

# *An Interactional Model of Direct Democracy*

## Lessons from the Swiss Experience

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*Abstract:* Direct democratic decision-making has often been associated with populism, irrationality, and oppression of minorities as it requires allegedly “cognitive overstrained” citizens to decide on complex political issues often brought forward by special interest groups. The usage of popular initiatives in particular in the State of California seems to provide conclusive evidence for all of these shortcomings. Due to its constitutional arrangement and its diverse structure, Switzerland – which historically served as a blueprint for introducing instruments of direct democracy at the state-level during the progressive era in the United States – offers a unique case to assess these claims: More than half of the world’s referenda held at the national level during the 20<sup>th</sup> century have taken place in Switzerland. At the same time, the Swiss Federal Constitution provides for limited constitutional review only, excluding Federal statutes and international law from judicial control. Based on the lessons from the Swiss experience, this paper argues not only for a more realistic approach to popular decision-making but for a more differentiated understanding of the general term “direct democracy” by pointing at the often neglected importance of the interface between institutions of direct and indirect democracy. At the same time, it cautions against simplistic demands for “popular constitutionalism”. In sum, this paper champions what I call an interactional model of direct democracy.

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## I. The Swiss Puzzle

Popular decision-making by institutions of direct democracy has been the object of fierce criticism. In a tradition rooted in *Plato's* elitist skepticism of democracy,<sup>1</sup> *Joseph A. Schumpeter* coined the phrase that direct democracy might work in Switzerland, as “[t]here is so little to quarrel about in a world of peasants which, excepting hotels and banks, contains no great capitalist industry, and the problems of public policy are so simple and so stable that an overwhelming majority can be expected to understand them and to agree about them”, but fails to deliver sound solutions for more complex, industrialized societies asking for “great decisions”.<sup>2</sup> Along the lines established by *Max Weber*,<sup>3</sup> rejection of institutions of direct democracy seems to be particularly widespread in mainstream German legal academic circles where plebiscites are still associated with the collapse of the Weimar Republic.<sup>4</sup> The *Grundgesetz*, consequently, does not, at least according to the prevailing opinion, allow for direct-democratic decision-making at the national level.<sup>5</sup> *Peter Krause*, writing in the leading *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, even claims that direct democracy does “not lead to acceptance or stability (...), rather, it goes against the general welfare, and leads to irrationality, inconsistency, and punctuality.” It would not only fail to “promote the disimpassioned and objective decision-

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<sup>1</sup> PLATO, REPUBLIC 285-91 (Reginald E. Allen, trans., Yale University Press 2006) (approx. 360 B.C.E.). See also Gerasimos Santas, *Plato's Criticisms of Democracy in the Republic*, 24 *Social Philosophy and Policy* 70 (2007).

<sup>2</sup> JOSEPH A. SCHUMPETER CAPITALISM, SOCIALISM, AND DEMOCRACY 267 (2<sup>nd</sup> ed. 1947).

<sup>3</sup> E.g. MAX WEBER, *Wirtschaft und Gesellschaft* 666 (5<sup>th</sup> ed. 1921-25/72): “[D]ie Überprüfung der Beschlüsse der Parlamente durch das ‘Referendum’ bedeutet in der Hauptsache eine wesentliche Stärkung aller irrationalen Mächte des Beharrens (...)“

<sup>4</sup> See e.g. Hans Schneider, *Die Reichsverfassung vom 11. August 1919* § 5 N. 56 in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND. BAND II (Josef Isensee & Paul Kirchhof eds., 3<sup>rd</sup> ed. 2003) (arguing that referenda offered “political demagogy ... a romping place” instead of serving the cause of “political education of the people.” – Translation by the author.)

<sup>5</sup> The prevailing opinion usually relies on a structural argument based on GRUNDGESETZ [GG] art. 29 and GG art. 118/118a. GG art. 20 § 2 (second sentence), thus, is to be read only as a commitment to popular sovereignty as such.

making”, but “impedes the ordinary citizen from fulfilling his other responsibilities.”<sup>6</sup> Similar criticism origins from the late *Hans Huber*, a influential figure in Swiss legal academia for several decades, who argued that popular initiatives would “distract” the political branches and the administration from “more important and more pressing tasks” leaving them to be preoccupied with “the defense against demagoguery and impracticability”<sup>7</sup>. The core of the argument was coined by *Giovanni Sartori* who argued that not only would direct democracy “quickly and disastrously founder on the reefs of *cognitive incompetence*”, but it would inevitably lead to a “zero-sum mechanism”, extremism, and “majority tyranny”.<sup>8</sup> It appears that direct democracy aggravates an inherent peril of democracy observed by *James Madison*, namely “that measures are too often decided, not according to the rules of justice and the rights of the minor party; but by the superior force of an interested and overbearing majority.”<sup>9</sup>

Against this backdrop, the case of Switzerland provides some puzzling insights. More than half of all the referenda held worldwide at the national level between 1900 and 1993 – 52 percent – took place in Switzerland<sup>10</sup>, whereas the Swiss Federal Constitution provides for limited constitutional review only, excluding Federal statutes and international law from judicial control.<sup>11</sup> Furthermore, Switzerland seems to be particularly exposed to the threats that direct democracy allegedly brings about: Not only is quadrilingualism enshrined in the Swiss Federal

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<sup>6</sup> Peter Krause, *Verfassungsrechtliche Möglichkeiten unmittelbarer Demokratie* § 35 N 48 in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND. BAND III (Josef Isensee & Paul Kirchhof eds., 3<sup>rd</sup> ed. 2005) (translation by the author).

<sup>7</sup> Hans Huber, *Über den Initiativbetrieb und über Ausführungsgesetze zu Volksinitiativen* 357 in STAATSORGANISATION UND STAATSFUNKTION IM WANDEL. FESTSCHRIFT FÜR KURT EICHENBERGER ZUM 60. GEBURTSTAG (Georg Müller, René A. Rhinow et al. eds., 1982) (translation by the author).

<sup>8</sup> GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 115, 120 (1987).

<sup>9</sup> THE FEDERALIST No. 10, at 48 (James Madison) (R. Pole, 2005).

<sup>10</sup> David Butler & Austin Ranney, Practice, in REFERENDUMS AROUND THE WORLD. THE GROWING USE OF DIRECT DEMOCRACY 5 (1994).

<sup>11</sup> Bundesverfassung der Schweizerischen Eidgenossenschaft [SWISS FED. CONST.] April 18, 1999, SR 101, RO, 101, art. 190 (Switz.)

Constitution naming “German, French, Italian, and Romansh (...) national languages”<sup>12</sup> but, as both Zurich and Geneva were cradles of the Roman Catholic Church’s reformation in the 16<sup>th</sup> century, both Protestants and Roman Catholics make up a significant proportion of the population.<sup>13</sup> Apart from these traditional minorities, more than one in five of Switzerland’s inhabitants are non-Swiss citizens and as many as 24 percent of them are foreign-born, roughly the same percentage as in Australia, as a result of a considerably higher degree of immigration per capita in comparison with traditional immigration countries such as Australia, Canada or the United States<sup>14</sup>. If Switzerland, despite its strong commitment to direct democracy, in fact turns out to be a “paradigmatic case of political integration” as the late *Karl W. Deutsch* phrased it,<sup>15</sup> are all the perils associated with popular decision-making plainly false? Does Switzerland, thus, supply evidence that popular constitutionalism does not jeopardize the legitimate interests of minorities even without protection provided by courts?

This paper aims at explaining this putative “Swiss puzzle” by demonstrating that Switzerland has, over time, adapted a form of direct democracy which provides for an *interaction* between the political elite and citizens. I therefore label the system of direct democracy at the federal level in Switzerland as an “*interactional model of direct democracy*” and highlight the importance of the *interface* between the institutions of direct and indirect democracy. I will argue that this interactional model provides a set of safeguards for the protection of (traditional)

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<sup>12</sup> SWISS FED. CONST. art. 190.

<sup>13</sup> CLAUDE BOVAY, RAPHAËL BROQUET, RELIGIONSLANDSCHAFT IN DER SCHWEIZ 11 (Federal Statistical Office ed., 2004) available at <http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/22/publ.Document.50514.pdf> (stating that in 2000 about 42 percent of Switzerland’s population were registered members of the Roman-Catholic and about 33 percent of the Established Evangelic-Protestant Churches).

<sup>14</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD ECONOMIC SURVEYS: SWITZERLAND 118-9 (2007); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL MIGRATION OUTLOOK ANNUAL REPORT 37, 50-1, 287-7 (2007)

<sup>15</sup> KARL W. DEUTSCH, SCHWEIZ ALS EIN PARADIGMATISCHER FALL POLITISCHER INTEGRATION (1976).

minorities, at least for those who form part of the political system. The Swiss experience, however, does not provide support for those who would deny any demand for constitutional safeguards enforced by courts in a democracy as “discrete and insular minorities” are often located in the “*blind spot*” (see p. 26-30) of the instruments of direct democracy. It could, however, provide for means to cure what can be called the alleged “*Californian disease*”, that is the misuse of popular initiatives by special interests groups curbing the legitimate rights of minorities.

My argument is structured in four steps: Section II (p. 5 sqq.) briefly outlines both the constitutional history and the foundations of Swiss Federal constitutional law. Section III (p. 13 sqq.) portrays the institutions of direct democracy at the federal level (mandatory referendum, optional referendum, popular initiative) and links the constitutional provisions with empirical finding in the field of political science and public choice theory. Section IV (p. 21 sqq.) focuses on the interface between direct and representative democracy and assesses the main allegations against direct democratic decision-making and the claims in favor of popular participation. The main findings are summarized in the concluding remarks (V; (p. 31 sqq.).

## II. Nation Building in the 19<sup>th</sup> Century and its Legacy

### A. A State but not a “Nation”

Modern Switzerland emerged in 1848 after a short civil war (*Sonderbundskrieg*) – which lasted only three weeks and resulted in few casualties (140 dead and 400 wounded persons) – between the liberal<sup>16</sup>, mainly Protestant Cantons on the one side and conservative, predominantly Roman-Catholic Cantons tied together in a secret treaty (*Sonderbund*), on the other side. The

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<sup>16</sup> In view of their political goals the “liberals” and the “radicals” (*les radicaux*) of Switzerland’s 19<sup>th</sup> century may rather be called “libertarian” in an American context.

decisive victory of the liberal Cantons in 1847 paved the way for a transformation into a federal state with the enactment of the first Federal Constitution of the Swiss Confederation of September 12, 1848. Thus, despite its official name as “Swiss Confederation”, Switzerland has been a *federal state* since 1848. The birth of the Swiss “nation”, however, is usually traced back as far as 1291. In that year the three communities Uri, Schwyz, and Unterwalden signed the “Federal Charter” agreeing upon mutual assistance. This pact, which was a common feature of the European Middle Ages, over time emerged into a network of mutual agreements between different entities.<sup>17</sup> After France conquered Switzerland in 1798, a centralized state, the “Helvetic Republic”, was put into place by *Napoleon* but ceased to exist as a central authority in 1803. At the Congress of Vienna in 1815, Switzerland agreed to reinstall the traditional loose confederation of sovereign states linked together by an assembly of representatives of the Cantons (the Diet), each having the right to veto. However, not only did the principle of equality of the Cantons introduced by *Napoleon* remain in place but many of the liberal ideas of the French Revolution sustained their influence within Switzerland.

When Switzerland became a federal state in 1848, the new state lacked what constituted a “nation” according to the reigning paradigm of Europe’s 18<sup>th</sup> and 19<sup>th</sup> century: a common ethnicity as well as a common language. This holds true even today. Sixteen out of today’s twenty-six Cantons chose German, five French, and one (Ticino) Italian as their official language, three Cantons are bi-lingual (Berne, Fribourg, Valais), and one is tri-lingual (Grisons). In contrast, the long standing opposition between the Protestant and the Roman Catholic denomination rooted in the fiercely fought *Kulturkampf* of the second half of the 19<sup>th</sup> century – the struggle between political Roman Catholicism and anticlerical liberalism – eased

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<sup>17</sup> See, e.g., ULRICH IM HOF, MYTHOS SCHWEIZ 29-33 (1991); see also BERNHARD STETTLER, BUNDESBRIEFE IN HISTORISCHES LEXIKON DER SCHWEIZ (2005), <http://hls-dhs-dss.ch/index.php>.

considerably during the 20<sup>th</sup> century. As of 2000, 63.7 percent of the inhabitants of Switzerland (7.5 millions in 2008) name German as their main language, 20.4 percent French, 6.5 percent Italian, 0.5 percent Rumatsch and 9.0 percent a language not having the status of a “national” language according to the Swiss Federal Constitution.<sup>18</sup> Against this background of linguistic, denominational, as well as ethnic diversity, legends such as the founding saga of 1291 romanticized by *Friedrich Wilhelm von Schiller* in his “William Tell” (1804) may be interpreted as the construction of a common identity for the perceived “nation of will” (*Willensnation*; *nation de volonté*)<sup>19</sup>. Political features, such as direct democracy, neutrality, and federalism, which differentiated Switzerland as an “*imagined community*”<sup>20</sup> from surrounding nations, became cornerstones of a common identity and the claim of Switzerland being “a *special case*” (*Sonderfall, cas particulier*) depicting a Swiss version of (national) *exceptionalism*.

“*Exceptionalism*” is commonly associated with the phrase “American Exceptionalism” coined by *Alexis de Tocqueville* alluding “to the spirit of religion and the spirit of liberty”.<sup>21</sup> Swiss exceptionalism –

<sup>18</sup> GEORGES LÜDI, IWAR WERLEN, SPRACHENLANDSCHAFT DER SCHWEIZ 17 (Federal Statistical Office ed., 2005) available at <http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/22/publ.Document.52216.pdf>.

<sup>19</sup> See, e.g., OLIVER ZIMMER, A CONTESTED NATION. HISTORY, MEMORY AND NATIONALISM IN SWITZERLAND, 1761-1891 151-3, 203-7, 218 (2003). For a classical account see the seminal work by ERNEST RENAN, QU’EST-CE QU’UNE NATION ? (CONFERENCE FAITE EN SORBONNE, LE 11 MARS 1882) 9, 20 (1882) (on the notion of “the nation”).

<sup>20</sup> BENEDICT ANDERSON, IMAGINED COMMUNITIES. REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 138-9 (rev. ed. 1991). – However, *Anderson*’s basis for his claim that Switzerland, as a society rather than a state, became a nation as late as 1891 is not only exceedingly narrow – as he refers to CHRISTOPHER HUGHES, SWITZERLAND (1974) only as ANDERSON, supra note 20, at 135/footnote 42 openly admits (“This [Hughes’s] ... text... is the basis for the argument that follows.”) – but, as ZIMMER, supra note 19, at xiv, rightly points out, contrary to historical evidence.

<sup>21</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 36-7 (Philips Bradley, ed., Henry Reeve trans., A.A. Knopf 1948)

The birth of American exceptionalism, according to the traditional narrative, traces back to *John Winthrop*, Governor of the Massachusetts Bay Company in the first part of the 17<sup>th</sup> century, who underscored in his sermon of 1630 “A Model of Christian Charity” that “we [the Puritan colony of the Massachusetts Bay] must consider that we shall be as a city upon a hill. The eyes of all people are upon us.” (John Winthrop, *We Shall be as a City upon the Hill* 65 in SPEECHES THAT CHANGED THE WORLD (Owen Collins, ed., 1999)). In doing so, Winthrop echoed a passage of the Sermon on the Mount as described by the Gospel of Matthew insisting on the exemplary role the young Christian community should display: “You are the light of the world. A *city set on a mountain* cannot be hidden.” (5 *Matthew* 14 (emphasis added)).

stemming from the myth that Switzerland was *founded* on a hill, the Rütli, in 1291 in a struggle for freedom and against foreign oppression<sup>22</sup> – shares, to some degree even today, the *two seemingly contradictory elements* of the concept of exceptionalism, that is *isolationism* on the one hand and a mild *sense of mission*<sup>23</sup> on the other hand. Even if the second characteristic is, if at all, pronounced in a much weaker fashion, it left traces in the Federal Constitution declaring the promotion of “human rights [and] democracy” to be official goals of Swiss foreign relations<sup>24</sup> while *neutrality* has been interpreted in a strict, isolationistic manner over a long period of time.

The first Swiss Federal Constitution of September 12, 1848 was completely revised through the adoption of a new constitution of May 29, 1874. The latter led to a higher degree of unification and the enactment of an (incomplete) bill of rights. Some provisions, such as the positive right to free, religiously neutral, primary education, the freedom to marry, and the right to a “decent funeral”, were meant to push back the Roman Catholic Church’s role in the Swiss society at the culmination of the *Kulturkampf* between 1871 and 1874. Hence, the new constitution was fiercely contested. Some conservative and Roman Catholic Cantons rejected it with majorities as high as 92.1 percent, while some liberal and predominantly Protestant ones approved it with margins up to 96.8 percent.<sup>25</sup>

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<sup>22</sup> See, e.g., ZIMMER, supra note 19, at 200-8.

<sup>23</sup> As Thomas Maissen, *Säkularer Staat in konfessionalisiertem Land*, Neue Zürcher Zeitung, July 5, 2008, at 62 rightly points out the concept of the Swiss being “the chosen people” – chosen by history rather than by a denominational (that is Protestant or Catholic) God – is not connected with a “missionary claim” as “uniqueness may at best be preserved but never exported.” (Translation by the author). Yet, some counter-examples exist. The following hymn written by the influential polymath and Protestant minister *Johann Kaspar Lavater* (1741-1801) in 1768 is set in a strikingly parallel ton compared to aforementioned sermon (supra, note 21): “Let us be a light on the earth, and an example of constant fidelity, free as we are, others will be, and will scrunch tyranny!” (cited according to IM HOF, supra note 17, at 269 (translation by the author)). During the outside menace of fascism the Swiss novelist *Denis de Rougemont* (1906-1985) defined the guardianship of the concept of federalism in which the “rights of the individual and the responsibility for the common good are mutually enriching” constituting a benchmark for Europe as a whole as the “necessary mission of Switzerland” (DENIS DE ROUGEMONT, *MISSION OU DEMISSION DE LA SUISSE* 109-10 (1940) (footnote omitted)).

<sup>24</sup> SWISS FED. CONST. art. 54, ¶ 2.

<sup>25</sup> Federal Chancellery – Results of Popular Votes, <http://www.admin.ch/ch/d/pore/va/18740419/can12.html> (the results of the Canton of Uri and Schaffhausen respectively are cited in the text above).

If “*amendmentitis*” is a constitutional disease,<sup>26</sup> the Swiss Federal Constitution indeed suffered heavily from it. At the same time, the Federal Supreme Court expanded the bill of rights based on the concept of “unwritten fundamental rights”.<sup>27</sup> The fragmentation of Swiss Federal constitutional law gave rise to a completely revised constitution adopted on April 19, 1999 that came into force on January 1<sup>st</sup>, 2000. After several failed attempts to revise the Constitution had failed since the 1960s, the concept of the revision of 1999 was relatively modest: Instead of major innovations, the authorities aimed at “updating the present written and unwritten constitutional law, to present it in a comprehensive manner, to structure it systematically, and to unify the language and the denseness.”<sup>28</sup>

## B. Supremacy of Parliament and Partial Constitutional Review

Despite its commitment to the *Rechtsstaat*, fundamental rights, democracy, social welfare, and free markets, the institutional design of the Swiss Federal Constitution of 1999 to some extent still breathes the spirit of the founding era of the 19<sup>th</sup> century. This is especially true for the separation of powers. Article 148 puts forward that “the Federal Parliament is” – “subject to the power of the People and the Cantons” – “the highest authority of the Confederation”.<sup>29</sup> Article

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<sup>26</sup> See Kathleen M. Sullivan, *Constitutional Amendmentitis*, American Prospects, November 30, 2002, [http://www.prospect.org/cs/articles?article=constitutional\\_amendmentitis](http://www.prospect.org/cs/articles?article=constitutional_amendmentitis) (arguing that “we should keep in force a strong presumption against amending the Constitution.”).

<sup>27</sup> See, e.g., Bundesgericht [BGer] [Federal Court] Oct. 27, 1995, 121 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 367 at 370 para. 2a (summarizing the doctrine of “unwritten constitutional rights” according to which a alleged right must pass a two-prong test in order to qualify by proving that it (1.) is a prerequisite for the enjoyment of other fundamental rights guaranteed by the Constitution, or is an essential part of a constitutional order based on the principles of democracy and *Rechtsstaat*, and (2.) reflects either a constitutional reality in the Cantons or is supported by a broad consensus; the right to assembly, the right to property, personal liberty, and the positive right to aid in distress, inter alia, qualified under this doctrine.).

<sup>28</sup> Bundesbeschluss über die Totalrevision der Bundesverfassung [Federal Decree on the Total Revision of the Federal Constitution] June 3, 1987, BBl II 963-4 (1987) article 3 (stating the following in German: “*Der Entwurf wird das geltende geschriebene und ungeschriebene Verfassungsrecht nachführen, es verständlich darstellen, systematisch ordnen sowie Dichte und Sprache vereinheitlichen.*”).

<sup>29</sup> SWISS FED. CONST. art. 148, ¶ 1.

148 is echoed by Article 190, which sets forth that “[t]he Federal Supreme Court and the other authorities applying the law [that is, all Federal and cantonal courts as well as administrative agencies] are obliged to apply the Federal statutes and treaties.”<sup>30</sup> In other words, such sources of law have to be applied by the courts even if they violate the Federal Constitution.

The reason for this solution is twofold: First, parliament is seen as the superior “voice of the people” as opposed relative to the other Federal authorities; secondly, the liberal-radical movement dominated Switzerland during the first decades after 1848 and a judicial control of liberal reforms would have been against the interest of the politically dominant force.<sup>31</sup> Yet, the adoption of the European Convention on Human Rights (ECHR) in 1974 changed this constitutional arrangement considerably.<sup>32</sup>

### C. Federalism

The need for what from an American perspective could be labeled “*Reconstruction*” after the Swiss civil war (*Sonderbundskrieg*) in 1847, resulted in a strong commitment to federalism. As a consequence the Confederation has to rely on a specific constitutional provision in order to enact laws in a certain area such as nuclear power<sup>33</sup> or genetic engineering.<sup>34, 35</sup> Such a

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<sup>30</sup> SWISS FED. CONST. art. 190.

<sup>31</sup> ALFRED KÖLZ, *NEUERE SCHWEIZERISCHE VERFASSUNGSGESCHICHTE. IHRE GRUNDLINIEN IN BUND UND KANTONEN SEIT 1848* 576 (2004).

<sup>32</sup> According to Article 34 of the Charter, the European Court of Human Rights in Strasbourg “may receive applications from any person (...) to be the victim of a violation (...) of the rights set forth in the Convention or the protocols thereto.” The European Charter, thus, does not take into account the differentiation set forth in Art. 190 of the Swiss Constitution. Moreover, in line with the system of monism, self-executing guarantees of treaties are directly applicable in Swiss courts and administrative agencies. As the European Court of Human Rights “may only deal with the matter after all domestic remedies have been exhausted” (Article 35.1 ECHR), the Swiss Federal Supreme Court was confronted with the problem of how to deal with Federal statutes that violated the Convention. After a period of reluctance, it decided in 1991 to review such statutes in cases of controversies, as long as guarantees of the ECHR were allegedly violated. Therefore, in practical terms the scope of Article 190 has been reduced considerably.

<sup>33</sup> See SWISS FED. CONST. art. 90 (stating that the regulation of nuclear energy is a federal matter).

constitutional amendment calls for a double majority by the People and the Cantons.<sup>36</sup> The authority to allocate the powers within the federalist framework – the so-called “*competence-competence*” – therefore lies with the *People and the Cantons*. In addition, the federal element is reflected in the bi-cameral structure of parliament, which at the time of its institution constituted a modification of the model set forth in the United States Constitution.<sup>37</sup> Parliament – referred to as the Federal Assembly – consists of the National Council (200 representatives directly elected according to the system of proportional representation and each Canton forming an electoral district) and the Council of States (46 delegates of the Cantons, each of them represented by two<sup>38</sup> members according to their own regulations which predominantly chose majority representation).<sup>39</sup> Both chambers of the Federal Assembly have equal powers.<sup>40</sup> With the exception of elections, petitions of pardon and jurisdictional disputes between the highest federal authorities which are decided by the Federal Assembly as a whole, decisions made by the parliament must be approved by both chambers.<sup>41</sup>

Besides strong influences of the French Revolution and the Constitutions of the Cantons, the bi-cameral design of the legislative branch provides evidence that the United States Constitution served to some extent as a role model for the Swiss Federal Constitution. The American presidential system, however, was feared as an “approximation to monarchy or even

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<sup>34</sup> See SWISS FED. CONST. art. 119, ¶ 2 (stating that the regulation of gene technology in the human field is a federal matter).

<sup>35</sup> SWISS FED. CONST. art. 3; SWISS FED. CONST. art. 42, ¶ 1.

<sup>36</sup> SWISS FED. CONST. art. 142, ¶ 2 and SWISS FED. CONST. art. 140, ¶ 1 (a).

<sup>37</sup> See ALFRED KÖLZ, NEUERE SCHWEIZERISCHE VERFASSUNGSGESCHICHTE. IHRE GRUNDLINIEN VOM ENDE DER EIDGENOSSENSCHAFT BIS 1848 563 (1992).

<sup>38</sup> Cantons that emerged through a split of one Canton into two (Obwald, Nidwald, Basel City, Basel Land, Appenzell Outer Rhodes, Appenzell Inner Rhodes) each have only one instead of two seats in the Council of States.

<sup>39</sup> SWISS FED. CONST. art. 149-50.

<sup>40</sup> SWISS FED. CONST. art. 148, ¶ 2.

<sup>41</sup> SWISS FED. CONST. art. 156, ¶ 2.

dictatorship” as *Henri Druey*, who became a member of the first Federal Council (executive branch) on November 16, 1848, put it in a debate of the Swiss counterpart to the U.S. Constitutional convention debating the design of the executive branch.<sup>42</sup> Instead, the envoys relied on a model that had already been tested in several Cantons: The executive branch, named “Federal Council” consists of seven members, each of them having equal rights.<sup>43</sup> To provide for the parliamentary supremacy<sup>44</sup> outlined before, the Federal Assembly elects the Federal Council for a term of four years.<sup>45</sup> Neither a recall nor a motion of no-confidence is permissible during these four years. One of the Federal Councilors is elected President of the Confederation chairing the Federal Council as a mere *primus inter pares*, not enjoying any special political privileges besides representative tasks for one non-renewable term of one year only.<sup>46</sup> The Federal Council makes its decisions in sessions not open to the public as a collective body.<sup>47</sup>

The chosen design of the Federal Council allows the adaption of *modes of power-sharing* as a specific form of consensus democracy in the executive branch: As an unwritten rule the Federal Council is traditionally composed of four members from a Swiss-German canton and three from a French (usually two or three) or Italian-speaking canton (usually none or one); well into the 20<sup>th</sup> century, the religious denomination of possible Federal Councils was a crucial factor, now slowly being displaced by gender-considerations. As a result of constitutional

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<sup>42</sup> KÖLZ, *supra* note 37, at 570.

<sup>43</sup> See SWISS FED. CONST. art. 177, ¶ 1.

<sup>44</sup> For historical evidence for the relevance of this argument see KÖLZ, *supra* note 37, at 570 (referring to Henri Druey).

<sup>45</sup> SWISS FED. CONST. art. 175, ¶ 2 and SWISS FED. CONST. art. 149, ¶ 2, second sentence.

<sup>46</sup> SWISS FED. CONST. art. 176.

<sup>47</sup> See SWISS FED. CONST. art. 177, ¶ 1.

factors<sup>48</sup> and institutional factors<sup>49</sup>, the Federal Council – like executive bodies of other countries – holds *de facto* a strong position *vis-à-vis* the Federal Assembly, in particular due to its privileged access to specific information provided by the administration. Therefore, the Federal Council plays by far the most important role in the political decision-making process, as there is not a single point to completely bypass the Executive branch.<sup>50</sup>

### III. Institutions of Direct Democracy

#### A. Frequency: “Voting as a Way of Life”<sup>51</sup>

From the founding of modern Switzerland as a Federation in 1848 until the end of February 2008, 546 proposals underwent a *nation-wide popular vote*, 318 (or 58 percent) of them in the last three decades alone.<sup>52</sup> As a result, Swiss citizens are called to the ballots to vote on a federal bill, a constitutional amendment or a treaty approximately *every three to four months*. Voter participation varies significantly. As a general trend, voter turnout declined sharply from about 60 percent after World War II to about 40 percent in the mid-seventies.<sup>53</sup> The figures have,

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<sup>48</sup> Such as fixed term, right to initiate laws in the Federal Assembly and to draft proposals, right of the Federal Councilors to take part in sessions of parliamentary committees and to speak in the Federal Assembly, Federal Councils being heads of the expanded Federal administration.

<sup>49</sup> Namely, Federal Councilors as professionals as opposed to the members of the Federal Assembly each of them having a professional career besides their political mandate as well as direct democracy weakening the role of the Federal Assembly.

<sup>50</sup> Ulrich Klöti, *The Government* 154 in HANDBOOK OF SWISS POLITICS (Ulrich Klöti et al, eds., 2<sup>nd</sup> ed., 2007).

<sup>51</sup> This phrase is borrowed from the title of *Voting as a way of life*, The Economist, February 12, 2004 (Survey: Switzerland), at 6.

<sup>52</sup> Data according to the Federal Chancellery – Chronologie Volksabstimmungen, [http://www.admin.ch/ch/d/pore/va/vab\\_2\\_2\\_4\\_1.html](http://www.admin.ch/ch/d/pore/va/vab_2_2_4_1.html) (as of February 28, 2008).

<sup>53</sup> See Alexander H. Trechsel, *Popular Votes* 438 in HANDBOOK OF SWISS POLITICS (Ulrich Klöti et al. eds., 2<sup>nd</sup> ed. 2007).

however, risen in recent years. Deciding majorities in popular votes make up approximately 10 to 20 percent of the population.<sup>54</sup>

## B. Mandatory Referendum

Amendments to the Federal Constitution initiated by the federal authorities must undergo a mandatory referendum.<sup>55</sup> Consequently, every extension of the powers of the Confederation is subject to such a vote (see p. 10). Moreover, an entry into organizations for collective security (such as the North Atlantic Treaty Organization – NATO) or into supranational organizations (such as the European Community as the supranational core of the European Union) as well as Federal statutes declared urgent and, at the same time, lacking a constitutional basis, must undergo a mandatory referendum.<sup>56</sup> The mandatory referendum requires a *double majority*: the majority of those voting *and* the majority of the Cantons.<sup>57</sup> The bill is defeated in case of a split. The vote of a Canton is determined by the result of the popular vote in the respective Canton.<sup>58</sup> Six Cantons have each half a cantonal vote only for historical reasons.<sup>59</sup> Thus, a mandatory referendum is approved as long as it reaches both a majority of those voting and at least 12 votes of the Cantons. Between 1848 and 2005 205 *mandatory referenda* took place. 152 of them were adopted, 53 were rejected; 8 times a referendum reached popular but not the cantonal support required by the Federal Constitution.<sup>60</sup>

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<sup>54</sup> WOLF LINDER, SWISS DEMOCRACY: POSSIBLE SOLUTIONS TO CONFLICT IN MULTICULTURAL SOCIETIES 91-3 (2<sup>nd</sup> ed., 1998).

<sup>55</sup> SWISS FED. CONST. art. 140, ¶ 1 (a).

<sup>56</sup> SWISS FED. CONST. art. 140, ¶ 1.

<sup>57</sup> SWISS FED. CONST. art. 142, ¶ 2 and SWISS FED. CONST. art. 140, ¶ 1 (a).

<sup>58</sup> SWISS FED. CONST. art. 142, ¶ 3.

<sup>59</sup> See SWISS FED. art. 142, ¶ 4.

<sup>60</sup> Wolf Linder, *Direct Democracy*, in HANDBOOK OF SWISS POLITICS 111 (2<sup>nd</sup> ed., Ulrich Klöti et al., eds., 2007).

The requirement of a double majority significantly increases the weight of the small Cantons given the vast differences in the size of their population. Throughout history, however, the double-majority clause was a concession towards the defeated Cantons of the civil war during “the Swiss Reconstruction” (*see* p. 5&10) aiming at protecting the small, rural and traditionally Roman-Catholic and German speaking Cantons of central Switzerland. The losers of the double majority clause are the linguistic minorities and Cantons with large cities (Cantons Zurich, Geneva, Basel-City, and Berne).<sup>61</sup> Most of the mandatory referenda dealt with the extension of the powers of the Confederation. Therefore, the mandatory referendum is a *bulwark of federalism* against a trend towards centralizing power within the Swiss Federal Constitution.

### C. Optional Referendum

Federal statutes, and those declared urgent with a validity exceeding one year, Federal decrees to the extent the Constitution or the statute foresee this, international treaties *provided that* (a) they are of unlimited duration and may not be terminated, *or* (b) provide for the entry into an international organization, *or* (c) involve a multilateral unification of law, may be put to a popular vote *provided that* 50,000 citizens entitled to vote *or* 8 Cantons ask for a optional referendum within 100 days after the official publication of the bill (*see* also p. 21).<sup>62</sup> The requirement of 50,000 signatures equals currently about 1 percent of all the citizens entitled to vote. These levels were met 163 times between 1874 and May 2008.<sup>63</sup> In the same period only 7 percent of the bills potentially qualifying for an optional referendum were actually put to a

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<sup>61</sup> Adrian Vatter, Fritz Sager, *Föderalismus am Beispiel des Ständemehrs*, 2 Swiss Pol. Sci. Rev. 1, 13-4 (1996).

<sup>62</sup> SWISS FED. CONST. art. 141, ¶ 1.

<sup>63</sup> *See* Federal Chancellery – Referenden, Übersicht in Zahlen, [http://www.admin.ch/ch/d/pore/rf/ref\\_2\\_2\\_3\\_4.html](http://www.admin.ch/ch/d/pore/rf/ref_2_2_3_4.html).

popular vote based on the request of 50,000 citizens.<sup>64</sup> The seminal work by *Leonard Neidhart* in 1970 on the “representative alteration of the referendum”, however, provided evidence of the strong *preemptive moderation-effect* that the mere possibility to put a bill to a popular vote gives rise to.<sup>65</sup> The figures of the period from 1874 to 2008 indicate that a bill which must undergo a popular vote due to a popular referendum fails to gain popular support in more than 45 percent of the cases.<sup>66</sup> Conversely, there is a positive casual relationship between the degree of consensus in the Federal Assembly and the likelihood that a bill will be approved by the voters.<sup>67</sup> This interrelation exerted a strong influence and transformed the Swiss political system into an arrangement of power sharing called consensus- or “*concordance democracy*.” As opposed to the Netherlands, the Swiss model of “consociationalism” (*Arend Lijphart*<sup>68</sup>) does not stem from a mutual agreement by the leading parties but from the “*coercive pressure to cooperate*”<sup>69</sup> set in place by the optional referendum. As the fiercely disputed Federal Constitution of 1874 (*see p. 8*) indicates, Switzerland was not born as a consensus democracy as conflicts were prevalent from the outset but *shaped* in such a way over the years by, among other things, the different direct democratic institutions.

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<sup>64</sup> Calculation by the author based upon the data according to Linder, *supra* note 60.

<sup>65</sup> LEONARD NEIDHART, *PLEBISZIT UND PLURALITÄRE DEMOKRATIE* 287, 313 (1970). For an assessment see *e.g.* HANSPETER KRIESI, *LE SYSTÈME POLITIQUE SUISSE* 99 (1998). For empirical evidence see *e.g.* Adrian Vatter, *Consensus and Direct Democracy. Conceptual and Empirical Linkages*, 38 *Europ. J. of Pol. Res.* 171, 185 (2000).

<sup>66</sup> See Linder, *supra* note 60.

<sup>67</sup> See Pascal Sciarini, *The Decision Making-Process* 487 in *HANDBOOK OF SWISS POLITICS* 111 (2<sup>nd</sup> ed., Ulrich Klöti et al., eds., 2007).

<sup>68</sup> See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (1977); *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (1984); *Democratic Political Systems, Types, Cases, Causes, and Consequences*, 1 *J. of Theoretical Pol.* 33 (1989); *Democracies: Forms, Performance, and Constitutional Engineering*, 25 *Europ. J. of Pol. Res.* 1 (1994); *Reflections: Dimensions of Democracy*, 31 *Europ. J. of Pol. Res.* 195 (1997); *THINKING ABOUT DEMOCRACY. POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE* (2007).

<sup>69</sup> LINDER, *supra* note 54, at 119 (emphasis added).

According to public choice theory, every party represented in a parliament strives to push through as much of its own partisan agenda as it possibly can. This leads to a so-called “minimal winning coalition”, that is the smallest possible coalition of parties necessary to push through a proposal. Rational actors facing the possibility of an optional referendum have to balance such a strategy against the possibility of a “popular veto”.<sup>70</sup> The optional referendum, therefore, leads to a *broader coalition* of parties compared to purely parliamentary democracies. As not only political parties but also interest groups, such as unions, employers’ associations, or NGOs may have the resources necessary to collect 50,000 signatures within the time-frame set forth by the Constitution, their interests will indirectly influence parliamentary decision-making. This is why in 1947 the “procedure of consultation” was instituted. Important legislation, international treaties and other “projects of substantial impact” are subject to “consultation” among the “Cantons, the political parties, and the interested circles”<sup>71</sup>

As not only most of the legislations are initiated by the executive branch (Federal Council) but as the optional referendum provides incentives to consider the interests of the relevant groups in an early stage of the decision-making process, the “popular veto” also shapes the partisan composition of the Federal Council. The Catholic conservative minority used the optional referendum “like a machine gun to shoot down important projects”<sup>72</sup> of the liberal majority in the 19<sup>th</sup> century. These “windstorms of referenda” in the 1880s only came to an end when the first member of the Catholic Conservative Party was elected Federal Councilor in

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<sup>70</sup> See WOLF LINDER, SCHWEIZERISCHE DEMOKRATIE: INSTITUTIONEN, PROZESSE, PERSPEKTIVEN 256-64 (2<sup>nd</sup> edition, 2005) (discussing the possible trade-offs).

<sup>71</sup> SWISS FED. CONST. art. 147.

<sup>72</sup> LINDER, *supra* note 54, at 118.

1891.<sup>73</sup> The same scheme was applied in 1928 in order to integrate the party of farmers and craftsmen into the executive branch, and again in 1943 in regard to the Social Democratic Party.

The system of concordance paved the way *from coexistence to pluralism* by successfully integrating the linguistic, denominational and socio-economic minorities into the political system.<sup>74</sup> This came at the price, however, of reduced transparency and political accountability through elections. The optional referendum and the principle of proportional representation in the National Council installed in 1919 played a crucial role in that process. This shift towards pluralism was at least enhanced by the *absence of clear-cut socio-economic, denominational and linguistic cleavages*. Both denominational groups, for example, can be found among French and German speakers and the socio-economic boundaries do not follow the linguistic or denominational cleavages.

#### D. Popular Initiative

The institution of the “popular initiative” gives 100,000 citizens entitled to vote (currently 2 percent of all the voters) the right to propose a revision of the Federal Constitution.<sup>75</sup> The popular initiative was established as an amendment to the Constitution in 1891. In contrast to the Cantons, where popular initiatives may be used in order to change statutes, only the Federal Constitution can be object of a popular initiative. It can aim at either a complete or at a partial revision of the Federal Constitution. The latter may be proposed as a general suggestion requiring the Federal Assembly to formulate the definite draft for an amendment or as a formulated draft. A

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<sup>73</sup> But see Christian Bolliger, Regula Zürcher, *Deblockierung durch Kooptation? Eine Fallstudie zur Aufnahme der Katholisch-Konservativen in die schweizerische Landesregierung 1891*, 10 Swiss Pol. Sci. Rev. 59, 85-8 (2004) (providing evidence that the end of the “windstorms of the referenda” was rather the cause not the result of the election of a Catholic Conservative into the Federal Council).

<sup>74</sup> The argument in this paragraph stems from LINDER, *supra* note 54, at 18-27.

<sup>75</sup> SWISS FED. CONST. art. 139.

formulated draft, provided it is valid, may not be changed by the Federal authorities. Close to 90 percent of all the initiatives successfully launched since 1892 were formulated drafts. When a popular initiative aims at changing the Constitution, a double majority of the people and the Cantons is required (*see* p. 14).<sup>76</sup> This turned out to be a *high threshold*: Only 15 (or 9.3 percent) out of 162 initiatives have been approved from 1892 to May 2008.<sup>77</sup> Yet, the barriers of entry to the political arena remain low (draft supported by 2 percent of the voters within 18 months), while the hurdles to reach ultimate success remain difficult to cross. A popular initiative deemed to have success in the voting process, however, often triggers a bargaining process. Consequently, although complete success is rare, data provides evidence that approximately a third of all the popular initiatives nevertheless exhibit a considerable impact on Federal legislation.<sup>78</sup>

This *indirect effect* is due to the *interaction* which takes place at the different *stages* a popular initiative must pass according to the Swiss Federal Constitution. The first of these three stages takes place outside the system of representative democracy: The “initiative committee” launching the proposal aims at collecting the required 100,000 signatures within 18 months.<sup>79</sup> After the Federal Chancellery’s approval that the formal requirements of the initiative are met, the procedure moves to the second stage: The popular initiative is absorbed by the system of representative democracy. Both the Federal Council as well as the chambers of the Federal Assembly may initiate counter-proposals embracing some of the concerns set forth in the popular initiative, either at the level of the Constitution or the Federal statutes. This may provide

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<sup>76</sup> SWISS FED. CONST. art. 142, ¶ 2 and SWISS FED. CONST. art. 139, ¶ 3.

<sup>77</sup> See Federal Chancellery – Volksabstimmungen, abgestimmte Volksinitiativen, [http://www.admin.ch/ch/d/pore/vi/vis\\_2\\_2\\_5\\_7.html](http://www.admin.ch/ch/d/pore/vi/vis_2_2_5_7.html).

<sup>78</sup> See Dominique Joyce, Yannis Papadopoulos, *Votations moteur. Les logiques de vote blanc et de la participation* 260, in *ÉLITES POLITIQUES ET PEUPLE EN SUISSE* (Yannis Papadopoulos, ed. 1994).

<sup>79</sup> See SWISS FED. CONST. art. 139, ¶ 1.

incentives for the initiative committee to withdraw the initiative in order to avoid a costly and unpredictable voting campaign. The amount of popular initiatives withdrawn, however, sharply declined from about 50 percent to slightly more than 25 percent since the 1970s.<sup>80</sup> Based on a detailed report by the Federal Council, the Federal Assembly not only recommends the popular initiative to be approved or rejected, but determines whether the proposal complies with the requirements of Article 139 § 2 of the Constitution.<sup>81</sup> A popular initiative as a formulated draft must “respect the principle of unity of form, the principle of unity of subject matter” and “peremptory norms of international law”<sup>82</sup>. The Federal Assembly “shall declare the initiative invalid, in whole or in part” if one of these requirements is not complied with.

The popular initiative is used by various groups, ranging from the established parties from the left and the right represented in the Federal Assembly, to labor unions, national-conservative anti-immigration movements, and environmental groups. The popular initiative breaks up the monopoly over the political agenda and, as the Swiss political scientist and lawyer *Wolf Linder* put it, “enlarges the realm of the politically thinkable and feasible... .”<sup>83</sup> In contrast to the mandatory and the optional referenda, the popular initiative’s starting point lies *outside* the boundaries of the system of representative politics.

Topics brought forward through initiatives are thus *unmitigated* by the channels of executive and legislative decision-making. The popular initiative has, consequently, not only

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<sup>80</sup> Yannis Papadopoulos, *How Does Direct Democracy Matter? The Impact of Referendum Votes on Politics and Policy-Making*, 24 West Europ. Pol. 35, 49 f. (2001).

<sup>81</sup> SWISS FED. CONST. art. 139, ¶ 2. – For an extensive analysis see Johannes Reich, *Direkte Demokratie und völkerrechtliche Verpflichtungen im Konflikt. Funktionellrechtlich differenzierte Herstellung praktischer Konkordanz zwischen der Beachtung des Völkerrechts und konfligierenden Volksinitiativen im schweizerischen Bundesverfassungsrecht*, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [Heidelberg Journal of International Law] (2008) (*forthcoming*).

<sup>82</sup> *Ibid.*

<sup>83</sup> Wolf Linder, *Direct Democracy*, in HANDBOOK OF SWISS POLITICS 117 (2<sup>nd</sup> ed., Ulrich Klöti et al., eds., 2007).

been used for progressive change such as proportional representation or the protection of the natural environment but also for proposals deliberately targeting certain groups of society. The very first successful popular initiative was launched in 1892 to prohibit kosher butchering (*shehitah*). Behind the official promotion of animal welfare lurked the ugly grimace of anti-Semitism. Both of them joined together in a flimsy victory on August 20, 1893.<sup>84</sup>

## IV. Interplay between Direct and Representative Democracy

### A. Selection and Control of Government Policies

The political system at the federal level of Switzerland is generally classified as being “semi-direct democratic”<sup>85</sup> pointing to the fact that not each and every proposal may or must undergo a popular vote. Rather, the Federal Constitution allows for a system of *selection*<sup>86</sup>: the most important decisions (amendments to the Constitution; treaties to join supranational organizations or organizations for collective self-defense) are taken by the People *and* the Cantons in a popular vote<sup>87</sup>, while important decisions (especially Federal statutes and certain international treaties) are primarily decided by the Federal Assembly but undergo a popular vote by the people when 50,000 citizens demand it,<sup>88</sup> and less important decisions (simple federal decrees; ordinances) are taken by the Federal Council or the Federal Assembly alone.<sup>89</sup> As opposed to the concept of plebiscites initiated by governments in order to gain support for their

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<sup>84</sup> Due to the requirement of a double majority, as few as 63 individual votes in the small Canton of Nidwalden could have provided for a reverse outcome. *See* BBI IV 401 (1893).

<sup>85</sup> Linder, *supra* note 60, at 108.

<sup>86</sup> *See* LINDER, *supra* note 70, at 243 (describing semi-direct democracy as “a selecting system”).

<sup>87</sup> SWISS FED. CONST. art. 141. *See* Kernenergiegesetz [KEG] [Federal statute on Nuclear Energy] March 21, 2003, SR 732.1, art. 48, ¶ 4 (Switz.) (allowing for an optional referendum against the construction permit for a nuclear power).

<sup>88</sup> SWISS FED. CONST. art. 140.

<sup>89</sup> SWISS FED. CONST. art. 163, ¶ 1 & 2; SWISS FED. CONST. art. 182, ¶ 1.

policy as incorporated, e.g., in the French<sup>90</sup> and the Austrian<sup>91</sup> constitutions, it is *not* within the discretion of the Federal Council or the Parliament whether or not to put a certain act to a popular vote. As a consequence, instruments of direct democracy in the Swiss context are means to control and to oppose the policies set forth by the political branches of government.

## B. Responsiveness and Deliberation

Institutions of direct democracy are often a mere *complement* to representative democracy. This holds true as well for most of the states of the United States. Article II Section 8 of the Constitution of the State of California<sup>92</sup>, for example, does not provide for channeling popular initiatives through the institutions of representative democracy in order to allow for deliberation. Consequently, “‘Californian style’ direct democracy” is held to be dominated by mere “no-talk-just-vote drive-through referenda”<sup>93</sup>. Although even in such a dualistic system politicians have incentives to adapt and preempt both popular initiatives and referenda<sup>94</sup>, empirical data on individual decision-making in a direct democratic vote in the context of Switzerland provides evidence for the crucial importance of the *interface* between direct and representative democracy. A study conducted by *Hanspeter Kriesi*<sup>95</sup> on the basis of an integrated

<sup>90</sup> See (1958) CONST. art. 11 § 1 (France) (according to which “[t]he President of the Republic may put any bill ... to a referendum...”; “[l]e Président de la République ... peut soumettre au référendum tout projet de loi ....”).

<sup>91</sup> See Bundes-Verfassungsgesetz [B-VG] [Constitution]BGBl. No. 1/BGBl. Nr. 1/1930, as last amended by Bundesgesetz [BG] BGBl. I No. 100/2003, art. 44, ¶ 3 (Austria) (according to which each partial or complete revision of the Federal Constitution shall put to a referendum by the people provided that a third of either the National - or the Federal Council asks for it).

<sup>92</sup> C.A. Const. art. II, § 8.

<sup>93</sup> AKHIL REED AMAR, AMERICA’S CONSTITUTION. A BIOGRAPHY 309 (2006).

<sup>94</sup> See Elisabeth R. Gerber, *Pressuring Legislature through the Use of Initiatives: Two Forms of Indirect Influence* 191 in CITIZENS AS LEGISLATORS (Shaun Bowler et al., 1998)

<sup>95</sup> The following text within this paragraph builds on the insights provided by HANSPETER KRIESI, DIRECT DEMOCRATIC CHOICE: THE SWISS EXPERIENCE (2005) and Hanspeter Kriesi, *Argument-Based Strategies in Direct-Democratic Votes: The Swiss Experience*, 40 Acta Politica, 299, 313-4 (2005) as well as the two case-studies outlined by Hanspeter Kriesi, *Individual Opinion Formation in a Direct Democratic Campaign*, 32 Brit. J. of Pol. Sc. 171, 184-5 (2002).

level dataset stemming from 47 surveys of popular votes at the federal level highlights the effects on the individual decision-making process underscores that voters are not left to apply *systematic strategies* (that is, individual information gathering through mass media and other relevant sources) at all times. As the data interpreted in the light of the groundbreaking insights provided by Amos Tversky and Daniel Kahneman<sup>96</sup>, voters may adopt four types of *shortcuts* in order to make their decision in a sound and efficient way: First, they may prefer the status quo (status quo heuristic), secondly, they may vote according to the recommendation by the Federal Government and the Federal Assembly (trust heuristic), they, thirdly, may rely on the position of their party or interest group (partisan heuristic) or, as a fourth strategy, they may not vote at all (abstain). The actors influencing the individual decision making process, namely the parties, interest groups, the media, the Federal Council, members of the Federal Assembly – in short: the political elite – bear a considerable responsibility for both the legitimacy and the integrity of the direct-democratic process and its outcome. Intensive campaigns over fiercely disputed issues increase not only the relevance of partisan heuristic but the decisiveness of systematic strategies. Trust heuristics, on the other hand, play a pivotal role in undisputed votes. Voters with strong opinions tend to apply systematic strategies whereas those with weaker opinions often rely on heuristics. Therefore, voters mainly decide on the basis of elite-supplied arguments and heuristic cues. Both systematic voting and heuristics are significantly enhanced by the clear-cut structure of the voting process in the Swiss context, namely by the temporal binary party-coalition, respectively the government/opposition coalition temporally put in place.

The main lesson to be learned from the Swiss experience is that a constitution enacting elements of direct democracy should provide for a *clearly structured process*, in which the

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<sup>96</sup> See Amos Tversky, Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974).

entities of representative democracy are *connected* with the direct-democratic institutions. In other words, an *interactional model of direct democracy*, as I call it, is crucial for the quality and for the integrity of the process of public deliberation and, as a consequence, for the legitimacy of the outcome of the democratic process. The seemingly small difference whether instruments such as the popular initiative are partly channeled through the executive and the legislative branch may decide whether direct democracy is limited to mere „no-talk-just-vote drive-through referenda“<sup>97</sup> or enables voters to make an informed decision based on a public deliberation by the public elites. At the same time, this conclusion points at the fact that direct democracy should not be mistaken for pure “governance by the people.” Political elites play a *pivotal role* even in a system of semi-direct democracy. Their behavior, however, is subject to a wide array of *controlling instruments* apart from regular votes and, as a result, tends to be more closely tied to the voters’ preferences.

### C. Inclusion and its Limits

According to *Robert Dahl’s* normative theory of democracy identifying equality as the core justification of democracy, modern democracies should provide for a high degree of *inclusion*.<sup>98</sup> In other words, democratic states should, *idealiter*, grant political rights to all of the inhabitants affected by the outcome of the political process. Measured against this benchmark, Switzerland’s system of direct democracy exhibits a record hardly being exemplary. Women’s suffrage was introduced at the federal level as late as 1971. The small Canton Appenzell Inner Rhodes granted its female citizens the right to vote, only after a ruling by the Federal Supreme

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<sup>97</sup> *Supra* note 93.

<sup>98</sup> ROBERT DAHL, POLYARCHY. PARTICIPATION AND OPPOSITION 202-7 (1971). *See also* ROBERT DAHL, DEMOCRACY AND ITS CRITICS 233 (1989) and ROBERT DAHL, ON DEMOCRACY (1998).

Court on November 27, 1990.<sup>99</sup> At present “[a]ll Swiss citizens who are 18 years or older, and are not under guardianship because of mental illness or weakness, shall have political rights in federal matters.”<sup>100</sup> Migration poses new challenges to the legitimacy of the process of direct democracy as 22 percent of the inhabitants of Switzerland are non-Swiss citizens not being entitled to political rights at least at the federal level. Only the Cantons Neuchâtel (since the 19<sup>th</sup> century) and Jura grant non-Swiss citizens, depending on the number of years of residence, the right to vote and the eligibility for office at the Cantonal level.

This relatively low level of inclusion may partly be explained on the basis of the incentive-structure provided by institutions of direct democracy<sup>101</sup>: The introduction of women’s suffrage at the federal level asked for a constitutional amendment and, consequently, for an approval by a majority by both the (male) citizens eligible to vote and the Cantons. Under the assumption that politicians and parties act according to the economic model of human behavior and, therefore, “formulate policies in order to win elections, rather than win elections in order to formulate policies” as *Anthony Downs*<sup>102</sup> stated, they face an inherent incentive to broaden their electoral basis and are able to formulate their programmatic goals in a way that appeals to men and women alike. Whereas a representative system offers this option of bargaining, the same problem amounts to a zero-sum-game in a direct democracy: The increase of influence of one player (in this case: the female citizens) is mirrored by the same decrease of political power of another player (the male citizens). This suggests that *progressive change* resulting in a considerable shift in political power might face additional obstacles in a system of direct

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<sup>99</sup> See Bundesgericht [BGer] [Federal Court] Nov. 27, 1990, 116 Entscheidungen des Schweizerischen Bundesgerichts [BGE] Ia 359.

<sup>100</sup> SWISS FED. CONST. art. 136, ¶ 1.

<sup>101</sup> See LINDER, *supra* note 70, at 62.

<sup>102</sup> ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 28 (1957).

democracy. Yet, given the rather progressive outcome of popular votes in sensitive issues such as abortion, drug policy, stem-cell research and gay rights, it can, in comparison with parliamentary European states, hardly be argued that direct democracy is reluctant to social change as such.

#### D. The Blind-spot of Direct Democracy

As recently as in the year 2000, Swiss voters have been called upon to vote on such controversial issues as a liberalization of the norms set forth in the criminal penal code on abortion, Switzerland's accession to the United Nations, "registered partnership for same-sex couples" (civil unions), life sentences for "highly dangerous" and "untreatable" sexual or violent offenders, a limited moratorium of genetically modified organism in agriculture, the financial support of countries of Eastern Europe having joined the European Union on January 1<sup>st</sup>, 2004 (amounting to financial aid of one billion Swiss Francs to be spent within ten years), a constitutional obligation to enter into negotiations to join the European Union, or a provision to cap the share of non-Swiss citizens in relation to the inhabitants of Switzerland at 18 percent.<sup>103</sup> While the last two proposals were dismissed, the others were approved. Against this backdrop, it is difficult to establish a clear pattern on the outcome of direct popular participation as far as the legitimate interests of minorities – the alleged "*tyranny of the majority*" – are concerned. An actual "tyranny" of the majority properly called so – as opposed to mere disagreement both common and necessary to any intersubjective mode of decision-making – can only be claimed "when the rights or interests of the minority are wrongly subordinated to those of the majority",

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<sup>103</sup> For an overview of all the popular votes since 1848 at the federal level see Schweizerische Bundeskanzlei – Chronologie Volksabstimmungen, [http://www.admin.ch/ch/d/pore/va/vab\\_2\\_2\\_4\\_1\\_gesamt.html](http://www.admin.ch/ch/d/pore/va/vab_2_2_4_1_gesamt.html) (in German, French or Italian).

that is the decision made was not only “wrong and tyrannical in its *implications* for the rights of those affected” but the *membership* of the decisional and “topical majority” overlap.<sup>104</sup>

Systematic *empirical studies* reached contradictory conclusions on the issue. *Bruno S. Frey* and *Lorenz Goette*, drawing on a dataset from voting results in Switzerland at the national, at Cantonal and at communal level (City of Zurich), found “that there is *no inherent tendency* in popular votes to suppress civil rights” and went on adding that “[f]or Switzerland, we find no evidence of voters overly disapproving civil rights issues.”<sup>105</sup> The two authors, thus, re-emphasize the conclusion one of the authors reached in 1994, stating that “[t]he widely held Madisonian fear of ‘irresponsible voters’ and ‘excesses of the majority’ has no empirical basis in a well-chosen constitutional framework.”<sup>106</sup> Conversely, *Donald P. Haider-Markel*, *Alana Querze* and *Kara Lindaman* pointed out, based on data of 143 local and state gay civil rights initiatives and referenda held in the United States between 1971 and 2005, that the “evidence clearly suggests that the homosexual minority tends to lose when the voters decide”, whereas “minority rights do in fact fare better in representative democracy, especially when policy proposals are intended to limit the rights of the gay and lesbian minority.”<sup>107</sup> Yet, the very case of gay and lesbian rights casts doubt on the assumption that the procedure of democratic decision-making as such detached from socio-economic, religious, or cultural factors brings about better or worse protection of minority rights. On June 18, 2004 the Federal Assembly adopted a Federal statute that provided same-sex couples joined together in so-called “registered partnerships” (civil

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<sup>104</sup> Jeremy Waldron, *The Core against Judicial Review*, 115 Yale L. J. 1346, 1397 (2006) (emphasis added). See also JEREMY WALDRON, *LAW AND DISAGREEMENT* 13 (1999).

<sup>105</sup> Bruno S. Frey & Lorenz Goette, *Does the Popular Vote Destroy Civil Rights?*, 42 Am. J. of Pol. Sci. 1343 (1998).

<sup>106</sup> Bruno S. Frey, *Direct Democracy*, 84 Am. Econ. Rev. 338 (1994).

<sup>107</sup> Donald P. Haider-Markel, Alana Querze & Kara Lindaman, Lose, Win, or Draw? A Reexamination of *Direct Democracy and Minority Rights*, 60 Political Research Quarterly 304, 312 (2007).

unions) the very same rights as married heterosexual couples in terms of, *inter alia*, inheritance and social security law, with the exception that the former are not allowed to adopt children.<sup>108</sup> A conservative committee collected 50,000 signatures for an optional referendum by October 7, 2004. On June 5, 2005 58 percent of the voters approved the bill, 42 percent opposed it (voter turnout: 56,58 percent). The degree of approval within the Cantons varied within a range of 41,6 to 68,6 percent.<sup>109</sup> In contrast, the above mentioned popular initiative asking for life-long imprisonment for “highly dangerous” and “untreatable” sexual or violent offenders was approved by the Cantons and the people although a clear majority of the Federal Assembly opposed the initiative.<sup>110</sup> The intensity of the campaign by both the opposing parties and the Federal Council remained remarkably low.<sup>111</sup> This suggests – as the rational actor model of public choice theory predicts – that it may not be promising for politicians and parties to support the interests of certain minorities. This is a problem shared by the democratic process as such. The United States Supreme Court famously coined the notion of “*discrete and insular minorities*” for groups neglected by the political process.<sup>112</sup>

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<sup>108</sup> Bundesgesetz vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare [PartG] [Federal Statute on the Registered Partnership of Same-sex Couples], June 18, 2004, SR 211.231.

<sup>109</sup> The so-called “*Vox analysis*” systematically conducted after every vote based on interviews with approximately 1,000 voters, concluded that the following factors influenced the individual decision-making: age (younger voters favored the bill, persons older than 70 did not), social standing and education (people with a higher degree of education and a higher social standing were more likely to approve the bill), frequency of church attendance (frequent church goers tended to reject the bill), degree of knowledge about the bill (persons who could give precise reasons for their decisions were more likely to approve the proposal). In contrast neither religious denomination, nor gender, nor the place of residence, as far as the linguistic parts of the country were concerned, influenced the individual decision-making. See Analyse der eidgenössischen Abstimmungen vom 5. Juni 2005, <http://www.politrends.ch/abstimmungen/abstimmungsanalysen/vox-analysen/050506d.html>.

<sup>110</sup> See SWISS FED. CONST. art. 123a.

<sup>111</sup> See Analyse der eidgenössischen Abstimmungen vom 5. Februar 2004, <http://www.politrends.ch/abstimmungen/abstimmungsanalysen/vox-analysen/040802d.html>.

<sup>112</sup> United States v. Carolene Products Co., 304 U.S. 144, 152, N. 4 (1938). See also Graham v. Richardson, 403 U.S. 365, 372 (1971) (stating that “[a]liens as a class” qualify as “discrete and insular minorities.”).

Yet, the factors determining whether or not the political process is – as the famous “footnote 4” suggests – “to be relied upon to protect minorities”, are distinctive in the Swiss context, as they are shaped, *inter alia*, by constitutional and socio-economic factors. As far as the latter are concerned part of the “Swiss puzzle” (*see* p. 2) is explained by the fact that social cleavages rarely run congruently within Switzerland (*see* p. 18). These cross-cutting cleavages within the Swiss society are most likely to forestall a constant discrimination of those minority groups with a considerable weight in the political process derived either from federalism or the number of voters.<sup>113</sup> Additionally, the institutions of federalism tend to overrepresented traditional minorities living relatively concentrated in certain geographical areas (*see* p. 15). This helps to explain why both Roman-Catholics and linguistic minorities are or became over time part of the power-sharing model of Switzerland. Federalism as “a frozen instrument of minority protection”, however, fails to protect new minorities. Yet, with regard to such groups, as, e.g., the blue collar workers as a “by-product” of the Industrial Revolution, the distinctive mechanism might provide for protection through the political process. Both the mandatory and the optional referendum affect proposals which originate inside the institutions of representative democracy. The *preemptive moderating effect of the referendum* described above (p. 16) tends to mitigate such proposals significantly. The procedure of consultation provides affected groups the opportunity to raise their objections even before a proposal reaches the stage of parliamentary discussion. It is, therefore, unlikely that a bill that is subject to a referendum overtly infringes the legitimate interests protected by fundamental rights as long as these interests are shared by well-organized and assertive groups.

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<sup>113</sup> Here again, a *caveat* applies: Groups that are geographically concentrated in certain areas (as the traditional denominational and language minorities) tend to enjoy a far better protection in the Swiss democracy as their voice is overrepresented due to the decision-making mechanism of federalism.

In sum, the influence and the protection provided by the political system is closely tied to two factors: First to *federalism* as a “frozen instrument” inherently favoring traditional and geographically concentrated minorities and, secondly, and even more decisively, *political rights*. Against this backdrop, non-traditional Swiss minorities, such as the Muslim population, put the Swiss system channeling minority protection at the federal level by and large through the political process to new tests it is unlikely to pass smoothly. These new challenges might be illustrated by the Muslim community in Switzerland. Although Muslims accounted for 4.26 percent of the population of Switzerland in the year 2000, only 12 percent are Swiss citizens and therefore are entitled to have political rights.<sup>114</sup> The Muslim community, as a consequence, is far from enjoying the same degree of political protection as traditional minorities. “Discrete and insular minorities”, therefore, constitute the *blind spot* of the direct democracy in general and the referenda in particular. This underscores that popular participation in decision-making *cannot fully substitute* for some level of constitutional review.<sup>115</sup>

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<sup>114</sup> BOVAY, BROQUET, *supra* note 13, at 49, 83-4.

<sup>115</sup> See Jörg Paul Müller, *Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*, 39 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 53, 92-4 (1981) (arguing that constitutional review remains particularly essential in the Swiss democracy as far as the protection of minorities not having the capacity to launch a referendum are concerned).

It should be added, however, that constitutional review and legislation *do not share the same rationality* although both of them have to abide by the constitution: Parties and politicians, in the one hand, primarily aim at realizing their political goals and values through regulatory instruments whereas the conformity with the constitution usually remains but an external constraint and therefore a mere subsequent consideration, constitutional review, on the other hand keeps solely focused on the frame put in place by the constitution without, at least *idealiter*, enlarging its own realm.

## V. Concluding Remarks: Lessons from the Swiss Experience

Social science has taken a growing interest in analyzing direct democracy. Recent studies concluded, *inter alia*, that direct democracy leads to a more efficient administration, a lower tax level, and lesser tax evasion due to mutual trust.<sup>116</sup> Some authors even claim that direct democracy results in a higher degree of happiness.<sup>117</sup> This paper shed light on the three institutional pillars of the Swiss arrangement of direct democracy: the mandatory referendum, the optional referendum, and the popular initiative and their legal implications namely regarding minority protection. The *preemptive moderating effect* of the referendum transformed Switzerland from a majoritarian democracy in the 19<sup>th</sup> century to a political system based on negotiation, power-sharing, and consensus thereafter. Thus, a properly designed constitutional arrangement of direct democracy not merely complements representative democracy but leads to a close *interaction* between representative and direct democracy. Such an interactional model of direct democracy enhances deliberation on political issues as it allows the individual voter to adjust his/her decision based on certain short-cuts due to the recommendations by the authorities or the temporary party-coalitions formed due to the regular votes on referenda and initiatives. Due to the strong incentives for consensual decision-making provided by the institutions of direct democracy the interests of minorities are *in general* given considerable weight even though the Swiss system does provide for only limited constitutional review. That is why the so-called

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<sup>116</sup> See John G. Matsusaka, *Fiscal Effects of the Voter Initiative in the First Half of the Twentieth Century*, 43 J.L. & Econ. 619 (2000); Lars P. Feld, John G. Matsusaka, *Budget referendums and government spending. Evidence from Swiss Cantons*, 87 J. of Public Econ. 2703 (2003); Markus Freitag, Adrian Vatter, *Initiatives, referendums, and the tax state*, 13 Journal of European Public Policy 89 (2006); Lars P. Feld, Gebhard Kichgässner, *Does direct democracy reduce public debt? Evidence from Swiss municipalities*, 109 Public Choice 374 (2001).

<sup>117</sup> Bruno S. Frey, Alois Stutzer, *Happiness, Economy and Institutions*, 110 Econ. J. 918 (2000); Alois Stutzer, Bruno S. Frey, *Stärkere Volksrechte – Zufriedenere Bürger: Eine mikroökonomische Untersuchung für die Schweiz*, 6 Swiss Pol. Sci. Rev. 1 (2000). But see David Dorn, Justina A. V. Fischer, Gebhard Kirchgässner & Alfonso Sousa-Poza, *Direct Democracy and Life Satisfaction Revisited: New Evidence for Switzerland*, J. of Happiness Studies (2007), [www.springerlink.com/content/x5572540p3221854/fulltext.html](http://www.springerlink.com/content/x5572540p3221854/fulltext.html), who explain the differences with cultural factors.

“discrete and insular minorities” such as non-traditional minorities constitute the *blind spot of the interactional model of direct democracy* set in place by the Swiss Federal Constitution. This finding is further heightened by the fact that direct democracy provides only limited incentives for a high level of inclusion, as the case of female suffrage illustrates. An interactional model of direct democracy, therefore, mitigates a wide array of diverting claims, yet, it does not fully substitute for some level of constitutional review.

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