* and *Gordon*, in justifying their conclusion that the majority had "affirmatively granted certain powers to a minority."[156] The assertion that the one person-one vote rule is a means toward ensuring majority government was simply not addressed. Rather, it was sidestepped in favor of a justification offered independently of both the relevant case law and the historic context.

For example, it notes that there is virtually nothing in the minutes of the state constitutional convention that speaks to the motives of the delegates who approved the referendum-suspension language in the 1972 Montana Constitution. And of course, it would be absurd to imply that "the majority," in approving the new Constitution, had in a rational and informed way given its authority to the minority identified in the referendum process.

In his dissent in *Nicholson*, Associate Justice Terry Trieweiler (joined by Justice Hunter) criticized the majority for misreading the requirements of *Reynolds*. Trieweiller felt *Reynolds* was clearly about ensuring representative government by majority rule and that the one person-one vote principle was the means to that end.[157] Most importantly, Justice Trieweiler recognized that the right of a minority to suspend a law ignores that principle:

> [T]he fact that both Montana's House of Representatives and Senate are apportioned on a population basis is of no benefit to the majority who elected them if a minority can routinely and effectively veto their efforts in a process which provides no opportunity for those who are

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153 *Id.* at 492.
154 *Id.* at 489-90.
155 *Id.* at 490.
156 *Id.*
157 *Id.* at 496.

> opposed to the proposed referendum to cast their vote in opposition.[158]

He observed, "The argument that those who oppose Referendum 112 will ultimately have an opportunity to express their view on November 8, 1994, is of little constitutional significance, considering the irreversible suspension of the majority's decision for the intervening 14 months."[159] Trieweiler also agreed with appellants that R. 112 had unbalanced the budget, that the voters could not do that, and that the income tax bill in dispute was so intertwined with general fund appropriations that suspension was tantamount to a cut in appropriations excepted from the initiative and referendum process.[160] In October, the U.S. Supreme Court denied certiorari, and *Nicholson's* career as a vehicle for challenging minority rule by the suspension process ended.[161]

DISCUSSION

The initiative and referendum processes epitomize the populist tradition in American democratic thought and practice. They assume that the majority is capable and willing to make significant policy determinations on its own, and assume also that government, even well-established representative government, is corruptible and often is corrupt. These devices, products of late 19th and early 20th century zeal for reform, were based upon some real fears.[162] It appeared that state governments, especially the state legislatures, were often controlled by well-heeled special interests.[163] So, it was reasoned, the citizens needed a method to get around unresponsive institutions.[164] In short, the initiative and referendum processes envision representative government subject to direct checks by the people. Voicing this populist theory of governance, Senator James Abourzek (D-SD), in arguing for an amendment to the U.S. Constitution to allow for a national initiative process, said:

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158 *Id.* at 496-98.

159 *Id.* 496.

160 *Id.* at 494-96, 498-99.

161 The grounds cited by the Assistant Clerk of the Court were that appellants had failed to file in a timely manner. The issue was narrowly technical. Attorneys for Nicholson used the Montana filing deadline requirements, which were slightly different than those used by the U.S. Supreme Court; the appeal was formally filed on October 12, well within the Montana standard, but was 14 days past the deadline by U.S. Supreme Court standards. An appeal of this rejection was then filed, but to no avail. By his own admission, the lead attorney for appellants had erred. But the probability of the Court accepting jurisdiction was, in any case, very small. Given the crowded docket, the absence of conflicting case law on the question, and the fact that the state legislature had cut the spending (thus raising the issue of mootness), the chances of the Court granting certiorari had been small to being with.

162 ZIMMERMAN, *supra* note 6, at 68-70.

163 MAGLEBY, *supra* note 9, at 20-25.

164 *Id.*

> I believe that true democracy must rest on the fundamental belief that the people are sufficiently intelligent, sufficiently discerning, and sufficiently capable to govern themselves. In the representative form of government we have today, we trust the judgment of the people to elect our leaders. Throughout our history this Nation has been well served by the judgment of the people. If we accept the premise that the people can choose between good and bad leaders, I think we must accept the notion that the people can choose between good and bad laws.[165]

In 1911, Congressman John Raker (D-CA), an early supporter of the direct democratic process, succinctly summarized the case for initiatives, referenda, and recall elections:

> The Initiative, Referendum, and Recall are closely connected parts of the same political theory. The people elect representatives; if these representatives don't carry out the will of the people, then the people initiate legislation. If their representatives transgress the will of the people, then the people, through the referendum, repeal the laws which their representatives have made. . . . If [they] do violence to the will of the people as expressed in their laws, then the people reserve the right to recall the interpreters as well as the makers or executives of law. . ε. This political theory constitutes democracy in action.[166]

Most commentary on direct democratic devices has focused on the initiative rather than the popular referendum; but the problems identified with the initiative apply with even more force to the popular referendum, especially where the contested law has been suspended pending a popular vote.[167]

First, voters often do not have the knowledge and motivation to sort out the often highly detailed ballot questions presented to them.[168] David Magleby, in a groundbreaking study, provides extensive evidence that many voters, confused and intimidated by the length and complexity of initiative propositions, do not take the time to understand these pro-

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165 *Voter Initiative Constitutional Amendment, 1977: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 15 (1977) [hereinafter *Voter Initiative Constitutional Amend.*].

166 *Id.* at 246.

167 *Id.* at 59-65; ZIMMERMAN, *supra* note 6, at 91-95.

168 MAGLEBY, *supra* note 9, at 127-44.

positions on which they vote.[169] Magleby states that this is especially the case for less-educated voters:

> Generally, only the better educated can understand the issues, endure the length and complexity of the wording, and cast knowledgeable votes. The universalist ethic of the early and modern advocates of direct legislation is not supported in practice. Less educated voters are less likely to participate on propositions, and the reasons for their lower levels of participation are now partially apparent: they are confused by the propositions and unable to cope with the task of informing themselves about them.[170]

Consider, for example, the travail of California's voters where the initiative, as a source of major legislative action, has been well-established. In the 1990 general election, California voters faced 28 separate initiatives and legislative referendums.[171] The voter information pamphlet filled two volumes totaling 221 pages.[172] By comparison, Californians got lucky in 1992 when there were only 13 ballot issues, filling 94 pages of the official voter information pamphlet.[173] Not surprisingly, evidence suggests that only a minority of voters have very specific and accurate information about the issues they are called upon to decide.[174]

Symptomatic of this generalization, witness Proposition 187 in California. One of the most controversial voter initiatives in recent years, "Prop 187" seeks to cut off most state government services to illegal immigrants and their children and requires service providers like medical personnel and school teachers to check on the citizenship of their clients.[175] Despite the most intense, and often very critical, publicity directed at Prop 187, 44 percent of registered voters, in September 1994, could voice no opinion on Prop 187 after its title was read to them.[176] But when a brief description was read, the percentage unable to voice an opinion declined to 9 percent.[177] By mid-October these numbers had

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169 *Id.*

170 *Id.* at 144.

171 SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (Nov. 6, 1990); SECRETARY OF STATE, CALIFORNIA SUPPLEMENTAL BALLOT PAMPHLET: GENERAL ELECTION (Nov. 6, 1990).

172 *Id.*

173 SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (Nov. 3, 1992).

174 MAGLEBY, *supra* note 9, at 139-44.

175 Cathleen Decker, *Voters Back Service Cuts For Illegal Immigrants*, L.A. TIMES, May 29, 1994, at 1.

176 Paul Feldman, *62 Percent Would Bar Services to Illegal Immigrants*, L.A. TIMES, Sept. 14, 1994, at 1.

177 *Id.*

declined to 30 percent (label only) and 8 percent (label + description), respectively.[178] Prop 187 passed easily in November only to be quickly blocked by a Federal district court.[179]

Further, ballot questions are often "hot button" issues in which the fears and ignorance of voters can be easily exploited. Like Proposition 187, proposals to cut taxes, prevent new taxes, or reduce government spending have similar powers of persuasion since they appeal to the passion and perception rather than the intellect, and they are popular.[180] Between 1978 and 1992, 399 statewide initiatives appeared on the ballot, and of these, better than one in four (26 percent) concerned taxes.[181] But at least in the initiative process, there is the opportunity for extensive public debate prior to the vote.[182]

Not so for the popular referendum. In the popular referendum, the contested law is already effectively voided prior to any receipt of accurate information by the voters, and it is nullified long before the actual vote is taken.[183] Rather, in ways only determined by a petition's supporters, signatures are gathered here and there without a statewide public discourse about the attempt to repeal and its implications.[184] In short, the initiative admits the possibility of a public debate, while the suspension of an enacted law by referendum petition does not.

Secondly, the initiative and referendum often oversimplify the choices that voters are obliged to make. The initiative, and especially the petition for a referendum, are not deliberative processes. The observations made by Magleby for the initiative apply to the issues like Referendum 112 with even greater force:

> In direct legislation the voter is only partially a legislator. The voter is not party to the drafting and compromising process and can play no part in the determination of the policy choice he will confront. Thus, voters are faced with statutes that they did not help to write and that they must affirm or reject *in toto*. Direct legislation does not face the procedural constraints of the legislative process: hearings, amendments, markup, scheduling,

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178 Paul Feldman, *Anti-Illegal Immigration Prop. 187 Keeps 2-to-1 Edge*, L.A. TIMES, Oct. 15, 1994, at A1.

179 Maura Dolan, *Parts Of Prop. 187 May Be Blocked 2 Or More Years*, L.A. TIMES, Nov. 16, 1994, at 1; Paul Feldman & Patrick McDonnell, *U.S. Judge Blocks Most Sections of Prop. 187*, L.A. TIMES, Dec. 15, 1994, at 1.

180 ZIMMERMAN, *supra* note 6, at 93-95.

181 Magleby, *supra* note 13, at 238.

182 As noted above, deadlines for sucessfully filing referendum petitions are much shorter than those to qualify an initiative. Choi, *supra* note 12, at 331-32, 337.

183 Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, *supra* note 16, at 5, 10-11.

184 *See* MAGLEBY, *supra* note 9, at 184-85.

> floor debate, and conference. In contrast, rarely do the sponsors of an initiative circulate their bill prior to the petition phase — and once this phase begins, the language cannot be changed. The process of direct legislation is not built upon the principle of compromise and accommodation but instead forces an all-or-nothing policy decision on the question as formulated by the sponsors alone.[185]

The "all or nothing" quality of public choice on ballot questions necessarily minimizes the give-and-take of open and extensive debate, debate which can reveal not only flaws in the initial proposal, but which can also encourage an atmosphere in which discussion, compromise, and accommodation of views can happen.[186] Eule says of ballot propositions:

> Public debate is infrequent. Exposure to minority perspectives occurs accidentally if at all. Voters may be confused and overwhelmed by the issues before them . . . . Most important, voters register their decisions in the privacy of the voting booth. They are unaccountable to others for their preferences and their biases. Their individual commitment to a consistent and fair course of conduct can be neither measured nor questioned.[187]

This lack of accountability is especially pronounced in a referendum petition process. While the polling place may lend an aura of importance and hence responsibility to all those who take part, the slapdash, shotgun randomization of signature gathering does not.[188] Rather, the unsuspecting citizen may be accosted outside the local convenience store and see a clipboard thrust forward with a request to "sign" to "cut taxes" or "reduce government." Rarely does a petition signer, already interrupted on the way to more immediate business, bother to read, analyze, think about the significance of the issue. Further, if the citizen hesitates, the petition gatherer then asserts (as many have said to me) that the citizen should sign just "to get the issue on the ballot" so that "the people" can decide, presumably after a full and complete airing of the costs and benefits of the proposal in the "marketplace of ideas."[189] Studies have shown that most initiative petition signers do not read what they sign, but simply

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185 *Id.* at 184.

186 *Id.* at 186-88.

187 Eule, *supra* note 88, at 1555-56.

188 See the critical comments of State Representative Dave Gilbert (R-Glendive) in Charles Johnson, *Petition Opponents Take Action*, BILLINGS GAZETTE, Sept. 25, 1993, at 1.

189 MAGLEBY, *supra* note 9, at 62-63.

accept the characterization given by the signature gatherers.[190] To be sure, with the initiative some subsequent public debate will ensue prior to a public vote, but as we must stress, there is no deliberation in the referendum-suspension process. The only loud "voice" is that of the army of gatherers.

Referendum 112 was a classic case in point. R. 112 proponents, for the most part, defined the issue as one of lowering taxes and cutting the size and cost of government.[191] Lost in the one-sided selling was objective evidence about whose taxes would go up or down if House Bill 671 were suspended, and where cuts in appropriations would be made should the petition drive be successful.[192] Most signers of the petition could not have known that, of the 46 programs in the state general fund, five of them (social services, education, corrections, human services, and family services) accounted for $907 million out of $1.15 in general fund appropriations (78.1 percent of the total).[193] Nor could they have known in the summer of 1993, unless they very carefully read some isolated article in a daily newspaper, that initial estimates made by the Montana Department of Revenue showed that HB 671 would decrease state income tax obligations for 44 percent of Montana households, increase for 39 percent, and not significantly change the tax obligations for the rest.[194]

What they saw instead was almost all elected officials of both parties running for cover in hope that, by saying nothing, R. 112 would die quietly.[195] Symptomatic of the timidity on the part of elected officials, Governor Marc Racicot, a moderate Republican, announced that he would not sign the petition nor did he support it; however, he made no attempt to use the "bully pulpit" of his office to denounce the petition and he tolerated the open public support given to R. 112 by his budget director, Dave Lewis.[196]

Thirdly, the early advocates of initiative and referendum would be surprised and shocked to discover that today direct legislation is often

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190 *See id.*

191 *See* MONTANANS FOR A BETTER GOVERNMENT, *supra* note 61, and accompanying text.

192 *Compare* MONTANANS FOR BETTER GOVERNMENT, *supra* note 61, *with* Mike Dennison, *Impacts Vary Widely Under Montana's New Income Tax*, GREAT FALLS TRIB., July 19, 1993, at 1, 6.

193 *See* OFFICE OF THE LEGISLATIVE FISCAL ANALYST, POTENTIAL SUSPENSION OF HOUSE BILL 671 (1993).

194 Jim Elliott (Montana State Representative), *HB671 — Montana's New Income Tax*, June 14, 1993 (press release on file with author).

195 An exception was Superintendent of Public Instruction Nancy Keenan. *See* Keenan, *This Public Official Will Not Be Silenced*, BOZEMAN DAILY CHRON., Aug. 19, 1993, at 4; State Senator Tom Towe, *Don't Sign Natelson's Petition*, BOZEMAN DAILY CHRON., June 27, 1993, at 5.

196 Charles Johnson, *Racicot Reveals Stance on Petition*, BILLINGS GAZETTE, Aug. 13, 1993, at 1; Mike Dennison, *Budget Chief's Right To Sign Petition Defended*, GREAT FALLS TRIB., July 15, 1993, at 1.

initiated by well-organized and well-heeled economic interests. In California, for example, the initiative process has created a multimillion dollar mini-industry of professional consulting firms who will gather the necessary signatures for a handsome fee and help create propaganda to sell your idea.[197] Indeed, in a mass market like California, with its heavy reliance on television as a medium of political communication, multimillion dollar initiative campaigns are simply the norm.[198] A rural state like Montana, with its relatively low signature requirements to qualify an initiative or a popular referendum for the ballot,[199] may be seen as a "cheap date" by national groups with a national agenda who can cultivate a reputation for success, either by winning, as in the case of term limits, or by coming close to winning, as in the anti-gay initiative in Oregon in 1992.[200]

Given the often one-sided and non-deliberative quality of the ballot petition process, and given that the checks and balances found in representative government are largely absent, the courts must necessarily play a more central role as referees and gatekeepers. Magleby observed, "Unlike the legislative process, in which bicameral legislatures, decentralized decision making, and the threat of a gubernatorial veto function as checks against unconstitutional and excessive legislation, direct legislation is checked in its excess only by the courts."[201]

What criteria have the courts used in deciding whether to intervene and possibly nullify a ballot proposition, especially a petition for referendum which suspends an enacted law?

According to Zimmerman, courts may intervene and nullify popular referendums for the following reasons:

- The proposition in dispute contains more than one question;

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197 MAGLEBY, *supra* note 9, at 59-65. *See also* Ernest Tollerson, *In 90s Ritual, Hired Hands Carry Democracy*, N.Y. TIMES, July 9, 1996, at 1, 6 (illustrating the widespread and almost exclusive use of paid signature collectors to place initiatives or candidates on the ballot).

198 *See, e.g.*, Leo Wolinsky, *$23 A Vote*, L.A. TIMES, Mar. 31, 1989, at 3, 23 (analyzing the spending by an insurance company to defeat auto insurance initiatives in California).

199 For example, supporters of a constitutional initiative to impose term limits on state elected officials spent only $59,000 to successfully win approval of their proposal. *See* MONTANA COMMISSIONER OF POLITICAL PRACTICES, CAMPAIGN FIANNCING (Ed Argenbright ed., 1992).

200 The drive to impose term limits in Montana was largely paid for by two Washington, D.C. groups, Americans to Limit Congressional Terms and U.S. Term Limits, Inc. These two groups accounted for 73% of contributions to the Montana group, Citizens For CI-64. *Id.* at 843-44. *See also Telemarkerters Push For Term Limits*, GREAT FALL TRIB., Apr. 14, 1992, at 3B; Tom Laceky, *National Term Limits Leader Boosts Voter Initiative*, GREAT FALLS TRIB., Sept. 27, 1992, at 3B; Bettina Boxall, *Gay Rights Foes Take To Ballot Again*, L.A. TIMES, Nov. 7, 1994, at 14 (regarding an Oregon drive).

201 MAGLEBY, *supra* note 9, at 194.

- The ballot language is misleading and/or the voter information pamphlet explaining what the proposition means is misleading or uninformative;
- Evidence shows that fraud was used in the gathering of signatures to place the issue on the ballot;
- That the ballot issue could not be voted on or sustained after a favorable vote because the subject was excepted from a public vote by state law (e.g., appropriations discussed above); or
- The proposed law would in fact adversely impact the rights of citizens under the Equal Protection Clause, and if inadvertently approved by the voters, would easily fail a test in the courts.[202]

Considerable debate exists concerning under what circumstances and with what constitutional criteria courts should intervene in the initiative and referendum process.[203] There appears to be, however, a general consensus that courts should exercise great deference.[204] Gordon and Magleby take the most cautious approach in urging a broad policy of non-intervention:

> [T]here are extreme examples in which pre-election review of substantive validity should also be allowed. While the values that argue against pre-election review are very important, they are not absolute, and in special circumstances they can be outweighed by serious injury to other fundamental public values. Therefore, there should be a "circuit breaker" exception to the general principle of judicial nonintervention. In cases involving a present, significant, irreparable injury to a fundamental public interest, the court should be able to review pre-election challenges to substantive validity. The exception should be as limited as possible to reflect the appropriate deference for the legislative process, and should not be invoked if less onerous alternatives are available to avoid or mitigate the injury.[205]

Eule, in contrast, advises that courts take a "hard look" at direct ballot issues, especially popular referendums, because:

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202 *See generally* ZIMMERMAN, *supra* note 6, at 78-85.

203 *See, e.g.*, Priscilla Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135 (1981); Hans Linde, *When Initiative Lawmaking Is Not Republican Government*, 72 OR. L. REV. 19 (1993).

204 James Gordon & David Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 318 (1989).

205 *Id.* at 318.

> In several ways the popular referendum has the potential to be the most dangerous of direct democratic devices. Like the mandatory referendum [where state constitutions or statutory law require a public vote, e.g., school bond issues], it affords the opportunity for inflamed majorities to take away the gains that minority groups have struggled to achieve through the representative system [initiatives and referendums to repeal gay rights ordinances come to mind].e.e. . [A] court willing to review these electoral vetoes would have to rely on a thesis never accepted by a Supreme Court decision — that "mere repeal" of a single piece of legislation unaccompanied by a boarder restructuring of the political decision-making process can itself violate the Constitution. For the present, however, the threat of popular referenda is purely speculative. Because the time period for gathering the requisite signatures tends to be short — typically no more than ninety days after adjournment of the legislative session that produced the law — the device has seldom been used.[206]

But in Montana, the deadline for obtaining signatures to suspend a contested law and forcing a public vote is a relatively permissive six months after enactment.[207] Further, Referendum 112, because it is accompanied by suspension gained by winning the signatures of a small minority of voters (as few as six percent of the registered voters), represents a clear negation of the majority rule principle in that the majority, or even an equivalent minority of voters, have no procedural recourse with which to stop suspension.[208]

Further, the success of the Natelson effort in Montana invites the use of the suspension-referendum process in other places and for other issues in addition to taxes. The opportunity for mischief is great given that the topics excepted from the suspension by the minority are few in all states that permit it. In addition to chilling legislative attempts to impose new taxes or increase old ones, curtailed revenue possibilities may compel state legislatures to cut existing programs and services. Furthermore, the things most likely to be cut affect the interests of the least powerful and most despised constituencies, e.g. the poor, racial minorities, and homosexuals. Indeed, the use of fiscal means to implicitly reduce governmental obligations to certain relatively powerless groups

206 Eule, *supra* note 88, at 1578-79.

207 Choi, *supra* note 12, at 337.

208 Appellants' Opening Brief, *supra* note 96, at 11-12.

avoids troublesome constitutional guarantees safeguarded under the Equal Protection Clause.

More to the point, the suspension-referendum process invites direct assaults on disadvantaged groups by permitting those who object to "special rights" to suspend newly enacted laws designed to recognize explicitly the civil rights and common citizenship of certain groups. For example, most states have enacted "hate crime" statutes which include a sentence enhancement component for bias-motivated criminal acts.[209] But relatively few explicitly identify criminal assaults on homosexuals as a "bias" requiring a sentence enhancement.[210] Suppose a state legislature decides to amend its hate crime statute to include gays and lesbians; in those states that provide for suspension of an enacted law, there is every likelihood that extension of hate crime penalties to those who commit crimes based on hostility toward homosexuals could be suspended pending a public vote.[211]

Eule would advocate courts to take a "hard look" at the suspension of an enacted law based upon the law's substantive content.[212] This approach, however, invites a great deal of needless definitional controversy over what is and what is not a "fundamental right" or a "suspect classification." In a critique of the "hard look" school represented by Eule, Professor Robin Charlow stated, "Either state and local plebicitary processes are constitutional forms of lawmaking or they are not. If they are constitutional, a particular group's dissatisfaction with the perceived efficacy of these processes should not, in and of itself, warrant different constitutional treatment of the products of these processes."[213] Under the arguments advanced by appellants in *Nicholson*, the "products" of suspension are not the issue; rather, the issue is *the process of suspension of enacted law by a minority of voters.*[214]

The Framers of the U.S. Constitution, who welcomed the use of supermajority voting requirements as a way of protecting minority interests in especially critical decisions, might reasonably be appalled by the

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209 STEVEN M. FREEMAN, ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS (1994).

210 *Id.* at 30-31.

211 Recall that 20 states permit the suspension of an enacted law. Of these, only one (Michigan) currently includes sexual orientation as a catagory protected under its hate crime law. In all, 15 states currently include sexual orientation under bias-motivated crime. *See id.* In its 1993 session, the Montana Legislature considered and rejected a bill to include sexual orientation under the state's malicious harassment law. Instead, the state legislatures, heavily pressured by anti-homosexual lobbyists and perhaps their own particular prejudices, even refused to include sexual orientation as a catagory for reporting alleged hate crimes. *See* LEGISLATIVE COUNCIL, *supra* note 45, and MONTANA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, WHITE SUPREMACIST ACTIVITY IN MONTANA (1994).

212 Eule, *supra* note 88, at 1549.

213 Robin Charlow, *Judicial Review, Equal Protection and the Problem of Plebiscites*, 79 CORNELL L. REV. 527, 557 (1994).

214 Appellants' Opening Brief, *supra* note 96, at 11-13.

creation of a process like suspension-referendum which installs the possibility of a minority veto even over the most ordinary processes of government (e.g. taxation and the extension of civil rights laws). In this regard, Alexander Hamilton said:

> To give a minority a negative upon the majority . . . is, in its tendency, to subject the greater number to that of the lesser. . . .[215] The public business must in some way or other go forward. If a pertinacious minority can control the opinions of the majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue, contemptible compromises of the public good.[216]

In the Federalist No. 58, Hamilton again addressed the dangers of institutionalizing minority rule saying:

> In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed [referring to a requirement of supermajorities in the ordinary transaction of business]. It would no longer be the majority that would rule: the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences.[217]

These commentaries, though they specifically apply to problems of state representation in the U.S. Congress, apply with even greater force to the constitutional problem presented by the suspension-referendum process.

Nationwide, the anti-tax, anti-government movement appears to be growing and confident as minorities of angry anti-tax citizens attempt to "screen themselves" from taxes which they object to.[218] These efforts, where successful, have had chilling effects. In Arizona in 1992, for ex-

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215 THE FEDERALIST No. 22, at 131, 135 (Alexander Hamilton) (The Modern Library, 1937).

216 *Id.* at 136.

217 THE FEDERALIST No. 58, at 361 (Alexander Hamilton) (The Modern Library, 1937).

218 *Voters Rebel Against Status Quo*, *supra* note 24, at 18.

ample, voters approved an initiative requiring a supermajority vote to impose new taxes. A proponent says that it has achieved its desired effect: "[T]hese days the legislators don't even bother to propose new taxes."[219]

CONCLUSION

This paper has examined the character and implications of the referendum-suspension process. The suspension of an enacted law raises serious constitutional concerns, especially in relation to the Equal Protection Clause, and under any reasonable interpretation, suspension by a minority of voters clearly violates the one person-one vote requirement first enunciated in the reapportionment cases. Further, the popular referendum device demands a hard look at the populist and reformist assumptions upon which it is based. There is substantial evidence that voters are not prepared to exercise their lawmaking responsibilities and that direct democracy can be easily used to advance the causes of the very "special interests" that initiative and referendum were designed to counter.[220]

In the absence of more detailed constitutional limits in state constitutions establishing where the popular referendum-suspension instrument may not be used, we may expect to see its increasing use in the years ahead by not only anti-tax groups but also by other intense minority interests capable of effectively mobilizing the extremist tendencies always found among some sectors of the electorate. It is therefore imperative that the courts examine closely whether the suspension-referendum process conforms to the Equal Protection requirements laid down in *Reynolds* and subsequent cases. The suspension under the popular referendum device is clearly violative and ought to be done away with altogether, retaining for all of the people the right to vote on contested laws.

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219 Stephen Moore & Dean Stansel, *The Great Tax Revolt of 1994*, REASON, Oct. 1994, at 23.

220 MAGLEBY, *supra* note 9, at 121.