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The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process

> The moment a mere numerical superiority by either states or voters in this country proceeds to ignore the needs and desires of the minority, and for their own selfish purpose or advancement, hamper or oppress that minority, or debar them in any way from equal privileges and equal rights—that moment will mark the failure of our constitutional system.
>
> Franklin D. Roosevelt[1]

At the dawn of the twentieth century, populists and progressives forged a movement to reform American democracy. Fed up with state governments corrupted by decades of control by big business and big money, this movement sought to return sovereignty to the people and make government, and the process of government, more responsive to the needs of average citizens. Populists and progressives helped pass legislation, state and federal, protecting the interests of laborers, farmers, and average citizens against corporate dominance in both the economic and political sectors.[2] This

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[1] Radio broadcast, Mar. 2, 1930, *in* THE COLUMBIA DICTIONARY OF QUOTATIONS 555 (Robert Andrews ed., 1993).

[2] *See, e.g.*, U.S. CONST. amends. XVI, XVII (limiting Congress's ability to levy taxes and providing for the popular election of U.S. Senators, respectively); Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2008)) (strengthening the Sherman Antitrust Act and exempting unions from antitrust legislation); CAL. CONST. art. 4, § 1 (1966) (establishing powers of initiative and

movement also sought to bring government closer to the people, urging voters to amend their state constitutions so that they could govern directly through initiative or referendum. In 1898, South Dakota became the first state to add direct democracy to its constitution; Utah followed in 1900. Oregon was the third state to adopt direct legislation but it was the first state to engage in direct lawmaking. Oregon quickly became the prototype for the direct democracy movement: the "Oregon System" was adopted around the country. Today, twenty-seven states and the District of Columbia include some form of direct democracy in their state constitutions.[3]

Direct democracy was, and remains, highly controversial. Criticisms of direct democracy are both normative and practical. Most derive from the distinction between direct legislation and the system of representation embodied in the U.S. Constitution and state constitutions. Direct legislation eliminates the deliberative process of legislative and executive review, circumventing the checks and balances that define representative democracy. As a result, direct democracy has been severely criticized for violating the Republican Form of Government Clause of the U.S. Constitution, eliminating political accountability, and failing to safeguard the rights of minorities.[4] The initiative process in states like Oregon comes under

referendum in California); CAL. PENAL CODE § 393 1/2 (West 1914) (prohibiting employers from requiring more than an eight-hour work day); OR. CONST. art. I, § 18 (1908) (recall on public officials); 1908 Or. Laws c. 3 (limiting campaign expenditures); 1910 Or. Laws c. 5 (providing mechanisms for direct primary nomination).

[3] Initiative and Referendum Institute, State-by-State List of Initiative and Referendum Provisions, http://www.iandrinstitute.org/statewide_i%26r.htm (last visited June 2, 2009). Direct democracy comprises a variety of different methods for vesting lawmaking directly with citizens, including popular initiative, referendum, and recall. Numerous variations on these methods exist at both the state and local level. For purposes of this Article, direct democracy and direct legislation refer to those forms of lawmaking that bypass legislative and executive decision making and rest ultimate authority with the voters.

[4] *See, e.g.*, Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 295 (2007); K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1208 (1995); Edward J. Erler & Brian P. Janiskee, *California's Three Strikes Law: Symbol and Substance*, 41 DUQ. L. REV. 173, 176 (2002); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1539 (1990); Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1292 (1995); Justin Henderson, *The Tyranny of the Minority: Is it Time to Jettison Ballot Initiatives in Arizona?*, 39 ARIZ. ST. L.J. 963, 964 (2007); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 20 (1995); Catherine A. Rogers & David L. Faigman, "*And to the Republic for Which it Stands": Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1061 (1996).

particular fire because it allows amendment of the state constitution by a simple majority vote.[5]

The Framers of the U.S. Constitution, in designing a representative system of government, weighed the virtues of a republic against those of a plebiscite and rejected direct democracy. James Madison wrote extensively on the dangers of direct democracy, warning of the dual threats of a tyranny of the majority and the capture of government by a minority faction.[6] One hundred years later, when populists and progressives campaigned to bring direct democracy to state government, opponents sounded similar alarms, arguing that direct legislation would lead to mob rule. More recently, critics charge that a system designed to decrease the leverage of big business and big money over government has become a powerful tool for well-financed special interests.[7]

Even if one assumes that majoritarian democracy is the ideal, direct legislation typically is a highly flawed means of reflecting majority

[5] OR. CONST. art. XVII; *see also* FLA. CONST. art. V, § 11 (amended 2006) (requiring that any proposed amendment or revision to the state constitution, whether proposed by the legislature, by initiative, or by any other method, must be approved by at least sixty percent of the voters rather than by a simple majority); Steve C. Briggs, *Colorado Bar Association President's Message to Members—The Shadow Side of the Right to Vote: The Ballot Initiative*, 33 COLO. LAW. 47 (Nov. 2004); Catherine Engberg, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569 (2001); Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037 (2001); Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691 (1996); Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535 (1995).

[6] THE FEDERALIST NO. 10, at 61–62 (James Madison) (Westvaco Corp., 1995) ("[A] pure [d]emocracy, 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 for the mischiefs [sic] of faction. . . . [S]uch [d]emocracies 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."); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 24 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 500, 505–06 (Paul H. Smith ed., Library of Congress 1996) ("Those who contend for a simple Democracy . . . assume or suppose a case which is altogether fictitious. They found their reasoning on the idea, that the people composing the Society, enjoy not only an equality of political rights; but that they have all precisely the same interests . . . . [N]o Society ever did or can consist of so homogenous a mass of Citizens."); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 253, 254 (Saul K. Padover ed., 1953) (stating that danger of oppression lies in acts where "Government is the mere instrument of the major number of the Constituents").

[7] *See, e.g.*, Eule, *supra* note 4, at 1557–58; Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1203–10 (2005).

will. Poorly worded initiatives can leave voters confused about the consequences of their vote. Citizens may ignore bloated voter pamphlets and cast their vote with little or no substantive understanding of the issues. Without the deliberative process, unintended policy consequences occur. For example, Oregon commercial fishing was halted when Oregon voters in 1908 simultaneously passed two competing initiatives banning or limiting fishing methods in the Columbia River.[8] Unintended budgetary impacts pose some of the most significant consequences of circumventing the deliberation process. Implementation of initiatives may require substantial state expenditures, often to the detriment of other policies and programs.

One can readily conclude that lawmaking by initiative, the manifestation of unchecked majority will, carries a high risk of producing bad laws. The "bad law" risk posed by the initiative is not simply that of generic poor policy. The absence of the deliberative process can leave the voters with profoundly inaccurate information. False information may be an unintended byproduct of the public campaign, or it may be deliberately disseminated for political advantage. Deliberate dissemination of false information can be a particularly potent and harmful strategy to agitate the majority against minority groups. Immune from legislative or executive review, initiative campaigns may rely on appeals to voter prejudice. The only checks on bias-driven initiatives are a well-financed opposition and judicial review.

Direct democracy in Oregon has produced an abundant number of controversial proposals. Since 1902, Oregonians have debated more than 340 initiative measures, including proposals concerning recall of public officials, popular election of U.S. Senators, women's suffrage, tax relief, supermajority voting requirements, the death penalty, mandatory minimum sentences, gay rights, and death with dignity.[9] In 1922, Oregon voters approved one of the most controversial initiatives in Oregon history, the compulsory public education measure, dubbed the "School Bill" by the press.[10] The compulsory

[8] SECRETARY OF STATE, OREGON BLUE BOOK, INITIATIVE, REFERENDUM, AND RECALL: 1908–1910 (2008), *available at* http://bluebook.state.or.us/state/elections/elections11.htm.

[9] *See, e.g.*, *infra* note 100–01.

[10] *See, e.g.*, *School Bill Makes Trouble for Democrats*, OREGONIAN, Nov. 1, 1922, at 1; *School Bill Again Rapped*, OR. STATESMAN, Nov. 1, 1922, at 2; *Debate on School Bill*, OR. VOTER, Oct. 7, 1922, at 14.

public education law, the first enacted in the country, required children between the ages of eight and sixteen to attend public school, effectively destroying private, particularly Catholic, education in the state. The challenge to Oregon's compulsory public education law yielded a landmark U.S. Supreme Court decision, *Pierce v. Society of Sisters*.[11] In *Pierce*, the Court struck down the Oregon law, finding that it violated the constitutional rights of parents to control the upbringing and education of their children.

The fight over compulsory public education revealed more than a landmark constitutional dispute. The story of the School Bill campaign offers insights into systemic problems with the initiative process. The campaign was widely condemned throughout the country for exploiting voter ignorance and prejudice.[12] The initiative inflamed passions on both sides, with political observers describing the measure as the most controversial in the state since the question of slavery. The proponents, led by the Ku Klux Klan and the Scottish Rite Masons, waged a campaign that exploited voters' antipathies toward Catholics, radicals, and immigrants.[13] Proponents also misled the public as to the effect of the law. The success of these tactics serves, even today, as a confirmation that direct legislation offers a powerful vehicle for enacting prejudice against unpopular minorities.

During this commemoration of the 150th anniversary of Oregon statehood, it is fitting to tell a story of how the constitution has affected the lives of Oregonians. Through the initiative and referendum process, average citizens wield substantial, and direct, authority over state governance. As we assess the state constitutional landscape, it is fair to conclude that direct legislation has dramatically influenced Oregon law and history. The last thirty years have seen a notable increase in the use of initiatives to resolve controversial social issues. As we pause to reflect on Oregon's rich constitutional history,

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[11] 268 U.S. 510 (1925).

[12] *See, e.g.*, *Eyes of Nation Watching Forces of Intolerance in Struggle to Seize Oregon*, PORTLAND TELEGRAM, Oct. 26, 1922; RECORDER (San Francisco) (date unknown) ("Such laws as the recently adopted Oregon School Law are a reflection upon the intelligence of the people who adopted them, and . . . should be cast into the discard with other evidence of bigotry and intolerance), *as cited in* NAT'L CATHOLIC WELFARE COUNCIL, PUBLIC OPINION AND THE OREGON SCHOOL LAW 8–9 (1923); NORFOLK VIRGINIAN-PILOT, Nov. 18, 1922 ("When we seek for the motives of the Oregon law we encounter the familiar bogey of little minds . . . . A plague on all this intolerance masquerading as Americanism."), *as cited in* PUBLIC OPINION AND THE OREGON SCHOOL LAW, *supra*, at 9.

[13] *See* discussion *infra* Part III.B.

it is wise to consider whether it is time to take a fresh look at judicial review of direct legislation.

This Article presents a case study of the initiative process by examining the campaigns waged for and against the School Bill. It is not intended to provide a thorough study of deception and discrimination in the initiative process. Instead, this Article offers case-specific insight into how voters can be manipulated by misinformation and prejudice. Part I examines the tension between representative democracy and the initiative process, particularly how the initiative undermines the deliberative process. Part II explores the history of the Oregon initiative prior to the School Bill. Part III describes how the Oregon initiative campaign for compulsory public education used misinformation to confuse voters and encourage bigotry. Part IV analyzes how voter ignorance, fear, and prejudice toward minority groups may taint the initiative process. Part V explores legal solutions and recommends that the courts reject the presumption of constitutionality attached to facially neutral legislation or legislation targeting nonsuspect classes and closely scrutinize direct legislation that harms historically disadvantaged groups.

I
THE MAJORITARIAN DILEMMA

Ben Franklin, when questioned at the close of the Constitutional Convention as to the type of government created, was famously reputed to respond, "A republic, if you can keep it."[14] The Framers embodied a republic in the structure of the U.S. Constitution by limiting the unchecked power of majorities. Separation of federal powers, division of power between federal and state governments, the electoral college, and embedded checks and balances are the most obvious examples that the Framers established a representative form of government to prevent tyranny by diffusing power. It is no accident that the people exercise no direct lawmaking authority under the U.S. Constitution; the tyranny that concerned the Framers was as much that of majority or "mob" rule as it was of a monarch.[15]

[14] As delegates emerged from the Constitutional Convention, the following exchange purportedly took place: "Above the din, a Mrs. Powel, wife of the mayor of Philadelphia, shouted out, 'Well Dr. Franklin, what have we got, a monarchy or a republic?' Franklin looked at her over his spectacles and responded, 'A Republic, madam, IF you can keep it.' EARL WARREN, A REPUBLIC IF YOU CAN KEEP IT 11 (1972).

[15] Alexander Hamilton, Convention of New York: Speech on the Compromises of the Constitution (1788), *in* 2 THE WORKS OF ALEXANDER HAMILTON 426, 440 (John C.

Sovereignty may lie with the people, but only as a source of power, not as lawmaker. Article I, Section 3 of the U.S. Constitution, providing for election of senators by state legislatures, and Article V, assigning the amendment process to Congress and state legislatures or conventions, are powerful indicators of the Framers' commitment to limiting direct government.[16]

Not surprisingly, *The Federalist Papers* laud the virtues of representative democracy.[17] Madison argued that a republic offers the best way to control the "dangerous vice" of faction.[18] The harm of faction derives from unchecked popular will:

> By a faction I understand a number of citizens, whether amounting to a majority or a 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.[19]

Hamilton ed., 1850) ("The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. [] Their very character was tyranny; their figure deformity. When they assembled, the field of debate presented an ungovernable mob . . . . [I]t became a matter of contingency, whether the people subjected themselves to be led blindly by one tyrant, or by another.").

[16] The Seventeenth Amendment, ratified in 1913, replaced the process in Article I, Section 3 with the election of senators directly by the people.

[17] *See, e.g.*, THE FEDERALIST NO. 10, at 62, 64, 65 (James Madison) (Westvaco Corp., 1995) ("A [r]epublic, by which I mean a [g]overnment in which the scheme of representation takes place . . . promises the cure for which we are seeking. . . . [T]he greater number of citizens and extent of territory which may be brought within the compass of [r]epublican, than of [d]emocratic [g]overnment . . . renders factious combinations less to be dreaded in the former, than in the latter. . . . [T]he same advantage, which a [r]epublic has over a [d]emocracy, in controlling the effects of faction, . . . is enjoyed by the Union over the States composing it. Does this advantage consist in the substitution of [r]epresentatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice? It will not be denied, that the Representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the [i]ncreased variety of parties, comprised within the Union, [i]ncrease this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage."); THE FEDERALIST NO. 63, at 194 (James Madison) (Westvaco Corp., 1995) (asserting that the republican form of government contemplated by the Guaranty Clause was predicated upon "*the total exclusion of the people in their collective capacity*") (emphasis in original); *see also* John Adams, Thoughts on Government, *in* 4 PAPERS OF JOHN ADAMS 86–93 (Robert J. Taylor ed.) (Harvard Univ. Press 1977) ("[T]here is no good government but what is Republican.").

[18] THE FEDERALIST NO. 10, at 55 (James Madison) (Westvaco Corp., 1995).

[19] *Id.* at 57.

Madison made clear the value of a republic over pure democracy:

> [A] pure [d]emocracy, *by which I mean, a [s]ociety, consisting of a small number of citizens, who assemble and administer the [g]overnment in person*, can admit of no cure for the mischiefs [sic] of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of [g]overnment itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. . . .
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> A [r]epublic, *by which I mean a [g]overnment in which the scheme of representation takes place*, opens a different prospect, and promises the cure for which we are seeking.[20]

Federalist 51 emphasizes the significance of republicanism to protecting minority political groups:

> It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.[21]

Other writings by Federalists strike similar themes. Alexander Hamilton disdained the purported virtues of pure democracy:

> It has been observed, that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved, that no position in politics is more false than this. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. [] Their very character was tyranny; their figure deformity. When they assembled, the field of debate presented an ungovernable mob . . . .[22]

Charles Pinckney expressed similar misgivings about unfettered democracy:

> It is the anarchy, if I may use the term, or rather worse than anarchy, of a pure democracy which I fear—where the laws lose their respect, and the magistrates their authority; where no permanent security is given to the property and privileges of the citizens; and no measures pursued, but such as suit the temporary interest and convenience of the prevailing parties, I cannot figure to myself a government more truly degrading; and yet such has been

[20] *Id.* at 61–62 (emphases added).

[21] THE FEDERALIST NO. 51, at 169–70 (James Madison) (Westvaco Corp., 1995).

[22] Hamilton, *supra* note 15, at 440.

> the fate of all the ancient, and will, without great care, be probably the fate of all the modern republics.[23]

Edward Rutledge wrote to John Jay about the need to mediate populist government through separation of powers:

> A pure Democracy may possibly do when patriotism is the ruling Passion, but when a State abounds in Rascals (as is the case with too many at this day) you must suppress a little of that Popular Spirit, vest the executive powers of Government in an individual that they may have Vigor, & let them be as ample . . . .[24]

And John Adams concluded that the "simplicity of . . . a pure democracy will always have its charm with minds not kept awake to its susceptibility of abuse."[25]

Even the anti-Federalists, far more supportive of pure democracy, recognized the substantial difficulties faced by a federal government designed as a national plebiscite. Some, like George Mason, argued the virtues of pure democracy outweighed the risks: "I am for preserving inviolably the democratic branch of the government. True, we have found inconveniences from pure democracies; but if we mean to preserve peace and real freedom, they must necessarily become a component part of a national government."[26] The "Brutus" essays admit that pure democracy functions only in political communities small enough to make citizen participation practical and meaningful:

> In a pure democracy the people are the sovereign, and their will is declared by themselves; for this purpose they must all come together to deliberate, and decide. This kind of government cannot be exercised, therefore, over a country of any considerable extent; it must be confined to a single city, or at least limited to such bounds as that the people can conveniently assemble, be able to debate, understand the subject submitted to them, and declare their opinion concerning it.[27]

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[23] Charles Pinckney, Speech to the New Jersey Assembly (Mar. 13, 1786), *in* 23 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 187, 192 (Paul H. Smith ed. 1976).

[24] Letter from Edward Rutledge to John Jay (Nov. 24, 1776), *in* 5 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 538 (Paul H. Smith ed. 1979).

[25] John Adams, Illness in Europe—Commercial Treaties—Mission to the Court of Great Britain, *in* 1 THE WORKS OF JOHN ADAMS 400, 428 (1856).

[26] George Mason, The Notes of the Secret Debates of the Federal Convention of 1787, *in* 1 ELLIOT'S DEBATES 383, 433 (Jonathan Elliot ed., 2d ed. 1937).

[27] "BRUTUS" NO. 1 (Oct. 18, 1787), The Anti-Federalist Papers, *available at* http://www.constitution.org/afp/brutus01.htm.

Of course, the design of the federal government leaves unresolved the legitimacy or value of pure democracy at the state level. The Framers rejected a government based on national plebiscite. They did not contemplate the variations on pure democracy presented by the initiative and referendum. The Constitution does, however, address the importance of representative government at the state level. Article IV, Section 4 mandates that "the United States shall guarantee to every State in this Union a Republican Form of Government." The debates at the Constitutional Convention on the Guarantee Clause reflect a concern that individual states might institute a monarchy or aristocracy.[28] But many of the Framers were equally concerned about the tyranny of the majority.[29] The Constitution requires states, as well as the federal government, to establish a republic because the Framers concluded that a representative democracy was superior to any other form of government, be it monarchy or pure democracy. The Guarantee Clause does not, however, define "a republican form of government." Thus, the clause offers little guidance for determining whether direct legislation satisfies the republicanism requirement; a number of commentators have argued it does not.[30]

[28] *See, e.g.*, 3 ELLIOT'S DEBATES 280 (Jonathan Elliot ed., 2d ed. 1937) (statement of William Grayson) ("What, sir, is the present Constitution? A republican government founded on the principles of monarchy . . . There is an executive fetter in some parts, and as unlimited in others as a Roman dictator. A democratic branch marked with the strong features of aristocracy, and an aristocratic branch with all the impurities and imperfections of the British House of Commons . . ."); *see also id.* at 417 (statement of Francis Corbin) ("Animadverting on Mr. Henry's observations, that the French had been the instruments of their own slavery, that the Germans had enslaved the Germans, and the Spaniards the Spaniards, &c., he asked if those nations knew any thing [sic] of representation."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Max Farrand ed., 1937) (statement of Edmund Randolph) ("[A] republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy.").

[29] *See, e.g.*, Hamilton, *supra* note 15; *see also* THE FEDERALIST NO. 51, at 169 (James Madison) (Westvaco Corp., 1995) ("It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part."); THE FEDERALIST NO. 39, at 124–25 (James Madison) (Westvaco Corp., 1995) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans . . . .").

[30] *See* Chemerinsky, *supra* note 4, at 301–04; *see also* Steven William Marlowe, *Direct Democracy Is Not Republican Government*, 24 SEATTLE U. L. REV. 1035, 1046–48 (2001); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The*

The Supreme Court has held the Guarantee Clause to be nonjusticiable.[31]

The robust republicanism of the original text of the U.S. Constitution has, however, been tempered by numerous amendments that enhance voter power and expand access to the franchise. The amendments providing for direct election of senators, elimination of the poll tax, and prohibitions on discrimination based on race, gender, and age can be seen as a process of "democratizing" the Constitution.[32] Direct legislation, in the form of the initiative and referendum reflects a similar decision to infuse state representative government with a strong dose of pure democracy. The U.S. Constitution offers no clear answer on whether direct legislation's alteration of representative government fatally undermines republicanism.

If the U.S. Constitution leaves unresolved the validity of direct legislation, it does offer some compelling arguments for concern. The initiative, designed to bypass the carefully wrought deliberative process of legislative and executive review, removes powerful systemic checks on prejudice in lawmaking. To begin with, the initiative process circumvents the legislative drafting process. It replaces professional analysis of legal conflicts and unintended consequences with partisan citizen drafters who may decide that confusion, rather than clarity, better serves their interests. More significantly, lawmaking by initiative eliminates the benefits of deliberation gained through legislative debate and compromise. Direct legislation also removes the check of executive review through signature or veto. Finally, unlike elected officials, voters have no duty to support the U.S. and state constitutions and remain unaccountable for acting on prejudice rather than reasoned judgment. These departures from representative government are substantial and

Campaign Against Homosexuality, 72 OR. L. REV. 19, 19–24 (1993); Engberg, *supra* note 5, at 575–76; Rogers & Faigman, *supra* note 4, at 1058–59.

31 *See, e.g.*, Pac. Sts. Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 147–51 (1912); *see also* discussion *infra* Part II.B. *But see* Chemerinsky, *supra* note 4; Gavin M. Rose, Note, *Taking the Initiative: Political Parties, Primary Elections, and the Constitutional Guarantee of Republican Governance*, 81 IND. L.J. 753, 780 (2006); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 396–97 (2003); Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143 (2002); William T. Mayton, *Direct Democracy, Federalism and the Guarantee Clause*, 2 GREEN BAG 2D 269, 271 (1999). Most of the commentators who claim that direct democracy violates the Guarantee Clause also argue that the Court should find the clause justiciable.

32 U.S. CONST. amends. XVI, XVII, XIX.

significant. In particular, the omission of the checks and balances embodied in the deliberative process seriously undermines the protection of minority group interests, a value at the core of our constitutional system.

In Oregon, the success of the 1922 initiative requiring all children to attend public schools offers a compelling example of how the initiative may be used as a tool of prejudice against minority political groups. The Oregon campaign in favor of compulsory public education revealed the dark side of the initiative process. Populists and progressives believed direct democracy would expand the rights and interests of citizens by returning lawmaking to the people. With the School Bill, the people of Oregon faced the decision whether to use the initiative to reduce, rather than expand, the rights of her citizens. The choice they made was driven by fear and bigotry.[33] It would not have been made without the initiative.

II
THE STORY OF THE OREGON SYSTEM

The populist and progressive drive to give average citizens greater control over lawmaking garnered enthusiastic support in many states, but perhaps nowhere more so than in Oregon, which enacted a direct democracy system that became a model for other states. The direct democracy movement generated a great deal of controversy within the state, but when Oregonians finally approved direct legislation they wielded the initiative and referendum with zeal. Since 1902, the initiative process has been a powerful tool for transforming Oregon social policy.

A. Populists and Progressive Roots

The Oregon direct democracy movement began in the late nineteenth century, when a poor economy and unsafe working conditions in mines and timber attracted many Oregonians to populism. They flocked to the People's Party and placed populist politicians in the statehouse. In 1887, Oregon became the first state to recognize the first Monday in September as Labor Day.[34] Populists achieved only limited legislative success however; the legislature also

33 *See* discussion *infra* Part III.B.

34 PHILIP SHELDON FONER, MAY DAY: A SHORT HISTORY OF THE INTERNATIONAL WORKERS' HOLIDAY, 1886–1986, at 4 (1986).

housed incompetence and corruption, the "briefless lawyers, farmless farmers, business failures, bar-room loafers, Fourth-of-July orators, [and] political thugs"[35] who served as the "representatives of the monied and monopolistic classes."[36] It was the corporate officers, bankers, and railroad magnates—the "First Families of Portland"—who controlled the legislature.

Rampant corruption in the management of federal land grants and the political power of corporate special interests pushed Oregonians to a radical response. During the 1890s, an alliance of labor and farm interests joined to form the Joint Committee on Direct Legislation, a populist organization committed to bringing direct democracy to Oregon.[37] Their literature promised that direct democracy, through the referendum and initiative process, would "make it impossible for corporations and boodlers to obtain unjust measures by which to profit at the expense of the people."[38] The Joint Committee, and its successor, the Direct Legislation League, joined with the populist People's Party in an aggressive campaign to lobby support for a constitutional amendment establishing an initiative and referendum system. The secretary of each of these groups, William S. U'Ren, a populist, attorney, and political activist, became the primary architect of direct democracy in Oregon, and a prominent figure in the national direct legislation movement where he became known as the "father" of the Oregon System.[39]

U'Ren and the Populists faced an uphill battle in a Republican dominated state. Editorials in the *Oregonian* called the proposal "one of the craziest of all the crazy fads of populism,"[40] a "vagary which nobody cares about."[41] Undeterred, U'Ren sought a larger political forum to build support for the initiative and referendum amendment. Elected to the Oregon House of Representatives in 1897 as a Populist,

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35 David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 TEMP. L. REV. 947, 949 (1994) (quoting ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON (1912)).

36 ROBERT D. JOHNSTON, THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON 122 (2003).

37 *Id.*

38 *Id.*

39 Oregon Historical Society, U'Ren Defends Communist Labor Party Members, http://www.ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=D345218C-AF45-DB28-82EA18F907B554D8 (last visited June 2, 2009).

40 Editorial, *Main Aspect of Our Contest*, OREGONIAN, May 9, 1894, at 4.

41 Editorial, *The Populist Platform*, OREGONIAN, Mar. 17, 1894, at 4.

U'Ren orchestrated the infamous "Hold-up Session" of the 1897 legislature, exploiting infighting between factions of Republicans to prevent formation of a quorum in the House.[42] After two months, the legislature went home without convening, but U'Ren came away with promises of support for the direct legislation amendment from a number of powerful Republicans. U'Ren called in those Republican pledges to gain legislative approval of the proposal during the 1899 and 1901 legislative sessions. By the time the amendment went to the voters in 1902, direct legislation enjoyed the support of all the political parties in Oregon, except the Prohibitionists. The amendment passed in a landslide, 62,024 to 5668, amending the state constitution for the first time since 1859.[43]

Direct democracy, dismissed only a few years earlier as a "socialistic innovation,"[44] became the rallying cry of a citizenry fed up with public and corporate corruption. Prominent Oregon politician George Williams accurately captured the public's mood when he concluded that "in these days, when corporations and combinations of corporations have become so powerful, it seems to us that this amendment is necessary to protect the people from the aggressions of the money power of the country."[45] The "Oregon System," as the reforms became known around the country, provided the majority with a potent antidote to the special interests controlling the statehouse.

B. Opposition

The vision of egalitarian, participatory democracy promised by direct legislation did not appeal to all Oregonians. Business interests and conservatives feared an empowered, radical majority, enamored of populist platforms and fomenting political chaos. Philosophical opposition came from those who considered direct democracy at odds with the representative form of government established in the U.S.

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[42] Robert C. Woodward, *William S. U'Ren: A Progressive Era Personality*, *in* EXPERIENCES IN A PROMISED LAND 195, 197 (G. Thomas Edwards & Carlos A. Schwantes eds., 1986).

[43] Oregon State Archives, Oregon Constitutional Amendments: 1902–1910, http:/arcweb.sos.state.or.us/exhibits/1857/learn/am/amend1.htm (last visited June 2, 2009). OR. CONST. art. IV, § 1 establishes the initiative and referendum. Article IV, section 1(1) provides: "The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly . . . ."

[44] Editorial, *supra* note 40.

[45] JOHNSTON, *supra* note 36, at 123.

Constitution. Some populists and progressives viewed direct democracy as simply another means for the wealthy and powerful to deceive the average citizen into passing laws against their interests:

> How would you like to live in a state where the people can and do amend their constitution in the most radical fashion by a minority vote, where one-third of the voters decides the fate of laws affecting the other two-thirds, . . . where special interests hire citizens to circulate petitions asking for the recall of judges who have found them guilty; where men representing themselves as for the people, buy signatures with drinks, forge dead men's names, practice blackmail by buying and selling, for so much per name, signatures for petitions needed to refer certain measures to the people; a state where the demagogue thrives and the energetic crank with money through the Initiative and the Referendum, can legislate to his heart's content . . . ?[46]

One prominent Oregonian, Ralph Duniway, son of suffragist Abigail Scott Duniway, went further, stating: "[I]f the initiative and referendum is in force, I predict that men will be shot in the streets of Portland, that a state of anarchy will exist in Oregon, and that it will be necessary to call out the Federal troops."[47]

The Oregon System survived legal challenges at both the state and federal level. In *Kadderly v. City of Portland*, the Oregon Supreme Court rejected a claim that the amendment violated Article IV, Section 4 of the U.S. Constitution, which guarantees to each state "[a] republican form of government."[48] The court found that in the direct democracy system "[t]he representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place."[49]

When the Article IV Guarantee Clause challenge to the Oregon initiative came before the U.S. Supreme Court, the Court dismissed the case for lack of jurisdiction. In *Pacific States Telephone & Telegraph Co. v. Oregon*, the Court held that the constitutional authority to determine whether a state has a republican form of government resides with Congress, not the courts. Thus, the Court

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[46] ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON v–vi (1912).

[47] Editorial, *Predicts Dire Disaster: Ralph R. Duniway Scores Initiative and Referendum*, OREGONIAN, Dec. 12, 1904, at 8.

[48] Kadderly v. City of Portland, 44 Or. 118, 74 P. 710 (1903).

[49] 44 Or. at 145, 74 P. at 719–20.

reasoned that the constitutional challenge to direct legislation presented a political question outside the jurisdiction of the Court.[50] *Pacific States* sounded the death knell for challenges to direct legislation through the Guarantee Clause.

C. Direct Democracy During the Progressive Era

The strength of public support for the Oregon System, and the vigor with which U'Ren and his People's Power League employed the initiative and referendum, produced a veritable revolution in state government within a few short years. In 1904, Oregonians, by initiative, approved a direct primary law that included, well before the passage of the Seventeenth Amendment, a provision for the direct election of U.S. Senators. In rapid succession the citizens adopted an array of progressive legislation including protective labor laws, recall power on public officials, a corrupt practices act, authorization for a state university, taxes on oil, railroad, utility, and communication companies, and extension of the initiative and referendum process to local government.[51] By 1914, Oregonians added women's suffrage, abolition of the poll tax and the death penalty, proportional representation, and the requirement of indictment by grand jury to the list of reforms achieved through the initiative process. Although nearly half of the states eventually adopted some form of the Oregon System, during the first decade of the twentieth century Oregon stood alone in aggressively employing it, putting twenty-three initiatives on the ballot.

The Oregon initiative, as used in the first two decades of the twentieth century, served the progressive era well. Direct legislation increased citizen involvement in the political process and reduced the influence of special interests. Many of the reforms, including women's suffrage, recall power, and workers' compensation, expanded the rights and political participation of less powerful groups.[52] U'Ren also achieved success in assuaging conservative business interests that the system provided "ample insurance against any revolutionary laws."[53] During these early years of direct

[50] Pac. Sts. Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 129 (1912).

[51] EATON, *supra* note 46, at 50–52.

[52] *See, e.g.*, OR. CONST. art. II, § 18 (1906) (recall of public officials); OR. CONST. art. IX, § 1a (1910) (abolishing poll tax); 1912 Or. Laws c.1 (mandating eight-hour maximum work day for contractors and laborers employed by state or municipal government).

[53] JOHNSTON, *supra* note 36, at 124.

legislation, Senator Jonathan Bourne described the Oregon system as "the best system of popular government in the world today" and "the safest and most conservative plan of government ever invented."[54]

But Oregonians' attachment to direct legislation carried a clear risk of abuse. Allen Eaton, scholar and Oregon legislator, wrote in his 1912 book *The Oregon System*: "From what has been said, it already must appear that the people of the state of Oregon enjoy a very wide political power—so wide that they may do anything in politics that they please to do."[55]

The direct democracy experiment drew national attention to Oregon. U.S. Supreme Court Chief Justice and former President, William Taft, reflected popular opinion when, visiting the Northwest, he described Oregon as a useful "laboratory" for dangerous political and social experiments, too remote from the centers of population in the Union to pose a serious hazard to the rest of the country.[56]

Taft's view of Oregon as a venue for political experimentation proved accurate. In 1922, when proponents of the School Bill initiative obtained sufficient signatures to place the measure on the ballot, Oregonians faced a "dangerous" decision on whether to use the power of the initiative to reduce the rights of the Catholic and Lutheran minorities who maintained private schools.

III

THE STORY OF THE SCHOOL BILL INITIATIVE

The School Bill was sponsored by a small group of Scottish Rite Masons. However, the political weight behind the measure came primarily from the Ku Klux Klan. The Klan swept into Oregon in 1921 and, in little more than a year, became the most powerful political force in the state. The School Bill was born from post-World War I nationalist fervor. Immigrants, including Catholics and German Lutherans, were mistrusted and perceived as unpatriotic, as was anyone seen to be sympathetic to Bolshevism or socialism. The arrests of more than 7000 suspected radicals during the Red Scare of 1919-20 were the most dramatic indicator of the nationalism sweeping the country. Mandatory public education was touted as a powerful tool to assimilate immigrants and indoctrinate all children in

54 EATON, *supra* note 46, at v; JOHNSTON, *supra* note 36, at 124.

55 EATON, *supra* note 46, at 6.

56 LAWRENCE J. SAALFELD, FORCES OF PREJUDICE IN OREGON, 1920–1925, at 63 (University of Portland Press 1984) (1950).

American values. The Oregon initiative process allowed a powerful minority faction to put before the voters a proposal born primarily of fear and hatred. It gave the homogenous, Protestant majority the power, and the opportunity, to determine the fate of private education.

The sponsors of the School Bill gambled that the majority could be persuaded to ignore the interests of the minority religious groups who maintained private schools. An editorial in *The Portland Telegram* described the attitudes of many favoring the School Bill: "We, the majority, have decided what is necessary . . . . The public schools please us. Why not make them please the other fellow? Why not march him up to the school of our choice and say to him in effect: 'There, take that, it's good for you.'"[57]

School Bill proponents were not content to rest their campaign on simple appeals to majority politics. The face of their campaign advocated the imperatives of assimilation and nationalism. But they also waged a more nefarious campaign, using misinformation and fear to exploit voters' prejudice toward minority groups.

The contentious School Bill campaign foreshadowed the persistent problems that plague the initiative process and give serious concern about the harm posed by exploiting voter ignorance and prejudice. As with many controversial initiatives that emerged in later years and decades, the campaign was marked by voter confusion about the initiative and blatant appeals to distrust of minorities. In 1922, Catholics, immigrants, and political radicals were the targeted groups. Today, while the identities of the groups may differ, the tactic of demonizing unpopular minorities often mirrors the hate-filled campaign of 1922.[58]

A. Deception in the Ballot

The sponsors of the School Bill called their initiative the "Compulsory Education Bill," a title liable to confuse voters who thought they were voting to assure the continuation of mandatory attendance requirements. Oregon already had compulsory education; compulsory attendance laws were enacted in 1889, requiring children between the ages of nine and fifteen to attend school.

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[57] Editorial, *He that Soweth Sparingly*, PORTLAND TELEGRAM, Oct. 26, 1922.

[58] *See, e.g.*, Hoesly, *supra* note 7, at 1209–13; Linde, *supra* note 30, at 35–40; Eule, *supra* note 4, at 1553–56; William E. Adams, Jr., *Is it Animus or a Difference of Opinion? The Problems Caused By the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449 (1998).

Complaints that the sponsors intended to mislead voters with the ballot title dated from the signature-gathering phase. *The Portland Spectator* reported that sponsors secured signatures by assuring citizens that the purpose of the initiative was "to give every child an education."[59] The pamphlet released by the Catholic Civic Rights Association against the School Bill argued, "[t]his bill secured a place on the official ballot by fraud, misrepresentation, and misunderstanding of many of those who signed the petitions . . . ."[60] Interviews with petition signers suggested that perhaps thousands signed under the belief that the measure was merely a compulsory school attendance proposal.

Proponents exploited the misconception about the purpose of the School Bill throughout the campaign. They urged citizens to vote "yes" for "Compulsory Education."[61] This misnomer gave School Bill advocates the strategic advantage of charging their opponents with harming Oregon's children by being "anti-compulsory education." The opponents tried to alert voters to the real purpose of the initiative, calling it the "so-called Compulsory Education Bill." In addition to reaping the benefits of any confusion generated by the ballot title, School Bill supporters successfully used the ballot title as a campaign slogan. The ballot title made it easy for supporters to distill the campaign to a simple proposition, "Are you for the public schools or against them?"

Despite widespread efforts to prevent voters from being misled by the ballot title, School Bill opponents believed that many voters went to the polls and voted for what they thought was "compulsory education." In a pamphlet printed after the election entitled *Remember Oregon*, Dudley Wooten, Executive Secretary of the Oregon Catholic Civic Rights Association, wrote that: "[a] potent influence in the election, as it was cunningly contrived it should be, was the false and misleading title given to the bill."[62] The effect of this deceptive name misled thousands of voters, and created such

[59] PORTLAND SPECTATOR, Oct. 14, 1922.

[60] DUDLEY G. WOOTEN, 24 REASONS AGAINST LAWS TO ABOLISH PRIVATE SCHOOLS AND TO CREATE STATE MONOPOLY OF SCHOOLS 3 (1923).

[61] Ads ran in newspapers throughout the state asking voters to "honor" public education and support "Free Public Schools." *See, e.g.*, Advertisement, OREGONIAN, Nov. 5, 1922, at 2; Advertisement, EUGENE DAILY GUARD, Nov. 1, 1922, at 6. The ads consistently referred to the School Bill as "The Compulsory Education Bill." *See, e.g.*, Advertisement, OREGONIAN, Nov. 5, 1922, at 2.

[62] DUDLEY G. WOOTEN, REMEMBER OREGON 7 (1923).

confusion in the minds of thousands of others that they refrained from voting at all. Wooten acknowledged the advantage the ballot title may have given its sponsors: "it served to put the opponents of the measure in a false light before the general public, by making it appear that they were warring against compulsory education in the free public schools."[63]

B. Appeals to Prejudice

Appeals to prejudice may be a far more potent campaign tactic than exploiting voter confusion. The proponents of the School Bill recognized that the overwhelmingly Protestant, white voters in Oregon had little experience with diversity. Catholics and immigrants made convenient scapegoats for the substantial problems of postwar America. The risk that the Bolshevik Revolution would be successfully exported to America created a profound national unease, particularly in states where economic turmoil prevailed. In Oregon, the profitable shipbuilding industry collapsed after the war, creating massive unemployment and labor unrest. School Bill proponents played on Oregonians' political fears and economic anxieties by assuring voters that compulsory public education promised an egalitarian process of assimilation that would bring stability to the country and guarantee a new generation of patriotic Americans.[64]

The compulsory public schooling movement tapped into deep suspicions about Catholics. Some proponents, led by the Ku Klux Klan ("Klan") leaders, wanted to be certain that Oregonians perceived Catholics as unpatriotic and beholden to a foreign power in Rome. The Scottish Rite Masons' aggressive support of compulsory public education contained mixed messages, combining appeals to patriotism and anti-elitism with blatant bigotry. The Oregon Masons published a number of ads rife with anti-Catholic messages. One typical ad charged that opponents of the School Bill include "[t]hose who believe the rights of church should take precedence over the rights of the state."[65] The Klan also directly provoked hostility toward Catholics, as in this statement by Exalted Cyclops Fred Gifford: "We

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[63] *Id.*

[64] The voter pamphlet argument in favor of the School Bill urged: "[m]ix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot . . . and finally bring out the finished product—a true American." OREGON SCHOOL CASES, COMPLETE RECORD 732–33 (1925).

[65] OREGONIAN, Nov. 5, 1922.

do feel that as the allegiance of Catholics is to a foreign power, the pope, that their clannish attempts to extend the temporal power of the pope over the offices of this country is opposed to the best interests of America . . . ."[66]

To Klan audiences, Gifford spoke even more bluntly, throwing them the raw meat of bigotry he claimed they craved: "Somehow these mongrel hordes must be Americanized; failing that, deportation is the only remedy [in the] best interests of America."[67] Other Klan leaders aggressively attacked Catholics. The Reverend Reuben H. Sawyer, Klan leader and pastor of Portland's East Side Christian Church, was one notorious example. His garbled message sounded a veritable potpourri of religious bigotry, nativism, and patriotism:

> The Ku Klux Klan swears allegiance to the flag and not to the church. . . .
>
> One of our purposes is to try to get the Bible back into the schools, such as it was in the old days. The little red schoolhouse on the hill is the cornerstone and foundation for our government. Within the next few years we hope to see only native born Americans rule the government instead of foreigners.[68]

While the anti-Catholic strategy preyed on Protestant fears that Catholics answered only to Rome, it also fostered antipathy toward Catholic schools. Proponents urged voters to protect the public schools from the "Roman monopoly" and the "catechized monstrosities [that] would destroy all of our public schools."[69] Masonic supporters of the initiative, proclaiming the "truth" as to the official position of Masonry on the public schools, boasted that all Masons pledge to protect the public schools from the "*assults* [sic] of those who would destroy and create in its stead a system of *parochial schools*, supported by public taxation, dominated and controlled by and under the absolute influence and power of an *autocratic hierarchy*, upon ideas foreign in conception and directly contrary to the theory of . . . American democracy."[70]

Allegations of substandard education and incompetent teaching in private schools surfaced, intermingled with insinuations about the appropriateness of the curriculum, particularly in parochial schools.

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66 OREGON VOTER, Mar. 25, 1922.

67 *Id.*

68 KENNETH T. JACKSON, THE KU KLUX KLAN IN THE CITY, 1915–1930, at 205 (1967).

69 J.E. Hosmer, Advertisement, SILVERTON APPEAL, Oct. 13, 1922, at 2.

70 J.J. Pittenger, Advertisement, ASTORIA BUDGET, Oct. 21, 1922, at 4.

The disseminators of these innuendos never offered evidence to support their claims. On the surface, these criticisms purportedly were directed at the adequacy of citizenship instruction in religious schools. But the criticisms also played on Protestants' lack of familiarity with Catholic schools. Sometimes implied, sometimes explicit, these charges all made the same point: Catholics could not be trusted to teach American patriotism because they were committed to instructing loyalty to Rome over loyalty to country.

The anti-Catholic campaign exploited Protestant Oregonians' ignorance of the Catholic religion by portraying the Catholic Church as a secretive cult, beholden to suspicious and immoral practices. Dr. James R. Johnson, Portland Klan leader, traveled Oregon making inflammatory speeches that accused Catholic priests of misusing the confessional to obtain sexually stimulating disclosures. Johnson and other Klan members paraded a series of disgruntled ex-nuns and priests before audiences eager to hear scandalous tales of sexual and physical abuse within the Catholic cloister. Ex-nun Elizabeth Schoffen, the most infamous mouthpiece for the Oregon Klan, denounced the church before packed auditoriums. Schoffen served for many years as a floor supervisor at St. Vincent's Hospital in Portland, but she left her Order and turned on the church after she was transferred to a less prestigious assignment. Speaking as "Sister Lucretia" and drawing on her purported thirty-one years of experience as a nun, she spread sordid accusations about depraved behavior at St. Vincent's. At one of her more seamy speeches—one restricted to "men only"—a man representing more than fifty physicians attempted to distribute flyers protesting her attacks against St. Vincent's. He was beaten until unconscious and dumped outside of town. The Sisters of St. Vincent responded with a public refutation of Sister Lucretia's charges. They also requested Portland Mayor George Baker launch a public inquiry to prevent further damage to the hospital's reputation, an invitation that Baker refused.[71] In response, a group of fifty-eight non-Catholic physicians paid for a full-page advertisement protesting the vilification of the Sisters through crude and malicious falsehoods.[72]

These attacks on Catholics took on new relevance to many Oregonians upset about the explosive political issue of public school teachers wearing religious garb in school. Approximately twenty

[71] SAALFELD, *supra* note 56, at 24–25.

[72] OREGON VOTER, Oct. 21, 1922.

nuns worked in public schools throughout Oregon, both as teachers and principals. These nuns wore the habits of their religious orders during the school day. The Klan lost no time in circulating campaign ads built around pictures of public school classes posing with their teacher in religious garb. The ads simply instructed voters "Find the Teachers—then THINK!"[73] Other ads identified the nuns teaching in public schools and their respective salaries, and then quoted part of a statement by Theodore Roosevelt, who opposed "any appropriation of public money for sectarian purposes."[74] The juxtaposition of these pictures with the charge that Catholics sought to control the public schools provided powerful propaganda for School Bill proponents. One of the first acts taken by the Klan-dominated 1923 legislature was the enactment of a law banning public teachers from wearing religious garb in the classroom.

The Oregon Klan's pamphlet on the School Bill, *The Old Cedar School*, exemplified Klan strategy toward working class Oregonians. Part populism, part religious bigotry, *The Old Cedar School* managed both to excoriate multiple minority religions for their elitist efforts to destroy public education and to deny any religious animus. Replete with longing for a more homogeneous era, the pamphlet offered a dialogue between an unsophisticated farmer and his troublesome children, who married Catholics, Episcopalians, Methodists, and Seventh-Day Adventists. The children intended to reject the Old Cedar School, a fictitious public school, in favor of private religious schools. In the Forward, King Kleagle Luther Powell wove populist and progressive themes, claiming that the School Bill campaign represents a "battle of the mass of humanity against sects, classes, combinations and rings; against entrenched privilege and secret machinations of the favored few to control the less favored many," and that those who opposed the initiative "wished to work their children and collect their earnings."[75] According to Powell, the Klan supported the School Bill because the group had a duty to protect public schools from the onslaught of private religious education, not because it desired the "destruction or injury of any religious sect."[76]

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[73] Campaign flyer, Lutheran Schools Committee, Compulsory Education Bill in Oregon, 1922–1925, MSS 646, Oregon Historical Society Research Library.

[74] ASTORIA BUDGET, Oct. 2, 1922.

[75] GEORGE ESTES, THE OLD CEDAR SCHOOL 5 (1922).

[76] *Id.* at 6.

The Old Cedar School ridiculed its opponents, mocking a fictional intellectual windbag named the Hon. Ab. Squealright, and Catholic education at the "Academy of St. Gregory's Holy Toe Nail," where children learn "Histomorphology, the Petrine Supremacy, Transubstantion . . . [and] the Beatification of Saint Caviar."[77] Nor did it equivocate on charging minority religions with a conspiracy to destroy the public schools. A full-page cartoon at the end of the pamphlet depicts the Old Cedar School, with its loyal, old teacher in the doorway welcoming children of all backgrounds and religions while the American flag waves atop the bell tower. But holding the children back are the Catholic, Episcopalian, Methodist, and Seventh-Day Adventist mothers. As a Catholic priest approaches the school with a burning torch, an Episcopalian bishop, a Seventh-Day Adventist minister, and a Methodist superintendent swing against the foundation of the school with large mallets. The last image, also a full page, shows the school in flames, toppling from its foundation with the old schoolteacher dead in the doorway, his hand futilely grasping the cord of the burning school bell as the American flag, severed from the school tower, ignites. The Catholic priest walks away, his torch extinguished, a smile on his face.[78]

In the pamphlet, as elsewhere in the Klan campaign, the Klan hurled accusations of religious persecution back at their opponents, charging them with manufacturing claims about religious bigotry to protect their elitist institutions.[79] Klan leaders ridiculed all non-Protestant religions, mocking "Mohammedans," polygamists, and "head-hunters," who "howled" religious persecution whenever the enlightened majority intervened to halt their brutal practices.[80]

As the campaign progressed, the anti-Catholic assault became more public and personal. The Klan attempted to undermine its opponents by accusing Protestant adversaries of being Catholic, or part of the Catholic "machine." The most prominent victim of this misinformation campaign was Governor Ben Olcott. Governor Olcott faced rumors that were spread throughout the state that he and his wife were Catholic and sent their children to Catholic school, and that his deceased sister, a Methodist Sunday school teacher before her death, was still alive and living as a nun in San Francisco. False

[77] *Id.* at 26.

[78] *Id.* at 38, 44.

[79] *Id.* at 7–8.

[80] *Id.*

statistics about the number of Catholics appointed to government positions by Olcott circulated as evidence of Olcott's obeisance to the Catholic machine.

Many of the newspapers in the state failed to challenge the campaign of prejudice waged throughout the state. Some supported the Klan; others feared its wrath. Newspaper editors opposed to the Klan or the School Bill fell prey to deceitful charges. The Klan regularly assailed adverse editorials as the work of Catholics. In an editorial entitled "Liars and Us," *The Bend Bulletin* alleged that "[e]ver since we began our argument against the Ku Klux Klan . . . reports have been coming to us of a story going about to the effect that the editor . . . was a Catholic" and that the *Bulletin* "'is controlled by the Catholics,' and people have been asked to boycott us on that account."[81] Hugh Hume, the editor of the weekly, *The Spectator*, faced similar false accusations.[82] The public status of the recipients of these attacks put them in the awkward position of denying the allegations while at the same time trying to assure voters that they would be proud to be Catholic and were only protesting the "unconscionable" lying of their attackers.

Misinformation was also spread about the propensity of parochial school graduates to engage in criminal behavior. Distortions of Catholic scripture also surfaced. Anti-Catholic speakers ranted that "the law of the Church says drink all you can," a dramatic misinterpretation of Christ's counsel to his disciples at the Last Supper to "drink ye all of this."[83]

C. The Catholic Response

As in any political campaign grounded in bigotry, School Bill opponents faced significant political risks if they aggressively denounced the religious bigotry in the School Bill campaign. Moderate voters perhaps could be persuaded that the School Bill threatened religious liberty. These arguments could easily backfire if voters perceived them as charges of religious prejudice. School Bill opponents often found themselves on the defensive when they attempted to debate the impact of the measure on religious liberty.

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[81] Editorial, *Liars and Us*, BEND BULLETIN, Oct. 20, 1922, at 4.

[82] SAALFELD, *supra* note 56, at 53.

[83] Stenographic record of lecture in Lebanon, Oregon, Catholic Truth Society Archives, as quoted in *The Case of the Sisters of the Holy Names vs. The State of Oregon*, Sisters of the Holy Names of Jesus and Mary Research Library.

Catholics, acutely sensitive to the potential backlash, devised a strategy that championed the importance of religious liberty and tolerance to all Americans and downplayed religiously divisive attacks. It was a weak and generic response to the bigotry inflamed by the Klan. Opponents of the initiative staked their campaign on convincing voters that compulsory public education violated the rights of parents to control the education of their children, an argument that ultimately persuaded the U.S. Supreme Court, but failed to sway Oregonians. When the votes were counted, the School Bill passed by a margin of 11,821 votes, 115,506 to 103,685, garnering 52.7% of the vote.[84] Interestingly, 22,066 voters showed up at the polls but abstained from voting on the School Bill; thus the abstainers were almost double the margin of victory.[85] Whether those voters abstained from confusion or apathy is a matter of conjecture, as is the intent of the voters who approved the measure. Some voters certainly voted for the School Bill because they decided that compulsory public schooling offered an anti-elitist, egalitarian education in democracy. But others just as certainly channeled their prejudices and fears into a "Yes" vote.

The Society of the Sisters of the Holy Names of Jesus and Mary, the largest provider of private education in the state, joined with the secular Hill Military Academy to challenge the law in federal court. In 1924, the federal district court in Oregon found the School Bill unconstitutional, concluding that it violated the economic rights of schools, teachers, and parents.[86] By the time the U.S. Supreme Court rendered its decision in 1925, the political influence of the Klan in Oregon had dissipated. The Court's holding that the School Bill violated the constitutional rights of parents to control the upbringing and education of their children relieved most Oregonians, many of whom were uncomfortable with the scorn directed at Oregon for its passage of an initiative perceived nationally as the product of bigotry.

[84] OREGON SECRETARY OF STATE, OREGON BLUE BOOK, INITIATIVE, REFERENDUM AND RECALL: 1922–1928, *available at* http://bluebook.state.or.us/state/elections/elections14.htm (last visited June 3, 2009).

[85] OREGON SECRETARY OF STATE, BLUE BOOK AND OFFICIAL DIRECTORY, 1923–1924, at 170 (1923).

[86] Soc'y of Sisters v. Pierce, 296 F. 928 (D. Or. 1924).

IV
VOTER CONFUSION AND BIAS IN THE INITIATIVE PROCESS

The voter confusion and appeals to prejudice that marked the initiative campaign for compulsory public education are not unique to that controversy. To the contrary, they are emblematic of persistent concerns with the use of the initiative to determine social policy. Initiative states tend to use direct democracy to enact conservative social legislation, including the death penalty, restrictive abortion laws, and anti-gay rights measures.[87] Voter ignorance or confusion about ballot measures often leads voters to abstain from voting on those ballot items.[88] One analysis of the first thirty years of the Oregon initiative showed, on average, a twenty-seven percent voter "drop off"—voters who show up at the polls but fail to vote on one or more ballot measures.[89]

The reasons for the low voter response to direct legislation during that period are not documented. Voter confusion may explain some voter behavior, as well as apathy. More recent data offers insight on voters who pull the lever for candidates but not ballot measures. Surveys show a wide range of voters express concerns that ballot measures are too complicated to understand.[90] In Oregon, twenty

[87] *See* John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 195 (2005).

[88] A 1985 survey of California voters found sixty-eight percent said they would not vote on a ballot measure if they were not knowledgeable on the issue. Eule, *supra* note 4, at 1518 n.54. In a 2005 voter survey in California, when asked to name the ballot measure that interested them the most, voters' top response was "don't know" (thirty-eight percent) or "none" (twelve percent). Press Release, Pub. Policy Inst. of Cal., Special Survey on Californians and the Initiative Process (Sept. 2005), http://www.ppic.org/content/pubs/survey/S_905MBS.pdf. Of voters polled in the 2005 survey, seventy-seven percent found ballot initiatives "complicated and confusing." *Id.* at vi. On voter confusion, see also Rose, *supra* note 31; Magleby, *supra* note 4, at 23; PHILIP L. DUBOIS & FLOYD F. FEENEY, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 121–22 (1992).

[89] Waldo Schumacher, *Thirty Years of the People's Rule in Oregon: An Analysis*, 47 POL. SCI. Q. 242, 245 (1932).

[90] Eule, *supra* note 4, at 1516 n.46 and accompanying text ("A recent poll of voters revealed that only fifteen percent of those surveyed felt that they consistently knew enough about initiative measures to make a wise decision. Another 37% claimed to know enough about the issues involved to make a wise decision on ballot measures 'most' of the time. The remaining 47% admitted to confusion on a regular basis. Similar voter perceptions were detected in an earlier mail survey of four western states. Thus, 41% of Arizona voters surveyed 'strongly agreed' that initiative and referendum measures on the ballot were 'so complicated that one can't understand what is going on' with 33% agreeing 'somewhat.' In Colorado, 23% strongly agreed and 36% agreed somewhat. In Oregon, the figures were 20% and 40% and in Washington, 18% and 34%." (citation omitted)).

percent of voters "strongly agreed" that ballot measures were too complicated to understand; forty percent of voters agreed "somewhat."[91] Oregon, like a number of other direct legislation states, limits an initiative to "one subject only."[92] Oregon also requires that any "two or more amendments" be "separately" submitted on the ballot.[93] These provisions offer some protection against voter confusion by prohibiting logrolling of proposals but they do little to address voter confusion occurring from complex or poorly worded ballot titles or text.

Voter confusion presents particular concerns when the rights of minorities are on the ballot. Confused voters frequently vote counter to the policies they intend to support.[94] The risk that substantive policy will be made based on an inaccurate reflection of voter will is especially problematic when individual rights are at stake. The School Bill campaign demonstrated that voter confusion can be a powerful partner to prejudice, leading to the enactment of laws harmful to minority interests. The School Bill campaign also revealed that fomenting voter confusion is often a tactical component of a campaign strategy that seeks to obscure the issues.

Voter confusion is not a problem specific to direct democracy. Voter ignorance and confusion exist on matters of candidate choice, not just ballot measures. But a misinformed vote for or against a candidate typically poses less risk of harm than voter error in the enactment of substantive policy. The deliberative process embodied in representative government is designed, through checks and balances, to prevent abuse by an individual—both in the accumulation of power and in the perpetuation of hostile legislation. These

91 *Id.*

92 *See* OR. CONST. art. IV, § 1(2)(d); *see also* CAL. CONST. art. II, § 18; OHIO CONST. art. II, § 15(d); OKLA. CONST. art. 5, § 57; WYO. CONST. art. I, § 27.

93 OR. CONST. art. XVII, § 1.

94 *See* Eule, *supra* note 4, at 1518 ("Studies of voting on propositions generally reveal a significant percentage of voters casting ballots at variance with their stated policy preferences. Estimates of this number generally run from ten to fifteen percent, although occasionally the figures rise much higher. . . . In a 1980 plebiscite on a local rent control ordinance those desiring to retain rent control were required to vote *against* the measure. Over three-fourths of the voters questioned in exit surveys did not match up their views on rent control with their votes on the measure. One quarter favoring rent control incorrectly voted yes while one half opposing it erroneously cast a negative vote." (footnotes omitted)); *see also* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984) (fifteen percent of voters on a 1979 Ohio referendum voted at variance with their stated position; sixty percent who voted on 1969 California lottery proposition marked ballot capriciously).

protections limit the potential for mischief from any one elected official.

Voter abstention on initiatives is particularly problematic. Where abstention is high, lawmaking by initiative, unlike legislation, may result in the enactment of substantial social change based on the will of less than a majority of voters. During the first thirty years of direct legislation in Oregon, more than sixty-eight percent of the ballot measures were either adopted or rejected by a minority of registered voters.[95] The 11,000-plus margin of voter approval on the School Bill was half of the 22,000 voters who went to the polls but abstained from casting their opinion on compulsory public education.[96] These statistics highlight the risks of interest group capture—that a highly motivated faction will use the initiative process to make social policy with the support of less than a majority of the electorate. Voter confusion and abstention tend to favor interest group capture by reducing ballot measure voters to special interest voters. The threat of interest group capture is particularly problematic when the rights of minority political groups are put to a vote. Special interest groups fronting initiatives often are ideologically driven factions, mobilized after failing to convince the legislature to act on their proposals.

The vulnerability of minority groups to discrimination through direct legislation is a direct consequence of majoritarian governance. The majority often has little incentive to protect minority interests and every incentive to further its own interests. A recent analysis of direct legislation addressing gay rights, English language laws, AIDS policy, school desegregation, and housing and public accommodations for racial minorities found "strong evidence" that minority groups suffer from direct legislation.[97] Of the seventy-four civil rights initiatives examined, more than ninety-two percent "actively sought" to limit minority rights.[98] An extension of this analysis concluded that, faithful to Madison's concern, minority rights are most vulnerable in smaller, homogeneous political communities.[99]

The School Bill was the first successful Oregon initiative targeting an unpopular minority, but it has hardly been the last. Although the

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[95] Schumacher, *supra* note 89, at 249.

[96] *Id.* at 252.

[97] Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245–46 (1997).

[98] *Id.* at 254.

[99] Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020, 1023 (1998).

use of direct legislation in Oregon subsided for a number of decades, the late 1970s saw a resurgence in measures impacting minority groups, including reinstatement of the death penalty, mandatory minimum sentence requirements, and crime victims' protection.[100] The most blatant recent targeting of a minority group through direct legislation has been a series of initiative proposals limiting rights of homosexuals.[101] Although voters have not approved all of these measures, the overt targeting of gay and lesbians reinforces concerns about the use of direct legislation as a tool of discrimination. This criticism does not suggest that legislatures are immune from approving discriminatory legislation. One need look no further than the Jim Crow laws for evidence that representative government also can fail to protect unpopular minorities. But more typically, representative government and the deliberative process function effectively to reject discriminatory proposals. In representative government, judicial review serves as the last level of scrutiny in a system designed to constrain the excesses of the majority. By contrast, judicial review provides the *only* substantive check on the enactment of discriminatory laws through direct legislation.

V

DIRECT DEMOCRACY AND THE ROLE OF THE COURTS

Although there is a persuasive argument that direct legislation is a departure from representative government, the U.S. Supreme Court has shown little inclination to revisit its 1912 holding that the issue is nonjusticiable.[102] The Court should reconsider its decision in *Pacific States Telephone & Telegraph Co*. The opinion relied upon an 1849 decision, *Luther v. Borden*, in which the Court refused to decide which of two dueling government factions should be deemed the lawful government of Rhode Island, concluding that the issue presented a nonjusticiable political question under the Guarantee Clause.[103] The Court in *Pacific States* should not have equated the

[100] OR. REV. STAT. §§ 163.005–163.145 (amended 1978 and 1984); *id.* ch. 136 and § 40.385 (amended 1986), ch. 137 (amended 1988).

[101] *See, e.g.*, Minority Status and Child Protection Act, Oregon Ballot Measure 13 (1994) (denying minority status to homosexuals).

[102] A number of commentators have urged the Supreme Court to reexamine its 1912 holding in *Pacific States*. *See, e.g.*, Chemerinsky, *supra* note 4, at 304; Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI L. SCH. ROUNDTABLE 1, 13–14 (1997).

[103] Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

dispute in *Luther* with the challenge to the Oregon initiative process. The challenge to lawmaking by initiative presented a different, and far narrower question; it attacked the form, not the existence of republican government. Unlike *Luther*, where the Court was asked to identify the legitimate government of the state, *Pacific States* involved a challenge to the method of lawmaking in an established government. *Luther* represents the paradigmatic "political" question. The Court in *Baker v. Carr* agreed, noting that *Luther*'s only significance is its holding that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government."[104] In *New York v. United States*, Justice O'Connor, writing for the majority, opened the door to some reconsideration of the Guarantee Clause: "More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[105] Even if the Court is willing to revisit the broader question of the justiciability of the Guarantee Clause, it has given no indication that it would be inclined to entertain a challenge to the constitutionality of direct legislation. To the extent that judicial review remains the only meaningful check on direct democracy, courts should carefully scrutinize laws and amendments enacted by direct legislation that undermine one of the core values underlying representative democracy—the protection of minorities from majority tyranny.

A. State Judicial Review

The Oregon Supreme Court's 1998 decision in *Armatta v. Kitzhaber* shows an increased willingness by the court to scrutinize direct legislation.[106] In *Armatta*, the court struck down Ballot Measure 40, a crime victims' rights initiative, because the measure violated an Oregon constitutional requirement that any "two or more amendments" to the Oregon Constitution must be voted upon separately.[107] *Armatta* marks the first time the court substantively addressed the separate vote requirement. Since then, the court has struck down a number of other initiatives under the *Armatta* rule; these opinions represent the most successful attacks on the initiative

104 Baker v. Carr, 369 U.S. 186, 223 (1962).

105 New York v. United States, 505 U.S. 144, 185 (1992).

106 327 Or. 250, 959 P.2d 49 (1998).

107 OR. CONST. art. XVII, § 1.

in Oregon history.[108] Although the *Armatta* test does not assess the substantive legitimacy of ballot measures, it nonetheless offers a potent judicial check on direct legislation, particularly of measures that may be the product of voter confusion from multiple subjects.

Former Oregon Supreme Court Justice Hans Linde has argued persuasively that state courts should scrutinize direct legislation under the Guarantee Clause.[109] State courts have tended to read *Pacific States* as a broad preclusion of judicial review under the Guarantee Clause.[110] If, however, as the U.S. Supreme Court suggests in *New York*, *Pacific States* does not preclude judicial review of all issues under the Guarantee Clause, state courts should begin to ascertain whether, and under what circumstances, the initiative may undermine a republican form of government.[111] The 1903 *Kadderly* decision, unlike the U.S. Supreme Court holding in *Pacific States*, does not bar further consideration of whether aspects of direct legislation may violate the Guarantee Clause. *Kadderly* simply held that direct legislation is not inherently inconsistent with a republican form of government; it does not stand for the conclusion that all uses of direct legislation are consistent with the Guarantee Clause.[112] State courts should begin to address what challenges to direct legislation may be subject to judicial review under the Guarantee Clause.

B. Federal Judicial Review

Federal judicial review offers an important check on state laws and constitutional amendments enacted through direct legislation. The late professor Julian Eule, in a thorough analysis of direct legislation, advocated a "hard look" by courts faced with constitutional challenges to lawmaking by plebiscite.[113] Eule argued that the normal presumption of constitutionality that attaches to judicial review of most legislation should not apply when a court is reviewing direct legislation. In the absence of the filters so essential to representative democracy, it falls to the courts to assure that the

[108] Lehman v. Bradbury, 333 Or. 231, 37 P.3d 989 (2002); Swett v. Bradbury, 333 Or. 597, 43 P.3d 1094 (2002); League of Or. Cities v. State, 334 Or. 645, 56 P.3d 892 (2002).

[109] *See, e.g.*, Linde, *supra* note 30; Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994).

[110] *See, e.g.*, State v. Manussier, 921 P.2d 473, 482 (Wash. 1996).

[111] *See, e.g.*, VanSickle v. Shanahan, 511 P.2d 223 (Kan. 1973).

[112] Kadderly v. City of Portland, 44 Or. 118, 145, 74 P. 710, 720 (1903).

[113] Eule, *supra* note 4, at 1558.

values of representative government have not been disrupted by direct legislation.[114] While I agree with Eule's assessment, my proposal is narrower, focusing on the risk of harm to minority groups presented by direct legislation: the courts should dispense with any presumption of constitutionality when reviewing direct legislation that harms a historically disadvantaged minority group. Close scrutiny of direct legislation compensates for the absence of the deliberative process and provides a necessary check on animus-based initiatives. Close scrutiny should occur even where the law is facially neutral and even if the disadvantaged group is not otherwise entitled to heightened scrutiny under the Equal Protection Clause. I offer this proposal for several reasons. First, discrimination against minorities is the most significant harm posed by the initiative process. Further, the focus on harm to minority groups is consistent with the Framers' concerns about direct democracy. Finally, existing equal protection doctrine easily could accommodate enhanced scrutiny of direct legislation that harms unpopular minorities.

Current equal protection doctrine under the Fourteenth Amendment requires the courts to impose strict scrutiny on classifications based on suspect criteria such as race, national origin, or religion.[115] Classifications based on gender or illegitimacy are considered quasi-suspect and receive intermediate scrutiny.[116] Heightened scrutiny generally protects suspect and quasi-suspect classes from discriminatory lawmaking where the classification is obvious on the face of the legislation.[117] Facially neutral classifications that are alleged to disadvantage suspect or quasi-suspect groups are subject to heightened scrutiny only if the classification has a disparate impact on the minority group and evidence of discriminatory purpose is established.[118] Classifications not based on suspect or quasi-suspect criteria are presumed constitutional unless they fail to satisfy a rationality test.[119] The presumption of constitutionality typically insulates legislation impacting nonsuspect classes or classifications that are not apparent on the face of the law.

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114 *Id.* at 1558–59.

115 Korematsu v. United States, 323 U.S. 214, 216 (1944).

116 Under intermediate scrutiny, the classification must be substantially related to an important government interest. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

117 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

118 *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

119 Hodel v. Indiana, 452 U.S. 314, 331–32 (1981).

The presumption of constitutionality is based, in part, on the assurance of checks and balances in lawmaking undertaken through the deliberative process. The famous *Carolene Products* footnote describes certain types of legislation where the presumption of constitutionality should not apply, including "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," and situations where "prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[120] Although the footnote addresses only legislation, the principles, resting upon a concern for situations where the political process may malfunction to negate normal checks and balances, are equally applicable to lawmaking by plebiscite. Direct legislation targeting minorities should be subject to heightened scrutiny precisely because it circumvents the checks and balances designed to protect minority interests.

The U.S. Supreme Court's opinion in *Romer v. Evans* offers support for careful scrutiny when reviewing direct legislation disadvantaging minority groups. In *Romer*, the Court invalidated a Colorado constitutional amendment enacted by referendum that repealed state and local laws protecting gays and lesbians from discrimination and prohibited the enactment of new laws protecting gays and lesbians.[121] Classifications based on sexual orientation typically receive rational basis review.[122] Although the Court did not indicate any special standard would apply to review of direct legislation, it did examine the legislation with a scrutiny uncharacteristic of rational basis review. The Court struck down the referendum because it concluded that it was the product of animus.[123] As the Court explained, legislation motivated by animus is *per se* a violation of equal protection: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group

120 *Carolene Prods. Co.*, 304 U.S. at 152–53 n.4 (emphasis added).

121 Romer v. Evans, 517 U.S. 620 (1996).

122 The Supreme Court has not specifically ruled on the standard of review for classifications based on sexual orientation. Most of the U.S. Courts of Appeals to rule on the issue have held that rational basis is the appropriate standard of review. *See, e.g.*, Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994), Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989).

123 *Romer*, 517 U.S. at 634.

cannot constitute a *legitimate* governmental interest."[124] The Court has invalidated other direct legislation when it found that the purpose of the law was to disadvantage minority groups.[125] The Court's analyses in these cases reflect a certain suspicion, not only about the purpose behind these measures, but also more generally about the ability of the direct legislation process to correct for discrimination. Unfortunately *Romer* obscures the issue by purporting to apply traditional rational basis review; the Court should articulate a standard of heightened review of direct legislation to ensure that animus will not go undetected.

Equal protection doctrine is heavily dependent upon purpose-based inquiry. The text and impact of direct legislation is as easily analyzed as lawmaking by representative bodies. While direct legislation does not provide the traditional legislative record to evaluate purpose, it offers ballot measure statements and campaign materials that serve a similar function. As with analysis of legislative lawmaking, the issue is not the individual motivations of the sponsors and voters, but rather the purpose of the law. Deceptive ballot titles and voter information, with resulting voter confusion, may be highly relevant to evidence of discriminatory purpose.

The most tenable way for the U.S. Supreme Court to proceed in reviewing direct legislation is to find challenges to direct legislation justiciable under the Guarantee Clause and address whether direct legislation undermines the core principles of representative democracy. Even without reconsideration of the Guarantee Clause, the Court should reject the presumption of constitutionality attached to facially neutral legislation or legislation targeting nonsuspect classes when reviewing direct legislation disadvantaging minority groups. Heightened scrutiny is justified as a check on a form of lawmaking that bypasses the carefully wrought constitutional framework of legislative and executive decision making.

The Oregon Supreme Court has embarked on a late, but welcomed, scrutiny of direct legislation. The Oregon Constitution's separate vote and single subject limitations provide the potential for a meaningful check on the risk of majoritarian abuses of the minority.

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[124] *Id.* (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[125] *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (striking down a facially neutral law prohibiting mandatory busing for desegregation of the schools); Hunter v. Erickson, 393 U.S. 385 (1969) (limiting the authority of government to adopt fair housing laws).

Judicial review, with teeth, at both state and federal levels, offers the best protection of the principles of representative democracy.

CONCLUSION

The Oregon System of direct legislation gained national recognition as the prototype for popular governance. The use of the initiative to pass the School Bill gained Oregon a different kind of notoriety: the School Bill campaign was widely condemned for exploiting voter confusion and prejudice to achieve passage of a measure that discriminated against unpopular minorities. The troubling legacy of this campaign remains a force in Oregon and other states that employ direct legislation to limit individual rights. As we contemplate both the past and the future of the Oregon Constitution, it is appropriate to reconsider deferential judicial review of direct legislation. Direct legislation, a departure from a representative form of government, should be subject to rigorous scrutiny by state and federal courts to assure that this variance does not undermine the core values of representative democracy.