Seattle University Law Review

2001 Symposium on Law and Public Policy

The Initiative Process in Washington: Implications and Effects

Presented by

Seattle University Law Review
Symposium on Law and Public Policy

The Initiative Process in Washington: Implications and Effects

September 14, 2001

PROGRAM

1. INTRODUCTIONS
   Leslie Griffith, Managing Editor - Seattle University Law Review

2. WELCOME
   Dean Rudolph Hasl, Seattle University School of Law

3. OPENING REMARKS, RAINIER INSTITUTE
   Governor Booth Gardner

4. EVENT FORMAT AND SYMPOSIUM INTRODUCTIONS
   Barry Mitzman

5. PRESENTATION OF THE ARTICLES (with short Q & A from panel)
   Steven Marlowe, *Direct Democracy Is Not Republican Government*
   Kenneth Miller, *Courts as Watchdogs of the Washington State Initiative Process*
   Brewster Denny, *Initiatives – Enemy of the Republic*

6. PANEL DISCUSSION WITH AUDIENCE PARTICIPATION

   Steven Marlowe – Landerholm, Memovich, Lansverk & Whitesides
   Vancouver, WA

   Kenneth Miller – University of California at Berkeley
   Institute of Governmental Studies

   Brewster Denny – University of Washington
   Graduate School of Public Affairs

   The Honorable Philip Talmadge – Washington State Supreme Court

   James Rigby – Permanent Offense, Initiative747

   Shawn Newman – The Initiative and Referendum Institute

   Knoll Lowney – Initiative 63

7. CONCLUSION
   Barry Mitzman

Reception on the Second Floor to follow.

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RAINIER INSTITUTE

The non-profit, non-partisan Rainier Institute seeks solutions to important public policy concerns through research, education, and public debate. The organization focuses on crafting improved policies, rather than debating simplistic solutions, such as increasing or decreasing the size of government. The Institute proposes to address issues such as urban sprawl, preservation of open space, traffic congestion, health care insurance coverage, education in today's technological world, court reform, and legislative budgeting. This fall, the Institute plans to sponsor a health care forum, in hopes of improving access and reducing costs for Washington citizens. The organization is also preparing a study on transportation funding options, and analysis of the 18th Amendment to the Washington Constitution limiting gasoline tax revenue to highway construction.

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PANEL MEMBERS

The Honorable Philip Talmadge – Justice Talmadge is a graduate of West Seattle High School as a National Merit scholar. He has a B.A. from Yale and a J.D. from the University of Washington. He served in the Washington State Senate from 1979 to 1995, and the Washington Supreme Court from 1995 to 2001. He has taught appellate advocacy at the Seattle University and University of Washington Law Schools, and has written extensively on a number of legal issues. Justice Talmadge is currently in private practice, concentrating on appellate and governmental law issues. He is a fellow of the American Academy of Appellate Attorneys and is admitted to practice in Washington courts as well as the Ninth and Federal Circuits and the United States Supreme Court. Phil has been active in a variety of youth and community organizations, such as the Rainier Institute. He currently chairs the King County Active Sports and Youth Recreation Commission, and participates in adult baseball.

Brewster C. Denny – Professor Denny founded the University of Washington Graduate School of Public Affairs and is currently Dean Emeritus of the school. He is a member of the General Accounting Office, Comptroller-General's Research and Education Advisory Panel. He served as a Naval Officer during World War II and the Korean War, and worked as a Supervisory Intelligence Research Analyst for the Department of Defense. Professor Denny also served as a staff member for Sen. Henry M. Jackson. He has authored numerous articles for national academic journals and news publications. Professor Denny is a founding member of the Washington Council on International Trade, and has served as a member of the United States National Commission for the Pacific Economic Cooperation Conference. He is also the grandson of Arthur and Mary Denny, founders of Seattle and the University of Washington.

Kenneth Miller – Mr. Miller is an attorney, a lecturer in constitutional law, and a doctoral candidate in political science at the University of California at Berkeley. He is a graduate of Pomona College (1985) and Harvard Law School (1988), and expects to complete his Ph.D. at Berkeley later this year. His doctoral dissertation focuses on the courts' role in the initiative process. Mr. Miller has published several articles on the initiative process and voting rights, and has spoken at a number of national conferences regarding initiative reform. He has practiced law with Morrison & Foerster, LLP since 1989 (part-time since 1994), and was the co-founder of the firm's Sacramento office in 1991. His law practice focuses on political regulation. Miller formerly worked as an aide to Congressman David Dreier and California State Senator Rebecca Q. Morgan.

Steven W. Marlowe – Mr. Marlowe is an associate at Landerholm, Memovich, Lansverk & Whitesides in Vancouver, Washington. His practice emphasizes general business, business transactions, and contract matters. He has also served as a law clerk in the Spokane City Attorney's Office, and in the Legislative Counsel's office for the Oregon State Legislature. Mr. Marlow graduated from Gonzaga University School of Law where he received numerous academic scholarships, and received his B.A. in political science from the University of Portland where he received numerous awards for academic excellence.

Shawn Newman – Mr. Newman is a lawyer, currently in private practice. He has served as an Assistant Attorney General in the Education Division and served as staff counsel for Evergreen State College and Senate Committee Services. Mr. Newman serves on the board of legal advisors to the Initiative and Referendum Institute and serves as its Washington State director. The Institute is a non-profit non-partisan research and educational organization dedicated to the promotion, protection and expansion of
the initiative and referendum process in America He graduated from Notre Dame School of Law School where he was a Fellow with the White Center for Law and Government. He also served as research editor for the Notre Dame Journal of Legislation.

James Rigby – Mr. Rigby has practiced law in Seattle since "hanging out his shingle" in 1980. He is the principal of The Rigby Law Firm. Mr. Rigby has substantial experience in the bankruptcy arena, and also represents small businesses in corporate and commercial matters. He has also been a Bankruptcy Trustee for the United States Bankruptcy Court for the Western District of Washington. Mr. Rigby graduated with a B.A. from the University of Washington in 1976 and received his law degree from the University of Puget Sound in 1979.

Knoll Lowney – Mr. Lowney is a principal in the law firm of Smith & Lowney, PLLC, which focuses on public interest environmental law. He is a founder and co-chair of Yes for Seattle, which uses direct democracy for local solutions. Yes for Seattle is currently running its first initiative campaign, Initiative 63, which will increase water conservation for the environment. Knoll also founded the organization Permanently Offended, which takes aim at Tim Eyman and the destructive impacts of his initiatives

Moderator

Barry Mitzman is one of the Northwest's best-known television journalists. He recently announced his departure from the airwaves, and a long career in news and public affairs. He is currently a vice president in the West Coast office of Shepardson Stern Kaminsky, a New York-based communications consulting and advertising firm. Mr. Mitzman had appeared in tens of thousands of living rooms on Friday nights for 11 years as host of *Serious Money*, a weekly public television series on Northwest business and investment trends. He also has been a reporter and producer of many documentaries and news specials that have earned nearly every major broadcasting award including a Peabody, known as broadcasting's Pulitzer Prize.

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SYMPOSIUM: THE INITIATIVE PROCESS IN WASHINGTON: IMPLICATIONS AND EFFECTS

SYMPOSIUM

THE INITIATIVE PROCESS IN WASHINGTON: IMPLICATIONS AND EFFECTS

Introduction

Initiative Process in Washington

*Philip A. Talmadge**

I am honored to write this Introduction to the *Seattle University Law Review*'s Symposium on the initiative process in Washington. In recent years, the people, exercising their basic constitutional right to legislate, have proposed and enacted—or rejected—a smorgasbord of initiative measures, ranging from public disclosure to denture regulation. The Washington Supreme Court, however, has found some of those initiative measures to violate the Washington Constitution and has thus invalidated them.[1]

In this Symposium, the authors address a variety of issues associated with the initiative process in our state. They examine the specific case of Initiative 695, the role of the courts in reviewing initiatives, the application of the Republican Government Clause in the United States Constitution to Washington's initiative process, and the larger question of whether the entire initiative process is unconstitutional. These articles are timely analyses of a pressing public issue.

Virtually no one interested in public affairs in this state lacks an opinion on initiatives. I am no exception. From my perspective as a former legislator and Supreme Court Justice, I have concerns about the initiative process.

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* J.D., University of Washington; B.A., Yale University. The author was a member of the Washington State Senate from 1979 to 1995 and a Justice of the Washington Supreme Court from 1995 to 2001.

1. The Washington Supreme Court reviews initiative measures just as it would legislatively enacted bills and finds such enactments unconstitutional where necessary. *See, e.g.*, Limstrom v. Ladenburg, 136 Wash. 2d 595, 606, 963 P.2d 869 (1998) (traditional rules of statutory construction apply to initiatives); Culliton v. Chase, 174 Wash. 363, 373-74, 25 P.2d 81 (1933) (initiatives subject to constitutional mandates). The Supreme Court has found term limits unconstitutional, Gerberding v. Munro, 134 Wash. 2d 188, 949 P.2d 1366 (1988), as well as tax limitation measures like Initiative 695, Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000).

In 1912, the people adopted the initiative process;[2] it is a legitimate form of expression for the people's will, particularly where the traditional branches of government fail to act. I am concerned, however, that the initiative process has become a substitute for thoughtful legislation, particularly on budget issues. I decry the lack of public process on most initiatives. Instead of open public hearings, debate, and careful amendments to a bill, we have an undeliberative process often characterized by secret and malevolent purposes.[3]

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2. The Washington Constitution states with respect to initiatives:

> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or party of any bill, act, or law passed by the legislature.
>
> (a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of the initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.
>
> Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

WASH. CONST. art. II, § 1. *See generally* Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55 (1973).

3. As one recent scholarly analysis of initiatives opines:

The development of a cottage industry on initiatives is troubling. Today, we have consultants who go from state to state to enact initiative measures for special interest groups with the money to support their effort. These consultants pay signature gatherers[4] to assist them in gathering signatures to advance a special interest agenda. Instead of the initiative process being a mechanism for action where the governor and legislature have failed to act, the initiative process has become a separate governing process unto itself. Instead of being a citizen's constitutional right to compel government action in the face of a legislative failure to act *because* of special interests, the initiative process has instead become a tool of those special interests or people with agendas not always fully revealed.[5]

> The proliferation of issue balloting . . . together with the objectives sought by many of the proposals, places minority rights and individual liberties in serious jeopardy. While the original advocates of American direct democracy may have emphasized progressive governmental reforms, such applications are less common in modern practice than are measures by which civil rights, and personal lifestyle and moral choices, are threatened by an amorphous, anonymous majority. In the Sixties efforts to repeal fair housing laws reached epidemic proportions. In the Seventies desegregative busing and antidiscrimination ordinances protecting homosexuals have fallen prey to this "tyranny of the majority." Even facially neutral measures such as California's Proposition 13 may adversely affect the poor by curtailing government services on which the poor, and hence minorities, are disproportionately dependent. In addition to discrimination against minorities, the list of personal liberties sought to be regulated or constrained by initiative is both voluminous and alarming.
>
> Compounding this threat is the lack of procedural safeguards governing initiative and referendum use. Ballot certification can easily be obtained by a well-financed interest group. "Tumultuous, media-oriented" campaigns often replace legislative hearings and debate, reducing sensitive, complex political questions to simplistic moral judgments and depriving a reviewing court of a coherent legislative history. Once enacted, a ballot proposition may be more difficult to amend or repeal than a legislative enactment, either because of statutory restraints or because of legislators' pragmatic reluctance to defy the vox populi. While this lack of procedural safeguards facilitates enactments hostile to minorities and individual liberties, the victim seeking judicial redress is likely to encounter judicial deference, or paralysis, in dealing with direction legislation.

Marc Slonim & James H. Lowe, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 181-83 (1979) (Footnotes omitted). *See also* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993). Justice Linde contends that certain initiatives fail of the Republican Government Clause of the United States Constitution when they have a malevolent or stigmatizing intent aimed at identified groups. He might be concerned with a measure like Initiative 200, aimed at eliminating affirmative action.

4. *See, e.g.*, Waremart v. Progressive Campaigns, Inc. 139 Wash. 2d 623, 989 P.2d 524 (1999) (for-profit signature gathering organization sought access to private premises of grocery store to gather signatures).

5. For example, what is the hidden agenda of Tim Eyman's Washington organization, Permanent Offense, or Bill Sizemore in Oregon? We know of the agenda of George Soros—liberalization of drug laws. *See* David Broder, *"The Ballot Initiative Battle"* (visited on Nov. 8, 2000) <http://www.washingtonpost.com/wp-dyn/articles/A4256-2000Nov2.html>. *See gener-*

The initiative process fails to secure public involvement in the development of the proposed law. Once the measure is on the ballot, it is all or nothing. Our constitution limits the ability of the legislature to fix such measures, as they can only be amended by a two-thirds vote of both houses for two years after their enactment.[6] A small group of willful people can develop and effectively enact an initiative without any other consultation of the public, except perhaps the assistance of the consultants mentioned above.

In contrast to the efforts of such modern, narrowly-focused groups, the proponents of Initiative 276, the Public Disclosure Act, actually toured the state of Washington and held public hearings and broadly disseminated information on the proposed initiative, gathering public input before they placed the measure on the ballot for consideration.[7] The process utilized by the proponents of Initiative 276 had its analog in the legislative hearing process, where all views on issues may be expressed and problems in measures identified and addressed by decision makers. In sad contrast to the initiatives proposed of late, this kind of community deliberation and decision-making enriches our system of government as an appropriate supplement to legislative action.

Finally, I am concerned about the initiative process as an alternative to the traditional legislative process, particularly with respect to budget matters. It is incredibly difficult for legislative bodies to develop and enact budgets. It is nearly impossible to accomplish budgetary decisions when so much of the budgetary process has been affected by initiative measures.[8] The people in 1978 adopted Initiative 62, which limited revenues and the growth of state government. In 1993, the people enacted Initiative 601, which limited state government expenditures. When that measure proved too restrictive in its policy for transportation funding, the people voted in favor of Referendum 49 in 1999. In turn, that measure was substantially contradicted by Initiative 695 in 1999. How can any rational policymaker function when fiscal policy in the transportation arena lurches from one standard to the next?

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ally DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000).

6. WASH. CONST. art. II, § 1(c).

7. *See* Washington Fed'n of State Employees v. State, 127 Wash. 2d 544, 574, 901 P.2d 1028 (1995) (Talmadge, J., concurring in part and dissenting in part).

8. The people have acted frequently to revise Washington's tax structure, usually diminishing available revenues. The people passed an income tax by initiative (Initiative 69), effectively eliminated the state inheritance tax (Initiative 402), and removed the sales tax on trade-ins such as automobiles (Initiative 464), just to mention a few.

The culmination of this phenomenon of "budget by initiative" was the 2000 election. The people enacted (simultaneously): Initiative 722 (limiting property and other taxes); Initiative 728 (mandating education spending increases); and Initiative 732 (providing cost of living adjustments (COLAs) for teacher salaries). All have serious and contradictory implications for the state general fund and transportation budgets.

Legislators serving on budget committees find that the procedures for enacting a budget have been affected by initiatives: available revenue has been affected, and the direction for expenditures has been controlled as well. This is an irrational process for budgeting that no sensible organization would tolerate. As the *Seattle Times* cogently commented editorially:[9]

> Like shoppers on a spending spree, voters on Election Day bought themselves smaller classes in public schools, better teacher pay and limits on property taxes. Now the Legislature gets to figure out how to pay the bills.
>
> If you thought last year's budgetary fallout from the car-tab initiative turned a supposedly short legislative session into an ungainly endurance contest, wait till you see the challenging budget work that lies ahead next year in Olympia.
>
> Three initiatives passed that together reflect $1 billion worth of decisions voters made for lawmakers. The costliest measure is Initiative 728, which spends roughly $500 million on class-size reduction, extended learning time and school construction. Though smaller, Initiative 732, the teacher-salary boost, creates the biggest squeeze on competing programs paid for by the general fund—over $400 million. Initiative 722, the property tax cap, will cost the state an estimated $24 million, with much larger impacts on local governments. Reconciling initiatives will be a giant challenge.

The initiative process should be available for citizens when the traditional branches of government fail to respond. The initiative process should not be available as an end run around the deliberative legislative process, or to short circuit policy-making in the regular legislative arena.

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9. Editorial, *Heavy Lifting: Reconciling Initiatives in Olympia*, SEATTLE TIMES, Nov. 19, 2000, at D2.

While the initiative power is broad,[10] it is not all-encompassing. It does not extend, for example, to administrative actions.[11] Perhaps the initiative power does not,[12] and should not, extend to budget-related issues. Rational fiscal policy cannot be established when the fiscal situation is buffeted by a constant barrage of initiative measures adding or subtracting revenues and dictating expansion or contraction of expenditures. If the initiative power actually extends to budget matters, perhaps the legislature should have the courage to seek a constitutional amendment from the people clarifying the appropriate scope of the legislature's power to budget and the scope of the people's power by popular measure to affect such fundamental policy-making. For example, the Washington Attorney General could screen such proposals for constitutionality and the voters could be apprised of the state and local fiscal impact of such measures. A supermajority vote

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10. Trautman, *supra* note 2, at 67. *See* State v. Davis, 133 Wash. 2d 187, 190-02, 943 P.2d 283 (1997) (rejecting challenges to initiatives based on the federal Republican Government Clause); State v. Manussier, 129 Wash. 2d 652, 669-72, 921 P.2d 473 (1996).

11. Ruano v. Spellman, 81 Wash. 2d 820, 505 P.2d 447 (1973); Durocher v. King County, 80 Wash. 2d 139, 492 P.2d 547 (1972).

12. Arguably, Article 8, section 4 of the Washington Constitution entrusts the appropriation power exclusively to the legislature:

> No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

WASH. CONST. art. VIII, § 4. As the Washington Supreme Court stated in *State ex rel. Peel v. Clausen*, 94 Wash. 166, 173, 162 P. 1 (1917):

> The object of Article 8, section 4, of the Washington constitution and the statute cited, is to prevent expenditures of the public funds at the will of those who have them in charge, and without legislative direction.
>
> > Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government (2 Opinions Attorneys-General, 670). It had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament.
>
> Humbert v. Dunn, 84 Cal. 57, 59, 24 P. 111 (1890).
>
> It is well understood that these provisions—and they are common to most, if not all, of our written constitutions—are mandatory, and that no moneys can be paid without the sanction of the legislative body. The legislative intent must be certain. It is not to be disclosed by a construction of doubtful acts or ambiguous language. But it does not follow that an appropriation need be in any particular form or words.

Initiatives—Enemy of the Republic

*Brewster C. Denny**

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .[1]

The Seattle University Law Review's Symposium on the initiative process in Washington State addresses an issue of both transcendent importance to the health of the Republic and immediate challenge to the welfare of the children of this state. This discussion could not be more timely, and not just locally. Here's why. Devolution, tax cuts for the rich and the super rich, welfare reform, and a more conservative, market-oriented philosophy of government lay on the states and low income parents and children the burden of meeting the most critical needs of children—from prenatal care through college. With twenty percent of our children living in poverty and that many or more living in dysfunctional families, or in no families at all, the situation has reached crisis proportions.

Enter the initiative. All along the West Coast, ill advised and ill intentioned initiatives have produced a severe crisis, albeit one obscure to many citizens. Initiatives have effectively, and in my view unconstitutionally, taken the appropriation and revenue raising responsibilities away from the legislature and passed them not to the people, as initiative supporters argue, but to special interest groups, just as James Madison predicted.[2] David Broder, in his masterful study of the damage done to California by initiatives, concludes:

> Admittedly, representative government has acquired a dubious reputation today. But as citizens, the remedy to ineffective representation is in our hands each election day. And whatever its flaws, this Republic has consistently provided a government of laws. To discard it for a system that promises laws without government would be a tragic mistake.[3]

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* Brewster C. Denny is Professor and Dean Emeritus of Public Affairs at the University of Washington. He is Trustee and former Chairman of The Century Foundation (formerly the Twentieth Century Fund) and has served in a number of major ballot issue campaigns in Seattle, King County, and the state. For the last ten years he has been Co-Chair of the Children's Budget Coalition of the State of Washington.

1. U.S. CONST. art. IV, § 4.
2. THE FEDERALIST NO. 10 (James Madison).
3. DAVID S. BRODER, DEMOCRACY DERAILED 243 (2000).

would also be appropriate for measures that dramatically affect the budgetary process such as votes on school levies, for example.[13]

This *Seattle University Law Review* Symposium on initiatives will highlight difficult issues facing the initiative process in Washington and will offer substantive and sensible ways of interpreting and dealing with initiatives in our state. All who value our democratic system will look forward to the thoughts of the many fine authors writing for this Symposium.

13. WASH. CONST. art. VII, § 2 (a sixty percent favorable vote required to pass various levies such as school levies).

The crisis that faced Washington's Governor and legislature in the 2001 session illustrates both the immediate problem and the pernicious role of initiatives and their threat to representative government. Throughout the session, the Governor and the legislature accepted and incorporated the severe fiscal limitations that initiatives adopted over the last several years and the threat of more have placed on the ability of the state government to meet its obligations. For children alone, by way of example, the most important unmet or postponed needs, prenatal through college, were shortchanged by at least two billion dollars[4]—the initiative-produced shortfall in state and local revenues. To conform to this artificial and distorted ceiling, the government reduced present budgets for children and families by $91 million, proposing to fund less than 7% of the nearly half billion dollars of the most urgent needs for new money in the coming biennium.[5] While some high priority improvements survived, particularly with respect to foster care, immunization, and child welfare services, the list of vital children's programs cut or grossly under-funded is awesome. A few examples: The Basic Health Program plan sustained over $29 million in cuts, reducing slots by 8,000 people and increasing cost-sharing for enrollees.[6] People leaving TANF[7] will be made to share in the cost of their Medicaid coverage.[8] The state did not expand health care coverage to youth leaving the foster care system, even though the federal government now provides a 50% match to state funds used for this purpose.[9] Teen pregnancy grants were reduced.[10] Only 17 more beds were funded for the nearly 2,000 youths living on the streets connected to the highly successful HOPE act, far short of the 75 new beds contemplated in the Act.[11] And there is no new funding for childcare and early childhood education, a rapidly growing need.[12]

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4. *See generally* Capital Budget, ch. 8, 2001 Wash. Laws 2d Spec. Sess. 1413; Fiscal Matters, ch. 7, 2001 Wash. Laws 2d Spec. Sess. 1289; Fiscal Matters – Supplemental Operating Appropriations, ch. 117, 2001 Wash. Laws 337.

5. *See generally id.*

6. *See generally id.*

7. Temporary Assistance for Needy Families (TANF) is the federal program that replaced the Aid to Families with Dependant Children (AFDC) program under federal welfare "reform" legislation. Pub. L. No. 104-193 (1996) (codified as amended at 42 U.S.C. § 600 et seq. (Supp. 1998).

8. *See generally* Capital Budget, ch. 8, Wash. Laws 2d Spec. Sess. 1413; Fiscal Matters, ch. 7, 2001 Wash. Laws 2d Spec. Sess. 1289; Fiscal Matters – Supplemental Operating Appropriations, ch. 117, 2001 Wash. Laws 337.

9. *See generally id.*

10. *See generally id.*

11. *See generally id.*

12. *See generally id.*

These and dozens of other severely under-funded forms of assistance to families and children are essential if we are to meet the challenges posed by the recent attention being given to education. Teachers will tell you that the failure to fund such programs as those noted above sharply limits their ability to achieve the increasingly publicized needs of our schools. There is some important, initiative-produced, targeted new funding for K-12 education, but pressure continues for new and vitally needed support for schools.[13] But such vital needs as increased enrollment, early childhood education, higher teacher pay, and teacher recruitment, as well as the system for funding education more generally, are still hurting badly. The current, much publicized federal interest in education includes little new money for the most vital needs of schools—teachers and buildings. Instead, Washington proposes to help schools by increasing "accountability" through tests—seen by most educators as of very little help and by some as downright harmful and no substitute for desperately needed federal funding.

And finally, for higher education, state funding will continue the slide of the last number of years.[14] This slide has already caused major losses in quality and access; it will produce devastating effects on work force composition and the leading edge research so vital to our technology-based economy. By sharply increasing tuition, the budget addresses, but not does not reverse, the steady decrease in college and university funding.[15] This increasing cost to students will deny both the promise and the opportunity for higher education to children in low income families, further eroding state support of public higher education, now at less than 15% of, for example, the University of Washington budget.[16]

But the complexity of and limitations on legislative action wrought by initiatives are not their only problems. Fairness is another major downside to the ballot issue process. For, throughout the history of their use, ballot issues have often been about taxes, not only reducing revenue and capping spending, but also moving the tax burden from one group of taxpayers to another. For the most part, initiatives from lotteries to motor vehicle excise taxes have made one of the country's most regressive tax systems even more regressive. According to the Citizens for Tax Justice and the Institute on Taxation & Economic Policy, the top 1% of earners in the state pay 3.6% of their income in state and local taxes; the poorest 20% pay

13. *See generally id.*
14. *See generally id.*
15. *See generally id.*
16. *See generally id.*

17%.[17] Ballot issues are largely responsible for this steadily increasing unfairness. Fairness has been another major casualty of the initiative process as it relates to bringing minorities into mainstream society, particularly in education. In California, Washington, and Oregon, anti-affirmative action initiatives and related attitudes have done tragic harm, particularly in higher education, to economic and social opportunity for minorities, to the economic need for an educated diverse workforce, and to the quality of education for all students.

While legislators are slowly beginning to recognize hard fiscal realities, the heavy hand of the initiative process continues to weigh on vital needs for the future. These restraints are increasingly praised by the anti-government forces in the country who will continue to use the initiative as a way to keep government from doing its job and, while they are at it, to get some special largesse for their own benefit. James Madison identified "factions" who would substitute ballot legislation for the representative legislative system his Constitution decrees as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[18]

California, where much of the origins and the contemporary ravages of the "plebicitis"[19] disease originated, is a case in point. Two of America's best public policy journalists, David Broder and Peter Schrag, have written seminal books on the great risks to the Republic that the California experience portends, as well as some of the price it has already exacted.[20] Both titles, Broder's *Democracy Derailed* and Schrag's *Paradise Lost*, signal the gravity of their findings about the contemporary impact of the state initiative process on the future of the Republic. Schrag describes how Governor Ronald Reagan began the downward slide (which has been recently arrested) of the University of California, perhaps our greatest public University, and how Reagan was later aided and abetted by Howard Jarvis's Proposition 13.[21] Schrag is particularly articulate in documenting how the initiative process has been transformed from a way that "the people" could "check the excesses" of interest groups to "the prevailing

17. Citizens for Tax Justice & The Institute on Taxation & Economic Policy, *Who Pays? A Distribution Analysis of the Tax Systems in All 50 States*, App. I 48 (1996).

18. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

19. Black's Law Dictionary defines plebiscite as "[a] binding or nonbinding referendum on a proposed law, constitutional amendment, or significant public issue." BLACK'S LAW DICTIONARY 484 (pocket ed. 1996).

20. *See generally* BRODER, *supra* note 3; PETER SCHRAG, PARADISE LOST (1998).

21. *See generally* SCHRAG, *supra* note 20.

instrumentality of government itself."[22] He recounts how the initiative process has, in effect, taken from the people the role contemplated for them by the plebiscite initiatives at the turn of the last century; handing that role to "interest groups, backed by media consultants, direct mail specialists, pollsters, and others, that usually finance the costly signature drives . . . to get measures on the ballot . . . ."[23] California was the scene of a devastating attack on affirmative action that has severely harmed higher education and has spread to the state of Washington. There, California's antiracial "preferences" guru, Ward Connerly, did huge harm to education; he mentored Washington State's own John Carlson's parallel sabotage of diversity in education here.[24]

These illustrations of the havoc wrought by the runaway initiative process of recent years lead immediately to fundamental questions about the state of the Republic itself. The issue arises sharply in the context of a number of other worrisome signs. Voter participation is down sharply. Fewer and fewer of our ablest young people are selecting careers in public service and teaching. The teaching of civics and history in the schools has suffered severely in quantity and quality. The bottom line increasingly influences television news. Federal public interest requirements for the privilege of using the public's airways by radio and television have been largely eliminated, and what is left is ignored. The United States is the only major industrial democracy that does not have free television for political candidates. Television advertising represents well over half the cost of campaigns. Respect for and confidence in elected officials has increasingly declined, correlating closely to the growing role of campaign fundraising in their lives and ours. Campaign financing is seen by the public as nothing more than a corrupt scandal and, more importantly, as an indication that its vote and its input do not count and are not counted. And, while the Internet has vastly increased the quantity of information on public policy issues available to the public, there is still a serious "digital divide" and little evidence that the Internet has increased broad citizen interest in or knowledge of public policy or of the performance of the people's elected representatives. Worse yet is the threat to the elective process itself by emerging technology. David Broder says it best:

> I do not think it will be long before the converging forces of technology and public opinion coalesce in a political movement

22. *Id.* at 11.
23. *Id.*
24. *See* BRODER, *supra* note 3.

> for a national initiative—to allow the public to substitute simplicity of majority rule by referendum for what must seem to many frustrated Americans the arcane, ineffective, out-of-date model of the Constitution.[25]

From the contemporary context of these concerns, then, we turn to the fundamental question of the proper role of initiatives in our governmental system. It is important to understand exactly what that governmental system is. The central features of representative democracy are the lawmaking process and the selection of the representatives of the people, by the people, to make and administer those laws. It is this core meaning of representative government that initiatives severely impair. Jefferson and Madison both studied the history of self-government and were clearly instructed by Aristotle, who said well what Jefferson and Madison lived for—including their collaboration in founding public education in America. Hear Aristotle, who declared that the greatest task for a republic is "the education of the citizens in the spirit of the polity"[26] and "there are no more momentous duties than those of electing officers of State and holding them responsible . . . ."[27]

In founding free public education as the wartime governor of Virginia, Jefferson put into that law the essential meaning of both education and republican government. The preamble to the law he wrote said that there are two great objectives to public education. First, "to illuminate . . . the minds of the people at large" and second, to ensure "that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens and that they should be called to that charge without regard to wealth, birth or other accidental condition or circumstance."[28] Years later, in retirement, the man who founded free public higher education to nurture and sustain democratic government asserted eloquently his commitment to representative government. As Jefferson said in a letter to John Adams:

> [T]here is a natural aristocracy among men. The grounds of this are virtue and talents. . . . There is also an artificial aristocracy founded on wealth and birth, without either virtue or talents; . . . The natural aristocracy I consider as the most precious gift of

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25. *Id.* at 242.

26. ARISTOTLE, THE POLITICS OF ARISTOTLE 379 (J.E.C. Welldon, D.D., trans., Macmillan & Co. 1905).

27. *Id.* at 132.

28. MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 146 (1970).

> nature for the instruction, the trusts and government of society. . . . May we not even say that that government is the best which provides most effectually for a pure selection of these natural aristoi into the offices of government?[29]

And so our Republic was to be a place where an informed people chose a high quality group of public servants to make and carry out our laws. Our Constitution, in Article I, basically lists the powers and the scope of the powers of government as it describes the powers of the Congress.[30] The principle of checks and balances dominates the allocation of authority, both within the Congress and among the three branches.[31] The executive's job is to administer the programs and follow the laws authorized by the Congress.[32] Even in foreign and defense affairs, the executive's power is closely circumscribed by Congress's full role in the raising and support of armies and the provision and maintenance of a Navy and the War Power itself.[33] While we are not a parliamentary system where the prime minister is a creature of and member of the legislature, for us the legislative power is the essential power of making laws, establishing programs, and providing the means to get things done.[34]

The Constitution expressly leaves to the states all legislative powers not granted to the Congress,[35] and it is very plain about how those legislative powers shall be exercised.[36] Article IV, Section 4 of the Constitution guarantees a republican form of government to the states.[37] This is a clear instruction that the states must NOT use initiatives. I will leave the arguments as to the constitutionality of initiatives under this clause to learned colleagues in this Symposium, but I will make a few historical points in support of the proposition that Madison and his colleagues meant what they said. First, remember that the states in 1787 were essentially governed by colonial legislatures and the "national government" had no executive from 1776 to 1789. So, republican in form clearly meant that laws were to be made by elected legislatures, not plebiscites. It is also important to note that the United States Supreme Court has never ruled on the constitutionality of plebiscites, only letting them stand by insisting that the propriety of plebiscites is a political question not properly the

29. DUMAS MALONE, THE SAGE OF MONTICELLO 239 (1977) (alteration in original).
30. *See* U.S. CONST. art. I, §§ 8,9.
31. *See generally* U.S. CONST. art. I-III.
32. U.S. CONST. art. II, § 3.
33. U.S. CONST. art. I, § 8, cl. 11-13.
34. *See generally* U.S. CONST. art. I.
35. U.S. CONST. amend. X.
36. *See generally* U.S. CONST. art. I.
37. U.S. CONST. art. IV, § 4.

subject of a Court action.[38] The political question doctrine has been somewhat eroded over the more than one hundred years since the landmark case establishing it.[39] One wonders what the effect on this doctrine, and thus the constitutionality of plebiscites, will be with the almost complete erosion by the action of the Rehnquist Court in the Florida Presidential vote count.[40] *Luther v. Borden* and the rulings that followed basically held that Congress, rather than the Courts, should judge the results of the elective process of the states.[41] Perhaps the time has come to check the primacy of the political question doctrine over ballot issues. The last major check was in an Oregon case in 1912, where the political question doctrine again ruled supreme.[42]

What to do?

In the State of Washington, the two ideal next steps to repair the havoc wrought by initiatives would be: (1) to rule out most ballot issues as unconstitutional in a republic, and (2) to establish by statute a graduated income tax to substitute for the unfair, dysfunctional system of taxation that currently exists as the most destructive legacy of the initiative system. While both of these steps are essential for our future, they are hardly likely to take place quickly—threatening though the current situation is. But they need to be seen as needed steps down the road. An excellent first step that would largely accomplish these purposes would be that suggested by Phillip Talmadge in his superb Introduction to this Symposium:

> [P]erhaps the legislature should have the courage to seek a constitutional amendment from the people clarifying the appropriate scope of the legislature's power to budget and the scope of the people's power by popular measure to affect such fundamental policy-making.[43]

Another approach to the same route might be to seek and obtain a state supreme court decision that using the initiative process to effectively write a budget or significant taxing and spending features thereof clearly takes away the basic constitutional power, to say nothing of responsibility, of the legislature.

It might be a good time to convene a group of good government

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38. *See, e.g.*, Luther v. Borden et al., 48 U.S. 1, 38-40 (1849).

39. *See generally id.*; Powell v. McCormack et al., 266 F. Supp 354 (D.C. 1967).

40. *See* Bush v. Gore, 531 U.S. 98 (2000).

41. *Luther*, 48 U.S. at 38-40; *Powell*, 266 F. Supp. at 356-60; Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 148-51 (1912).

42. *Pacific States Tel. & Tel. Co.*, 223 U.S. at 148-51.

43. Philip A. Talmadge, *Initiative Process in Washington*, 24 SEATTLE U. L. REV. 1016, 1021 (2001).

advocates, such as the League of Women Voters, and other wise persons to review the crisis and make recommendations on improvements in the process. Such recommendations could range from significant incremental changes, such as more careful definitions of subject matter, an official review of wording and ballot titles, or getting sitting legislators on the record for their view of proposed initiatives, to the more formidable proposals suggested above. Phillip Talmadge's suggestion would be a wonderful place to start.

There is important work to be done. Thanks largely to the ballot issue process, we probably have the most regressive tax system in the country. Elected officials frequently use ballot issues as a way out of taking principled and courageous actions in the public interest. The tax system, and initiatives more generally, has severely harmed education, social programs, transportation, the environment, equality of opportunity, and the future of the children of this state. It is broke. Fix it!

Direct Democracy Is Not Republican Government

*Steven William Marlowe**

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I. INTRODUCTION

The date is November 7, 1922, and the people of the great State of Oregon are going to the polls.[1] On the ballot is the Compulsory Education Bill, which reads as follows:

> Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over . . . who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor.[2]

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1. OREGON STATE ARCHIVES, 1997–1998 OREGON BLUE BOOK 348 (1997).
2. Society of Sisters v. Pierce, 296 F. 928, 930 (D. Or. 1924) (citing 1923 Or. Laws 9).

This proposed bill was submitted to a vote by the people under the initiative provision of the Oregon Constitution and passed by a vote of 115,506 to 103,685.[3] The bill never became law, however, because an injunction, approved by the Oregon Supreme Court, prevented it from taking effect.[4] On appeal, the United States Supreme Court upheld the injunction in a case now famous for holding that a person has a fundamental liberty interest in determining where to educate his or her children.[5]

Although it was ignored in the United States Supreme Court decision, the case involved another important issue: the initiative process itself. The law itself was passed in violation of the Guarantee Clause of the United States Constitution.[6]

The Court was correct in striking down the Oregon Compulsory Education Act, but it could have held the initiative process that produced the law unconstitutional as well. The United States Supreme Court declined to take this step, however, because in an earlier case, *Pacific States Telegraph & Telephone Co. v. Oregon*, it held that the issue was a political question.[7] Nevertheless, state courts are not bound by this holding because the Supreme Court dismissed the *Pacific States* case for lack of jurisdiction.[8]

This Article will initially explain the examples of direct democracy in the states of Washington and Oregon. It will then analyze the United States Constitution's Guarantee Clause. Finally, this Article will argue that state initiative and referendum provisions are inconsistent with a republican form of government and that laws passed through the use of this process are unconstitutional.

II. WASHINGTON STATE CONSTITUTIONAL PROVISIONS PERMITTING DIRECT DEMOCRACY

As originally adopted, the Washington State Constitution did not provide for an initiative or a referendum.[9] The constitution that enabled Washington to become a state, approved by Congress in 1891, stated, "[t]he legislative powers shall be vested in a Senate and

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3. OREGON STATE ARCHIVES, *supra* note 1, at 339.

4. *See Society of Sisters*, 296 F. at 928.

5. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

6. *See* U.S. CONST. art. V, § 4 ("The United States shall guarantee to every state in this Union a republican form of government . . .").

7. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (declining to consider a challenge to initiative and referendum provisions of a state constitution and holding that within the federal government, the enforcement of the Guarantee Clause is assigned not to federal courts but to the political branches).

8. *Id.*

9. WASH. CONST. art II, § 1 (amended 1911).

House of Representatives, which shall be called the legislature of the State of Washington."[10]

Whether the state government was republican in form was of obvious concern to the United States. As the proclamation by then President Harrison announcing Washington's statehood declared, "whereas it was provided by said act that the [Washington] Constitution so adopted should be republican in form . . . ."[11] At that time, Washington's constitution was indeed republican in form. People elected representatives to make political decisions for them.

This representative form of government was altered twenty years later to include direct government by the people when an amendment was adopted in 1911, adding to the legislative powers the phrase,

> but the people reserve to themselves the power to propose bills, laws and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act or law passed by the legislature.[12]

Following the procedure for constitutional amendments, the requisite majority of the voters approved the amendment.[13] The 1911 amendment required ten percent of the legal voters, but not more than 50,000, to sign a petition before an initiative could be put before the people.[14] In 1956, Amendment 30 changed this to eight percent of the number of people voting for the office of governor at the last preceding regular gubernatorial election.[15] Once placed on the ballot, a simple majority is needed to make an initiative a law.

These provisions have allowed many laws to be passed in the State of Washington. Recently, in the 1998 election, Initiative 200 banned affirmative action, Initiative 692 allowed the use of medical marijuana, and Initiative 688 raised the minimum wage.[16] Measures that did not pass include Initiative 694, which would have restricted abortion rights; Initiative 173, which would have provided scholarship vouchers; and Initiative 670, which would have established congressional term limits.[17]

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10. *Id.*

11. Proclamation No. 8, 26 Stat. 1552 (1891).

12. WASH. CONST. art. II, § 1.

13. WASH. CONST. art. XXIII.

14. WASH. CONST. art. II, § 1 (amended 1956).

15. WASH. CONST. art. II, § 1(a). This use of percentage rather than voter numbers was made possible by the fact that statewide voter registration was enacted by Initiative 58 in 1932. 1933 Wash. Laws 3.

16. Office of the Secretary of State, State of Washington, *Results of the 1998 Washington State General Election* (Dec. 3, 1998) <http://www.secstate.wa.gov/elections/gen98.htm>.

17. Office of the Secretary of State, State of Washington, *Initiatives to the People on the*

While the initiative is the most common form of direct democracy, it is not the only form allowed in Washington. The referendum is also permitted, whereby any law passed by the legislature may be submitted to the people for approval.[18] The provision for a referendum in Washington was first enacted along with the initiative provision in 1911. Either the people or the legislature may call for a referendum.[19] Initially, six percent and not more than 30,000 of the legal voters were required to sign and make a valid referendum petition.[20] Ultimately, the percentage of voters necessary for a referendum dropped to only four percent.[21] If the legislature declares an emergency, then the people have no right to a referendum.[22] The voters must be sent a voter's pamphlet describing the proposed laws.[23] The final example of direct democracy in the State of Washington is the provision allowing for the recall of elected officials, including the Governor.[24]

III. THE OREGON SYSTEM

Oregon's Constitution is similar to Washington's in that it originally did not provide for an initiative or a referendum.[25] When Congress approved Oregon's Constitution in 1859, it stated, "Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form . . . ."[26] In June of 1902, however, an amendment was approved that gave the

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Ballot: 1914-2000 (Feb. 26, 2001) <http://www.secstate.wa.gov/inits/ipballot.htm>.

18. WASH. CONST. art. II, § 1(b). Referendum is the process of referring a political question to the electorate for a direct decision by general vote. It may be ordered on any act, bill, law, or any part thereof passed by the legislature, with certain limits. *Id.*

19. *Id.*

20. WASH. CONST. art. II, § 1(a) (amended 1956).

21. In 1981, Amendment 72 clarified that the number of voters needed to file a successful petition for referendum with the Secretary of State is four percent of the number of voters who cast ballots for the office of governor at the last gubernatorial election preceding the filing of the referendum. WASH. CONST. art. II, § 1(c).

22. WASH. CONST. art. II, § 1(b).

23. WASH. CONST. art. II, § 1(e). As the constitution has authorized the legislature to enact legislation to facilitate initiative and referendum operations, there are many steps that one must take to successfully put an idea on the ballot. One Washington State Assistant Attorney General outlined the procedure in a 1997 law review article. *See* Jeffery T. Evan, *Direct Democracy in Washington: A Discourse on the People's Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247 (1997). Also, the Secretary of State publishes a procedural manual for filing an initiative or referendum in Washington State. *See* Office of the Secretary of State, State of Washington, *Procedures for Filing Initiatives and Referendums in Washington State* (last updated Mar. 15, 2001) <http://www.secstate.wa.gov/inits/cmanual.pdf> [hereinafter *Procedures for Filing Initiatives*].

24. WASH. CONST. art. I, § 33.

25. OR. CONST. art IV, § 1 (amended 1902).

26. 11 Stat. 383 (1859).

people the right to file initiatives and referendums.[27] The Oregon Constitution was amended to read, "The people reserve for themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the legislative assembly."[28]

At present, out of the total number of votes cast for all candidates for the current governor, six percent is needed for an initiative to be placed on the ballot and eight percent is needed for an initiative proposing an amendment to the constitution.[29]

The referendum power was also reserved to the people by the 1902 amendment. Any act that does not "declare an emergency" may be subject to the referendum.[30] Of the votes cast, four percent is needed to call a referendum.[31] A referendum may also be called by the legislature itself.[32] Either way, no referendum is subject to the Governor's veto power.[33] As of 1998, there have been 288 initiatives in Oregon, ninety-nine of which have passed.[34] The legislature has referred 363 measures to the people and 206 have been approved.[35]

Oregon has passed some groundbreaking legislation through the initiative process. For example, the Oregon Right to Die measure, the only such state law in the nation, was passed by initiative in 1994.[36] Term limits passed as an initiative by a vote of 1,003,706 to 439,694.[37] Another groundbreaking initiative was put on the ballot in 1992; measure 9, a bill that would have required the state government to discourage homosexuality, was defeated 56.5% to 43.5%.[38]

IV. DIRECT DEMOCRACY IS NOT REPUBLICAN GOVERNMENT

John Stuart Mill writes that the ideal form of government is a representative democracy.[39] He states that "since all cannot, in a community exceeding a single small town, participate personally in

27. OREGON STATE ARCHIVES, *supra* note 1, at 436.

28. OR. CONST. art IV, § I(2)(a).

29. OR. CONST. art. IV, § I(2)(b) & (c). This differs from Washington, which does not allow constitutional amendments by the initiative process.

30. OR. CONST. art. IV, § 1 (3)(a).

31. OR. CONST. art. IV, § 1 (3)(b).

32. OR. CONST. art. IV, § 1 (3)(c).

33. *Id.*

34. OREGON STATE ARCHIVES, *supra* note 1, at 348.

35. *Id.*

36. *Id.* at 369.

37. *Id.* at 353.

38. *Id.* at 368.

39. *See* John Stuart Mill, *Considerations on Representative Government*, *in* UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 234 (H.B. Acton ed. 1972).

any but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative."[40]

The processes of representative government are invaluable because of the extra deliberation they provide. A bill becomes a law within the republican processes by first being introduced on the floor of either the state House of Representatives or the state Senate. Before a bill is introduced in the legislature, however, offices such as the Oregon Legislative Counsel Committee, the Senate Committee Services, or the House of Representatives Office of Program Research of the State of Washington probably draft it.[41] These state government offices are comprised of attorneys and staff who draft measures for legislators and legislative committees. Proper drafting is vital to successful lawmaking.

Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, and citizens with an earnest desire to conform to them are confused. Often, a lack of artful drafting results in the statute's failure to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation. Failure to comply with certain constitutional requisites may produce total invalidity.[42]

A very good example of a badly drafted initiative is Washington's Initiative 695, which led to the recent case of *Amalgamated Transit Union Local 587 v. State*.[43] The King County

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40. *Id.*

41. The author was an intern at the Oregon Legislative Counsel Office and interviewed with a member of the Office of Program Research of the State of Washington and so is calling on his personal knowledge.

42. *See* Alfred R. Menard, *Legislative Bill Drafting*, 26 ROCKY MT. L. REV. 368 (1954).

43. Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000).

This case involved Initiative 695, which asked, "Shall voter approval be required for any tax increase, license tab fees be $30 per year for motor vehicles, and existing vehicle taxes be repealed?" *Id.* at 193, 11 P.3d at 774. On November 2, 1999, the voters of Washington passed I-695 by 56.16% of the vote. *Id.*

Soon thereafter, seven lawsuits were filed. King County Judge Robert Atsdorf granted summary judgment in favor of the Union, striking down the initiative in its entirety. Amalgamated Transit Union Local 587 v. State, 2000 WL 276126 (Wash. Super. Ct. 2000). The court also issued an injunction against the State and any of its subdivisions, prohibiting it from taking any action to implement the initiative. *Id.*

When the State and the campaign appealed to the Supreme Court of Washington, the court granted review, and on Oct. 26, 2000, affirmed the lower court's decision for the following reasons:

> An act must have only one subject—the single subject rule of art. II § 19 is intended to prevent people or the legislature from having to vote for a law they do not favor in order to obtain a law which they do. I-695 contains 2 subjects: (1) limiting license fees tabs to $30; and (2) requiring voter approval of all future state and local tax

Superior Court held Initiative 695 unconstitutional under Article II, section 1(b), Article II, section 19, and Article II, section 37 of the Washington State Constitution, striking down the initiative in its entirety.[44] This decision was upheld by the Supreme Court of Washington.[45]

A properly drafted bill is introduced into either the House or the Senate. Once introduced, the bill is sent to the appropriate committee, which reviews the bill. The committee may also hold hearings. At a hearing, all interested parties may offer suggestions, advice, and comments. The committee may then choose to approve the bill, reject the bill, not review the bill, or table the bill, thereby destroying it. If the bill is approved, the entire House of Representatives votes on it. At this point, the bill can be approved, rejected, or sent back to committee. If the bill is approved, it is then sent to the Senate, where the process of committee hearings and possible approval or rejection occurs once again.

During this process, attorneys from various state offices may be consulted and even asked to appear to testify before a committee or the entire House or Senate. At the same time, news reporters broadcast the latest developments to all interested listeners, and feedback comes into the offices of Representatives and Senators. The bill may be amended at various points in the process. Even if both houses of the legislature approve the bill, the governor's veto power may kill it. This process is consistent in both Oregon and Washington.

The initiative process, on the other hand, provides for only one step of the republican form of government, the initial bill drafting stage. In Washington, the Code Reviser reviews the draft of an initiative for technical errors and style, advising the sponsor of any potential conflicts with existing statutes.[46] In Oregon, the sponsors

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increases.

These two subjects are contained in both the title and body of I-695, I-695 is therefore unconstitutional in its entirety.

. . .

Section 2 of I-695 requires voter approval of all future tax legislation passed by the Legislature, but does not require a petition of the voters as to the specific piece of legislation, nor referred by the Legislature. Section 2 therefore establishes a referendum procedure not allowed under the state constitution and accordingly violates art. II, § 1(b).

Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d at 191-92, 11 P.3d at 773 (2000).

44. Amalgamated Transit Union Local 587 v. State, 2000 WL 276126 (Wash. Super. Ct. 2000).

45. Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000).

46. *Procedures for Filing Initiatives*, *supra* note 23, at 4.

may obtain a manual by calling the Legislative Counsel's Office.[47] If fifty legislators petition to have the proposed initiative examined by the Legislative Counsel's Office, the attorneys of that office will review the proposed bill.[48] While the drafting of the proposed initiative may be somewhat improved, the lack of amendments, compromise, and broad input may lead to bad laws that tear at the fabric of society. The forces that may exert such a strong influence on society are, in James Madison's words, factions.

> By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community.[49]

The Oregon Citizens Alliance (OCA) would be classified as a faction. In 1992, the OCA sponsored and campaigned for Measure 9, an initiative that would have required the State of Oregon to discourage homosexuality.[50] The bill was eventually defeated. Like the Compulsory Education Bill, however, Measure 9 demonstrated that the threat of passion-based laws looms with the initiative process.

In response to Measure 9, Hans Linde, a Justice on the Oregon Supreme Court from 1977 to 1990, suggested that there are five types of initiatives that are unconstitutional.[51] Justice Linde's categories resemble Madison's fears, pointing out that certain types of initiatives promote social conflict with laws that curtail some groups' liberties.[52] His categories can be summarized into two groups: (1) initiatives that appeal to majority emotions to impose values and target a group of individuals, and (2) initiatives that place affirmative legislation into the constitution itself.[53]

The first group of initiatives recognizes that some people, motivated by passion, might restrict the liberty of others.[54] The

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47. Telephone interview with Coleen Sealock, Elections Office, State of Oregon, May 3, 1999.

48. *Id.*

49. THE FEDERALIST NO. 10 (James Madison).

50. OREGON STATE ARCHIVES, supra note 1, at 368.

51. Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

52. *Id.* at 41.

53. *Id.* The five types of initiatives Justice Linde would invalidate are: (1) those using pejorative, stigmatizing terms or that exalt one group over another (2) systems directed against racial, ethnic, linguistic, religious, or social groups (3) those where the historical or political context indicates that people are asked to choose sides between groups (4) appeals to majority emotions to impose values that offend the conscience of other groups, and (5) those that place affirmative legislation in the constitution itself.

54. *See id.*

technical language of this type of initiative frequently confuses voters. Furthermore, voters may acquaint themselves with the initiative by relying upon only a few sources of information, rarely discussing the issues with other citizens. For example, an initiative may propose a tax cut, giving little or no consideration to whether the budget can afford it. The fate of the initiative also rests largely on how much money is spent on the proposal, either for or against it. Very often, the outcome of an initiative has little to do with the best interests of the citizens of a state; rather, it instead satisfies the narrow interests of a selected few.[55]

The second group of initiatives is unconstitutional because initiatives that amend the constitution make it very difficult, if not impossible, for the Oregon judiciary to strike down the measure once it becomes law.[56] This issue, unique to Oregon, arises from the fact that in that state, the initiative process can be used to amend the constitution. Whether the legislature may repeal an initiative-created amendment is an undecided issue. If the people amend the constitution, it appears that the legislature would have to amend that amendment in order to prevent the initiative from taking effect. That would mean using the process of Article XVII, section 1, which requires a majority of the legislators in the House of Representatives and then again in the Senate to approve the amendment.[57] The bill would then have to be submitted to the people, who would vote on the legislature's amendment rejecting their earlier amendment. The complexities of this remedy are obvious.

A. State Courts Are Reluctant to Invalidate Direct Democracy

Courts have consistently refused to use the Guarantee Clause to prohibit direct democracy. In the State of Washington, two recently reported cases have dealt directly with the issue of whether direct democracy is unconstitutional. In *State v. Manussier*, a convicted criminal challenged the "three strikes you're out" law that was passed by initiative.[58] Manussier argued that the Guarantee Clause is "absolutely incompatible with direct democracy as embodied in the recall, referendum, and initiative schemes . . . ."[59] The court

55. *See* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Convention in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1 (1996).

56. *Id.*

57. *Id.*

58. State v. Manussier, 129 Wash. 2d 652, 921 P.2d 473 (1996).

59. *Id.* at 670, 921 P.2d at 481.

concluded that the argument did "not satisfactorily address the power of the court to decide an otherwise political or governmental issue."[60]

Yet, afterwards, the court simply stated, "We find appellant's argument on the violation of the United States Constitution Art. IV, section 4 without merit."[61] The dismissal of the argument was a statement of dicta. The court expressly declined to rule on the Guarantee Clause issue in *Manussier*.[62] The court asked for more authority to rule on the issue because, "as the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress . . . ."[63] If the courts could be persuaded that this is not a political question, they might yet rule on this important constitutional issue.

The most recent Washington case, *State v. Smith*, comes from Division I of the Washington Court of Appeals.[64] In that case, the court stated that "any challenge to the [three strikes you're out law] based on the Guarantee Clause would be frivolous because courts have found it to be a nonjustifiable [sic] political question, and furthermore, courts that have treated the issue as justiciable have uniformly rejected the contention that use of the initiative process is inconsistent with the 'republican form of government.'"[65] This case did not cite to any authority, but it seems to have misinterpreted *Manussier*.

Oregon courts have reacted similarly when considering the Guarantee Clause issue. In the latest case, a court found that the issue was not properly briefed, but it still stated in dicta that it was unpersuaded by the arguments that were presented.[66] The court stated,

> a challenge to a particular initiative measure under the Guarantee Clause obviously involves extremely important as well as difficult questions. . . . It would require extensive briefing of the origins, the historic concerns and the drafter's political theories underlying the Guarantee Clause, and how they might bear on the particular measure at issue.[67]

60. *Id.*
61. *Id.* at 672, 921 P.2d at 482.
62. *Id.* at 671, 921 P.2d at 482.
63. *Id.* at 670, 921 P.2d at 482.
64. State v. Smith, 1999 WL 10091 (Wash. Ct. App. 1999).
65. *Id.* at *8 (quoting State v. Davis, 133 Wash. 2d 187, 191, 943 P.2d 283, 286 (1997)).
66. State v. Montez, 787 P.2d 1352 (Or. 1990).
67. *Id.* at 1377.

B. *Legislators Are Better Than "The People" at Making Law*

In *The Spirit of the Laws*, Montesquieu wrote,

> One great fault there was in most of the ancient republics; that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no hand in the government but for the choosing of representatives, which is within their reach.[68]
>
> . . .
>
> The great advantage of representatives is their being capable of discussing affairs. For this the people collectively are extremely unfit, which is one of the greatest inconveniences of a democracy.[69]

Legislators are better than the people at drafting laws because they are held accountable for their actions; the people are immune from direct consequences, and their motivations are different. There is a record of whether and how a legislator voted. Legislators weigh decisions carefully because they know there will be consequences when voting for or against a particular bill. The legislator who does not get a majority of the votes in the next election will not be a legislator anymore. The people have no such immediate consequence to their voting.

Legislators' motivations are also better suited to producing better laws. Their decisions are usually based on what will influence a majority of the people in their districts to re-elect them. Thus, the self-interest of legislators is turned to the advantage of a majority of the people. The people themselves are also obviously self-interested. However, an individual's self-interest does not consider the majority opinion of the district that he or she resides in. Such self-interest probably extends no further than the boundaries of the individual's property or that of his or her family and friends. Therefore, while representatives attempt to please a majority of the county, city, state, nation, etc., individuals are more likely to please themselves. While representative government helps society progress as a whole, a pure democracy helps each individual progress alone.

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68. Baron de Montesquieu, *The Spirit of the Laws*, *in* CLASSICS OF MODERN POLITICAL THEORY 348 (Steven M. Cahn ed. 1997).

69. *Id.*

C. Political Question Doctrine Does Not Deny Jurisdiction

The nonjusticiable political question doctrine in America has its roots in an 1849 case where the Supreme Court was asked to decide which of two rival governments was the legitimate government of Rhode Island.[70] The Court held that "it rest[s] with Congress," not the judiciary, "to decide what government is the established one in a state."[71] The Court held that it is Congress' prerogative to rule on whether a state has violated the Guarantee Clause.[72] The Court stated,

> when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.[73]

The Court did state that one type of government, a military government, would be unacceptable.[74] Yet, it would still "be the duty of Congress to overthrow it."[75] Such an extreme action of "overthrowing" has, of course, never occurred in the history of this nation. However, during the post-Civil War period of the Reconstruction, when the former Confederate states had to be formally readmitted to the Union, Congress refused to grant acceptance to the all-white delegation of the State of South Carolina because the state did not grant African-Americans the right to vote.[76]

The remedy of "overthrowing" a state government seems not only implausible today, but also unrealistic and impractical.[77] More recent cases should, therefore, be used to interpret the political question doctrine. A controversy is a nonjusticiable political question when there is a "textually demonstrable constitutional commitment of issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for the resolving controversy."[78]

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70. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).
71. *Id.* at 42.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 45.
76. ALISTAIR COOKE, AMERICA 219 (1977).
77. This would have been contrary to the Supreme Court case of *Powell v. McCormick*, which held that once an elected person meets the constitutional requirements of age and residence and citizenship, Congress cannot deny the member his or her seat. Powell v. McCormick, 395 U.S. 486 (1969).
78. Nixon v. United States, 506 U.S. 224, 228 (1993).

In defining what constitutes a political question, Washington case law is similar to federal case law. In Washington, there is a political question "in so far as questions of fact are involved, and that the courts have jurisdiction over it only in so far as statute or *written constitutional law prescribes.*"[79]

The Guarantee Clause is not committed textually to a coordinate branch of government and is not barren of judicially discoverable or manageable standards. The words of the Guarantee Clause are, "The United States shall guarantee to Every State in this Union a Republican Form of Government . . . ."[80] The section is not listed under the legislative powers that are spelled out in Article I of the Constitution. Under Article IV, Section 3, it states that, "New States may be admitted *by the Congress* into this Union. . . ."[81] Yet, the words of the Guarantee Clause state that the "United States," not just Congress, shall guarantee. In comparison, the Washington State Supreme Court has interpreted the word "state" to include the judiciary and not just the legislature.[82] The use of the words "shall guarantee" means that the provision is mandatory. Furthermore, the phrase "a Republican form of government" is the phrase that offers judicially discoverable and manageable standards.[83]

The plain meaning of "republican" can be derived from any basic government textbook for high school students.[84] The distinction is between a "direct" and an "indirect" democracy. An indirect democracy is where "the people elect representatives to make political decisions for them."[85] A direct democracy is where "all citizens take part in decision making."[86] An indirect democracy is also known as a republic.[87]

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79. State v. Howell, 81 Wash. 623, 644, 143 P. 461, 468 (1914) (emphasis added).

80. U.S. CONST. art. IV, § 4.

81. U.S. CONST. art. IV, § 3, cl. 1 (emphasis added).

82. *See* Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 512, 585 P.2d 71, 92 (1978). This complicated fact pattern involved the Seattle School District suing the State of Washington for more funds under the constitutional requirement that the state must provide for education. *See* WASH. CONST. art. 9, § 1. After being denied, the school district argued on appeal that the courts had no authority to deny its claim because the "state," meaning only the legislature, was involved. *See* 90 Wash. 2d at 500, 585 P.2d at 86. The Supreme Court of Washington dismissed that argument and ruled that the state includes the judiciary as well as the legislature. *Id.*

83. *See* Bonfield, Baker v. Carr: *New Light on the Guarantee of Republican Government*, 50 CAL. L. REV. 245 (1962).

84. The author still has his government textbook from his junior year in high school.

85. WILLIAM R. SANFORD & CARL R. GREEN, BASIC PRINCIPALS OF AMERICAN GOVERNMENT 14 (1988).

86. *Id.*

87. *Id.*

The kind of republic that James Madison described was very specific. "The elective mode of obtaining rulers is the characteristic policy of republican government."[88]

> A republic, by which I mean a Government in which the scheme of representation takes place . . . . Where the *people* fit in the government is as the electors of the representatives. Who are the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune . . . . The electors are the great body of the people of the United States.[89]

Madison not only conceived of the United States as a republic, he also warned of the dangers of a pure democracy. He stated,

> a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure of the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.[90]

D. Declining Voter Participation Decreases Direct Democracy's Legitimacy

With declining voter participation, the legitimacy of the initiative process is further diminished. In 1996, Oregon's voting-age population was 2,396,000.[91] The percentage of the voting-age population casting votes in the 1992 presidential election was 65.9%.[92] In 1996, the percentage dropped to 48.0%.[93] The percentage of the voting population casting votes for U.S. Representatives during the nonpresidential election year of 1994 was only 26.3%.[94] The Right to Die Initiative passed with a majority of only 627,980 votes in a state with a population of 3,082,000.[95] In the 1996 election, to attain a

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88. THE FEDERALIST NO. 57 (James Madison).
89. THE FEDERALIST NO. 10 (James Madison).
90. *Id.*
91. UNITED STATES CENSUS BUREAU, 1998 STATISTICAL ABSTRACT OF THE UNITED STATES Table No. 486 (1998).
92. *Id.*
93. *Id.*
94. *Id.*
95. OREGON STATE ARCHIVES, 1995-96 OREGON BLUE BOOK 10, 354 (1995).

majority sufficient to pass an initiative, all that was needed were the number of registered voters in Multnomah and Washington Counties, two of the three counties that make up the Portland metropolitan area.[96]

In contrast to the initiative process, to attain a majority within the republican processes in Oregon, a sponsor must gain the support of thirty-one of the sixty members of the House of Representatives, sixteen of the thirty members of the Senate, and the Governor. As only twenty-one Representatives' Districts make up the Portland Metropolitan area, to pass a bill beyond the House and gain a majority, a sponsor must get the support of these districts, perhaps all of the five districts that represent the Oregon Coast, and the Representatives for the districts of the towns of Eugene and Salem as well. Because only twelve Senate Districts make up the entire Portland area, a sponsor would need those Senators and the support of four Senators from other districts in order to pass a bill. Finally, the Governor's signature is necessary to make a bill into law. Deliberative legislative processes such as these provide the cure for the initiative process, which allows only two counties of the three that make up the Portland metropolitan area to determine the law for the entire State of Oregon.

In Washington, the estimated voting-age population in 1998 was 4,257,000.[97] Of that number 3,199,562 were registered voters.[98] In the 1998 election 1,939,421 votes were cast.[99] That means 62.17% of registered voters voted and 45.56% of the voting-age population voted. This election banned affirmative action (Initiative 200), legalized the use of medical marijuana (Initiative 692), and raised the minimum wage (Initiative 688).[100] In this election, once the petitioners garnered the 179,248 valid signatures necessary to put these initiatives on the ballot, only 969,711 people needed to vote for the initiatives to make them the law for all the people in the State of Washington. This means that the registered voters of King County alone can pass laws governing the approximately 5,610,000 people in the entire state.[101]

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96. *Id.* at 329.

97. Office of the Secretary of State, State of Washington, *Voter Participation in the State of Washington* (Dec. 7, 2000) <www.secstate.wa.gov/elections/votechart.htm>.

98. *Id.*

99. *Id.*

100. Office of the Secretary of State, State of Washington, *Results of the 1998 Washington State General Election* (Dec. 3, 1998) <http://www.secstate.wa.gov/election/gen98.htm>.

101. King County's registered voter population was 976,656 as of 1996. Office of the Secretary of State, State of Washington, *Results of the Nov. 5, 1996 Washington State General Election—Summary Report* (Dec. 5, 1996) <http://www.secstate.wa.gov/elections/gen96sum.htm>. King County had a total population of 1,654,329 as of 1998. United States Census Bureau, *Population Estimates for Metropolitan Areas and Components* (Oct. 20, 2000)

This presents the risk of precisely the minority factionalization that Madison wrote was the destroyer of democracies. It is also a clear indication of voter apathy creating a situation where a focused faction could, if the true majority did not rally, enact harmful legislation through the initiative process.

E. Initiatives Cannot Easily Be Repealed by Legislatures

It is more difficult to repeal a law through the legislative process than it is to approve a law via initiative. In Washington, for example, if the legislature wished to repeal the medical marijuana initiative, it would have to go through all the steps of the parliamentary processes outlined above. In the House of Representatives, fifty representatives would have to support the repealing bill; this would mean all of the representatives for King County and thirty other representatives. Further, the Senate would have to equally unite to form a majority of thirty. The governor would then have to approve the bill's repeal.

Further, it is politically problematic for the legislature to question the voters' intent by attempting to overturn an initiative. If the majority of the voters in the latest election approved a measure, it would seem very unresponsive of the legislators to ignore the vote and strike down the will of the people.

This shows how much more difficult it is to enact laws through the parliamentary processes of republican government as opposed to the processes of direct democracy via initiatives. It strongly counters the argument that the legislature can simply repeal or amend measures passed by the people. In Oregon especially, for the legislature to effectively repeal a constitutional amendment enacted by initiative, the people would have to reject it after its initial passage. This is because all constitutional amendments must be approved by a majority of the voters.

The framers of the Constitution intended that passing laws be difficult, because the process makes it more of a challenge to pass laws that restrain liberty. In other words, gridlock preserves liberty by allowing only laws that a majority of representatives approve to be enacted. The framers of the Constitution did not envision a direct democracy within this republic; rather, they envisioned a representative form of government. Their aim was to prevent factions within citizen groups that have the power to make hasty and passion-based laws that are more difficult to repeal than to enact.

<http://www.census.gov/population/estimates/ metro-city/ma99-03a.txt>.

V. CONCLUSION

While direct democracy has been a part of the legislative landscape in the states of Washington and Oregon for almost one hundred years, and while the process has been used to enact laws such as the Compulsory Education Act of 1922, the judiciary has not properly interpreted the Guarantee Clause within the plain meaning or intent of the Constitution's drafters. There is a textually demonstrable clause that requires a certain form of government in the states. The framers chose this form of government because there are advantages to its parliamentary procedures, as well as to the checks and balances included within those procedures, guaranteeing citizens the liberty that is embodied in the rest of the Constitution. Bypassing the process of the legislature makes for laws that are ambiguous, divisive, and reliant upon passion rather than reason. The state courts of Oregon and Washington should bravely admit that while direct democracy is popular, it is a dangerous method of lawmaking, and it is unconstitutional.

Courts as Watchdogs of the Washington State Initiative Process

*Kenneth P. Miller**

I. INTRODUCTION

In November 1999, Washington state voters enacted Initiative Number 695 (I-695), the high-profile ballot measure designed to reduce vehicle license fees and to require voter approval for future tax and fee increases.[1] Shortly thereafter, Washington Superior Court Judge Robert Alsdorf invalidated the initiative.[2] Tim Eyman, I-695's sponsor, was enraged. "[O]ne guy with a robe on, but he might as well be wearing a crown if he's going to act like a king."[3] In fact, Judge Alsdorf wielded a powerful scepter and committed a sweeping counter-majoritarian act. One solitary judge, and after him, eight justices of the Washington Supreme Court,[4] overturned the will of nearly a million Washington voters.[5]

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1. Act effective Jan. 1, 2000, ch. 1, 2000 Wash. Laws 1 (encoding I-695). The ballot title for I-695 was Shall Voter Approval Be Required for Any Tax Increase, License Tab Fees Be $30 per Year for Motor Vehicles, and Existing Vehicle Taxes Be Repealed? *See* Office of the Secretary of State, State of Washington, *Initiatives to the People 1999* (Dec. 21, 1999) <http://www.secstate.wa.gov/inits/people99.htm>. License tab fees in the state had been running several hundred dollars per year for newer, more expensive cars. David S. Broder, *The Ballot Battle: Initiative Engineers Seem to Be Running Out of Steam*, WASHINGTON POST, Nov. 3, 2000, at A20, *available in* 2000 WL 25425967.

2. *See* Amalgamated Transit Union Local 587 v. State, No. 99-27054-1, 2000 WL 276126, at *19 (Wash. Super. Ct., Mar. 14, 2000) (on cross-motions for summary judgment, the district court judge issued a written decision striking down the initiative in its entirety), *aff'd*, Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000).

3. David Postman, *I-695 Ruling Fuels Debate Over Role of Courts*, SEATTLE TIMES, Apr. 11, 2000, at B1.

4. *See* Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000). Eight Washington Supreme Court Justices voted to affirm the district court's ruling; one dissented. *Id.* at 189, 11 P.3d at 763. The majority held that the initiative violated four state constitutional requirements for initiative lawmaking, including the constitution's requirement that a bill contain only one subject. *Id.* at 256-57, 11 P.3d at 806. *See also* WASH. CONST. art. II, § 19 ("No bill shall embrace more than one subject, and that shall be expressed in the title.").

5. According to the Washington Secretary of State, the final vote totals for I-695 were 992,715 Yes votes and 775,054 No votes. Office of the Secretary of State, State of Washington, *Results of the 1999 Washington State General Election* (Dec. 2, 1999) <http://

The next year, Washington voters approved I-722,[6] another Eyman-sponsored tax-cutting initiative known as "Son of I-695."[7] In a ruling from the bench, Thurston County Superior Court Judge Christine Pomeroy promptly struck down that initiative.[8]

These rulings followed closely on the heels of the state supreme court's decision to invalidate I-573, Washington's 1992 term limit initiative.[9] The two dissenters in that case, Justices Richard B. Sanders and Gerry L. Alexander, made the point directly: "Today, 6 votes on this court are the undoing of the 1,119,985 votes that Washingtonians cast at the polls in favor of term limits."[10]

Invalidation of a citizen initiative is indeed different from our usual understanding of judicial review, wherein a court overturns the judgment of a coordinate branch of representative government.[11] Here, Washington courts nullified the decisions of the people themselves. While this outcome is remarkable, it is not particularly rare. Initiatives adopted by Washington voters, like initiatives in other states, are frequently challenged in court and are often invalidated, either in part or in their entirety.[12]

This Article describes the high rate at which courts have invalidated Washington initiatives and then explores why this is so. The Article suggests that it is initiative lawmaking's Populist orientation—with respect to both its unfiltered majoritarian processes and its often-

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www.secstate.wa.gov/elections/gen99.htm>.

6. Office of the Secretary of State, State of Washington, *Proposed Initiatives to the People—2000* (Dec. 2, 1999) <http://www.secstate.wa.gov/inits/people2000.htm> (citing I-722, Shall Certain 1999 Tax and Fee Increases Be Nullified, Vehicles Exempted from Property Taxes, and Property Tax Increases (Except New Construction) Limited to 2% Annually?).

7. David Postman, *I-722 Ruled Unconstitutional*, SEATTLE TIMES, Feb. 24, 2001, at A-1.

8. *Id.*

9. *See* Gerberding v. Munro, 134 Wash. 2d 188, 210 & n.11, 949 P.2d 1366, 1377 & n.11 (1998). The portion of I-573 restricting terms for members of Congress was earlier invalidated by a federal court in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994). In 1995, the United States Supreme Court affirmed that result, holding that a state's efforts to impose term limits on its members of Congress violates the Qualifications Clause of Article I, Sections 2 and 3 of the United States Constitution. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (striking down Arkansas' congressional term limits initiative and those of other states).

10. *Gerberding*, 134 Wash. 2d at 231, 949 P.2d at 1388 (Sanders, J., dissenting).

11. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1533-34 (1990).

12. Kenneth P. Miller, Judging Ballot Initiatives: A Unique Role for Courts, at 11, Table 3 (Paper presented at the 2000 Annual Meeting of the Western Political Science Ass'n, San Jose, CA, Mar. 23-26, 2000) (on file with the *Seattle University Law Review*). This study of all voter-approved statewide initiatives in four states (California, Oregon, Colorado and Washington) between 1960–1999 reported that of the 163 initiatives approved by voters in those states during that period, eighty-four were challenged in court (52%). Of those challenged, 54% were invalidated in part or in their entirety. Ten cases were still pending.

constitutionally suspect substance—that makes initiatives vulnerable to legal attack.

For their part, judges, who wield the sole institutional check on the initiative process, have to decide how strongly they are going to exercise that check. They can be what I call "juris-populists" and accommodate initiative lawmaking, or they can play the role of "initiative watchdogs" and look for ways to strike down initiatives and constrain the process. As initiative lawmaking has gathered force in recent years, legal scholars have debated whether courts should apply a different level of scrutiny to initiatives than to ordinary legislation, some arguing that initiatives should be scrutinized more aggressively.[13]

Very recently, courts in several states seem to have shifted discernibly from granting deference to initiatives toward applying tougher scrutiny. Specifically, several courts are more strictly applying technical state constitutional restrictions on initiative lawmaking, such as single subject rules and ballot title requirements, invalidating numerous initiatives on these grounds.[14] The Article suggests that the Washington state courts' invalidation of I-695 is consistent with this trend.

If the courts are going to play "watchdog" over the initiative process, however, they do so at some risk. Many voters are frustrated when courts overturn popular initiatives and are inclined to agree with Mr. Eyman's anticourt sentiments.[15] Especially where, as in Washington, judges are selected in competitive elections, the same Populist impulse that drives initiative lawmaking can further politicize the judiciary and threaten its independence.

II. JUDICIAL REVIEW OF WASHINGTON INITIATIVES

To understand the nature and magnitude of the courts' role in Washington's initiative process, it is helpful to look at some numbers. First, Washington is a high-use initiative state.[16] Since the state instituted the initiative process in 1912,[17] Washingtonians have adopted

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13. *See infra* Section IV.

14. *See infra* Section V.

15. *See* Postman, *supra* note 3, at A1.

16. This Article focuses exclusively on the statewide initiative process. Local initiatives are an important lawmaking mechanism in many cities and counties, but they fall outside the scope of this discussion.

17. Adopted in 1889, the Washington State Constitution did not initially contain provisions for initiative or referendum. Article II, section 1 instead provided that "[t]he legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington." WASH. CONST. art. II, § 1. In 1911, however, the Washington legislature proposed Amendment 7, amending Article II, section 1 to state,

sixty-four statewide initiatives.[18] Voters in only four states have adopted more. Oregon and California have used the initiative process most actively;[19] the second tier of initiative states includes Colorado, North Dakota, Washington and Arizona.[20] By contrast, voters in Utah, a "low-use" initiative state, have adopted only five initiatives in their state's history.[21] Unlike other high-use initiative states, Washington has not seen a major surge in initiative lawmaking over the past few decades. In Oregon, for example, voter-approved initiatives jumped from *zero* in the 1960s to twenty-two in the 1990s, and in California they surged from only three in the 1960s to twenty-four in the 1990s.[22] By contrast, Washington voters have adopted initiatives at a near-constant rate over the past four decades: nine in the 1960s, nine in the 1970s, seven in the 1980s, and eleven in the 1990s.[23]

Second, as in other high-use initiative states, Washington's voter-approved initiatives have frequently faced court challenges. As of 1999, fifteen of the thirty-six initiatives Washingtonians approved between 1960 and 1999 (42%) had been challenged in state or federal court—sometimes in both.[24] This challenge rate is similar to Oregon's (44%, nineteen of forty-three)[25] and Colorado's (48%, fourteen of

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> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and a house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

WASH. CONST. art. II, § 1. The following year, Washington voters approved Amendment 7 and gained, or "reserved," the power of initiative and referendum. *See* Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the People's Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 251-52 (1997).

18. *See* Office of the Secretary of State, State of Washington, *Index to Initiative History and Statistics: 1914–2000* (last modified Feb. 26, 2001) <http://www.secstate.wa.gov/inits/initstats.htm> (includes Initiatives to the People and Initiatives to the Legislature). *See also* Initiative and Referendum Institute Historical Database (visited Apr. 25, 2001) <http://www.iandrinstitute.org/>.

19. Here, "use" is defined as "adoption" rather than as qualification for the ballot or other activities, such as pre-petition filing.

20. The numbers of voter-approved initiatives in the highest-use initiative states are as follows: Oregon (115), California (95), Colorado (77), North Dakota (75), Washington (64), Arizona (64). Initiative and Referendum Institute Historical Database, *supra* note 18.

21. Other low-use initiative states include Mississippi (no voter-approved initiatives), Illinois (one), Wyoming (three), and Florida (ten). Initiative and Referendum Institute Historical Database, *supra* note 18.

22. Kenneth P. Miller, The Role of Courts in the Initiative Process: A Search for Standards, at 12 (Paper presented at the 1999 Annual Meeting of the American Political Science Ass'n, Atlanta, GA, Sept. 2-5, 1999) (on file with the *Seattle University Law Review*).

23. Miller, *supra* at note 12, at 9, Table 2.

24. *Id.*

25. Miller, *supra* note 22, at 12, Table 5. Note that this percentage will increase as lawyers

twenty-nine)[26] during the same period. California, the busiest initiative state over the past four decades, also had by far the highest rate of initiative challenges (65%, thirty-six of fifty-five).[27] In all of these high-use initiative states, including Washington, the sheer number of challenges and the crucial policy significance of many of the cases have now fully established courts as an important component of the initiative process.

Third, the outcomes of cases suggest that courts have played an important countering and filtering role in Washington's initiative process. Courts struck down, either in part or in their entirety, 53% (eight of fifteen) of Washington initiatives challenged in court over the past four decades.[28] The nullified initiatives included major proposals to impose a mandatory death penalty for first-degree murder;[29] restrict pornography;[30] prohibit forced busing for racial integration of schools;[31] ban storage of out-of-state radioactive waste;[32] impose term limits on state elected officials and members of Congress;[33] and reduce vehicle license fees and require voter approval for future tax and fee increases.[34]

III. WHY DO SO MANY INITIATIVES HAVE TROUBLE IN COURT?

We now turn to the question of *why?* Why are so many voter-approved initiatives challenged in court, and why are so many invalidated? I contend that the primary explanation for the courts' high

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file new challenges to long-standing voter-approved constitutional initiatives in the wake of the Oregon Supreme Court's decision in *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998). See notes 147-49, *infra*, and accompanying text. New challenges to long-standing, voter-approved initiatives could increase litigation percentages in other states as well.

26. *Id.* at 12, Table 6.

27. *Id.* at 12, Table 4.

28. Miller, *supra* note 12, at Appendix 35-41.

29. *See* State v. Green, 91 Wash. 2d 431, 444-47, 588 P.2d 1370, 1378-79 (1979) (holding that I-316 (1975) is invalid because it violates the Eighth and Fourteenth Amendments).

30. *See* Spokane Arcades, Inc. v. Ray, 449 F. Supp. 1145, 1158 (E.D. Wash. 1978); (concluding I-335 (1977) was a "constitutionally impermissible prior restraint upon freedom of speech"); State *ex rel.* Jones v. Charboneau's, 27 Wash. App. 5, 9-11, 615 P.2d 1321, 1324-25 (1980) (holding that the ballot title of I-335 was insufficient to give the public notice of the initiative subject matter), *overruled by* Washington Fed'n of State Employees v. State, 127 Wash. 2d 544, 579, 901 P.2d 1028, 1046 (1995) (holding that the court must consider both the legislative title and the ballot title in analyzing an initiative under Article II, section 19).

31. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (invalidating I-350 (1978)).

32. *See* Washington State Bldg. Constr. and Trades Council, AFL-CIO v. Spellman, 684 F.2d 627 (9th Cir. 1982) (invalidating I-383 (1980)).

33. *See* Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994) (invalidating I-573 (1992)).

34. *See* Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000) (invalidating I-695 (1999)).

level of involvement in initiative lawmaking in Washington (and elsewhere) lies in the nature of the initiative process itself. Specifically, the *Populist* conception of initiative lawmaking, which manifests itself both in the *process* of enacting initiatives and in the *substance* of laws enacted thereby, makes ballot measures vulnerable to legal challenge and invalidation.

I should explain what I mean by the "Populist conception" of initiative lawmaking, distinguishing it from the competing "Progressive conception."[35] The initiative process is often characterized as a Progressive reform because it was introduced in Washington and most other initiative states during the "Progressive era" (approximately 1900—1918).[36] However, Populists were agitating for adoption of direct democracy during the last decades of the 19th century, before the advent of the Progressive era.[37] More importantly for this discussion, Populists and Progressives had different conceptions of the initiative process.

Progressives respected the representative system and envisioned the initiative (as well as the referendum and recall) as a way to improve representative government. For example, Woodrow Wilson, who came to support the initiative process, maintained that Progressive advocates of initiative lawmaking had no intention of undermining representative or legislative processes, but rather wanted to redeem them.[38] By contrast, Populists made no secret of the fact that they distrusted representative government and saw the initiative as a way to bypass, constrain, and undermine it.[39]

Populists and Progressives from that earlier period have successors today, and the two conceptions of initiative lawmaking continue to compete. In short, neo-Progressives still seek to use the initiative to

35. Professor Bruce E. Cain and I develop this distinction at greater length in Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, *in* DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33, 33-48 (Larry J. Sabato et al. eds., 2001).

36. Twenty-two states adopted the initiative or referendum (or both) between 1898 and 1918. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL 51, Table 3.1 (1989). For a discussion of the adoption of the initiative process and the reasons why initiative lawmaking is largely a western phenomenon, see Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997).

37. *See* CRONIN, *supra* note 36, at 56; JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY 406-07 (Univ. Neb. Press 1961) (1931).

38. *See* CRONIN, *supra* note 36, at 54. In coordination with their other reforms, the Progressives sought to use the initiative to enhance the responsiveness, professionalism, competence, and expertise of government. *See also* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 21-25 (1984).

39. *See* CRONIN, *supra* note 36, at 59.

enhance the responsiveness, professionalism, and expertise of government, whereas neo-Populists seek to substitute the wisdom of the people for the deliberations of elected officials.

The Populist position today supports both the increased use of direct democracy and little or no reform of the initiative process. Term limit advocates (such as Sherry Bockwinkel)[40] and tax cutters (such as Tim Eyman and his counterparts Bill Sizemore in Oregon[41] and Doug Bruce in Colorado[42]) are good examples of contemporary Populists. They support not only term limits and tax cuts, but also unconstrained initiative lawmaking, in part because all of these mechanisms weaken and constrain legislatures, and they believe that legislatures tend to enact unwanted laws and create wasteful expenses.[43] Moreover, Populists tend to oppose initiative reforms that would give the legislature the ability to amend or respond to initiatives in circulation, and they favor the direct over the indirect initiative. As the initiative process has become more Populist-oriented, modern Progressives (including "good government" groups like Common Cause and the League of Women Voters) have become increasingly ambivalent about initiative lawmaking, seeking reforms to the process.[44] Progressives are right to be concerned, because the Populist conception of initiative lawmaking has largely prevailed, at least in most high-use initiative states.[45]

Is this the case in Washington? Although the initiative process in Washington is not as Populist-oriented as in some states and has

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40. Bockwinkel sponsored two term limits initiatives in Washington, and has played an important role in other initiative campaigns. *See* Joni Balter & Lance Dickey, *Initiatives: Governing by Microwave Populism: The Rise of Instant Gratification Politics, and We're Next*, SEATTLE TIMES, Mar. 5, 2000, at B5.

41. Sizemore, the executive director of Oregon Taxpayers United, has sponsored numerous initiatives in Oregon over the past decade, including six that appeared on the November 2000 ballot. *See* Brad Knickerbocker, *A Man Who Rules by Referendum*, CHRISTIAN SCIENCE MONITOR, Oct. 20, 2000, at 1.

42. Bruce was the proponent of Colorado Amendment 1 of 1992, the Taxpayer's Bill of Rights (TABOR), and several other initiatives. *See, e.g.*, Steve Lipsher, *Bruce Craves Respect but Taxes His Critics*, DENVER POST, Oct. 26, 1997, at A-25. Eyman, Sizemore, and Bruce are heirs to the tradition of Howard Jarvis, the California Populist who co-authored California's landmark 1978 property tax limitation initiative, Proposition 13. Jarvis died in 1986, but his impact is still strongly felt. *See generally* PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 188-99 (1998).

43. For a discussion of the imposition of term limits and tax and expenditure limits in several states, see Caroline J. Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 171 (Shaun Bowler et al. eds., (1998)).

44. *See, e.g.*, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST?: A STUDY UPDATE OF DIRECT LEGISLATION IN CALIFORNIA FROM PROGRESSIVE HOPES TO PRESENT REALITY (1998).

45. *See* Cain & Miller, *supra* note 35, at 39-42.

some important Progressive-oriented structural features, it has nevertheless increasingly been dominated by Populist forces.

It should be emphasized that Washington's initiative process has three important features that orient initiative lawmaking in a Progressive rather than a Populist direction. First, Washington does not allow initiatives to amend the state's constitution.[46] This restriction makes it more difficult for Populist-minded initiative sponsors to bind and undermine representative government. Washington voters' inability to impose term limits on elected officials without amending the state constitution is an example of how this rule places limits on Populist action.[47]

In addition, Washington permits the legislature to amend voter-approved initiatives.[48] Specifically, for two years after the initiative's enactment, legislative amendments require a two-thirds vote of both houses.[49] After two years, like any other law, an initiative can be amended or repealed by a simple majority vote in the legislature and the executive's signature. This feature prevents Populists from using initiatives to place permanent restrictions on legislative action. It contrasts with the super-populist California rule, under which statutory initiatives can be cast in stone, i.e., the legislature can never amend or repeal them without voter approval.[50]

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46. The Washington Constitution, Article II, section 41 reads in pertinent part as follows: "The legislative authority of the state of Washington shall be vested in the legislature, . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . . ." WASH. CONST. art II, § 41 No provision is made for constitutional amendment by initiative. Obviously, this is an important restriction, and initiative advocates have argued that the constitution *can* be amended by initiative. *See, e.g.*, Postman, *supra* note 3, at B1. The Washington Supreme Court, however, has consistently rejected this view. *See, e.g.*, Gerberding v. Munro, 134 Wash. 2d 188, 210, 949 P.2d 1366, 1377 (1998) ("We have often stated that the initiative process, as a means by which the people can exercise directly the legislative authority to enact bills and laws, is limited in scope to subject matter which is legislative in nature.") (citations omitted). *See also* Even, *supra* note 17, at 268, 270.

47. *See Gerberding*, 134 Wash. 29 at 211, 949 P.2d at 1377.

48. *See* WASH. CONST. art II, § 1(c).

49. The Washington Constitution, Article II, section 1(c) reads as follows:

> No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided*, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

50. *See* CAL. CONST. art. II, § 10(c). California initiatives sometimes contain provisions allowing for subsequent amendment by the legislature (usually by a supermajority vote), but such provisions are optional. A recent example is California Proposition 36 (2000), a measure

Third, unlike other high-use initiative states, Washington provides the option of the indirect initiative.[51] In theory, this mechanism, known in Washington as "initiative to the legislature," engages, rather than bypasses, the legislature, and thus is more consistent with the Progressive than the Populist conception of government. In practice, the indirect initiative has been disfavored in Washington[52] in part because few incentives favor the indirect initiative (e.g., the signature requirements are the same as for direct initiatives),[53] and also because

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that promotes treatment rather than criminal penalties for drug offenders. Section 9 of that initiative provided, "This act may be amended only by a roll call vote of two thirds of the membership of both houses of the Legislature. All amendments to this act shall be to further the act and shall be consistent with its purposes." CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE, 2000 CALIFORNIA GENERAL ELECTION 69 (Nov. 7, 2000) *available in* <http://www.VOTE2000.ss.ca.gov/VoterGuide/pdf/ballotpamphlet.pdf>.

51. The Washington Constitution, Article II, section 1(a), provides the following procedure.

> Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

WASH. CONST. art II, § 1(a).

52. In Washington between 1914 and 2000, 113 initiatives were submitted directly to the people, but only twenty-seven to the legislature. Office of the Secretary of State, State of Washington, *Summary of Initiatives and Referenda: 1994–2000* (last modified Feb. 26, 2000) <http://www.secstate.wa.gov/inits/initsum.htm>.

53. Proponents of both initiatives to the people and initiatives to the legislature must submit signatures equaling eight percent of the vote in the most recent gubernatorial election. WASH. CONST. art. II, § 1(a).

many initiative sponsors distrust the legislature and would rather take their proposals directly to the people than bother with elected officials. Nevertheless, providing the option of sending an initiative to the legislature affirms the Progressives' vision of initiative lawmaking.

Taken together, these three Progressive-oriented procedural characteristics have helped to make Washington's initiative process less of a Populist free-for-all than it otherwise might be. But, within these boundaries, there still is room for Populists to operate.

With respect to substance, Washington has a history of Progressive-oriented initiatives, such as I-207 (1960),[54] which established the state's civil service system, and I-276 (1972),[55] a wide-ranging political reform act that established open meeting requirements, lobbyist regulations, and campaign finance rules. However, these Progressive-oriented initiatives, designed to improve and "redeem" representative government, increasingly have been overshadowed by Populist-oriented measures such as those seeking to limit representatives' terms[56] and to constrain their ability to make policy choices.[57] The recent successes of Eyman, founder of Permanent Offense,[58] and Bockwinkel, "queen of signature gatherers in Washington,"[59] suggest that the Populist conception of initiative lawmaking is prevailing in Washington as elsewhere.

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54. *See* State Civil Service Law, ch. 1, 1961 Wash. Laws 1 (encoding I-207).

55. *See* Act effective Dec. 7, 1972, ch. 1, 1973 Wash. Laws 1 (encoding I-276).

56. *See* Office of the Secretary of State, State of Washington, *Initiatives to the People: 1914 Through 2000* (last modified Feb. 26, 2001) <http://www.secstate.wa.gov/inits/iphist.htm> (citing I-573, Shall Candidates for Certain Offices, Who Have Already Served for Specified Time Periods in Those Offices, Be Denied Ballot Access? (1992)).

57. Many examples of initiatives seek to constrain legislative flexibility, including I-601 (1993), establishing limits on state spending; I-200 (1998), prohibiting state-sponsored affirmative action; and I-695 (1999) and I-722 (2000), requiring voter approval for tax increases. *See id.* Importantly, however, not all "legislative-constraining" initiatives are associated with the political right. For example, an initiative like I-732 (2000), which requires salary increases for public school teachers, was supported by the political left, yet it undermines the legislature's authority and flexibility on budget issues. For a discussion of the implications of using the initiative process to constrain legislative choices, see Elizabeth G. Hill, *Ballot Box Budgeting*, EDSOURCE PUBLICATIONS, Dec. 1990, at 1 (noting that approximately three-fourths of California's state budget is not subject to legislative control through the budget process, and that more than half of this restriction is due to initiatives).

58. Eyman calls his initiative organization Permanent Offense. *See* <http://www.permanent-offense.org/>. Following judicial invalidation of I-695 and I-722, Eyman proposed a new initiative, I-747, "the Spirit of 695," which would limit property tax increases in Washington to one percent per year. *Id.*

59. Balter & Dickey, *supra* note 40, at B5. In 1994, Bockwinkel said, "Government's not doing the job . . . so the vacuum's been taken up by people willing to stand up and speak out. . . . We're taking government into our own hands." Barbara A. Serrano, *Citizens Are Taking Initiative: Proposals Reflect Loss of Faith in Legislators*, SEATTLE TIMES, Mar. 27, 1994, at A1.

More specifically, what is it about the process and substance of Populist-oriented initiative lawmaking that makes initiatives vulnerable to legal attack? Let us look at each in turn.

A. Process

In contrast to the often slow, careful, and compromise-oriented nature of most legislative action, the Populist-oriented direct initiative process is what V.O. Key, Jr. and Winston Crouch called a "battering ram."[60] It is a heavy, blunt instrument that can break through the inertia of a checks-and-balances system and produce major policy breakthroughs in an expedited way. However, this expediency often comes at a cost. In avoiding careful vetting (*i.e.*, in bypassing the processes of informed deliberation, refinement, compromise, and consensus-building that exist in any passably functional legislature),[61] an initiative emerges from the process more vulnerable to court challenges.

More specifically, the initiative process has two primary features that make the end product (voter-approved initiatives) vulnerable to attack: proponents have absolute control of the framing and drafting of the measure; and measures are fixed and unamendable at an early stage of the process. Unlike in the legislative process, where a bill's language is drafted (or at least reviewed) by staff attorneys, there are no formalized drafting procedures in the initiative process. As a formal matter, when the proponent files the measure with the Washington Secretary of State, the Secretary submits a copy to the Code Reviser for review.[62] That official reviews the initiative "for matters of form and style, and such matters of substantive import as may be agreeable to the petitioner, and shall recommend to the petitioner such revision or alteration of the measure as may be deemed necessary and

60. V.O. KEY, JR. & WINSTON W. CROUCH, THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA 458 (1939). In this section, I focus on initiatives to the people rather than on initiatives to the legislature, because the latter, at least in theory, receive some of the benefits of legislative procedures. Initiatives to the people bypass the legislature altogether.

61. Supporters of initiative lawmaking argue that initiative critics too often compare the initiative system to an idealized vision of legislatures. In fact, legislatures are flawed institutions where the quality of deliberation and refinement sometimes disappoints. *See, e.g.*, Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 748-49 (1991); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1362 (1985) (reviewing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984)). Even when the legislature's processes are working imperfectly, they still promote democratic values like deliberation and compromise more than the initiative process does. Cain & Miller, *supra* note 35, 43-48; Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 76-78 (1995).

62. *See* WASH. REV. CODE § 29.79.015 (1998).

appropriate."[63] However, the recommendations are purely advisory, and have no binding effect.[64] The Secretary of State then refers the initiative to the Attorney General.[65] Although he or she prepares a title and summary,[66] the Attorney General has no affirmative duty to review the measure's legal validity or to require the proponent to revise the measure if it is legally flawed. In fact, the Attorney General may not refuse to prepare a title and summary based on a conclusion that the measure, if enacted, would be unconstitutional.[67] After this minimal review, proponents circulate the measure to gather sufficient signatures to place it on the ballot.[68] Once it goes out for signature, a measure cannot be amended again, even by the proponents, even if it becomes apparent that the measure contains a flaw that should be corrected.[69]

These characteristics of the initiative process have negative implications for deliberation and refinement. The closed process limits input from interested parties and consideration of other, perhaps more optimal, alternatives. In addition, the restriction on amendment after circulation forecloses opportunities to address flaws and refine the measure. As a result, the nature of initiative lawmaking makes it more likely that the product will contain flaws that will expose the measure to subsequent court challenge.

Moreover, by limiting the opportunities for opponents and other interested parties to participate in the process, the initiative system makes compromise and consensus-building less imperative to success. In the initiative process, opponents have no leverage to force amendments or compromise. If the proponents are confident that their proposal can win the support of the initiative electorate, they can ignore their opponents' interests and maximize their own. Unlike in the legislature, initiative proponents have no need to build a larger consensus in order to win approval of an initiative—a simple majority of the electorate will do, even if the majority is relatively apathetic and the minority intense. In allowing proponents to eschew compromise

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63. *Id.*

64. *See* Even, *supra* note 17, at 257-58.

65. *See* WASH. REV. CODE § 29.79.030 (1998).

66. *See id.*

67. *See* Philadelphia II v. Gregoire, 128 Wash. 2d 707, 714-15, 911 P.2d 389, 392-93 (1996).

68. In Washington, the required number of valid signatures of legal voters is equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing with the Secretary of State of the initiative measure text. *See* WASH. CONST. art. II, § 1(a).

69. See Even, *supra* note 17, at 256-67, for a detailed discussion of procedures for initiative lawmaking in Washington.

and accommodation of competing interests, the initiative system polarizes. Again, opponents have few options: if they cannot defeat the measure outright at the polls, their *only* recourse is to litigate. In fact, initiative opponents who lose at the polls very often challenge the initiative in the courts.[70]

B. Substance

If the Populist-oriented, battering-ram *process* of initiative lawmaking contributes to the large number of initiative challenges and invalidations, so does the Populist *substance* of initiatives. Initiatives in Washington (as elsewhere) often manifest a Populist impulse—many seek to constrain or undermine representative government or reinforce majority values at the expense of minority interests and individual rights. Why does the Populist substance of initiatives fuel litigation? Simply put, it is because the content of Populist-oriented initiatives often conflicts with constitutional norms, and courts have the responsibility to defend these norms against attack. Federal and state constitutions (1) establish institutions of government and (2) prohibit laws that unduly infringe on individual and minority rights. By attacking the institutions of representative government or by imposing majority values at the expense of minority rights, Populist-oriented initiatives often run counter to these constitutional norms. It is natural for this conflict to produce litigation.

1. Initiatives to Constrain Representative Government

A common initiative is one designed to control or constrain representative government. Examples from Washington state include voter-approved initiatives to limit state officials' salaries,[71] limit state revenues,[72] impose term limits on elected officials,[73] limit state spending,[74] and limit taxes and require voter approval for future tax increases.[75] It is understandable that these proposals have been

70. *See supra* notes 24-27, and accompanying text.

71. *See* Office of the Secretary of State, State of Washington, *Initiatives to the People: 1914 Through 2000* (last modified Feb. 26, 2001) <http://www.secstate.wa.gov/inits/iphist.htm> (citing I-282, Shall State Elected Officials' Salary Increases Be Limited to 5.5% Over 1965 Levels, and Judges' the Same Over 1972 Levels? (1973)).

72. *See id.* (citing I-62, Shall State Tax Revenues Be Limited So That Increases Do Not Exceed the Growth Rate of Total State Personal Income? (1979)).

73. *See id.* (citing I-573, Shall Candidates for Certain Offices, Who Have Already Served for Specified Time Periods in Those Offices, Be Denied Ballot Access? (1992)).

74. *See id.* (citing I-601, Shall State Expenditures Be Limited by Inflation Rates and Population Growth, and Taxes Exceeding the Limit Be Subject to Referendum? (1993)).

75. *See id.* (citing I-695, Shall Voter Approval Be Required for Any Tax Increase, License Tab Fees Be $30 Per Year for Motor Vehicles, and Existing Vehicle Taxes Be Repealed? (1999);

pursued through the initiative process, because representatives have a vested interest in maintaining their institutional powers. The normal inertia built into the checks and balances system is magnified when it comes to measures that adversely affect legislators, and it is extremely rare for legislatures to adopt such reforms.

The most striking example of this dynamic is term limits. Over the past decade, polls have shown that a majority of Americans favor term limits for elected officials.[76] When members of Congress and state legislatures refused to approve proposals to impose term limits on themselves, voters invoked the initiative process.[77] However, term limit measures and other attempts to use initiatives to constrain or control representative government often conflict with constitutional provisions that establish these institutions. In Washington, for example, I-573, the 1992 voter-approved term limits initiative, came into conflict with state constitutional provisions establishing qualifications for state elected officials. The Washington Supreme Court held that imposition of term limits could only be effected through a constitutional amendment.[78] Similarly, the United States Supreme Court held that efforts by states (including Washington) to impose term limits on members of Congress violated the United States Constitution's provisions establishing qualifications for election to Congress.[79] The Court did not allow states to undermine those provisions on a piecemeal basis—only the arduous process of amending the federal Constitution would do.[80] In short, the job of defining how far an initiative can go in altering representative institutions falls to the courts, and the work of resolving these conflicts significantly fuels the high rate of initiative challenges.

1-722, Shall Certain 1999 Tax and Fee Increases Be Nullified, Vehicles Exempted from Property Taxes, and Property Tax Increases (Except New Construction) Limited to 2% Annually? (2000)).

76. For example, an April 1996 Gallup Poll showed that 74% of Americans favored congressional term limits. At the time, Paul Jacob, executive director of U.S. Term Limits, Inc., said, "I thought we had reached a peak in 1992, but I was wrong." Bill Varner, *Voters in 14 States to Decide on Limiting Congressional Terms*, USA TODAY, Oct. 17, 1996, at 4A.

77. Nationwide, with the exception of North Dakota, Illinois and Mississippi, every state where citizens have the opportunity to place initiatives on the ballot (*i.e.*, in twenty-one of the twenty-four states with the initiative process), term limits have been adopted. By contrast, with the exception of Louisiana, none of the twenty-six states that lack provisions for initiative lawmaking have adopted term limits through the legislative process. The New Hampshire legislature attempted to impose term limits on the state's representatives in Congress, but not on itself. Similarly, despite strong pressure for congressional term limits, members of Congress have declined to adopt proposals to limit their own terms. Telephone Interview with Paul Jacob, National Director, U.S. Term Limits, Inc. (Feb. 25, 2000).

78. *See* Gerberding v. Munro, 134 Wash. 2d 188, 210, 949 P.2d 1366, 1377 (1998).

79. *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 837-38 (1995).

80. *Id.*

2. Initiatives Affecting Racial and Other Minorities

In recent decades, at both the federal and state level, representative government has made numerous efforts to improve conditions for historically disadvantaged groups, including racial minorities, women, immigrants, language minorities, and homosexuals. These efforts have promoted voting rights for various minority groups, racial desegregation of the public schools, bilingual education programs, affirmative action programs to benefit racial minorities and women, and legal protections for persons who face discrimination on the basis of their race, gender, national origin, or sexual orientation.

At times, government efforts to assist minorities have stirred resentment, which in turn has fueled counter-efforts to reestablish and reinforce majoritarian interests. At the state level, the initiative process has provided a convenient vehicle for repealing or preempting representative government's efforts to assist minorities. In some states, such as California and Colorado, voters have approved a steady stream of such initiatives in recent decades, nearly all of which have been challenged in court.[81] Washington voters have largely refrained from such measures, but two examples are I-350 (1978), which sought to prohibit school districts from using mandatory busing to desegregate public schools,[82] and I-200 (1998), which dismantled the state's system of affirmative action for racial minorities and women.[83] I-350

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81. Challenged initiatives in California include Proposition 14 (1964), prohibiting enactment of fair housing laws, which the Supreme Court invalidated in *Reitman v. Mulkey*, 387 U.S. 369 (1967). Proposition 21 (1972), prohibiting racial assignments to desegregate public schools, was invalidated in part in *Santa Barbara School Dist. v. Superior Court*, 530 P.2d 605 (Cal. 1975). All but three sections of Proposition 187 (1994), restricting services to undocumented immigrants, were invalidated. League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995); League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997). Proposition 209 (1996), prohibiting affirmative action in state contracting, hiring, and university admissions, was challenged but upheld in *Californians for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). Colorado examples include the following: Amendment 8 (1974), prohibiting racial assignments to desegregate public schools, challenged but not invalidated in *Keyes v. School Dist. No. 1*, 119 F.3d 1437 (10th Cir. 1997); Amendment 1 (1988), establishing English as the state's official language, challenged but upheld in *Montero v. Meyer*, 13 F.3d 1444 (10th Cir. 1994); and Amendment 2 (1992), prohibiting enactment of antidiscrimination laws for sexual orientation, invalidated in *Romer v. Evans*, 517 U.S. 620 (1996).

82. Office of the Secretary of State, State of Washington, *Initiatives to the People: 1914–2000* (last modified Feb. 26, 2001) <http://www.secstate.wa.gov/inits/iphist.htm> (citing I-350, Shall Public Educational Authorities Be Prohibited from Assigning Students to Other Than the Nearest or Next-Nearest School with Limited Exceptions? (1978)). I-350 was a response to the "Seattle Plan" in which Seattle schools attempted to achieve racial balance by imposing racial busing. The initiative sought to prohibit school districts from "requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 462 (quoting I-350). It received 66% of the vote. *Id.*

83. *See id.* (citing I-200, Shall Government Be Prohibited from Discriminating or Granting

was challenged for conflicting with the 14th Amendment's Equal Protection Clause, and was invalidated in *Washington v. Seattle School District No. 1*.[84] I-200 has not yet been challenged, perhaps in part because a similar initiative, California's Proposition 209, was upheld by the Ninth Circuit in 1997.[85]

These types of initiatives present hard legal questions: How far can the electorate go in restricting representative government's efforts to protect minority interests? At what point do these majoritarian counter-measures infringe on minority rights? In the American system, courts have long assumed responsibility for protecting racial and certain other "discrete and insular" minorities, especially when prejudice against them "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[86] When an initiative affects a minority thus protected, it is predictable that after the election the measure's opponents will petition the courts to strike it down. This conflict between the initiative system's tendency to produce measures directed at protected minorities, and the courts' commitment to strictly scrutinize such measures, naturally generates litigation.

3. Criminal Justice Initiatives

Those accused and convicted of crimes, especially violent crimes, are a highly unpopular minority group. In recent decades, large segments of the public have viewed legislatures and courts as being too soft on criminals. Thus, conditions have been ripe for initiatives that restrict the rights of the accused and increase the penalties for those convicted. When "tough-on-crime" measures appear on the ballot, they almost always win, and often by large margins.[87]

Washington voters have approved fewer of these measures than have voters in some other high-use initiative states, but two examples

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Preferential Treatment Based on Race, Sex, Color, Ethnicity or National Origin in Public Employment, Education, and Contracting (1998)).

84. 458 U.S. 457 (1982).

85. *See Californians for Economic Equity*, 122 F.3d at 692.

86. U.S. v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

87. In the history of the California initiative, for example, six "tough-on-crime" initiatives have appeared on the ballot, and voters have approved all of them. These include Proposition 17 (1972) (authorizing the death penalty); Proposition 7 (1978) (again authorizing the death penalty); Proposition 8 (1982) (enacting stricter rules for criminal sentencing); Proposition 115 (1990) (increasing criminal penalties and restricting defendants' rights); Proposition 184 (1994) (imposing "three strikes" criminal sentencing for repeat offenders); and Proposition 21 (2000) (establishing stricter criminal procedures and penalties for certain juvenile offenders). California Secretary of State Bill Jones, *A History of the California Initiative Process*, Dec. 1996, at 16-71 (updated through the 2000 election), *available in* <http://www.ss.ca.gov/elections/elections_j.htm>. *See also* Miller, *supra* note 12, at 24.

are I-316,[88] which sought to require a mandatory death penalty for first degree murder, and I-593,[89] which required life sentences for certain repeat offenders. Federal and state constitutions, however, expressly protect the rights of the criminally accused and prohibit the imposition of "cruel and unusual" punishment, and courts have taken seriously their responsibility to protect these rights. The clash between the public's impulse to crack down on crime and the courts' role in ensuring that criminal justice procedures protect the rights of the accused is another way in which the Populist subject matter of initiatives contributes to the high rate of initiative litigation. In fact, both of Washington's voter-approved "tough on crime" initiatives were challenged on federal constitutional grounds.[90] The Washington Supreme Court invalidated the mandatory death penalty initiative,[91] but upheld "three-strikes-and-you're-out."[92]

Overall, in Washington, as in other high-use initiative states, the Populist-oriented *process* of initiative lawmaking, with its limitations on deliberation, refinement, compromise, and consensus-building, and the Populist-oriented *substance* of many initiatives, which pushes constitutional limits in their restrictions on representative government and individual and minority rights, expose initiatives to legal challenge. These two factors go a long way toward explaining why so many initiatives are challenged in court and why so many initiatives are invalidated.

IV. COURTS' ATTITUDE TOWARD INITIATIVES: JURIS-POPULISTS V. INITIATIVE WATCHDOGS

Through the initiative process, Populists have found an effective way to bypass legislatures and enact laws directly. They have not, however, found a way to bypass the courts.[93] By virtue of their power

88. Office of the Secretary of State, State of Washington, *Initiatives to the People: 1914–2000* (last modified Feb. 26, 2001) <http://www.secstate.wa.gov/inits/iphist.htm> (citing I-316, Shall the Death Penalty Be Mandatory in the Case of Aggravated Murder in the First Degree? (1975)).

89. *Id.* (citing I-593, Shall Criminals Who Are Convicted of "Most Serious Offenses" on Three Occasions Be Sentenced to Life in Prison Without Parole? (1993)).

90. *See* State v. Manussier, 129 Wash. 2d 652, 921 P.2d 482 (1996) (challenge to I-593 (1993), the "three strikes law"); State v. Green, 91 Wash. 2d 431, 588 P.2d 1370 (1979) (challenge to I-316 (1975), requiring mandatory death penalty for aggravated murder).

91. *See Green*, 91 Wash. 2d at 446, 558 P.2d at 1379 (finding that the statute qualified by I-316, requiring mandatory death penalty for aggravated murder, violated the Eighth and Fourteenth Amendments).

92. *See Manussier*, 129 Wash. 2d at 672-84, 921 P.2d at 482-88 (finding that I-593, the "three strikes law," did not violate the Fifth, Eighth, or Fourteenth Amendments).

93. State constitutions in two states, Colorado (COLO. CONST. art. VI, § 1 (1914)) and Nevada (NEV. CONST. art. XIX, § 2 (1904)), were amended to prohibit judicial invalidation of

of judicial review, courts are the institutional filter through which all laws potentially must pass.[94] As we have seen, for a number of reasons, initiatives frequently end up being tested in court. When this occurs, the court's attitude toward initiative lawmaking becomes crucial. How do judges view initiatives? Are judges tough on initiatives, or do they give them the benefit of the doubt?

In addressing this question, one must begin by noting that courts have refused to question the constitutional validity of the initiative process itself. Early critics of initiative lawmaking argued that the process is *per se* incompatible with Madisonian principles of republican government and violates Article IV, Section 4 of the United States Constitution, which states, "The United States shall guarantee to every State in this Union a Republican Form of Government."[95] Courts were unwilling to embrace this argument and thereby pull the plug on direct democracy. In 1912, the United States Supreme Court held in *Pacific States Telephone and Telegraph Co. v. Oregon* that the question of whether the initiative process violates the Constitution's guarantee of a republican form of government is a nonjusticiable political question.[96] Two years before that, the Washington Supreme Court also rejected a Guarantee Clause challenge to initiative lawmaking in *Hartig v. City of Seattle*.[97]

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initiatives. However, the Colorado provision is no longer in force and the present Nevada provision (NEV. CONST. art. XIX, § 1, cl. 2) is unlikely to bar judicial review. *See* Eule, *supra* note 11, at 1546 n.184.

94. Since its inception, judicial review has sparked controversy regarding its proper role in the American political system. *See, e.g.*,; ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 15-18 (1990); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 4 (1980); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Most analysis of judicial review focuses on its operation within the context of representative government. Thus, what Bickel calls "the counter-majoritarian difficulty" is generally understood as the nullification by unelected judges of laws enacted by elected representatives. Judicial review of direct democracy, however, is a more acute counter-majoritarian act. When a court strikes down a voter-approved initiative, it is not checking a coordinate branch of representative government; it is checking the people themselves. As one former California Supreme Court Justice noted, "It is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another." JOSEPH GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 105 (1989). Overturning a direct vote of the people thus has its own dynamic, different from judicial review of "ordinary" legislation. *See* Eule, *supra* note 11, at 1504-08; Cain & Miller, *supra* note 35, at 54-57.

95. U.S. CONST. art. IV, § 4, cl. 1.

96. 223 U.S. 118, 150-51 (1912).

97. 53 Wash. 432, 102 P. 408 (1909). *See also* Kadderly v. City of Portland, 74 P. 710, 719-20 (Or. 1903) (upholding the Oregon initiative system against Guarantee Clause challenge in part because the system allowed the legislature to amend voter-approved initiatives). Some

In recent years, some parties seeking to invalidate initiatives (including I-593 of 1993, Washington's "Three Strikes" law) have included Guarantee Clause challenges in their petitions. In *State v. Manussier*,[98] the Washington Supreme Court rejected the Guarantee Clause claim, noting that "*Pacific* still represents good law, and earlier cases decided by this court have been in accord with its holding."[99] Although some other state courts have recently expressed interest in the Guarantee Clause's relationship to initiative lawmaking, none has yet invalidated an initiative for violating the guarantee of republican government.[100] Jeffrey T. Even, a Washington Assistant Attorney General, recently surmised, "At this juncture in constitutional history, it would be astonishing if the courts were suddenly to announce that the Guarantee Clause prohibited or severely restricted the ability of the people to exercise a legislative function they have utilized for nearly a century."[101]

A second issue for courts is whether to apply a different level of scrutiny to individual initiatives than they do to "ordinary legislation."

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commentators, most notably law professor and former Oregon Supreme Court Justice Hans A. Linde, hold a more nuanced view of the relationship between the Guarantee Clause and direct democracy. Linde argues that while initiative lawmaking is not inherently nonrepublican, certain types of initiatives are inconsistent with republican government, and courts, including state courts, can and should invoke the Guarantee Clause to invalidate them. Linde is concerned in part with initiatives that violate republican principles by structurally eliminating the lawmaking authority of elected representatives. *See* David B. Frohnmayer & Hans A. Linde, *Initiating "Laws" as "Constitutional Amendments": An Amicus Brief*, 34 WILLAMETTE L. REV. 749 (1998). Because Washington does not allow initiative constitutional amendments and permits legislative amendment of initiative statutes, it largely avoids this problem. Linde's other principal concern is when initiatives are motivated by "passion" or "interest" (in the sense that Madison used those terms), enacted by a pure majoritarian process rather than through the filters of republican government. *See* Hans A. Linde, *Who Is Responsible for Republican Government?* 65 U. COLO. L. REV. 709, 712 (1994); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 34-35 (1993); Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?* 17 HASTINGS CONST. L.Q. 159, 166-69 (1989). For critiques of this approach, *see, e.g.*, Jesse H. Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. COLO. L. REV. 741 (1994) and Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

98. 129 Wash. 2d 652, 921 P.2d 473 (1996).

99. *Id.* at 671, 921 P.2d 482 (citations omitted).

100. *See, e.g.*, Morrissey v. Colorado, 951 P.2d 911, 916 (Colo. 1998) (invalidating an initiative on other grounds and declining to reach Guarantee Clause issue). While noting that the challenged initiative (which would have placed a "scarlet letter" on the ballot next to the names of candidates who failed to endorse a federal term limits amendment) was "inconsistent with Article IV, Section 4 (the Guarantee Clause)," the court did not reach the question of whether Article IV, Section 4 is justiciable. *Id.*

101. Even, *supra* note 17, at 256. For another practitioner's view, see Hardy Myers, *The Guarantee Clause and Direct Democracy*, 34 WILLAMETTE L. REV. 659, 662 (1998) (noting that "the relationship between the Guarantee Clause and the initiative process . . . may be the greatest undefined relationship between the U.S. Constitution and state lawmaking.").

The United States Supreme Court has held that courts should apply the same standard of review to initiatives as to laws enacted by representative government.[102]

While initiative lawmaking has increased in recent decades, a growing number of judges and legal scholars have questioned this "equal treatment" principle. The debate can be summarized as follows. One view, which I call the "juris-populist" position, maintains that courts should accommodate initiative lawmaking and should give *greater* deference to initiatives than to ordinary legislation. The rationale for this view is that initiatives represent the "pure" will of the people, and popular sovereignty is entitled to great respect. One proponent of this view was United States Supreme Court Justice Hugo Black. Justice Black asserted that the initiative process is "as near to a democracy as you can get" and that a legal challenge to a law should have less force if the law was enacted by the people directly than if it were enacted by the legislature.[103] Black extolled direct democracy in three high-profile cases: *Reitman v. Mulkey*,[104] *Hunter v. Erickson*,[105] and *James v. Valtierra*.[106] More recently, on the Ninth Circuit Court of Appeals, Justice Diarmuid O'Scannlain seemed to give special deference to a state constitutional provision because it was approved directly by voters. In an opinion reversing the district court's invalidation of California's Proposition 209, Justice O'Scannlain wrote, "A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy."[107]

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102. *See* Citizens for Rent Control Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981). In reviewing a local initiative, the Court declared, "It is irrelevant that the voters rather than the legislative body enacted [the challenged law]." *Id.* Generally, a law, whether enacted by representative government or by the people directly, is merely required to satisfy a rationality test; that is, it must be rationally related to a legitimate state interest. The law faces heightened scrutiny only if it creates a suspect classification, usually involving race, or infringes on a fundamental right protected by the Constitution, such as freedom of speech. *See generally* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769 (2d Ed. 1988).

103. *See* Oral Argument, *Reitman v. Mulkey*, 387 U.S. 369 (1967), *in* 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 668 (Phillip B. Kurland & Gerhard Casper eds., 1975); Eule, *supra* note 11, at 1506.

104. 387 U.S. 369 (1967) (invalidating California Proposition 14 (1964), which repealed California's fair housing act and prohibited enactment of similar legislation).

105. 393 U.S. 385 (1969) (invalidating an Akron, Ohio charter amendment requiring voter approval of fair housing legislation).

106. 402 U.S. 137 (1971) (upholding Article XXXIX of the California Constitution, which requires prior voter approval before a public body can develop a federally-financed, low-income housing project).

107. Coalition for Economic Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1992). California's Proposition 209, Prohibition Against Discrimination or Preferential Treatment by State and

Of the current justices on the Washington Supreme Court, Justice Richard Sanders most clearly presents himself as a juris-populist. He submitted sharply-worded dissents in two recent cases invalidating the state's Populist-oriented term limits initiative[108] and I-695.[109] In his dissent in the term limits case, Sanders defended the initiative, claiming,

> Term limits, which ensure our legislators remain citizen legislators, not career state employees, are generally consistent with [the state's] constitutional framework and specifically consistent with our citizens' historically Populist mistrust of the legislature. That this legacy remains in the minds of our citizens perhaps explains the popular adoption of the act before us today.[110]

As noted above, Justice Sanders made it a point to mention in his *Gerberding* dissent that "[t]oday, six votes on this court are the undoing of 1,119,985 votes that Washingtonians cast at the polls in favor of term limits."[111] When a judge cites those kinds of figures, it is likely that he or she is a juris-populist, and Justice Sanders clearly belongs to the category of judges seeking to give deference to Populist-oriented initiative lawmaking.

The competing view, which I call the "initiative watchdog" perspective, maintains that the initiative process is seriously deficient compared to representative government, and that courts should give *less* deference to initiatives than to "ordinary" legislation. The rationale for this view is that judicial review is designed to act as a filter to protect constitutional principles and minority rights against majoritarian attack, and thus, courts need to be more vigilant, not less, when reviewing laws enacted through the initiative's unfiltered majoritarian process. In recent years, several legal commentators, including Derrick Bell[112] and the late Julian Eule,[113] have advanced this view. This approach faces two challenges: determining which kinds of

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Other Public Entities (1996), dismantled the state's affirmative action programs for state contracting, hiring, and university admissions. The "Yes" vote for Proposition 209 was 5,268,462; the No vote was 4,388,733. California Secretary of State Bill Jones, *Statement of Vote: November 5, 1996*, at xiii. *See* California Secretary of State Bill Jones, *2001 Initiative Update* (visited June 1, 2001) <http://www.ss.ca.gov/elections/elections_j.htm>.

108. *See* Gerberding v. Munro, 134 Wash. 2d 188, 211, 949 P.2d 1366, 1378 (1998) (Sanders, J., dissenting).

109. *See* Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 258, 11 P.3d 762, 806 (2000) (Sanders, J., dissenting).

110. *Gerberding*, 134 Wash. 2d at 229, 949 P.2d at 1386.

111. *Id.* at 230, 949 P.2d at 1388.

112. *See* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

113. *See* Eule, *supra* note 11.

initiatives warrant increased scrutiny, and, for those that do, deciding how strict the scrutiny should be.

With respect to the first problem, Eule argued that certain initiatives (e.g., those that impact individual rights and equal application of the laws, as well as those that restructure government or limit taxes or expenditures) should receive heightened judicial scrutiny, whereas other initiatives (e.g., those that improve the processes of representative government, including measures that impose ethical rules on public officials, regulate lobbyists, or restrict campaign contributions) should not.[114] (In my terms, he would have had courts apply heightened scrutiny to Populist-oriented initiatives, and ordinary review to Progressive-oriented ones.)

The second problem facing this approach is how to define a heightened level of scrutiny for initiatives. Eule suggested,

> I do not perceive the concept of a hard judicial look to be a rigid one. Unlike "strict scrutiny"—a standard which on paper at least can be reduced to precise formulation—it is not intended to take on a unitary form. What I have in mind is more a general notion that courts should be willing to examine the realities of substantive plebiscites—that the unspoken assumptions about the legislative process that so often induce judicial restraint deserve less play in a setting where they are more fanciful. Sometimes a hard judicial look will take the form—[as it did in the Seattle busing case]—of a candid "We know what's going on here and we won't allow any of it." In other situations . . . recognition that the burden of plebiscitary action falls on political actors able to defend their interests in the popular arena, combined with the need to conserve limited judicial capital, will appropriately lead to a more modest form of review.[115]

More recently, a commentator boldly suggested that *all* challenged initiatives be subjected to strict scrutiny.[116] If this standard were universally applied, however, the effect on the initiative process

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114. *Id.* at 1559-60. Eule argued that in addition to applying strict scrutiny to measures that create suspect classifications or infringe on fundamental rights, courts should apply heightened scrutiny to any initiative that could have the effect of disadvantaging minorities. Initiatives that alter government structure or reapportion legislative districts, he argued, are often a façade for disenfranchising minorities. *Id.* at 1560 & n.255. Taxation and spending limitations, he argued, principally benefit upper- and upper-middle class white citizens, while burdening underrepresented racial minorities and the poor. *Id.* Because the initiative process does not adequately protect the interests of these groups, he argued, courts should aggressively review initiatives that disadvantage them. *Id.* at 1560.

115. *Id.* at 1572-73 (citations omitted).

116. *See* Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 265 (1999).

would be lethal.[117] But, perhaps that is precisely the unspoken objective. For those who are convinced that initiative lawmaking is dangerous, using judicial review to strangle the process would indeed be a good thing.

Although they do not expressly say so, some judges seem to apply a higher level of scrutiny to initiatives.[118] Two examples are judges Stephen Reinhardt and Betty B. Fletcher of the Ninth Circuit Court of Appeals. In *Jones v. Bates*,[119] judges Reinhardt and Fletcher held that a term limit initiative[120] was unconstitutional essentially because when voting on the initiative, voters were ignorant or confused about whether or not the initiative imposed a lifetime ban.[121] If "voter ignorance" were the controlling standard, however, most initiatives would be suspect.[122] Nevertheless, the two Ninth Circuit initiative watchdogs concluded that part of the *process* of enacting the initiative (i.e., informing voters of the initiative's impact) was so inadequate that the enactment was invalid.[123] In a subsequent en banc ruling, however, the Ninth Circuit rejected this watchdog view and upheld California's term limits amendment.[124]

Judges Reinhardt and Fletcher seem to have staked out an extreme initiative watchdog position. I will argue, however, that they may be trendsetters, because supreme courts in several initiative states—including Washington—seem to be gravitating in their direction.

V. CONSTRAINING POPULIST-ORIENTED INITIATIVE

117. Justice Thurgood Marshall suggested that strict scrutiny is "strict in theory, but fatal in fact." Fullilove v. Klutznik, 448 U.S. 448, 519 (1980) (Marshall, J., concurring), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that because federal racial classifications must serve a compelling governmental interest and be narrowly tailored to further that interest, to the extent that *Fullilove* held federal racial classifications subject to a less rigorous standard, it is no longer controlling). Justice Sandra Day O'Connor disagrees with Justice Marshall, pointing out that all Justices of the Court agreed that the discriminatory conduct of a state department justified a narrowly tailored race-based remedy. *See Adarand*, 515 U.S. at 237 (citing United States v. Paradise, 480 U.S. 149, 167 (1987)).

118. Pak, *supra* note 116, at 251.

119. 127 F.3d 839 (9th Cir. 1997), *rev'd en banc sub nom.*, Bates v. Jones, 131 F.3d 843 (9th Cir. 1997), *cert. denied*, 532 U.S. 1021 (1998).

120. *See Jones*, 127 F.3d at 843 (California Proposition 140 was adopted by voters in 1990.).

121. *Id.* at 863.

122. *See Bates*, 131 F.3d at 853 (O'Scannlain, J., concurring) ("Searching the Constitution . . . I am unable to locate an 'ignorant voter clause' that vests federal courts with the power to review voter-enacted legislation to ensure that enough people were capable of understanding what they voted for at the ballot.").

123. *See Jones*, 127 F.3d at 858-63.

124. *See Bates*, 131 F.3d at 843.

LAWMAKING THROUGH THE SINGLE-SUBJECT RULE

The foregoing discussion demonstrates that in Washington and elsewhere (1) courts are unlikely to prohibit or severely restrict initiative lawmaking as violative of the Guarantee Clause; and (2) judges officially apply the same standards of review to the substance of initiatives as they do to the substance of ordinary legislation; but that (3) judges vary in their attitudes about Populist-oriented initiative lawmaking, and the degree of deference it deserves. In this section, I will continue to focus on that last point, and I will offer evidence for the argument that in several state courts, judicial attitudes toward initiative lawmaking are discernibly shifting toward what I call the "watchdog" position. Specifically, this shift is evidenced by stricter judicial enforcement of state constitutional limitations on initiative lawmaking, especially so-called "single-subject rules." I contend that the recent I-695 case signals that the Washington Supreme Court is moving in the watchdog direction as well.

The Washington Constitution, like constitutions in other initiative states, includes several limitations on initiative lawmaking.[125] One of those limitations is that an initiative must contain only one subject.[126] It is actually more accurate to say that Washington's single-subject rule applies by implication to initiatives. The Washington Supreme Court (like courts in Idaho, Illinois, Montana, Nevada, and Oklahoma) has determined that the state constitution's single-subject restriction on "bills" applies not only to acts of the legislature, but to initiatives as well.[127]

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125. Examples include the single-subject rule and subject-in-title rule of Article II, section 19: "No bill shall embrace more than one subject, and that shall be expressed in the title." WASH. CONST. art. II, § 19. *See also* WASH. CONST. art. II, § 37 (an act revised or amended must set forth at full length and may not be amended or revised by mere reference to its title); Gerberding v. Munro, 134 Wash. 2d 188, 211, & n.11, 949 P.2d 1366, 1377, & n.11 (1998) (initiatives address only legislative matters and not amendments to the constitution).

126. WASH. CONST. art. II, § 19.

127. It has been argued that Washington's single-subject rule should not apply to initiatives, but only to legislative bills. *See, e.g.*, Amalgamated Transit Union Local v. State, 142 Wash. 2d 183, 261, 11 P.3d 762, 808 (Sanders, J., dissenting).

> I would therefore posit a consistent reading of these provisions, giving effect to the plain meaning of each word, may characterize initiatives to the legislature "bills," as all other bills in the legislative process (except with priority); whereas initiatives directly to the people at a general election are not "bills" but "laws," laws which are necessarily outside the scope of Article II section 19, because they are not "bills."

Id. However, the court in *Amalgamated Transit* rejected this view and held that the single-subject rule applies to initiatives. *Id.* at 261, 11 P.3d at 780. *See also* Anne G. Campbell, *In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING: THE GROWING REGULATION OF INITIATIVE AND REFERENDUM 131 (M. Dane Waters ed., 2001).

The generally stated purposes for imposing a single subject requirement for legislation are to prevent "log-rolling" and to prevent confusion.[128] Courts in several states have discovered, however, that single subject rules potentially play another, larger role—that is, if they are strictly enforced, they can be a powerful constraint on initiative lawmaking. Professor Daniel H. Lowenstein notes that single-subject rules allow for a wide range of interpretation because the concept of subject is "infinitely malleable."[129] Lowenstein observes,

> If we examine only the words of the single-subject rule, two extreme interpretations are possible. On the one hand, we might plausibly conclude that no initiative could possibly violate the rule. Consider the most bizarre assortment of unrelated provisions you can imagine. The mere fact that the provisions have been put together in one measure makes them constitute a "single subject," if only for purposes of discussion and study. On the other hand, the language of the single-subject rule also permits an interpretation that would abolish the initiative process altogether. That is, it is impossible to conceive of a measure that could not be broken down into parts, which could in turn be regarded as separate subjects.[130]

This malleability provides courts the opportunity to either accommodate or restrict initiative lawmaking. If courts interpret single-subject rules generously, sponsors can merge together in one initiative a wide array of proposals, thereby magnifying the measure's

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128. The Washington Supreme Court defined "logrolling" as "pushing legislation through by attaching it to other legislation." *Amalgamated Transit*, 142 Wash. 2d at 207, 11 P.3d at 781 (citing Power, Inc. v. Huntley, 39 Wash. 2d. 191, 198, 235 P.2d 173 (1951)). *See also* State v. Waggoner, 80 Wash. 2d 7, 9, 490 P.2d 1308, 1309 (stating that the "prevention of logrolling is one of the purposes of art. 2, s 19, of our constitution").

> The requirement that all legislative proposals include no more than one subject is consistent with basic democratic principles. The requirement is designed to present clear legislative proposals to the legislature or the public and forestall the combining of issues so that ones with minimal public support are not adopted merely because they are attached to popular proposals.

Washington Federation of State Employees v. State, 127 Wash. 2d 544, 552, 910 P.2d 1028, 1032 (citing Fritz v. Gorton, 83 Wash. 2d 275, 335, 517 P.2d 911 (1974) (Rosellini, J., dissenting)). *But see* Daniel H. Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L. REV. 936 (1983) (criticizing these justifications for the single subject rule).

> [N]either of the commonly mentioned purposes of the single-subject rule—avoidance of complexity and prevention of logrolling—is particularly well served by the rule. This conclusion does not necessarily mean the framers of the rule did an inept job of selecting means to accomplish their ends. It may mean that the purposes of the rule have been misconceived.

Id. at 963.

129. Lowenstein, *supra* note 128, at 967.

130. *Id.* at 942.

impact. By contrast, a strict interpretation of the single-subject rule limits an initiative sponsor's freedom of action and the initiative's potential power.

State courts have taken various approaches to enforcing the single-subject rule, with California and Florida staking out opposite ends of the spectrum. California adopted a single-subject rule for initiatives in 1948,[131] but the California Supreme Court applied a liberal standard for enforcing it, requiring only that the various elements of an initiative be "reasonably germane" and rejecting the stricter standard that they be "functionally related."[132] At least until last year, the California Supreme Court consistently upheld initiatives against single-subject challenges.[133]

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131. California's single-subject rule for initiatives is now contained in California Constitution, Article II, section 8(d). The rule was enacted in 1948 as Article IV, section 1(c), and was twice renumbered and rewritten. *See* Lowenstein, *supra* note 128, at 949-53 & n.69.

132. In 1949, the year after California adopted a single-subject rule for initiatives, the California Supreme Court held that the rule would be interpreted identically to the existing single-subject rule for legislative acts. Under this interpretation, the single-subject rule was to be "construed liberally to uphold proper legislation, all parts of which are reasonably germane." Perry v. Jordan, 207 P.2d 47, 50 (Cal. 1949) (quoting Evans v. Superior Court, 8 P.2d 467 (Cal. 1932)). Three decades later, California Supreme Court Justice Wiley Manuel advocated a stricter construction of the rule, arguing it should require that all provisions of an initiative be "functionally related in furtherance of a common underlying purpose." Schmitz v. Younger, 577 P.2d 652, 656 (Cal. 1978) (Manuel, J., dissenting). However, in that case, which occurred before the election, the court refused to rule on the single-subject issue and declined to embrace Justice Wiley's proposed test. *See id.* at 653. Shortly thereafter, in *Fair Political Practices Comm'n v. Superior Court*, 599 P.2d 46, 47-51 (Cal. 1979), the court elaborated on its liberal interpretation of the single-subject rule. In that case, the court upheld Proposition 9 of 1974, a complex political reform initiative, against single-subject attack. The initiative was invalidated in part on other grounds. *See id.* at 55. Noting that it is the duty of the courts to "jealously guard" the people's right of initiative, the court reasoned that

> voters may not be limited to brief general statements but may deal comprehensively and in detail with an area of law.
>
> Although the initiative measure before us is wordy and complex, there is little reason to expect that claimed voter confusion could be eliminated or substantially reduced by dividing the measure into four or ten separate propositions. Our society being complex, the rules governing the initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne.

Id. at 50. In *Brosnahan v. Brown*, 651 P.2d 274 (Cal. 1982), the court (by a 4-3 margin) upheld a multipart criminal justice initiative against single subject attack and rejected the "functional relationship" test. Three judges dissented and Chief Justice Bird charged that the majority had "obliterate[d] one section of the state Constitution by effectively repealing the single subject rule." *Id.* at 306 (Bird, C.J., dissenting).

133. Prior to 2000, the California Supreme Court had never overturned an initiative on single-subject grounds. The court had denied review in two cases in which initiatives had been invalidated by lower courts for single-subject rule violations. *See* Chemical Specialties Mfrs. Ass'n, Inc. v. Deukmejian, 278 Cal. Rptr. 128 (Cal. Ct. App. 1991) (invalidating California Proposition 105 (1988), The Public's Right To Know Act, for violating the single-subject rule); California Trial Lawyers Ass'n v. Eu, 245 Cal. Rptr. 916 (Cal. Ct. App. 1988) (striking down prior to the election a tort reform initiative for violation of the single-subject rule), *abrogated on*

The Florida Constitution contains a similar single-subject requirement for initiatives,[134] but the Florida Supreme Court has enforced it much more strictly. In Florida, initiatives are permitted only for constitutional amendments, not for statutory matters.[135] Partly for that reason, the Florida Supreme Court has held that initiatives require "strict compliance" with the single-subject rule because "our constitution is the basic document that controls our governmental functions,"[136] and thus it should not be easily amended. In searching for a violation of the single-subject rule, the court looks to see whether an initiative affects multiple "functions of government."[137] This standard, according to one member of the court, is "practically insurmountable,"[138] and the court has excluded many initiatives from the ballot for failure to satisfy its demanding single-subject test.[139]

The consequences of different approaches to single-subject rule interpretation are revealed by the fate of proposals in the respective states to end affirmative action in state hiring, contracting, and university admissions. In California, opponents of the proposal (Proposition 209 of 1996) never challenged the measure in state court on single-subject grounds. They likely assumed that it easily satisfied the state supreme court's liberal interpretation of the single-subject rule. In Florida, however, pro-affirmative action forces capitalized on the state supreme court's strict reading of the single-subject rule to kill a Proposition 209 clone. Even after sponsor Ward Connerly divided his anti-affirmative action proposal into four separate initiatives,[140] the

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other grounds, Lewis v. Superior Court, 970 P.2d 872 (Cal. 1999). For a discussion of the California Supreme Court's stricter approach toward enforcement of the single-subject rule, and toward initiative lawmaking, *see* Gerald F. Uelmen, *Taming the Initiative*, CALIFORNIA LAWYER, Aug. 2000, at 46.

134. *See* FLA. CONST. art. XI, § 3 ("The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith.").

135. *See id.*

136. Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984).

137. *Id.* at 990.

138. Justice Leander Shaw criticized the strictness of the "function of government" test in a concurring opinion in *Evans v. Firestone*, 457 So. 2d 1351, 1360 (Shaw, J., concurring) (1984).

139. *See, e.g.*, Advisory Opinion to the Attorney General *re* Right of Citizens to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998); Advisory Opinion to the Attorney General *re* Fish and Wildlife Conservation Comm'n: Unifies Marine Fisheries and Game and Fresh Water Fish Comm'ns, 705 So. 2d 1351 (Fla. 1998); Advisory Opinion to the Attorney General *re* Requirement for Adequate Public Education Funding, 703 So. 2d 446 (Fla. 1997); Advisory Opinion to the Attorney General *re* People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, and Advisory Opinion to the Attorney General *re* Voter Approval Required for New Taxes, and Advisory Opinion to the Attorney General *re* Property Rights, 699 So. 2d 1304 (Fla. 1997).

140. In an attempt to satisfy the Florida Supreme Court's strict reading of the state's