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WHEN THE MAJORITY SAYS YOU MAY DIE: AID-IN-DYING INITIATIVES

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A democratic system of government must be judged at least in part by whether the laws made under the system adequately reflect the enduring will of the majority of the people the government represents. An optimal governmental structure, then, must encourage policies furthering this enduring will while discouraging others. The founders of the United States, for instance, realized that neither simple rule by the majority nor concentration of political power in either the legislative or the executive branch would fulfill the long-term needs of most people. They attempted to avoid both of these outcomes by creating a republican system of representative government, whereby the people would have the authority to make laws, but only through having a say in the selection of legislators and the president. The U.S.

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1. Most analysts, particularly opponents of direct democracy, correctly refer to documents such as the Federalist Papers as evidence of the hostility of the founders to pure direct democracy. See, e.g., The Federalist No. 51 (James Madison). This, however, tells only half the story: An animating principle of the American Revolution and the Declaration of Independence was that a just government must derive its powers from the consent of the people.... The Declaration added enormously to the quest for democratic procedures, heightening yearnings of ordinary people for suffrage as well as for more self-rule. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 12 (1989). This dual emphasis suggests that fidelity to the framers does not demand complete rejection of direct democracy, and cuts against conclusory assertions that the thinking of the founders does not translate to contemporary political debate. The issue, then and now, centers on what degree of direct democracy governments “deriving their just powers from the consent of the governed,” THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776), can implement while continuing to work justly and efficiently.

2. The Constitution calls for direct election of Representatives by the people. U.S. CONST. art. I, § 2, cl. 1. It reserved selection of Senators to the state legislatures, id. at art. I, § 3, cl. 1, until enactment of the Seventeenth
Constitution further tested the strength of popular desire for new laws by establishing several institutional checks that proposed bills would have to survive, including a bicameral legislature, an executive veto, and judicial review.

The Constitution guaranteed a “republican” form of government to all states as well. Progressive-era reformers, though, weary of their inability to push the proposals they advocated through an unyielding (and, in their view, corrupt) legislative process, successfully convinced many states to adopt procedures for lawmaking by initiative. This alternative permits citizens to place proposed legislation directly before the people for a popular vote, with the proposal becoming law if a majority of the voters approve the measure.

In states with initiative lawmaking, then, issues may receive resolution either through the legislative process or through the initiative process. This Article analyzes both methods in the context of physician aid-in-dying and finds both processes as cur-
rently structured systematically unable to resolve aid-in-dying questions in accordance with the enduring will of the people. The Article then maps out a potential synthesis of the legislative and initiative processes in an attempt to capture the unique advantages of each form of lawmaking. Part I of the Article briefly sets out the parameters for discussion. Part II moves on to the shortcomings of leaving aid-in-dying questions to the legislature and points out the need for some increased participation by the people as a whole. Part III of the Article in turn evaluates the initiative process, with an eye toward the initiative approved by Oregon's voters in November 1994, as well as the rejected proposals in Washington and California, and concludes that laws drafted through this process have less likelihood of representing the long-term wishes of the people than laws drafted by the legislature do. Part IV presents a potential alternative process with the goal of allowing the public to have a greater opportunity to focus the legislature on issues like aid-in-dying while not becoming prisoner to the sentiments of initiative drafters or potentially transitory public opinion. Part V will briefly conclude by considering the implications of reform for aid-in-dying proposals.

J. L. & MED. 369, 386-87 (1992); Timothy E. Quill et al., Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide, 327 NEW ENG. J. MED. 1380 (1992). The institutional analysis set out in this Article, however, essentially remains the same regardless of the scope of the initiative, so, for the sake of simplicity, this Article will combine the categories except if specifically distinguished.


13. In addition to the initiatives listed above, Jack Kevorkian and his supporters proposed an initiative that would have added the following provision to the Michigan constitution: "The right of competent adults, who are incapacitated by incurable medical conditions, to voluntarily request and receive medical assistance with respect to whether or not their lives continue, shall not be restrained or abridged." Kevorkian Begins Ballot Drive for Suicide Measure, N.Y. TIMES, Jan. 31, 1994, at A13. They failed to obtain enough signatures to place the proposal on the ballot. Anne Mullens, A Landmark Vote on Assisted Suicide, TORONTO STAR, Oct. 20, 1994, at A25.

The Michigan proposal's brevity would have necessitated that the judiciary take a prominent role in interpreting the right granted; for this reason, this proposal would have proven as undesirable as unilateral attempts by the judiciary to resolve the issue. See infra notes 28-35 and accompanying text.
I. Parameters

Questions regarding both the general efficacy of direct democracy\(^{14}\) and the constitutional aspects of aid-in-dying\(^{15}\) must remain outside the scope of this Article in order to limit discussion to the practical issues revolving around aid-in-dying initiatives.

This Article will consider only aid-in-dying initiatives, as opposed to referenda sent to the people by the legislature for approval.\(^{16}\) It will limit the analysis in this way for three reasons. First, referenda require that the legislature have passed an aid-in-dying statute. Legislators, though, as later discussion will show, have proven quite reluctant to deal with the issue\(^{17}\) - hence the need for direct lawmaking in the first place. Second, initiatives raise more practical concerns in terms of drafting than referenda because the legislature has little if any role in drafting initiatives.\(^{18}\) Third, the aid-in-dying initiatives proposed in recent years provide a concrete reference point for discussion of aid-in-dying through popular lawmaking.

This Article will also assume that the initiative process in general represents a constitutional method of decisionmaking. The Supreme Court has yet to rule squarely on this question,


\(^{16}\) In the initiative process voters directly place a proposed statute or constitutional amendment on the ballot by obtaining signatures of a specific number of registered voters. In a referendum, the voters may petition to vote on a statute or constitutional amendment that the legislature has approved, or the legislature may vote to refer a measure for a popular vote. Magleby, supra note 14, at 1. Currently, 23 states have a referendum procedure. Only Illinois has an initiative procedure but not a referendum procedure (and the initiative procedure has proven so impenetrable that only one initiative has even qualified for the ballot). Maryland and New Mexico have a referendum procedure but no initiative procedure. See Schmidt, supra note 7, at 296-97.

\(^{17}\) See infra notes 43-47 and accompanying text.

\(^{18}\) See infra notes 56-61 and accompanying text.
AID-IN-DYING INITIATIVES

although it has upheld numerous initiatives over the years\(^\text{19}\) and has spoken approvingly of the process.\(^\text{20}\) In the leading case, involving a challenge to the constitutionality of initiative lawmaking on the grounds that laws bypassing the legislative process denied the "republican" system of government that the Constitution guaranteed to the states, the Supreme Court ruled the republican nature of a state government a political question.\(^\text{21}\) This rationale proves unconvincing,\(^\text{22}\) and the Court has left the issue open, but the constitutionality of the initiative process in all likelihood will survive any challenge, both theoretically\(^\text{23}\) and

\begin{itemize}
\item \textbf{20.} See, e.g., James v. Valtierra, 402 U.S. 137, 141 (1971) ("California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy. . . . Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.").
\item \textbf{21.} Pacific St. Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). The Court, quoting Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849), found:
\begin{quote}
Under this article of the constitution it rests with congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.
\end{quote}

223 U.S. at 147.
\item \textbf{22.} The acceptance of representatives, a formality, hardly constitutes a formal evaluation by the national government of the governmental structure of the state. At most, accepting the representative only affirms the legitimacy of the representative, not the republican nature of other aspects of the government or even of the government as a whole. See generally Louis J. Sirico, Jr., The Constitutionality of the Initiative and Referendum, 65 Iowa L. Rev. 637, 651 (1980).
\item \textbf{23.} The term "republican" contemplates many different ways of organizing governments; any legitimate government mixes direct will and delegated authority in some respect, so the vagueness of the term, the interest of the founders in both democratic and republican principles (see supra note 1), and federalism concerns dictate deference of review. Also, in evaluating constitutionality, courts cannot judge the republican nature of a government by examining the initiative process in isolation, just as they cannot do so by examining the actions of an unelected administrative agency in isolation. Instead, they must weigh the republican nature of the entire state government. The existence and occasional use of the initiative process, then, should not make the entire state government unrepublican. See generally Sirico, supra note 22, at 651-61.
\end{itemize}
practically.  

In addition, this Article will analyze only efforts to legalize physician aid-in-dying in some manner. Because virtually all states have prohibited aid-in-dying either specifically or generally, persons supporting aid-in-dying have more incentive to use the initiative process than those opposing aid-in-dying laws do. Of course, opponents of aid-in-dying laws remain free to propose a "preemptive" initiative to better secure prevailing attitudes on aid-in-dying from either the legislature or subsequent statutory initiative. Initiatives along these lines have recently occurred concerning issues of similar moral divisiveness, such as abortion and homosexual rights.

The Article will further assume that at least some aid-in-dying legislation can withstand constitutional scrutiny. The best indication of the potential avenues of constitutional attack has come with the lawsuit brought by aid-in-dying opponents to overturn the Oregon initiative. They have alleged that the Oregon initiative: 1) violates the equal protection rights of terminally ill persons; 2) deprives terminally ill persons who do not wish assistance in suicide of life and liberty without due process of law; 3) is unconstitutionally vague; and 4) violates the free exercise and association rights of physicians and health care providers opposed to aid-in-dying. Opponents could have raised the same objection had Oregon acted through the legislature rather than through popular initiative. This Article will focus on how the nature of the initiative process increases the likelihood that popularly enacted aid-in-dying statutes will prove susceptible to constitutional challenges.

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24. One can imagine the uproar if the Supreme Court invalidated the initiative process after permitting it to exist for over 80 years. See Sirico, supra note 22, at 646.


26. Colorado passed an initiative that said that the state or any of its localities could not "enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual . . . orientation, conduct, practices or relationships shall constitute . . . any minority status, quota preference, protected status or claim of discrimination." COLO. CONST. art. 2, § 30b. At this writing, courts have enjoined enforcement of the initiative. Evans v. Romer, 882 P.2d 1335 (Colo. 1994), cert. granted, 115 S. Ct. 1092 (1995).

Similarly, this Article will assume that courts will not strike down legislation criminalizing aid-in-dying. As of late, judicial decisions have borne out this assumption. The Michigan Supreme Court ruled that Michigan’s recently enacted statute criminalizing assisted suicide did not violate the Constitution.\(^2\) A district court judge in New York upheld New York’s assisted suicide law\(^2\) in a case brought by Dr. Timothy Quill, whose article in the *New England Journal of Medicine* detailing his role in the death of one of his patients\(^3\) sparked criminal charges. Most recently, the Court of Appeals for the Ninth Circuit sustained Washington’s assisted suicide law.\(^3\) A judicially-fashioned right to aid-in-dying, as these courts have recognized, would raise more cause for concern than an aid-in-dying regime created by the legislature or through an initiative.\(^2\) Judges would, as their job requires, make decisions primarily from choices advocated by litigants; the other institutions can consider the needs of all interested parties.\(^2\) Judges also lack the access to expertise on the issue upon which the legislature (and, to a lesser extent, proponents of an initiative) can rely.\(^3\) Finally, the legitimacy of the resolution of these questions may require deference to the views of a broader constituency. Ironically, the value Americans place

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28. People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 68 U.S.L.W. 3692 (U.S. Apr. 24, 1995) (No. 94-1490). In the case, the court also ruled that the legislation did not violate Michigan’s single-subject rule and it limited murder prosecutions to cases where “death was the direct and natural result of a defendant’s act.” 527 N.W.2d at 716.


32. *See Quill*, 870 F. Supp. at 84 (“the resolution of this issue is left to the normal democratic processes within the State”); *Kevorkian*, 527 N.W.2d at 733 (“the question clearly is a policy one that is appropriately left to the citizenry for resolution, either through its elected representatives or through a ballot initiative”).

33. *See Robert A. Burt, Death Made Too Easy*, N.Y. TIMES, Nov. 16, 1994, at A19 (“Legislation can be confined to incremental steps. . . . But in its nature, all judicially imposed constitutional change can be based only on generalized abstractions and, like *Roe*, must apply to the whole nation and protect the furthest reach of everyone’s claim to self-determination”).

34. *Cf. infra* notes 57-59 and accompanying text (describing resources available to the legislature in drafting bills).
on self-government by communities for the common good may preclude the courts from intervening to protect the self-determination of individuals.\textsuperscript{35}

II. DISADVANTAGES OF RELYING ON LEGISLATURES

Advocates of direct democracy have long criticized the legislative process, citing many perceived shortcomings. They have claimed most fundamentally that initiatives represent the collective will of the people,\textsuperscript{36} while "special interests" capture the legislature and cause it often to reject bills furthering the interest of the majority of the people.\textsuperscript{37} These broad general claims have serious flaws, but more specific allegations of procedural failures prove more noteworthy, particularly when evaluated in the context of issues such as aid-in-dying.

For instance, exclusive reliance on legislatures for the pas-

\textsuperscript{35} See, e.g., Terry Eastland, \textit{Shameless in Seattle}, \textit{Am. Spectator}, July 1994, at 57. Responding to the analogy of aid-in-dying to abortion, Eastland wrote: It is axiomatic that once judges declare a constitutional right, the people are no longer free to decide the issue democratically. When that declared right cannot be found in the text or history of the Constitution, as occurred in \textit{Roe}, the decision is likely to be less respected, and loss of the right to self-government even more sharply felt, especially when the issue involves deeply held moral beliefs.\textit{Id.}

\textsuperscript{36} See \textit{Butler & Ranney}, \textit{supra} note 14, at 24; \textit{Hahn & Kamieniecki}, \textit{supra} note 14, at 6; \textit{Zimmerman}, \textit{supra} note 14, at 3.

\textsuperscript{37} Progressives such as Senator Robert M. LaFollette consistently condemned the role of interest groups in lawmaking and viewed initiatives as a way to circumvent these interest groups. \textit{Zimmerman}, \textit{supra} note 14, at 90.


Interest groups, then, will influence lawmaking whether through legislatures or initiatives. In any event, as one analyst persuasively comments, "[O]ne person's 'special interest group' is another's 'public interest group.'" \textit{Schmidt}, \textit{supra} note 7, at 97.
sage of laws gives the legislature extensive freedom to set the agenda of issues it will deliberate on. While elections may encourage representatives to take positive actions on the issue or issues that motivate their constituents when they choose candidates, elections will do little to compel legislators to act affirmatively on issues on which voters will not base their candidate choices. On the other hand, if a legislator makes a serious attempt at reform on an issue, the attempt will alienate the voters favoring no reform and drive some of those voters into open opposition to that legislator.

Aid-in-dying represents a perfect example of the type of issue that constantly will defy resolution through the legislature alone. Voters will virtually never make aid-in-dying questions so prominent in their decision to vote for a candidate that they will demand that legislators take a firm stand on the issue in a campaign and enact legislation on the subject after elections. Aid-in-dying questions do, however, elicit strong emotions on the part of adherents on both sides of the issue. If legislators take a strong position on the issue, they risk incurring the wrath of opponents to their view, some of whom would likely direct more energy to defeating the legislators in their bids for reelection. At the same time, the legislators will not gain a reciprocal benefit of loyal support from people agreeing with their view on the subject; these people, while approving the reform effort, will still

38. For a general discussion of this problem, see Butler & Ranney, supra note 14, at 29-30; Zimmerman, supra note 14, at 90.

39. Extending the focus of legislative candidates has its drawbacks as well. The issues that voters consider when choosing candidates more likely than not truly involve the most important public policy questions. If so, substantial discussion of voter initiatives may unwisely divert candidates' attention from the primary issues of the legislative campaign. See David B. Magleby, Taking the Initiative: Direct Legislation and Direct Democracy in the 1980's, 21 P.S. 600, 608 (1988). The aid-in-dying campaigns support this proposition only partially. Compare Robert Reinhold, California to Decide if Doctors Can Aid in Suicide, N.Y. Times, Oct. 9, 1992, at A1 (none of the four U.S. Senate candidates in California in 1992 took a position on the California initiative) with Steve Wilson, Oregon Election to Test Future of "Right-to-Die" Movement, Az. Rep., Oct. 19, 1994, at A2 (both gubernatorial candidates in Oregon in 1994 opposed the Oregon initiative).

40. See generally Hahn & Kamieniecki, supra note 14, at 17.

41. James M. Hoefler, Deathright: Culture, Medicine, Politics, and the Right to Die 213-14 (1994). Hoefler concluded that legislators, seeing no benefit in acting themselves, decided to leave the issue to the courts.

42. The amount of money spent on the aid-in-dying initiative campaigns provides the best indication of this. For instance, organizers of the Washington initiatives spent approximately $1.7 million attempting to secure passage of the initiative, while opponents spent approximately $2 million. Donald W. Cox, Hemlock's Cup: The Struggle for Death With Dignity 154 (1993).
base their votes on the primary issues. As self-interested actors, then, legislators have a strong incentive simply to refuse to bring up aid-in-dying questions at all, because the negative electoral repercussions with regard to the issue strongly outweigh the benefits.

This legislative reluctance to tackle aid-in-dying issues receives strong empirical support. While a substantial majority of the public favors some form of aid-in-dying (at least in theory), very few state legislatures have considered legislation attempting to legalize aid-in-dying in some way. In fact, legislatures arguably would not have considered the issue absent the initiative efforts, and once the issue reaches the legislature it almost invariably dies with alacrity without ever reaching the floor. Clearly, legislatures have exhibited a marked reluctance to consider aid-in-dying measures, at least partially for the reasons detailed above. At least if the legislature openly debated and


44. 31 states have specifically criminalized assisted suicide, which covers any act of aid-in-dying. Physicians engaging in active euthanasia fall within homicide statutes in all states. David R. Schanker, Note, Of Suicide Machines, Euthanasia Legislation, and the Health Care Crisis, 68 IND. L.J. 977, 983 & n.31 (1993).

45. Bills introduced in Iowa and Maine in 1992 followed the California initiative closely; see id. at 1002. At this writing, legislators have proposed bills modeled on the Oregon initiative in at least five states. Assisted-Suicide Bill is Offered in State Senate, SEATTLE TIMES, Jan. 25, 1995, at B3 (Washington); Ergo! Booming Right to Die Legislation Across USA, PR NEWSWIRE, Feb. 8, 1995, available in LEXIS, News Library, Curnws File (California, New Hampshire); Susan Hogan-Albach, Assisted Suicide Debate Grows, ST. PAUL PIONEER PRESS, Jan. 10, 1995, at 1B (Wisconsin); Connie Paige, Suicide Bill Proposed in State Legislature, BOSTON HERALD, Dec. 30, 1994, at 8 (Massachusetts).


47. Michigan's experience illustrates this ambivalence well. While criminalizing assisted suicide, the legislature created a commission to consider the issue and to recommend a course of action. After extensive wrangling and concern over whether the commission's existence violated the constitution, the panel could not reach even a general consensus on the issue. A Michigan Panel Backs Suicide Aid, N.Y. TIMES, Mar. 6, 1994, § 1, at 31.

Legislators may also have balked at the prospect that if their state became the first in the nation to legalize aid-in-dying, they risked attracting people to
rejected an aid-in-dying proposal, the democratic process would have functioned; perhaps the specific bill would fail to address all concerns adequately, or maybe the legislature would simply conclude that any aid-in-dying statute proves unwise. When the legislature suppresses the issue in order to protect its members, however, the government fails to determine the wishes of the people, and the process fails.

Introduction of some form of initiative process into the policymaking mix would help ensure that issues like aid-in-dying receive the consideration the people desire. While voters supporting aid-in-dying might not evaluate legislators according to their positions on the issue, they have a proven willingness to sign petitions placing proposed aid-in-dying statutes on the ballot. Leading supporters of aid-in-dying have shown the ability to organize successful petition drives to place the issue before the voters. The resulting high-profile debate of the aid-in-dying initiatives has spurred public interest in the subject nationwide, and it has helped spark action in legislatures, as mentioned earlier. In short, the initiative process has enabled aid-in-dying to take its place in the public spotlight, to the benefit of all. Democratic systems lacking some sort of initiative, though, more likely would suppress consideration of aid-in-dying questions as thoroughly as possible, as self-regarding legislators would tend to avoid alienating voters with a strong view on the subject.

the state specifically to obtain aid-in-dying (although a residency requirement could partially guard against this possibility). If the Oregon initiative takes effect, though, this concern would serve as less of a deterrent.


49. This willingness to sign petitions need not, however, flow from support for the initiative. Some people might sign petitions in the belief that the people should vote on an issue, regardless of whether they support the initiative or not. Indeed, some unscrupulous signature gatherers in the past have covered up the text of the initiative attached to the petitions and urged people to sign based on a slogan and an emphasis that signing the petition in no way binds the voter. See Magleby, supra note 14, at 62.

50. Organizers obtained over 223,000 signatures for the Washington initiative, well over the 150,000 needed. Cox, supra note 42, at 150. Organizers of the California initiative gathered 600,000 signatures in six months, an impressive feat. Id. at 172. Organizers of the Oregon initiative procured 95,000 signatures, well over the 66,771 required. Mullens, supra note 13, at A25. Aid-in-dying advocates in Michigan collected over 200,000 signatures, although they fell about 50,000 short of the amount they needed. Id.

51. The initiative organizers in Washington and California took solace in the defeats because of the large audience they had reached. Cox, supra note 42, at 166, 178.
III. DISADVANTAGES OF THE INITIATIVE PROCESS

While the complete absence of initiatives would take away an important means of attracting attention to issues of public concern, passage of aid-in-dying initiatives would have less likelihood of fulfilling the enduring will of the people than the legislature process would. Opponents of direct democracy present a caricature of unrepentant single-issue activists who could not persuade a legislature starting an initiative and using misleading advertising to woo voters who lack substantial knowledge of the issues at stake in order to pass proposals inherently hostile to the interests of the voting minority. Although these critics exaggerate their case, several practical difficulties raise legitimate concerns about the initiative process.

A. General Drawbacks of Lawmaking by Initiative

The proposals sent before the people in initiative form in all

53. Television ranks just behind newspapers as the source of information most widely relied on by voters, and most people obtaining information from television relied on advertisements as opposed to other coverage. See generally MAGLEBY, supra note 14, at 132.

Of course, advocates of initiatives have no monopoly on the use of misleading advertising. In an extraordinary action, Washington's attorney general filed a lawsuit against opponents of the Washington initiative under the state's law banning false political advertising. The lawsuit focused on a flier proclaiming that the initiative "would let doctors end patients' lives without benefit of safeguards," with "no chance to change your mind." The attorney general charged that the flier recklessly disregarded the actual content of the initiative. See Margaret Miller, State Sues Enemies of Right-to-Die Initiative, SEATTLE TIMES, June 11, 1992, at D1; Margaret Miller, Attorney General Gets Heat for Suit - 120 Friends, 119 Foes Criticize Eikenberry, SEATTLE TIMES, June 12, 1992, at B4.

54. "[I]nformation costs" (the costs of learning about the various aspects of the issue) are generally even higher [in initiative elections] than in candidate elections." CRONIN, supra note 1, at 67. Voters have exhibited more sophistication, however, than originally feared. Eugene Lee, California, in BUTLER & RANNEY, supra note 14, at 119. Indeed, on issues like aid-in-dying little need exists for any specialized knowledge of the issue, provided that voters receive enough general information to gain an impression of the guidelines any initiative contains.

55. Critics who advance this argument overlook both the long history of legislative suppression of minority interests and the empirical record of initiatives, which compares to legislative lawmaking in that some laws have protected minority interests while others have not. See CRONIN, supra note 1, at 92, 98. In any event, given the voluntary nature of the proposed aid-in-dying regimes, a "tyranny of the majority" argument has little application to aid-in-dying, beyond possibly a "slippery slope" argument with regard to perceptions toward disabled persons.
likelihood will lack the procedural detail of bills before the legislature. State legislatures have people experienced in drafting legislation who draw up proposed legislation, especially for significant bills such as aid-in-dying legislation. This "first draft" then becomes subject to revisions at the hands of staff members of sponsors, legal counsel, lobbyists, committee staff, committee members, staff members of other legislators, and other legislators. In addition to spotting substantive difficulties, they will have a much greater chance of finding procedural trouble spots and amending the legislation to protect against these problems.

Advocates of initiatives typically must rely on their own expertise in drafting the initiatives, because they have to devote whatever resources they possess at the outset of the campaign to circulating petitions. In addition, initiative drafters must write with the electorate in mind, and this creates a vexing dilemma. Initiatives lacking sufficient detail open the proponents up to attack by opponents, and risk rejection by a wary public. If initiatives attempt to account for areas of concern, however, they tend to become exceedingly complex. In this case, voters may not want to attempt to wade through the details of the proposal, and, as with overly vague initiatives, will reject it because they do not understand its implications.

The leading role single-issue activists must assume also

56. See generally Magleby, supra note 14, at 186.
57. See generally Zimmerman, supra note 14, at 92. Zimmerman, citing a New York study, concluded that initiatives are drafted as well as legislation. Unlike drafters of initiatives, however, drafters of bills in the legislature can continue to work on poorly drafted bills after introduction; see infra notes 67-72 and accompanying text.
59. Some states make staff assistance available before drafting or have state boards review the wording of initiatives and propose technical changes. Cronin, supra note 1, at 208; cf. Christopher A. Coury, Student Note, Direct Democracy Through Initiative and Referendum: Checking the Balance, 8 Notre Dame J.L. Ethics & Pub. Pol'y 573, 589 (1994). These bodies, though, do not have the authority to suggest additional procedural details in aid-in-dying initiatives, for those would represent "substantive" changes to the initiative.
60. Schmidt, supra note 7, at 34.
61. Magleby, supra note 14, at 142. Voters can attempt to inform themselves about the implications of an initiative in two ways. First, voters may receive information about the initiative through the media prior to the election. Generally, voters know nothing about an initiative until they actually vote on it. Id. at 128-29. The aid-in-dying initiatives received extensive coverage; still, just prior to the election on the California initiative, over one third of likely voters could not even recognize the initiative, and almost one half did not know enough about it to offer an opinion until pollsters explained the initiative. The Times Poll, L.A. Times, Oct. 27, 1992, at A1; Voters Favor Term
decreases the likelihood that the initiative will accurately reflect the will of the people. Proponents of an initiative must mobilize a large number of volunteers, due to petitioning and fundraising constraints. Interest groups provide the only realistic source for these needs. Once a drafted initiative appears before the public, only the petition process and the vote itself check the initiative's approval. Thus, interest groups need only concern themselves with designing an initiative palatable enough to survive the petition process and to persuade a majority of the voters to approve the initiative. These checks, particularly the vote, will go a long way toward ensuring that the initiative reflects the enduring will of the people. But the checks only guarantee that the people will not vote for initiatives that stray farther from current public will than the status quo. Initiatives perceived to improve on the status quo will pass regardless of whether a more evenhanded proposal could have better reflected the public will. If the public does not debate the initiative vigorously, the incentive to draft the initiative strategically becomes greater.


Second, voters may glean information from the description that appears on the ballot. Most people lacking college-level reading ability, however, will not comprehend this description. MAOLEBY, supra note 14, at 118. The description of the California initiative does not appear immune from this problem. California Initiative, supra note 12.

62. See SCHMIDT, supra note 7, at 194-200, which details many recommendations for the organization of an initiative campaign, in recognition of the crucial role of volunteers.

63. Rev. Ralph Mero, director of the Pacific Northwest Region of the Hemlock Society, the preeminent organization pushing for legalization of aid-in-dying, organized the effort in Washington. COX, supra note 42, at 150. The California proposal largely mirrored the model statute of the Hemlock Society. Compare California Initiative, supra note 12, with DEREK HUMPHRY, DYING WITH DIGNITY: UNDERSTANDING EUTHANASIA 199-201 (1992) (describing the Hemlock Society model proposal). The Hemlock Society substantially guided the efforts to secure passage of these initiatives. See generally COX, supra note 42, at 158-79. See also O'Keefe, Measure Survives, supra note 37, at A1 (Hemlock Society the largest contributor to the Oregon proponents).

64. See generally Sirico, supra note 22, at 669-70.

65. The petition process doomed the proposed constitutional amendment in Michigan; see supra note 50. The Washington and California initiatives failed their tests at the ballot box; voters rejected both by a 54-to-46 percent margin. COX, supra note 42, at 166, 178. The Oregon initiative passed by a 51-to-49 percent margin. Jane Meredith Adams, Oregonians Still Debating Assisted-Suicide Law, CHI. TRIB., Dec. 8, 1994, at 33.

66. The aid-in-dying issue illustrates these phenomena well. Most voters support aid-in-dying in general (see supra note 43), and this translated into strong initial support for the aid-in-dying initiatives. See, e.g., Poll Finds Support for Three Initiatives, UPI, Sept. 22, 1992, available in LEXIS, News Library, Curnws
The limitations on amendment of initiatives that have become law exacerbates the problem of deficient drafting. No legislation can completely account for every eventuality, so amendments serve as a valuable tool to improve a law to make it more closely conform to the law's general intent. State constitutions, however, typically limit the ability of the legislature to amend initiatives, by such means as precluding changes to a popular initiative for a specified period of time or requiring a supermajority vote. In addition, legislators will hesitate to suggest changes to popularly enacted laws because of the inevitable backlash for questioning the wisdom of the majority of the electorate. The people could resort to initiatives to amend the initiative, but the process takes too much time and money for use as a correction device for previous initiatives. On the other hand,

File (68% support for California initiative); Jeff Mapes, Support Strong for Doctor-Aided Suicide Measure, OREGONIAN, Sept. 7, 1994, at B1 (63% support for Oregon initiative). After opponents focused public attention with advertisements, however, support dwindled. See, e.g., Sura Rubenstein, Voters Split on Measure 16, OREGONIAN, Nov. 6, 1994, at A1. Without this public ambivalence when confronted with opposing arguments, advocates may have pressed for a bill more to their liking. The drafters of the Oregon initiative emphasized the limited nature of their proposal in an attempt to soothe the fears of voters. O'Keefe, Lonely Vigil, supra note 37, at B1. Fundraising letters, however, cast the Oregon initiative as a stepping stone to legalized euthanasia. Wesley Smith, Going Dutch?, NAT'L REV., Oct. 10, 1994, at 60, 61. When put together, these facts indicate that aid-in-dying in Oregon put together the strongest bill that voters would accept.

67. ZIMMERMAN, supra note 14, at 75-76.

68. Id.

69. The Oregon legislature can alter the Oregon initiative freely, but even opponents of aid-in-dying, bowing to the inevitable, largely have ruled out efforts to make substantial changes to the initiative through the legislature. See Tom Bates & Dee Lane, Oregon's Suicide Statute Faces Tests, OREGONIAN, Nov. 27, 1994, at A1 (quoting state senator expressing hesitancy about changing requirements for second opinion because voters "understood" the initiative to set up a particular standard); Rob Carson, Oregon's Suicide Law to Face Fight in Legislature, NEWS TRIB., Dec. 11, 1994, at B1 ("Outright repeal of the initiative is unlikely, most legislators and lobbyists agree."); Warren Wolfe, Oregon May Rule Today on Assisted Suicide, STAR TRIB., Dec. 19, 1994, at 1A (quoting Thomas Balmer, deputy attorney general) ("The initiative process is very close to sacred in Oregon. The Legislature tinkers, but it does not overturn a decision of the voters. It just isn't done.").

70. Even noncontroversial initiatives in California require millions of dollars to stand a reasonable chance of passage. Figures show that half of all initiatives resulted in expenditures of over $1 million, and over 10 percent cost at least $2.5 million. MAGLEY, supra note 14, at 148. Advocates of an amendment could choose to spend less in the hopes that the "technical" nature of the amendment will generate little if any opposition. Lee, supra note 54, at 90-91. This would not decrease the costs of obtaining signatures. Also, if opponents do arise, and they outspend proponents by at least a 2-to-1 margin,
the legislature, with its committee system, bicameral structure (except in Nebraska), executive veto, and responsibility for issues other than the initiative itself,71 has a much greater capacity for fashioning a compromise solution accounting for some of the concerns of opponents,72 and thus will generally come closer to the true public consensus than initiative drafters will.

The weaknesses of the drafting process, the reliance on interest groups, and the inflexibility to compromise and amendment all will undercut the effectiveness of any aid-in-dying initiative. The specific aid-in-dying initiatives proposed to date reflect these general problems.

B. Specific Flaws of Aid-in-Dying Initiatives

1. Washington and California Initiatives

One of the strongest charges leveled at both the Washington73 and California74 aid-in-dying initiatives concerned the lack of procedural safeguards in the initiatives to limit the availability and implementation of physician aid-in-dying. Aid-in-dying advocates cast the Washington initiative in broad terms, hoping to handle procedural details after passage. The voters refused to enact such an uncertain system.

The drafters of the California initiative recognized that electoral success would require spelling out more of the procedural details.75 The California initiative, however, failed to include many provisions widely believed necessary to ensure a knowing and voluntary choice of physician aid-in-dying. For instance, it did not distinguish between assisted suicide and euthanasia; the latter impacts on the autonomy rights of a person to a greater

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71. For a discussion of the benefits of government by a body responsible for more than one issue, see MAGLEBY, supra note 14, at 190.

72. Cf. Shertz, supra note 48, at 590 (one-time sampling of public opinion brings undeliberate responses rather than careful judgment, public discussion, or consideration of needs of others).


75. HUMPHRY, supra note 63, at 40-41.
degree than the former.\textsuperscript{76} Any doctor licensed to practice in the state could have authorized the request of aid-in-dying, regardless of area of expertise.\textsuperscript{77} The certifying doctors did not need to have established a previous relationship with the person.\textsuperscript{78} The doctors had no duty to discuss other options with the person.\textsuperscript{79} In fact, doctors maintained no duty to determine whether the person's pain proved beyond effective relief or not.\textsuperscript{80} The proposal vaguely defined terminal illness to include people who two doctors believed had less than six months to live, but did not specify the level of care used as a benchmark from which to make that judgment.\textsuperscript{81} While the California initiative required two independent requests for aid-in-dying and that the request prove "enduring", it placed no time limit between the first and second request.\textsuperscript{82} The bill did nothing to assess the mental health of a person requesting aid-in-dying beyond the physician voluntarily requesting a psychological evaluation if the person approved.\textsuperscript{83} Finally, the bill required no witnesses for the actual request for aid-in-dying or for the death itself, meaning that only the doctors would have assessed whether the person acted under undue influence or not.\textsuperscript{84}

The Washington and California initiatives, then, did not reflect the will of the people. The imprecision of drafting resulted in proposals unpalatable even to many people who supported aid-in-dying in theory.

\textsuperscript{76} CeloCruz, supra note 9, at 390.
\textsuperscript{77} "Physician' means a physician and surgeon licensed by the Medical Board of California." California Initiative, supra note 12, § 2525.2(c).
\textsuperscript{78} Campbell, supra note 73, at 130. Given the importance of the physician's judgment to the safeguards in the various initiatives, the degree of consultation proves crucial to the effectiveness of the system. See Task Force, supra note 29, at 129-30, 143-44.
\textsuperscript{80} Peter Steinfels, Beliefs, N.Y. TIMES, Oct. 10, 1992, § 1, at 7.
\textsuperscript{81} The imprecision of prediction of terminal illness accentuates this shortcoming. See Task Force, supra note 29, at 12.
\textsuperscript{82} "'Enduring request' means a request for aid-in-dying, expressed on more than one occasion." California Initiative, supra note 12, § 2525.2(i).
\textsuperscript{83} "An attending physician who is required to give aid-in-dying may request a psychiatric or psychological consultation if that physician has any concern about the patient's competence, with the consent of a qualified patient." Id. § 2525.13. Many people have questioned the ability of general practitioners to make accurate psychological evaluations. See, e.g., Task Force, supra note 29, at 127. The relative lack of protection for people suffering from psychological depression or other treatable disorders takes on a disturbing light given that some studies estimate that up to 95% of all people committing suicide have such disorders. See Task Force, supra note 29, at 11.
\textsuperscript{84} Reinhold, supra note 39, at A1; Steinfels, supra note 80, § 1, at 7.
2. Oregon Initiative

After the defeat of the California initiative, a coalition of aid-in-dying advocates in Oregon gathered to draft a ballot initiative in that state. They recognized that success would depend upon convincing Oregon voters of the procedural soundness of the proposal. In some respects, the Oregon initiative does reflect this priority. Most fundamentally, the initiative would legalize only prescription of medication sufficient to end life by a physician; the initiative specifically excludes "lethal injection, mercy killing or active euthanasia." A person wishing to receive a prescription must make two oral requests fifteen days apart from each other, and a written request with two witnesses executed after confirmation of the terminal illness and at least two days before the writing of the prescription. The diagnosis of a terminal illness by the "attending physician" receives confirmation by a "consulting physician", "a physician who is qualified by specialty or experience to make a professional diagnosis and prognosis regarding the patient's disease." And the attending physician must discuss with the person "the feasible alternatives, including, but not limited to, comfort care, hospice care and pain control."

Despite these precautions, the Oregon initiative's provisions remain, as one commentator has put it, "scanty and unclear." Public scrutiny of the Oregon initiative has revealed numerous shortcomings, as the following survey will illustrate.

— Residency. The initiative includes only residents of Oregon. It does not, however, spell out any standard for determining the residency of those who make requests. In the absence of a spe-

85. Dana Tims, Euthanasia Proposal Headed for Voters, OREGONIAN, Sept. 13, 1993, at B1 (quoting chairman of coalition as saying "building adequate safeguards will be crucial to our success"). See Alexander Morgan Capron, Even in Defeat, Proposition 161 Sounds a Warning, HASTINGS CENTER REP., Jan.-Feb. 1993, at 32 (43 percent of persons voting against California initiative cited inadequate safeguards as primary reason for vote).
87. Id. § 3.06.
88. Id. § 2.02.
89. Id. § 2.01.
90. Id. § 3.08.
91. "Attending physician' means the physician who has primary responsibility for the care of the patient and treatment of the patient's terminal disease." Id. § 1.01(2).
92. Id. § 1.01(3).
93. Id. § 3.01(2)(e).
cific standard, courts may turn to the traditional test of domicile: presence in the state and intent to stay.\footnote{95} This would render largely ineffective the purpose of a residency requirement: the desire to keep people from traveling to Oregon solely to take advantage of the aid-in-dying laws.

— \textit{Doctor Relationship}. As with the prior initiatives, the Oregon initiative does not require that either doctor have maintained a prior relationship with the person making the request. The initiative does require that the “attending physician” have “primary responsibility for the care of the patient,”\footnote{96} but this does not preclude a physician from taking that role upon receiving the first oral request. If the doctor need not have maintained a prior relationship with the person making the request, the possibility of specialists of death emerges; even if this does not occur, doctors not having a prior relationship will have less knowledge about the patient, which could affect the quality of the diagnosis.

— \textit{Insurance}. The Oregon initiative prohibits any effect on an insurance or annuity policy as a result of a decision to pursue aid-in-dying in accordance with the initiative.\footnote{97} Insurance companies have expressed the fear that the initiative could prohibit them from refusing to issue policies to persons with a terminal illness.\footnote{98}

— \textit{Doctor Liability}. The initiative provides an exclusion from “civil or criminal liability or professional disciplinary action for participating in good faith compliance with this Act,”\footnote{99} but then emphasizes the possibility of “liability for civil damages resulting from other negligent conduct or intentional misconduct by any person.”\footnote{100} These sections provide no clear gauge of the scope of liability of doctors under the initiative, a particularly crucial question given the uncertainty over whether malpractice insurance covers aid-in-dying activities.\footnote{101}

— \textit{Recordkeeping}. The initiative requires that the attending physician retain various documentation indicating compliance with

\begin{flushleft}
96. Oregon Initiative, \textit{supra} note 10, § 1.01.
97. \textit{Id.} § 3.13.
100. \textit{Id.} § 4.02(3).
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the procedural requirements of the initiative,102 and the government takes on the responsibility of privately reviewing a "sample" of records and publicly issuing an "annual statistical report."103 The vagueness of these provisions has led observers to criticize both either for perceived laxity or for perceived onerousness. On the one hand, the fact that the government would not review every case could give doctors the capability to evade the initiative's procedural requirements with impunity.104 On the other hand, doctors have worried about the impact of any state review on the confidentiality of medical records.105

— Evaluation of Patient Prognosis. The initiative sets out a specific definition of "terminal disease,"106 but to a large extent a diagnosis of this sort represents a subjective judgment. The initiative seeks to ensure accuracy through confirmation by a "consulting physician" with "specialty or expertise to make a professional diagnosis and prognosis regarding the patient’s disease."107 Still, many observers have protested the limited nature of the confirmation. Some have insisted that doctors with expertise in pain management and/or mental capacity have a role in the review.108 Also, one observer has proposed that the second opinion come from a panel of experts as opposed to an individual doctor.109

102. Oregon Initiative, supra note 10, § 3.09.
103. Id. § 3.11.
106. "‘Terminal disease' means an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six (6) months." Oregon Initiative, supra note 10, § 1.01(12).
107. Id. § 1.01(3).
— The Act Itself. The initiative does not require that any other person witness the actual taking of the lethal medication. Furthermore, it does not prescribe any specific medications or dosages. Thus, even though the initiative requires that the attending physician inform the patient of the risks and probable result associated with the medication, the patient may take the medication improperly, or it may not work as intended.

— Role of Pharmacists. The Oregon initiative limits aid-in-dying to assisted suicide through self-administered medication in order to avoid troublesome questions regarding autonomy. This limit, however, creates separate problems. One involves the ability of pharmacists opposed to aid-in-dying to avoid filling prescriptions of lethal medication. The initiative allows any "health care provider" to refuse to participate in the procedure without penalty, but this protection may not apply to pharmacists working for managed care plans or drug store chains.

— De Facto Expansion to Other States. Another consequence of legalizing assisted suicide rather than euthanasia involves the possibility that people outside of Oregon will take advantage of the possibility to obtain lethal doses of medication. So long as an Oregon doctor writes the prescription, a pharmacy service in any state could fill the prescription, which increases the chances of abuse of the system.

The Oregon initiative, then, leaves many questions unanswered. The manner in which Oregon intended to resolve ambiguities, though, proves even more disturbing. The initiative would have taken effect on December 8, 1994 absent the restraining order and injunction blocking enforcement. One week earlier, a state task force began writing rules to implement the law; the administrator of the task force anticipated that the task force would accomplish its aims in a single meeting. The

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111. Oregon Initiative, supra note 10, § 1.01(7).
112. A practitioner of euthanasia in the Netherlands recently estimated that one or every four patients do not die for hours or even days after taking the prescribed medication. Mark O'Keefe, Dutch Researcher Warns of Lingering Deaths, OREGONIAN, Dec. 4, 1994, at A1. Obviously, such warnings fuel doctors' fear of liability under the initiative; see supra notes 99-101 and accompanying text.
113. Oregon Initiative, supra note 10, § 4.01(2).
115. Id.
116. See supra note 27 and accompanying text.
lack of attention to rulemaking, combined with the vagueness of the law and the reluctance of the legislation to substantially alter the initiative,118 meant that the details would take shape through litigation.119 The courts, as demonstrated earlier,120 do not resolve questions of this sort as well as other bodies do. The fact that the Oregon initiative will require extensive elucidation by its courts represents perhaps its largest weakness.

C. Lessons of the Aid-in-Dying Initiatives

If the aid-in-dying initiatives had gone through the legislative process, the legislature surely would have addressed many of the concerns left unresolved by the ballot measures. Public scrutiny of the proposals would have highlighted the initiatives' weaknesses, and proponents would have had the ability to alter the proposals accordingly. As explained earlier, no initiative drafter will accurately foresee all of the concerns of other parties,121 and drafters have an incentive to avoid procedural detail where possible to avoid confusing and alienating voters.122 The failure of the aid-in-dying initiatives to account successfully for the concerns of others, then, represents a failure of the initiative system itself rather than simply failures of the drafters. Since most people consider the cost of poorly drafted aid-in-dying legislation intolerable,123 an institutional structure more likely to produce poorly drafted proposals does not satisfy the enduring will of the people.

Aid-in-dying legislation inadequately guaranteeing that per-

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118. *See supra* note 69.
119. Bates & Lane, *supra* note 69, at A1 (quoting Jono Hildner, acting administrator of the Oregon Health Division) ("It's up to the lawyers to really decide."). Advocates of aid-in-dying have responded that parties concerned about implementation should have assisted in drafting the initiative. *See, e.g.*, Derek Humphry, *Law Reform*, 20 Ohio N.U. L. Rev. 729, 730 (1994). The nature of the initiative system, with the prominence of interest groups in drafting and the need to avoid overly complex proposals, decreases the likelihood of this occurring.
120. *See supra* notes 28-35 and accompanying text.
121. *See supra* text accompanying notes 67-68.
122. *See supra* notes 64-66 and accompanying text.
123. Most arguments along these lines stress that a lack of proper procedure will mean that a "slippery slope" toward death of people not envisioned by the statute will begin, because some doctors, particularly those with no previous relationship with the person, would seek only to comply with whatever procedure the statute mandates and little else. Campbell, *supra* note 73, at 132; CeloCruz, *supra* note 9, at 393; Schanker, *supra* note 44, at 1005. For an argument that an open, legal regime would guard against such eventualities, see Christine K. Cassel & Diane E. Meier, *Morals and Moralism in the Debate Over Euthanasia and Assisted Suicide*, 323 New Eng. J. Med. 750, 751 (1990).
sons make a knowing and voluntary choice to pursue physician aid-in-dying not only carries high costs in and of itself, it becomes more susceptible to invalidation on constitutional grounds. The lines of attack pursued by the parties challenging the Oregon initiative\textsuperscript{124} would not have had as much force had the proposal gone through the legislature. In particular, with the increased drafting attention the proposal would have received, the legislature could have accounted for some of the vagueness concerns and for the questions of free exercise and association. The institutional biases of initiative systems toward less detailed proposals, then, make constitutional challenges of these laws more potent.\textsuperscript{125}

IV. Proposal

The foregoing discussion identifies a dilemma. On the one hand, aid-in-dying legislation rarely will receive serious consideration if the legislature has exclusive authority to consider the issue. On the other hand, if the people resort to a popular initiative, they run the serious risk of passing an oversimplified law subject to constitutional invalidation and a law reflecting the desires of the drafters more than the desires of the people as a whole. With these problems in mind, the question becomes whether any way exists to combine the unique advantages of the legislative and popular processes while reducing the disadvantages of each system.

An optimal system for dealing with issues such as physician aid-in-dying would leave the primary responsibility for the drafting of appropriate proposals to the legislature. The people would then have the unique benefits of legislative drafting and review: a bill less vulnerable constitutionally, a bill with superior procedural safeguards, and a bill better serving the interests of all concerned. The legislature would also more likely make prudent changes to improve any law passed, in comparison to the relative rigidity of any popularly-passed law.

In exchange for this deference to the legislature, an optimal system would enable the people to compel the legislature to consider issues important to them such as aid-in-dying. As a neces-

\textsuperscript{124} See supra note 27 and accompanying text.

\textsuperscript{125} Courts invalidate initiatives more often than they do statutes enacted by the legislature, suggesting a structural difference in the quality of the laws. Sirico, supra note 22, at 642. Courts review initiatives just as they would any other law, but because initiatives face fewer institutional constraints, popularly enacted laws might deserve less deference than laws enacted by a legislature. Id. at 667-69.
sary corollary, the legislature must reach a decision on the question openly, so that the people may hold legislators accountable for their decision on the subject. A vote to have legislators consider aid-in-dying questions would accomplish little if legislators simply responded that they had considered the question but could not find a proposal worth voting on.

Therefore, I propose the following framework for allowing the public to play a role in the legislative process, in order to attempt to satisfy all of these goals:

1. People who advocated a statutory change would draft a proposed statute and circulate a petition to the public at large, as the current initiative system provides. If a sufficient number of registered voters sign the petition, the proposed statute would be placed on the next general election ballot. The drafting of the initial statute would remain in the hands of the advocates of change, because the only alternative would involve some form of legislative drafting, and the types of issues the drafters would choose to submit to the people may not represent the issues the public wishes to consider. The general election rule would help further legislative accountability - legislators might have to take a public position on any initiative before the voters at the same time, and having initiative votes coincide with general elections facilitates efforts to hold legislators accountable later. The touchy question centers on the threshold of signatures the state should require before placing an issue before the voters.

126. But see Reinhold, supra note 39, at A1 (California senatorial candidates took no position on California initiative).

127. Most states with direct initiatives require somewhere from 3 to 10 percent of the total votes cast for the governor in the preceding gubernatorial election. For a list of the various requirements, see Schmidt, supra note 7, at 296-97.

128. Analysts routinely complain of “ballot clutter”, where the number of propositions presented to voters inevitably increases voter confusion and results in a tendency not to vote on propositions appearing later on the ballot. See Magleby, supra note 14, at 90, 128. At least one analyst believed that the Oregon initiative would face this problem. Campbell, supra note 95, at 11.

129. See supra note 49.
voters. Aid-in-dying initiatives have the kind of grassroots support that make them more apt to survive the petition process if handled properly.\(^{130}\)

2. Voters would then decide whether or not to send the proposed statute to the legislature. Sending a complete statute to the legislature rather than simply commanding the legislature to, say, consider the aid-in-dying issue serves several interests, including giving the legislature a concrete reference point, giving the people an easy means to judge legislators subsequently, and giving the voters more incentive to consider their votes carefully (they presumably would not choose to send to the legislature a statute they opposed on principle). Still, the major worry centers on voters having little incentive to vote no in the belief that the legislature will assume the responsibility for amending or refusing the proposal. If the other checks have not solved this problem, the state could conceivably require a supermajority vote (or a majority of all persons voting in the election regardless of whether they voted on the initiative or not)\(^{131}\) for referral to the legislature.

3. Within one year of a vote to refer the issue to the legislature, both houses of the legislature would have to vote on the specific proposal referred to the legislature, regardless of any other action taken on the subject. The time limit aims both to give the legislature sufficient time to consider the proposal and to compel a vote that leaves enough time for the voters to hold legislators accountable for whatever choice they make. Compulsion of a vote has the goal of putting each lawmaker on record on a particular question. The vote must occur on the specific question sent to the legislature even if the legislature has passed an amended version because the amended version may not address the specific issues of the ballot measure. They could, of course, use the existence of a legislative alternative (or the need for more time to consider the issue) as a justification for a no vote.

The most troublesome aspect of this portion of the proposal concerns the lack of a sanction should the legislature steadfastly refuse to vote on the issue. Despite the public command to go on record on the issue, legislators may still conclude that the cost of taking a public position on issues such as aid-in-dying out-

\(^{130}\) See supra note 50.

\(^{131}\) A small percentage of voters in a general election will not vote on some or all of the ballot propositions. See generally Magleby, supra note 14, at ch. 5. This “dropoff” occurs at lower rates for popular initiatives, though, than for other ballot propositions. Id. at 90.
weigh the benefits of submitting to a vote. One way to spur 
action would involve letting the proposed statute become law 
after one year if the legislature did not act to the contrary. This 
would give the legislature too much incentive, though, to 
simply let the measure pass undisturbed unless the proposal con-
tained egregious flaws. In that event, the process would have 
done little to alleviate the harms of the initiative process. There-
fore, the referred statute must fail if the legislature refuses to 
vote. Even if no meaningful way exists to actually compel a vote, 
though, the system itself could serve as a sufficient prod. Legisl-
ators would have a difficult time convincing voters that the 
people's best interests require a choice to defy a constitutional 
voting requirement in order to avoid voting on a measure 
referred to it by the majority of the voters.

Obviously, a system along these lines faces quite formidable 
obstacles. No state currently has a system of this nature, so any 
state wishing to establish a process of this sort would have to 
amend its constitution. States that currently have an initiative 
system would encounter the greatest difficulty in changing their 
structures; voters would probably exhibit little enthusiasm toward 
watering down their ability to enact legislation independent of 
the legislature. Beyond the states, this proposal could extend 
to the national level. Proposals for direct democracy of any sort

132. This represents the form of "indirect initiative" operative in many 
states and recommended by several analysts. See ZIMMERMAN, supra note 14, at 
166.

133. Many provisions of the U.S. Constitution require the legislature or 
the president to take specific action, with no sanction for violation specified 
(except the ultimate threat of impeachment). These provisions include: the 
requirement that Congress assemble at least once a year, U.S. Const. art. I, § 4; 
the requirement that Congress maintain and publish a journal of its 
proceedings, including any votes if one-fifth of its members request their 
inclusion, id. at art. I, § 5; the requirement that the President nominate high-
ranking officials and that the Senate provide advice and consent on the specific 
people nominated by the president, id. at art. II, § 2, amend. XXV, § 2; the 
requirements that the President provide Congress with periodic information on 
the state of the union and recommend bills, receive ambassadors, faithfully 
execute the laws of the United States, and commission officers, id. at art. II, § 3; 
the requirement that Congress call a constitutional convention if enough state 
legislatures apply for one, id. at art. V; the various requirements placed on 
Congress regarding the procedure of the Electoral College, id. at amend. XII, 
amend. XX, § 3; and the requirement that Congress assemble and decide 
within 21 days a dispute over the ability of the President to perform in office, id. 
at amend. XXV, § 4. While none of these examples provides a precise analogy 
to the compulsory vote envisioned here, they do indicate that compulsory 
action without specific sanction does not go beyond the scope of the U.S. 
Constitution.

134. CRONIN, supra note 1, at 241.
at the national level currently remain the exclusive province of academics (and, maybe, Ross Perot and his followers). An indirect process such as the one proposed here might prove more palatable than a direct national initiative.

V. CONCLUSION

With the preceding discussion in mind, the potential implications for physician aid-in-dying can receive more explicit consideration. Under initiative systems as currently structured, the resolution of aid-in-dying questions will most likely not represent the true wishes of the majority of the people. Where the legislature maintains a free hand, the sensitive political nature of aid-in-dying will tend to suppress any consideration of the issue, much less permit any affirmative decision on the matter. On the other hand, none of the initiatives put forth to date satisfactorily deal with the issues, and the failures reflect general failings of the initiative process.

The system proposed above, though, could solve some of these problems. The effective gathering of signatures for aid-in-dying petitions in the past indicates that even if states used a high threshold for placement on the ballot, aid-in-dying initiatives would reach the electorate. The vote would provide a crucial test of public opinion, in a context different from the votes on the previous initiatives. The Washington, California, and Oregon experiences show that many voters have sympathy for the aid-in-dying cause but may not have cared for the initiatives as specifically drafted. The proposed system would give the legislature an incentive to fill the measure out with appropriate amendments; this in turn may convince voters generally supportive of aid-in-dying to send a reasonably drafted bill to the legislature. In other words, provided that the sponsors draft the initiative carefully enough to reflect the general desires of the people, the

135. See Schmidt, supra note 7, at 181 (advocating direct national initiative).

136. Perot made the "electronic town meeting", where citizens would voice their opinions on selected national issues, a centerpiece of his presidential candidacy, although the procedural details escaped most observers (including, no doubt, Perot himself). See John Mintz, Perot Sampler Short on Policy Details; Unconventional Texas Non-Candidate Grilled at Editors' Forum, Wash. Post, Apr. 11, 1992, at A1; Evan I. Schwartz, Electronic Town Meetings: Reach Out and Vote for Something, Bus. Week, Apr. 13, 1992, at 38.

A Canadian legislator proposed a national referendum on physician aid-in-dying after the controversial assisted suicide of Sue Rodriguez, but Prime Minister Jean Chretien curtly dismissed the proposal. David Vienneau, MPs Will Decide How to Vote on Suicide, PM Insists, Toronto Star, Feb. 17, 1994, at A14.

137. See supra note 66.
vote would become a purer test of principle. If the public decided to send the proposal to the legislature, the legislature could subject the proposal to greater scrutiny and amend the proposal as needed. The legislature could then choose to pass the initiative itself, reject it on the grounds that the legislature had developed a better alternative, or reject aid-in-dying legalization altogether. Whatever the outcome, the legislature's vote on the popular proposal would make it accountable to the electorate.

A democratic government does not work to the maximum benefit of the people as a whole if its institutions either suppress issues or adopt misguided laws which do not reflect the enduring will of the majority of the people. Restructuring the political system to combine the best aspects of direct democracy and representative democracy would bring the laws arising from the democratic system on issues like aid-in-dying closer to the long-term wishes of the people. The aid-in-dying dilemma illustrates, perhaps better than any other issue, the need to make an attempt to make our society more truly democratic.