

Who Knows Best? The Creation of the Citizen-initiated Referendum in New Zealand¹

AMONG ARGUMENTS ADVANCED IN FAVOUR OF DIRECT DEMOCRACY, legitimacy pleas loom large. If the rules governing people can only be legitimate when those rules arise from and represent the will of all,² then it is commonly argued that people should have the right to vote not just for representatives but on substantive issues of public policy as well. To claim otherwise is regarded as anti-democratic: for example, Bogdanor writes that ‘in the final analysis, the arguments against referendums are arguments against democracy’,³ while Saward asks, ‘What better way to maximize responsiveness of rulers to the ruled than by fostering a system in which the ruled themselves make the decisions?’⁴

Ranged against that view, however, are concerns about the ability of vote aggregation systems to help the people to reach rational or just decisions. Coming from multiple directions simultaneously, the attacks include those from social choice theory which seems to devastate any form of democratic vote aggregation, and from various liberal rights theorists who remain sceptical of the ability of democracy to deliver justice.⁵ Even deliberative democrats, who generally laud the rational abilities of ordinary people, are sceptical of the ability of referendums to engender rational debate,⁶ embedded as

¹ The research for this paper was conducted largely in the Department of Political Studies, University of Auckland, with comments and criticism from Helena Catt, to whom I am eternally grateful. My thanks also for the useful comments from the two anonymous referees.

² Bernard Manin, ‘On Legitimacy and Political Deliberation’, *Political Theory*, 15:3 (1987).

³ Vernon Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge, Cambridge University Press, 1981.

⁴ Michael Saward, *The Terms of Democracy*, Cambridge, Polity Press, 1998, p.84.

⁵ Kenneth Arrow, *Social Choice and Individual Values*, 2nd edn, New York, Wiley, 1963; Philippe van Parijs, ‘Justice and Democracy: Are They Incompatible?’, *The Journal of Political Philosophy*, 14:2 (1996), pp. 101–17.

⁶ John Uhr, ‘Testing Deliberative Democracy: The 1999 Australian Republic Referendum’, *Government and Opposition*, 35:2 (Spring 2000), pp. 206–8.

they are in existing liberal democratic structures. Some go further, attempting to set up procedures which assume that fundamental principles are both knowable in advance of any public debate, and fenced off from potential interference by 'ignorant masses'.⁷

In three of the four states that allow citizen-initiated referendums (CIR), it is often claimed that rationality is not compromised by direct democracy. In the United States, Italy and Switzerland, proponents of CIR claim that when given such power, majorities do not generally abuse it: the regular Swiss refusal to back anti-immigration initiatives is frequently cited as an example – although elsewhere I challenge this standard account of the Swiss case.⁸ However, that confidence is not so evident in the fourth state that holds CIR, New Zealand. It is the only place which does not make the results of CIR binding on government. Whereas Swiss CIR automatically alter the federal constitution, and American and Italian ones are entrenched on the statute books, New Zealand votes are purely advisory and the government of the day can, and does, ignore the results.

There is very little academic work on New Zealand CIR. Simpson discusses some principles and the history of government-initiated votes, but his collection was published before CIR was established in 1993.⁹ Since then the published work amounts, in total, to pieces by Catt, Church and Wehrle and while they offer some arguments for the advent of CIR, none discusses in any detail the non-binding

⁷ John Dryzek discusses some examples in *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford, Oxford University Press, 2000, p. 9.

⁸ Brian Beedham, 'A Survey of Democracy: "Happy 21st Century voters"', *The Economist*, 21 December 1996; Ian Budge, *The New Challenge of Direct Democracy*, Cambridge, Polity Press, 1996, pp. 95–100; Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall*, Cambridge, Mass., Harvard University Press, 1989, p. 123; Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, New York, St Martin's Press, 1994, p. 143; John Parkinson, 'Deliberative Democracy and Referendums', K. M. Dowding, J. Hughes and H. Margetts (eds), *The Challenges to Democracy*, London, Macmillan, forthcoming.

⁹ Alan Simpson (ed.), *Referendums: Constitutional and Political Perspectives*, Wellington, Department of Politics, Victoria University of Wellington, 1992. For a short history which suggests links between antipodean direct democracy and the Progressive movement in the United States, see Colin Hughes, 'Australia and New Zealand', in D. Butler and A. Ranney, *Referendums around the World: The Growing Use of Direct Democracy*, AEI Press, Washington DC, 1994.

nature of the votes.¹⁰ In this article I offer an explanation for that difference by tracing the history of the creation of CIR in New Zealand, comparing it with the institutions in Switzerland, the birthplace of modern direct democracy, and California, where the device has been used most often since the 1980s. I also examine briefly the operation of New Zealand CIR since 1993, looking for evidence of the 'rational public deliberation' that is sometimes supposed to be encouraged by direct, mass participation in decision-making.¹¹

THE CREATION AND FEATURES OF CIR IN NEW ZEALAND

Until the electoral reforms of 1993, New Zealand was the archetypal majoritarian country featuring concentration of executive power, cabinet dominance, a two-party system, plurality elections, a high degree of centralization, an unwritten constitution and parliamentary sovereignty.¹² It was an environment in which parliament generally, and a few key ministers in cabinet particularly, were able to wield enormous power without formal restraints by the judiciary, with no upper house to act as gatekeeper and relatively few channels for 'ordinary citizens' to affect the course of policy.¹³

This is not to say that direct democracy was unknown in New Zealand. Since 1911 there have been nine nationwide referendums on both moral and constitutional topics, as well as 90 years of statutory, triennial votes on local liquor licensing. As in Australia, the early use of the device in New Zealand was driven by moral

¹⁰ Helena Catt, 'The Other Democratic Experiment: New Zealand's Experience with Citizens' Initiated Referendum', *Political Science*, 48:1 (1996), pp. 29-47; Stephen Church, 'Crime and Punishment: The Citizens' Initiated Referenda to Reform the Criminal Justice System and Reduce the Size of Parliament', in J. Boston, S. Church, S. Levine and E. McLeay (eds), *Left Turn; The New Zealand General Election of 1999*, Wellington, Victoria University Press, 2000, pp. 184-99; Gabriela Wehrle, 'The Firefighters' Referendum: Should Questions Arising from Industrial Disputes be Excluded from Referenda Held under the Citizens' Initiated Referenda Act 1993?', *Victoria University of Wellington Law Review*, 27 (1997), pp. 273-99.

¹¹ J. Uhr, 'Testing Deliberative Democracy', pp. 189-91.

¹² Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*, New Haven, Yale University Press, 1984, p. 16.

¹³ Geoffrey Palmer, *Unbridled Power*, Wellington, Oxford University Press, 1979.

conservative movements like the Women's Christian Temperance Union, drawing inspiration from the Progressives in the United States. With the exception of the local licensing votes which quickly became routine, the national referendums on moral issues occurred only in two distinct groups: in 1949 on betting, bar opening hours and compulsory military training; and in 1967 on bar opening hours and the term of parliament. The four other government-initiated votes occurred in the early 1990s on the electoral system and term of parliament, of which more shortly.¹⁴

The other relevant feature of New Zealand politics is the relationship between the indigenous Maori minority, making up around 13 per cent of the population, and the *pakeha* (largely European) majority. Maori rights are guaranteed under the Treaty of Waitangi signed with the British Crown in 1840, and although those rights have been more honoured in the breach, a concerted effort has been made by governments since the late-1980s to redress injustices and to accord the treaty constitutional status. Maori also have a separate allocation of seats in parliament (four before 1996, seven in 1999) to ensure that they can elect Maori representatives even where they are a minority in a district.¹⁵

The very limited academic work so far ascribes the advent of CIR in New Zealand to public dissatisfaction with the unresponsive style of such dominant cabinets, particularly in the areas of economic policy and the redress of Maori grievances (to which a section of the *pakeha* population remains hostile).¹⁶ Along with concerns about

¹⁴ C. Hughes, 'Australia and New Zealand', pp. 154–8; Alan McRobie, 'Final and Binding: The 1993 Electoral Referendum', in J. Vowles and P. Aimer (eds), *Double Decision: the 1993 Election and Referendum in New Zealand*, Occasional Publication No. 6, Department of Politics, Victoria University of Wellington, 1994, pp. 101–2.

¹⁵ For a general discussion of the rights of Maori in New Zealand's democracy, see Richard Mulgan, *Democracy and Power in New Zealand*, Auckland, Oxford University Press, 1984; the key work on the history of the treaty is Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin/Port Nicholson Press, 1987; for a discussion of government efforts to address treaty issues in the 1980s, see Jane Kelsey, *A Question of Honour?: Labour and the Treaty 1984–89*, Wellington, Allen & Unwin, 1990.

¹⁶ S. Church, 'Crime and Punishment', p. 185; Bonnie Laxton-Blinkhorn, 'Half-hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand', thesis, University of Auckland, 1996, p. 42; G. Wehrle, 'The Firefighters' Referendum', p. 275. Data on the decline in trust in politicians is presented in Jack Vowles et al., *Towards Consensus?: The 1993 Election in New Zealand and the Transition to Proportional Representation*, Auckland, Auckland University Press, 1995, ch 7.

the ability of the 'first-past-the-post' system to put parties in power without needing to win a plurality of overall votes (as happened in 1978 and 1981), the responsiveness issue was at the forefront of moves to reform the New Zealand electoral system, moves which were investigated by the Royal Commission on the Electoral System in 1986 and which resulted in the adoption, following government-initiated referendums, of the mixed-member proportional system (MMP) in 1996. However, the Royal Commission rejected moves towards greater use of referendums, saying that other avenues for public participation were more important and useful.¹⁷

So, while concerns over responsiveness formed an important part of the background, they would not have been decisive in creating CIR on their own. Instead, what was required was a focal event to concentrate the attention of key policy entrepreneurs on the CIR issue.¹⁸ That event was the failure of various moral conservative groups to stop the passage of a bill launched by the Labour MP, Fran Wilde, to decriminalize homosexuality and ban discrimination on the grounds of sexual orientation.¹⁹

The debate that followed the bill's introduction mirrored the concerns noted above. On the one hand, much of the debate was horrifying to liberal ears: the issue seemed to reveal in people a level of ignorance, prejudice, fear and hatred that staggered the bill's proponents. One of the enduring images of the final stages of the debate was the arrival at Parliament Buildings in Wellington of a petition, supposedly carrying the signatures of 835,000 New Zealanders opposed to the bill (more than half the voting-age population), with young men and women in blue uniforms and red sashes lining marble steps, bearing large flags like standard bearers. At the same time, questions were also asked whether parliament should be passing legislation (and it did, on 9 July 1986) against the clear preferences of the majority of the New Zealand people; whether democracy meant that the will of the majority should hold sway, no matter how illiberal and prejudiced that majority is. These questions

¹⁷ Royal Commission on the Electoral System, 'Report of the Royal Commission on the Electoral System', Wellington, 1986, p. 176.

¹⁸ John Kingdon, *Agendas, Alternatives and Public Policies*, Boston, Little, Brown, 1984, p. 174.

¹⁹ New Zealand Parliamentary Debates, 'Homosexual Law Reform Bill', Wellington, 1985, Vol. 461, p. 3534.

were specifically raised in parliament: as Jim Anderton MP put it when defending the bill against ‘anti-Christian’ charges, ‘Nowhere in Christian teaching can I find any suggestion that our values should be determined by public pressure, by referenda, or by the weight of numbers on a petition’.²⁰

The prime opponent was the Coalition of Concerned Citizens, formed in 1985 specifically to fight gay rights under the broad banner of ‘protecting and maintaining traditional values aimed at promoting the interest of the family unit, the individual, and integrity in government’. Having failed in its bid to halt the bill in 1986, the Coalition began promoting CIR as a way of stopping ‘legislation considered unsound, unacceptable, undemocratic’, paralleling the anti-gambling and alcohol crusades of their Christian forebears in the early part of the century.²¹

The Coalition found natural allies in the One New Zealand Foundation, which was largely opposed to the redress of Maori grievances, and a number of other groups which focused solely on CIR for its own sake.²² The Coalition and its partners held exclusive concepts of what ‘the people’ meant in New Zealand: including those of European descent, in nuclear families and traditional gender roles, and excluding non-Europeans and alternative social arrangements. But it was the Coalition itself that made numerous submissions to the Royal Commission on the Electoral System, submissions which had the opposite effect to that intended: the commission’s report took the risk of majority tyranny seriously, agreeing that there was a place for binding, government-initiated votes but, with some exceptions, dismissing initiatives and facultative referendums as ‘blunt and crude devices’ which would undermine government and party accountability and could adversely affect minorities.²³

Immediately following the rejection of CIR by the Royal Commission, the Coalition found a new ally in National Reform, a lobby group within the centre-right National Party. Despite strong opposition from Jim Bolger, the party leader, pressure from delegates at

²⁰ New Zealand Parliamentary Debates, ‘Homosexual Law Reform Bill’, Wellington, 1986, Vol. 472, p. 2596.

²¹ Coalition of Concerned Citizens, ‘What is the “Coalition of Concerned Citizens”?’’, *The Coalition Courier*, October 1985, p. 1; Coalition of Concerned Citizens, ‘Constitutional Issues – the Public Referendum’, *Coalition Courier*, June 1988, p. 3.

²² B. Laxton-Blinkhorn, ‘Half-hearted Democracy’, pp. 43–53.

²³ Royal Commission on the Electoral System, op. cit., pp. 175–6.

the party's 1989 conference led to the establishment of a Caucus Committee on Electoral Reform which then made the creation of CIR an election promise in its 1990 manifesto, partly as a means of positioning National as a responsive party in contrast with perceptions of the then-governing Labour Party which had pushed through so much reform.²⁴ Following National's election win, the Citizens Initiated Referenda Bill was introduced to parliament in 1992 and passed into law on 14 September 1993.²⁵

Table 1 (pages 410–11)²⁶ compares the key features of New Zealand CIR with the citizen-initiated institutions in Switzerland and California (the most frequent user of the device in the United States). New Zealand initiatives have a few features which are broadly similar to those of California or Switzerland, but many that are the unique product of the forces which created it. In common with California, there is a time limit by which votes must be held; although the limit is shorter, usually one year, which means that proposals should retain more topicality than either California (with its two-year limit) or Switzerland (with long delays used regularly by the Federal Council to take the heat out of an issue). Usually the vote is held with a general election (although this is set by convention, not law) which means that New Zealanders and Californians do not go to the polls as frequently as the Swiss.

Like Switzerland, New Zealand petitioners have a relatively long time to gather signatures (twelve months, with three-month extensions possible), needing to gather about 650 signatures a day compared with California's 2,800 and just 180 a day in Switzerland. California's signatures-per-day rate has been partly responsible for the fact that only large organizations with extensive networks have

²⁴ B. Laxton-Blinkhorn, 'Half-hearted Democracy', pp. 50–3.

²⁵ New Zealand Parliamentary Debates, 'Citizens Initiated Referenda Bill', Wellington, 1992, Vol. 522, pp. 6749–7134; vol. 538, p. 17965.

²⁶ David Butler and Austin Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy*, Washington DC, AEI Press, 1994; California Secretary of State, *Ballot Initiatives: the Ins and Outs of Getting an Initiative on the California Ballot*, 1998, PDF document, available from http://www.ss.ca.gov/elections/elections_h.htm (accessed August 1999); California Voter Foundation, internet site available from: <http://www.calvoter.org/> (accessed July 1999); Catt, 1996, op. cit.; Cronin, 1987, op. cit.; Winston Crouch et al., *California Government and Politics*, Englewood Cliff, NJ, Prentice-Hall, 1964; Kris Kobach, 1993, op. cit.; Linder, 1994, op. cit.; Magleby, 1984, op. cit. Note that New Zealand does not possess an equivalent of the Swiss facultative ballot or the Californian referendum.

Table 1
Institutions of CIR in California, Switzerland and New Zealand

	California		Switzerland		New Zealand Initiative	
Year adopted	Initiative	Referendum	Initiative	Switzerland	Facultative	Initiative
Scope	1911 Covers both state constitution and legislation. US constitution overrides state measures. Specific ban on appointing individuals to office by initiative	1911 Legislation only – with some subject limits	1891 Constitution amendment only – limits initiatives to issues already in constitution (although broadly interpreted)	1874 Legislation only – no subject limits except under ‘urgency’ provisions	1993 Legislation only (no written constitution) with no subject limits	
Trigger	<i>Legislative:</i> Petition of 5% of all voters in previous election for governor <i>Constitutional:</i> 8% threshold	Petition of 5% of all voters in previous election for governor	Petition of 100,000 citizens, 1.75% of eligible voters (50,000 pre-1977)	Petition of 50,000 citizens, 0.88% of eligible voters (30,000 pre-1977), or a majority vote in eight cantons	Petition of 10% of registered electors	
Time limit for gathering signatures	150 days from official ‘summary date’. 40-day extensions may be granted, but may not extend later than 131 days before the scheduled vote	90 days after enactment	18 months from date of question submission	90 days after enactment	12 months from wording acceptance (three-month extensions may be granted)	
Question wording and ballot qualification process	Must provide full wording of the new law, but legislature gives short title and number. Must cover one question only. Legislature must hold hearings but cannot remove a question from ballot.	As for initiatives	7 citizens submit question to Federal Council, then collect signatures. Must cover one question only. Once successful, Federal Council either endorses, recommends rejection, or submits counter-proposal	Qualifies automatically on gaining required signatures	More general question on which government bases legislation. ‘One question’ requirement; a ‘yes/no’ answer must be possible. Final wording determined by Clerk of the House, not proponents	
Date by which a vote must be held	At least 6 months but no more than two years after petition accepted by the Secretary of State	As for initiatives	No restriction – Federal Council has 4 years to consider the proposal, then can set any date for the vote (delays up to 7 years)	No formal restriction, but by convention the question goes on the next ballot which contains no competing propositions	Within one year of reaching signature target, unless ¾ of legislature votes to postpone	

Campaign restrictions	No spending or campaigning limits, but mandatory disclosure of source and amount of funding. Information booklets issued by state government (also in web forms). Elected officials free to enter the debate.	No spending limits and no disclosure rules (due to financial secrecy laws). Free broadcasting time offered to even up media access. Information booklets & web information from Federal Council, members of which traditionally do not enter debate.	Advertising spending caps of \$50,000 on each side. No requirement for state-provided information.
Counter-proposals	By government or petition; often many competing propositions on the same or following ballots.	By government or petition; 'double yes' permitted since 1987	Not used, given the non-binding status of the vote.
Voting qualifications	Registered citizens only, in person on election day	Citizens only (excludes 1m foreign nationals; women excluded before 1971)	Registered voters (includes non-citizen permanent residents)
Voting frequency and ballot length	Almost always with state elections. Governor may specify another date, but has done so only three times. Many questions on the ballot (10+)	Held at any time other than at a general election. Usually only one or sometimes two initiatives on the ballot (often four or five federal votes in a year)	Any time of the government's choosing, sometimes with a general election, giving variable ballot lengths.
Decision rule	Simple majority	Double majority: at least 50% of voters nationwide, and of voters in 50% of cantons	Simple majority
Effect	Immediate statutory effect, but often with varied local implementation. If two conflicting propositions win majorities, the one with the biggest vote wins	In simple cases, immediate change to constitution. In 'double yes' cases, negotiation process with corporatist stake holders and other partners decides	Vote not binding. If government so chooses, it drafts and introduces a measure to the legislature itself, which may or may not mirror the question
Judicial review	Decisions subject to Supreme Court review, and frequently fail	No judicial review except on procedural grounds	No judicial review

been able to get propositions on the ballot for many decades.²⁷ While this has not been the case so far in New Zealand (as will be seen shortly), it may be that New Zealand's lower rate is still not low enough to prevent a similar development: even the Swiss, with their very low signature hurdles, have found that the CIR process is dominated by existing parties rather than ad hoc organizations of 'ordinary' citizens. New Zealand, like Switzerland, also lacks judicial review of CIR decisions: in Switzerland, CIR modify the constitution, while in New Zealand there is no written constitution, although the courts have chosen to adjudicate on some constitutional issues.²⁸

Given these similarities between the three jurisdictions one might imagine that CIR in New Zealand follows similar patterns, where problem definitions are framed by a dominant consensus which determines which policy solutions succeed in attaching themselves to those problems.²⁹ As will be seen shortly, this is indeed the case during the early stages of decision-making by CIR, that is, the problem identification and solution proposal phases.³⁰ However, the unique features of the New Zealand device have very different impacts on the following stages, the public debate, the decision-making moment and implementation, which ensure that CIR outcomes in New Zealand are quite different from the pattern seen in the other two jurisdictions. These features are the non-binding nature of New Zealand initiatives, its associated wording process, and the spending cap on both signature gathering and vote campaigns.

The reason given by Justice Minister Doug Graham for CIR's advisory nature was two-fold: 1) the grounds that decisions on security, foreign and some fiscal policy are too important, and matters on which 'only the Government is likely to be in possession of all of the information'; and 2) a repeat of the tyranny of the majority criticism that, given low participation rates, very small numbers of people 'could impose their will, and in such circum-

²⁷ David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States*, Baltimore, The Johns Hopkins University Press, 1984, p. 148.

²⁸ Jonathan Boston, Stephen Levine, Elizabeth McLeay and Nigel Roberts, 'Courting Change: The Role of the Judiciary in Altering an Electoral System', *Public Law Review*, 8:4 (December 1997), pp. 229-43.

²⁹ See Parkinson, 'Deliberative Democracy and Referendums', for a discussion of the policy-framing process in the Swiss context.

³⁰ Helena Catt, *Democracy in Practice*, London, Routledge, 1999, p. 16.

stances there is a real risk of the oppression of minority groups'.³¹ On these grounds, the New Zealand government retained for itself the power to react to CIR as it saw fit: it can draft whatever legislation it chooses, either reflecting the wishes of the proponents or differing radically from them; or it can ignore the vote entirely. The only channels by which pressure can be brought to bear on a government are the usual channels inside representative democracy, which had been enhanced in New Zealand during the transition to proportional representation; and the pressure for more responsiveness which would grow should governments continually ignore CIR results.

Related to this is the question wording which is much less precise than in either California or Switzerland. In New Zealand the question covers an issue broadly and it is up to the government, not the proponents, to draft specific legislation. Indeed, the proponents do not even have the final say on the question phrasing: the Clerk of the House has the final say, being given much more power over wording than California's Secretary of State or Attorney General. In these conditions CIR in New Zealand is, in the words of opposition justice spokesperson David Caygill, an expensive, nationalized opinion poll. However, the government promised to hold a review of CIR in five years and, if the device worked 'extremely well' then it would consider holding binding votes.³² This promise has not yet been acted on, and CIR remain non-binding.

Other features of New Zealand CIR reflect the same elite concerns about voter rationality and majority tyranny. Despite the relatively low signatures-per-day hurdle, the total signature target, at 10 per cent of registered electors, is very high by international standards. The reason for the high target was specifically to limit the number of petitions which succeeded in forcing a vote, both because the estimated cost of holding a referendum, at NZ\$10-11 million, was considered too high, and to stop proponents who 'may well be pursuing an issue in a vexatious manner'.³³

The aim of the spending cap was to ensure that the process and the issues were not dominated by moneyed interests as has been

³¹ 'Citizens Initiated Referenda Bill', *New Zealand Parliamentary Debates*, Wellington, 1992, Vol. 522, pp. 6704-5.

³² *Ibid.*, p. 6711; Vol. 537, p. 17609.

³³ Hon. D. Graham, 'Citizens Initiated Referenda Bill', *New Zealand Parliamentary Debates*, Wellington, 1992, Vol. 522, p. 6705.

the case in California.³⁴ Because sustained public communication is an expensive undertaking, the Royal Commission recommended that no spending cap be imposed in the interests of informing the public on issues, although it did recommend mandatory funding source disclosure and a review if 'expenditure on referenda campaigns becomes large'.³⁵ The government went against this advice and imposed a spending cap of NZ\$50,000 during the signature drive, and a further \$50,000 by either side during the vote campaign itself. The cap concerns published or broadcast 'advertising' which includes paid space in newspapers or television, as well as billboards, leaflets and internet sites, but excludes the hiring of public relations advisers. As will be seen in the following section, an effect of the spending cap has been not to equalize power between the different sides of a referendum debate but to ensure that voters remain unaware and uninformed about CIR issues.

Neither the government nor the opposition seemed to have much enthusiasm for CIR, despite protestations from the Minister of Justice.³⁶ The government had only been pushed into doing something thanks to internal party pressures before a major election. Having won the election, the government promoted CIR on the grounds that they would provide another channel for public opinion to be heard between elections;³⁷ and they would increase public participation and 'healthy debate' on 'issues of national importance'.³⁸ The signature hurdle was set high to ensure that only 'important' issues were brought forward,³⁹ while the government retained the right to act or not act as it saw fit to protect minority rights. Having been pushed into action by a highly conservative, illiberal group allied to a faction within its own party, the governing elite in New Zealand seems to have chosen to hamstring the CIR process to prevent majority tyranny on the one hand, and for rationality and sovereignty reasons on the other.

³⁴ H. Catt, 'The Other Democratic Experiment', pp. 33–4.

³⁵ Royal Commission on the Electoral System, 1986, *op. cit.*, p. 180.

³⁶ Hon D. Graham, 'Citizens Initiated Referenda Bill', p. 6708.

³⁷ *Ibid.*, p. 6703.

³⁸ C. Fletcher MP, New Zealand Parliamentary Debates, 'Citizens Initiated Referenda Bill', Wellington, 1992, Vol. 522, p. 6713.

³⁹ Hon. D. Graham, personal communication to B. Laxton-Blinkhorn, 1996.

ASSESSING THE NEW ZEALAND MODEL IN PRACTICE

Despite the toothless nature of the device, New Zealanders have launched 25 petitions on subjects ranging from battery hens and euthanasia to environmental issues, further electoral reform, justice and sentencing, as listed in Table 2.⁴⁰ This, it should be emphasized, is not a large number: Californians launched 39 initiatives for the November 2000 ballot alone, of which eight qualified, the average for the last four years.⁴¹ Of the 25 New Zealand petitions, only three have met the signature target and gone to a vote: the Fire-fighters Union initiative in 1995, and two at the 1999 general election, one to decrease the number of MPs and the other to impose harsher sentences for crime and to strengthen victim compensation.

It is interesting to note that, unlike California and Switzerland, New Zealand CIR have not generally been the tool of established elites. Apart from some early efforts by the Christian Heritage Party (which had links with the Coalition of Concerned Citizens) and a small number of MPs, proposals have come from individuals without pre-existing networks as well as other groups without direct roles in the legislative process. Could it be that something unexpected has happened in New Zealand, that its CIR device genuinely gives power to the people rather than established elites?

The nature of the petitions, including the successful ones, has been a surprise to politicians who thought difficult moral and political issues would be debated in this way. Instead, they see the

⁴⁰ H. Catt, 'The Other Democratic Experiment'; Ministry of Justice, *The General Election 1999*, Wellington, available from http://www.justice.govt.nz/pubs/reports/2000/election_e9_1999/; Office of the Clerk of the House of Representatives, 'Citizens Initiated Referenda', *Parliamentary Bulletin* 94:10-99:23 (1994-99). The question wording given in this Table is the final wording determined by the Clerk of the House, not the original wording of the sponsor. In most cases there is very little difference, but the original text of the question, from the Free New Zealand Party Society is worth noting for comparison. The original text was: 'Should government let New Zealanders have democracy by referendum where any individual or group can submit an idea and if we vote for it, then anyone can submit opinions which get numbered so we can list what we agree with and list what we disagree with, then the results are sent to four independent committees who create four separate laws and we vote for the most suitable one?' The turnout figure is percentage votes cast over the number of registered electors.

⁴¹ California Secretary of State, election returns, available from http://www.ss.ca.gov/elections/elections_j.htm

Table 2
New Zealand Initiative Petitions, 1993–1999

Year	Question	Sponsor	Status	Turnout	% Yes
1993	Should the production of eggs from battery hens be prohibited within five years of the referendum?	Royal New Zealand Society for the Protection of Cruelty to Animals	Failed signature target 10/95		
1993	Should a Judge sentencing a person convicted of murder to life imprisonment be empowered to order that the person be imprisoned for his or her natural life and not be eligible for parole?	Christian Heritage Party	Lapsed 6/95		
1993	Should the size of Parliament be reduced from 120 Members of Parliament to 100 by reducing the number elected from party lists?	Michael Laws MP, Hon Winston Peters MP, Geoff Braybrooke MP	Lapsed 8/95		
1994	Should there be a legally enforceable requirement that political parties observe their constitutions and their manifesto promises?	William Maung Maung	Lapsed 11/95		
1994	Do you agree that the laws of New Zealand should not discriminate against or give preference to citizens or permanent residents of New Zealand on the basis of their ethnic origins?	One New Zealand Foundation	Lapsed 3/96		
1994	Should all New Zealanders have access to comprehensive health services which are fully government funded and without user charges?	Next Step Democracy Movement	Failed signature target 3/96		
1994	Should all New Zealanders have access to public education services, from early childhood to tertiary level, which are fully government funded and without user charges?	Next Step Democracy Movement	Failed signature target 3/96		
1994	Should full employment with wages and conditions that are fair and equitable be the primary goal of government economic policy?	Next Step Democracy Movement	Withdrawn 2/96		
1994	Should all New Zealanders on income support and benefits get an income based on what it actually costs to live?	Next Step Democracy Movement	Withdrawn 2/96		
1994	Should increases in New Zealand's electricity demand be met from energy conservation and from the use of sources that are environmentally sustainable?	Next Step Democracy Movement	Withdrawn 2/96		
1994	Should New Zealand's defence expenditure be reduced to half its 1994/95 level by the year 2000 with the savings spent on health, education, conservation and the promotion of full employment?	Next Step Democracy Movement	Withdrawn 2/96		
1994	Should the number of professional fire-fighters employed full-time in the New Zealand Fire Service be reduced below the number employed on 1 January 1995?	New Zealand Professional Fire-fighters Union	Vote held 2/12/96	28%	12% (no for yes)
1995	Should people aged 18 years and over who are terminally or incurably ill be permitted to have their lives ended if they request this, in a humane manner and in accordance with procedures to be established?	Voluntary Euthanasia Society	Withdrawn 4/96		

1996	Should the forestry licences to 188,000 hectares of Crown forest land which are currently held by the Forestry Corporation of New Zealand Limited remain in State ownership (subject to the determination of any Treaty of Waitangi claims)?	Jim Anderton MP	Lapsed 12/96	
1996	Should all tree felling and clearing on any indigenous land (except in plantation forests and already protected conservation areas) be prohibited, unless such tree felling or clearing is in accordance with Maori customary use?	Nga Kaiiaki o Te Waonui Tane o Aotearoa	Lapsed 10/97	
1997	Should there be a Written Constitution, taking precedence of the Treaty of Waitangi and all other sources of law, which guarantees the right of all people without favour or discrimination?	Mark Whyte	Lapsed 6/98	
1997	Should the Government increase its annual spending on health services to at least 7% of GDP, funding the increase, if necessary, from personal income tax?	Cancer Society of New Zealand	Lapsed 12/98	
1997	Should the size of the House of Representatives be reduced from 120 members to 99 members?	Margaret Robertson	Vote held with general election 28/11/99	81.5%
1997	Should there be a reform of our Justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?	Norm Withers	Vote held with general election 28/11/99	82.9%
1998	Should members of Parliament be elected by single transferable vote (STV) with constituency-based, multi-member electorates?	Frederick Richards	Failed signature target 8/99	
1998	Should there be no further compulsory school closures until comprehensive criteria have been established by law for the Minister of Education to follow when deciding to close a school?	Gavin Hugh Piercy	Lapsed 3/00	
1999	Should the government be required to reduce the number of unemployed people to below 1% of the labour force by the year 2004?	Julie Waring	Lapsed 8/00	
1999	Should New Zealand adopt direct democracy by binding referendum whereby ideas for laws would be submitted and voted upon as of right by the public and, according to the result, submissions collected from the public and then assessed by opinion poll, resulting in draft law alternatives being prepared by independent groups, from which one opinion [sic] would be chosen by majority vote by the public; the resulting legislation to be binding?	The Free New Zealand Party Society	Signature deadline 10/00	
2000	Should Parliament enact legislation to ban the sale and distribution of tobacco?	Raymond Lorenzen		
2000	Should [Act New Zealand MP] Dr Newman's Shared Parenting Bill be made law in the Family Court?	Tim Hawkins		

topics as 'a bit loopy'.⁴² Regardless of what the politicians think should be good topics of discussion, it does appear that both illiberal and irrational proposals make it through the CIR pipeline in New Zealand, just as elsewhere. The two 1999 votes provide clear examples.⁴³ The Withers proposal on justice reform was the direct result of a nasty assault on the elderly mother of Norm Withers, a Christchurch man; and in a media environment which focused on horrifying pictures of Mrs Withers, what little public discussion there was dealt almost entirely with vengeance, punishment and individual responsibility, marginalizing other arguments. While penal reformists and social workers spoke out against the measure, talking about early intervention work with young people and 'the responsibility we all have to prevent destructive behaviour in our families and communities',⁴⁴ the measure was supported by 91.8 per cent of voters at the poll. The new Justice Minister in the Labour government elected in 1999 has expressed his preference for restorative justice initiatives rather than tougher sentencing, but in an effort to be seen to be listening to the people, the Withers proposal was referred to Parliament's Justice and Electoral Law Committee from which, at the time of writing, it had not emerged.⁴⁵

The Robertson initiative, which aimed to reverse the Royal Commission's recommended, and implemented, increase in the number of MPs from 99 to 120, was more an opportunity to 'punish politicians' than a vote on the substantive issue. Margaret Robertson claimed that 'a smaller parliament would be more efficient, harder working, and better ordered because the politicians would be too busy to behave badly'. Despite the opposition of a group of 70 political scientists who said that the effect of the measure would be a less responsive parliament – the exact opposite of Robertson's intentions – this measure too was supported by a massive 81.5 per cent of voters. The government's response has been to promise that the matter will be discussed when the new electoral system is

⁴² W. Cooper MP, quoted in H. Catt, 'The Other Democratic Experiment', p. 36.

⁴³ These examples are discussed in more detail in S. Church, 'Crime and Punishment'.

⁴⁴ 'Busting Burglars', Letters to the editor, *The Press*, Christchurch, 17 November 1999; Victoria Clausen, 'Penal Reformers Seek Poll Rejection', *The Press*, Christchurch, 19 November 1999.

⁴⁵ S. Church, 'Crime and Punishment'.

reviewed by parliament, a review due for completion in June 2002.⁴⁶ Thus in neither case can it yet be said whether CIR has given ordinary citizens the power to alter public policy.

On the question of the ability of CIR to generate rational debate, a feature of both issues was the remarkable extent to which public debate was absent, even the distorted debate that is characteristic of media-driven public discourse.⁴⁷ For example, the *New Zealand Herald*, the country's largest newspaper, carried only four articles mentioning the Robertson initiative between 9 February 1999, when it qualified for the ballot, and voting day on 27 November. Indeed, the efforts by political scientists to create public debate on the Robertson initiative provoked a remarkable series of attacks from some newspapers, including the *National Business Review* which lambasted the 'blatant politicking' of 'intolerant and grumpy academics' who 'are not employed to use public positions to advance personal agendas.'⁴⁸ In such an environment where reasoned debate was attacked as special pleading, 35 per cent of voters still did not know that the referendums were taking place just two days before the vote.⁴⁹ Among those who did know of them, the Withers initiative caused a great deal of confusion, including as it did three separate questions to which one had to give one yes/no answer (see Table 2, pages 416–17): 'The query's various parts had even some experienced political commentators stumped. They pointed out that someone who favoured longer sentences but not hard labour could be stymied in deciding a response. So could anyone who favoured victim support but not longer sentences . . .'.⁵⁰ Indeed, the question as put did not seem to reflect the policy preferences of Withers himself, who preferred that violent offenders work in prison, their wages going partly towards their upkeep and partly as compensation to their victims.⁵¹

⁴⁶ S. Church, 'Crime and Punishment', op. cit.; Royal Commission on the Electoral System, op. cit., pp. 126–7; 'Acting on Referendums', *The Press*, Christchurch, 30 November 1999, editorial; Bernard Orsman, 'Yes Vote Likely for Referendums', *New Zealand Herald*, Auckland, 25 November 1999.

⁴⁷ Richard Hofstetter et al., 'Information, Misinformation and Political Talk Radio', *Political Research Quarterly*, 52:2 (1999), pp. 354–5.

⁴⁸ 'The Left's Last Frantic Gasp', *National Business Review*, Auckland, 8 October 1999, editorial.

⁴⁹ S. Church, 'Crime and Punishment', op. cit., Table 18.4, p. 198.

⁵⁰ 'Acting on Referendums', *The Press*, Christchurch, 30 November 1999, editorial.

⁵¹ S. Church, 'Crime and Punishment', p. 194.

Incidentally, the Withers question seems to breach provisions of the Citizen Initiated Referenda Act 1993, including the specifications in sections 5(2) and 10(1)(a) that initiatives must ask only one question and admit of only one of two possible answers. In correspondence, the Clerk of the House of Representatives was not able to explain why the question survived in its final form, although reading between the lines of the correspondence between the Clerk and Mr Withers, my speculation is that, given the non-binding nature of the vote, the Clerk simply gave up fighting with a distrustful proponent.

Anecdotal evidence suggests many possible explanations for the lack of public debate; but until a more detailed study can be done, these explanations remain speculative. First, the fact that the votes were non-binding means that the mainstream media did not treat the issues seriously; there was no point in covering something that would not be acted on. The media might also have given more coverage if the votes had not coincided with a general election.⁵² Secondly, the spending cap may have prevented the proponents from informing voters; and in the absence of a strong 'yes' campaign, there was nothing to which a 'no' campaign might have reacted. Thirdly, unlike in California and Switzerland, the government makes no effort to produce voter information pamphlets; when the Chief Electoral Officer tried to do so for the firefighters' referendum in 1995, he could not obtain acceptable statements of position from either side and so cancelled the leaflet.⁵³ The Electoral Commission put some information on the number of MPs on its website because it is responsible for public education on the electoral process.⁵⁴ Incidentally, it is unclear what the Chief Electoral Officer's standard of 'acceptable statements' might have been. The California Secretary of State does not seem to think it necessary that the two sides meet such a test – he or she simply publishes the claims and counterclaims of the two sides verbatim, and supplies a fiscal impact report from the Legislative Analyst's Office without further comment,⁵⁵ leaving it up to the opposing sides to highlight the flaws in one another's

⁵² H. Catt, personal communication.

⁵³ H. Catt, 'The Other Democratic Experiment', p. 33.

⁵⁴ Electoral Commission of New Zealand, available from <http://www.elections.govt.nz>

⁵⁵ California Secretary of State, *Ballot Initiatives: The Ins and Outs of Getting an Initiative on the California Ballot*, Sacramento, 1998, available from <http://www.ss.ca.gov> (accessed August 1999).

arguments. Fourthly, the fact that New Zealand questions are broad ones without specific draft laws behind them may mean that there is little solid material for voters or the media to grasp. In the Withers case, there is simply nothing in the question that defines what 'minimum sentences' or 'hard labour' or 'serious violent offences' mean.

CONCLUSION

The New Zealand CIR device shares some similarities with those in California and Switzerland, mainly to do with the signature gathering process, the dates on which votes are held, and the decision rule. However, the origins of the New Zealand model have resulted in some unique features, namely the device's relative powerlessness, the nature of the questions, and the signature hurdle.

In this article I have argued that these unique features are not simply the result of a generalized concern about the responsiveness of cabinet-dominated governments, although they were important. The window of opportunity for CIR was certainly created by the then opposition National Party's determination to exploit perceptions that the Labour government was unresponsive. However, the event which focused attention on CIR was the failure to halt homosexual law reform by conservative groups with allies in the National Party. Subsequently, National MPs may have convinced themselves of the democratic virtues of CIR, but the fact that they still took the risk of majority tyranny seriously, particularly relative to questions of Maori rights, led them to hamstring the process. As a result, CIR in New Zealand are launched and held rarely compared with the other states that use the device, and (so far) have never been acted on. Because they are drained of power, they have not become the tools of established elites as is evident in other countries.

It is possible that, by continually ignoring the results of CIR votes, political parties will worsen the decline in trust of representatives. This may lead either to demands that CIR be made binding, or to further alienation from the political process entirely. What the long-term reaction of the New Zealand electorate will be remains to be seen.

