A HARDCORE CASE AGAINST (STRONG) JUDICIAL REVIEW OF DIRECT DEMOCRACY

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The use of citizen initiated referenda (CIR), which allows a prescribed number of voters to hold a binding referendum either to veto an existing law or directly enact constitutional amendments or statutes drafted by fellow citizens, today forms an integral part of political life in Bavaria, Switzerland, Liechtenstein, Uruguay as well as 26 American states.[1] Several prominent legal scholars, however, have emphasised the necessity in constitutionally empowering courts to invalidate CIRs which violate fundamental rights like freedom of religion, equality, and life itself. According to this view, these values should simply be beyond the reproach of an electorate hostile toward the rights of politically unpopular minorities.[2] Indeed, even scholars opposed to judicial review often limit their arguments to the distinction between unelected judges and enlightened representatives,[3] without any rigorous empirical analysis examining the underlying Madisonian assumption that a society without representative democracy would result in the masses systematically and materially depriving minorities of their fundamental rights.[4] This paper criticises the key theoretical arguments made in favour

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1 Regions with direct constitutional amendments include: Liechtenstein, Switzerland and its 26 cantons, Uruguay; Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota. German regions with direct citizen statutes include: Bavaria (6 referendums state wide; over 1000 referendums locally from 1995-2005), Brandenburg, Berlin, Bremen, Hamburg, Lower Saxony, North Rhine-Westphalia, Schleswig-Holstein, Thüringen; Alaska, Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming (note in Germany some states have direct constitutional amendments). Regions with popular vetos or facultative referendums include: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming and Italy. See generally David Altman, *Direct Democracy Worldwide* (Cambridge University Press, 1st ed, 2010); Übersicht Verfahren, *Mehr Demokratie!* (25 August 2011) <http://www.mehr-demokratie.de/5972.html>

2 Derrick Bell, 'The Referendum: Democracy's Barrier to Racial Equality?' (1978) 54 *Washington Law Review* 1-29; George Williams, 'CIR for the ACT' (1998) 7 *Griffith Law Review* 274, 292; Helen Gregorczuk, 'Citizen Initiated Referendums' (1998) 7 *Griffith Law Review* 249, 262; Julian Eule, 'Judicial Review of Direct Democracy' (1990) 99 *Yale Law Journal* 1503-90. For our purposes we shall be looking at what Eule calls the 'substitutive plebiscite': the ability for voters to enact constitutional amendments and statutes by bypassing the legislature and executive 'filters' altogether. This is compared to the 'complementary plebiscite' where a proposal must pass both chambers of the legislature in addition to the voters i.e. the electorate merely vetoing laws or approving legislative-referrals.

3 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1348, 1361.

4 James Madison, *The Federalist Papers* (Penguin Books, 1st ed, 1989) (Federalist No. 10). For papers challenging these Madisonian assumptions in a general nature see Corey Johanningmeier, 'Law and Politics' (2007) 82 *Indiana Law Journal* 1126-1152; Robin Charlow, 'Judicial Review, Equal Protection and the Problem with Plebiscites' (1994) 79 *Cornell Law Review* 527-640.

of (strong) rights based judicial review of direct democracy through the use of extensive empirical case studies.

This paper proceeds by examining the experience the United States has had with CIRs, arguing that while CIRs may have perceived flaws by occasionally producing outcomes some people do not like, these outcomes occur just as frequently with American legislatures or even courts (Section I).[5] This paper then argues that not only can federalism mitigate many of the perceived excesses of CIR, but that there is no convincing empirical evidence that CIRs create material or repetitive losses for minorities to warrant judicial review either in the United States or in any other foreign jurisdiction — indeed, it is argued that in the United States it is actually voter backlash resulting from judicial decision making which is responsible for causing the handful of CIRs frequently cited as materially disadvantaging minority interests (Section II). Finally, this paper concludes by arguing that a society which puts human rights before democracy will end up with very little of either. A society, however, which puts direct democracy before human rights will end up with a good measure of both (Section III).

I THE 'SPECIAL' REVIEW THESIS

In both Australia and the US, legal scholars advocating 'a hard judicial look'[6] at voter initiatives assert CIRs require 'special' scrutiny from the judiciary because, unlike ordinary legislation, they are more likely to produce laws which strip away the right of powerless minorities as they circumvent the 'checks and balances' found in the Parliamentary process.[7] These checks and balances include cross-party Parliamentary committees, a bicameral legislature, coalition building and log-rolling and an executive veto, all of which require political bargaining (and thus minority input) as a bill moves through the legislative process. Judicial review is therefore argued to be the only real 'safety net' capable of eliminating CIRs' 'unfiltered majoritarianism'.[8] However, if indeed legislatures are capable of filtering out 'local prejudices' and 'factious tempers',[9] then their output should be more protective of civil liberties compared to CIRs. But are legislatures really more likely to produce laws which protect minority groups than ordinary voters? This paper turns to examine whether this has been the case historically using civil rights, the death penalty and gay rights as case studies.

A *The Output of 'Deliberative' Filters*

1 *Civil Rights*

It was legislatures, not ordinary voters in referenda, who were the original pioneers in devising means to disenfranchise racial minorities. A total of 18 American states adopted literacy tests, seven to disenfranchise African Americans, five to disenfranchise Indians, Mexicans and Orientals and six to disenfranchise European immigrants.[10] By contrast, the seventh and last Southern State to adopt a literacy test was Oklahoma. This was done in 1910 through a CIR drafted and approved by both

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5 This paper will be looking at US-style judicial review only, not the Canadian 'dialogic' style judicial review with its override clause which in any event is rarely, if ever, used: Waldron, above n 3, 1356. The logical foundations behind judicial review are rejected later on in this paper.

6 Eule, above n 2, 1158-73. Williams, above n 2, 262.

7 *Ibid.*

8 Eule, above n 2, 1526-1528.

9 Madison, above n 4, 79.

10 William Riker, *Democracy in the United States* (Macmillan, 2nd ed, 1965) 60.

chambers of the state legislature and endorsed by the State Governor, who applauded the initiative's grandfather clause exempting illiterate whites from taking the test.[11] Although the Supreme Court invalidated the grandfather clause in Oklahoma and six other non-CIR states, it explicitly upheld the use of literacy tests: according to the court, any disparity between whites and blacks in passing the test was simply the Darwinian outcome of racial 'inequalities naturally inhering...in those who must come within the standard to enjoy the right to vote'.[12] The Oklahoma legislature merely retaliated by passing legislation which 'perpetually disenfranchised' voters who were not registered when the grandfather clauses were in operation.[13] It required 23 years for the Supreme Court to invalidate these provisions (i.e. long after the damage had been done), while in 1916 a legislative-referral to constitutionally entrench these provisions was resoundingly rejected by 60 percent of voters.[14] It also took a further 26 years for the judges to invalidate literacy tests, coinciding with a broader legislative shift banning literacy tests in the *Civil Rights Act* (1968).[15] In this instance, the judiciary lagged behind CIRs in securing equal rights of racial minorities.

It is interesting to note that African-Americans may actually have constituted the majority of the population in many of these Southern states.[16] But it was precisely because of this that all 11 former Confederate states enacted poll taxes between 1890 and 1904 to systematically disenfranchise poorer black voters.[17] Fortunately, however, CIRs led the revolt against such regressive taxation: three CIRs abolished poll taxes between 1910 and 1921, decades before the Supreme Court affirmed their constitutionally in 1937.[18] In 1921, however, a constitutional-referral by the Californian legislature repealed the 1914 CIR banning poll taxes by applying poll taxes for alien inhabitants. When the amendment was declared unconstitutional, the legislature merely retaliated with a race neutral poll tax on all inhabitants for the purposes of funding education expenditure, approved by a 0.8 margin.[19] By contrast, not a single CIR ever introduced a poll tax. Indeed, in Arkansas voters abolished poll

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11 Thomas Cronin, *Direct Democracy* (Harvard University Press, 1st ed, 1989) 93 (quoting Lee Cruce who argued 'if we place the franchise in the hands of the ignorant Negro it will make Oklahoma a dumping ground for the whole of the United States').

12 *Guinn v. United States* 238 U.S 347 (1915).

13 Richard Valelly, *The Two Reconstructions* (University of Chicago Press, 1st ed, 2004) 141.

14 *Lane v. Wilson*, 307 U.S. 268 (1939). Note, however, the trial judge and court of appeals rejected any claims of discrimination: *Lane v. Wilson*, 98 F.2d 980 (10th Cir. 1938).

15 *Louisiana v. United States*, 380 U.S. 145 (1965).

16 Gabriel Chin, 'The Tyranny of the Minority' (2008) 43 *Harvard Civil-Rights Civil-Liberties Law Review* 65, 66-67.

17 Riker, above n 10, 60. Joseph Kallenbach, 'Constitutional Aspects of Federal Anti-Poll Tax Legislation' (1947) 45 *Michigan Law Review* 717, 717-9; Editor Note, 'Disenfranchisement By Means of Poll Tax' (1940) 53 *Harvard Law Review* 645-52; Glenn Feldman, *The Disenfranchisement Myth* (University of Georgia Press, 1st ed, 2004) 135–136; Richard Pildes, 'Democracy, Anti-Democracy and the Canon' (2000) 17 *Constitutional Commentary* 295-305.

18 *Breedlove v. Suttles*, 302 U.S. 277 (1937). Cf. Measure 14, a 1910 Oregon direct constitutional amendment abolishing poll taxes, approved by 51.1 percent of voters; Proposition 10, a 1914 Californian direct constitutional amendment providing that no poll or head tax shall be levied, approved by 52.0 percent of voters; Initiative 40, a direct citizen statute repealing Chapter 174 which was introduced by the legislature in 1921, levying a poll tax of 5 dollars on each citizen between the ages of 21 and 49, approved by 75.3 percent of voters. Centre for Research On Direct Democracy, *Direct Democracy Database* C2D <http://www.c2d.ch/votes.php?table=votes>.

19 *Ex parte Kotta*, 200 Pac. 957 (Cal).

taxes via CIR firstly during wartime and then during peacetime in 1964.[20] In neighbouring Southern states without any recourse to the initiative and referendum (such as Alabama, Mississippi, Texas and Virginia), their governments continued to levy poll taxes all the way up to 1966, when the Supreme Court finally caught up with popular sentiment and declared them unconstitutional.[21] In this instance too, the judiciary actually lagged behind CIRs in securing equal rights of racial minorities.

Moreover, the existence of constitutional filters may prevent laws which also benefit minorities, in addition to stopping those CIRs which help them. The Supreme Court not only unanimously held that the franchise for women is not a right of citizenship,[22] but the Washington Supreme Court twice invalidated legislation giving women the right to vote.[23] Nor were American Congressmen any better: in 1878 an amendment to give women the constitutional right to vote was raised in Congress. The amendment, however, was buried in committee for nine years and when the Senate finally considered it in 1887, it was defeated by a vote of 16:34. The issue was not raised again until 1914.[24] Also, in 1887, opponents of polygamy in Congress disenfranchised women voters in Utah, believing that this blow would persuade polygamists to capitulate.[25] State legislators, however, were just as unresponsive: from 1901 to 1909 suffragists were only able to persuade one legislature, New Hampshire, to put the franchise issue to a ballot.[26] By contrast, Oregon suffragists used CIR to twice put the issue to the ballot over the same time period, at least generating public debate over the matter while 'enlightened statesmen' ignored the franchise issue altogether.[27]

Indeed, faced with unyielding legislative inaction, suffragists turned to CIR in order to promote their cause. Sweeping petition drives compelled legislatures to propose constitutional amendments, with referendums giving women the vote in Colorado in 1893; in Idaho in 1896; in Washington in 1910; and in California in 1911. In other states, patience and perseverance also paid off. CIRs in Arizona and Oregon in 1911 — gaining 68.4 and 51.8 percent of the vote respectively — granted full voting rights, including the right to stand for public office. In Nebraska fraud in the collection of signatures to repeal legislation sealed widespread popular support for the franchise.[28] By the end of 1918, the movement had achieved referendum victories in 13 states[29] while a facultative (popular veto) referendum asking the people if they

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20 Calvin Ledbetter, 'Arkansas Amendment for Voter Registration without Payment of Poll-Tax' (1995) 54 *The Arkansas Historical Quarterly* 134-162. Measure 37, a 1944 direct constitutional amendment providing that any citizen of Arkansas while serving in the armed forces of the United States may vote in any election without having paid poll tax, was approved by 79.6 percent of voters; Measure 54, a 1964 direct constitutional amendment to provide for a voter registration system without payment of a poll tax, was approved by 55.9 percent of voters.

21 *Harper-v.-Virginia*,-383-U.S.-663-(1966); *Harman-v.-Forssenius*,-380-U.S.-538-(1965).

22 *Minor-v.-Happersett*,-88-U.S.-162-(1875)-(Held: That state law limitations on voting rights were valid because a right to vote could not be derived from national citizenship.)

23 *Harland-v.-Washington*,-13-P.-453-(1887)-(holding the law was constitutionally vague as it implied women could-sit-as-jurors).

24 Kris Kobach, 'Rethinking Article V' (1994) 103 *Yale Law Journal* 1971, 1981.

25 *Ibid*, 1981; *Edmund-Tucker Act* 1887 (US).

26 *Ibid*, 1982.

27 In 1906, 1908 and 1910 direct citizen initiated constitutional amendment were put on the ballot and gathered 43.9, 38.6 and 37.4 percent of the vote respectively. Centre for Research On Direct Democracy, *Direct Democracy Database* C2D <http://www.c2d.ch/votes.php?table=votes>.

28 Laura Hickman, 'Thou Shalt Not Vote: Anti-Suffrage in Nebraska' (1999) 80 *Nebraska History* 55, 62.

29 Kobach, above n 24, 1983.

supported a recent act of the Maine legislature which granted women the right to vote for presidential electors was also upheld by 74.3 percent of voters. Although Switzerland and Liechtenstein were the last Western countries to give women the franchise this had more to do with their stability and cultural conservatism than CIR: all the countries neighbouring Switzerland only gave women the right to vote in the revolutionary aftermath of two world wars, while in Liechtenstein 50 percent of women rejected the opportunity to give themselves the franchise in 1968.[30] But if indeed CIRs are intrinsically problematic, how does one account for the fact that regions with CIR and referenda gave women the right to vote decades before numerous European and Canadian legislatures?[31]

In 1920, Californian voters passed an initiative that closed legal loopholes to a 1913 statute designed to bar American-born children of Japanese aliens from owning land in trust for them.[32] But, once again, this CIR began in the state legislature and was deferred to the initiative process only because of the intervention of the U.S. Secretary of State in order to buy time at postwar treaty negotiations.[33] Ultimately, the CIR was upheld by the Supreme Court, which displayed its members' own prejudices by citing approvingly the lower court's dire prediction that 'it is within the realm of possibility that every foot of land within the State might pass into the ownership or possession of noncitizens'.[34] With this judicial green light, 14 other states enacted virtually identical laws between 1917 and 1943,[35] and in 1923 and 1926 'enlightened statesmen' in the

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30 An obligatory referendum relating to a federal decision introducing voting and electoral rights for women in federal matters only gathered 33.1 percent of the vote. But it might be naive to assume that just because the Parliament referred the measure, this means they supported it: conservatives knew it would be rejected by the voters, even if they said they supported it. In 1971, an obligatory referendum relating to a federal decision introducing voting and electoral rights for women in federal matters was held. This was approved by 65.37 percent of voters in Liechtenstein. A consultative referendum on the right of women to vote had 49.2 percent of women saying no and 50.8 saying yes. 60.19 percent of men said no, while 39.81 said yes. In 1984, a consultative referendum on the right of women to vote at a national level gathered 51.29 percent of the vote.

31 On the following dates the franchise was given to women via a referendum: Colorado (1893), Idaho (1896); Washington (1910); California (1911); Kansas (1912); Arizona (1912); Oregon (1912); Montana (1914); Nevada (1914); New York (1917); Oklahoma (1918). The following years is when the full franchise was granted via the legislative process: Norway (1913); Denmark (1915); Iceland (1915); Austria (1919); Canada (1918); Germany (1918); Poland (1918); Russia (1918); Netherlands (1919); Luxembourg (1919); US (1920); Sweden (1921); UK (1928); New Brunswick, Canada (granting women the right to vote in 1918, but only in 1934 did they gain the right to stand for elections); Quebec (1940); France (1945); Hungary (1945); Italy (1945); Japan (1945) Belgium (1948); Canada (1960: for native women); San Marino (1974 to stand for election). Note that the franchise in most European countries was granted in the revolutionary aftermath of both World Wars, neither of which Switzerland participated in. Also recall New Zealand only gave women the right to stand for public office in 1919.

32 Kevin Johnson, 'A Handicapped, Not Sleeping, Giant' (2008) 96 *California Law Review* 1259, 1283-85.

33 Cronin, above n 11, 93 (noting the measure began in the legislature, but the legislature delayed action because 'the US Secretary of State cabled from an international peace conference that California action on this measure might jeopardize the results of the conference. But after the legislature had adjourned the measure was introduced as an initiative').

34 *Terrace v. Thompson*, 263 U.S. 197, 220-221 (1923) (Pierce J); *Porterfield v. Webb*, 263 U.S. 225 (1923).

35 Edwin Ferguson, 'The Californian Alien Land Law and the Fourteenth Amendment' (1947) 35 *California Law Journal* 61, 61-63. Dudley McGovney, 'The Anti-Japanese Land Laws of California and Ten Other States' (1947) 35 *California Law Journal* 7, 7-8: *citing* (1) ARIZ.

California legislature enacted 'even more drastic'[36] amendments to the *Alien Land Laws*: selling property to an alien would automatically escheat the land at the point of transaction; aliens were prohibited from owning stocks in any corporation that owned land; and a statutory presumption was enacted that anyone accused of selling land to an alien would be guilty of criminal conspiracy — $200,000 (US) dollars would be appropriated to investigate the charge, causing a dramatic drop in Japanese land ownership rates.[37]

Moreover, while Japanese-Americans were being ordered into detention camps,[38] in 1944 Coloradan voters rejected a CIR which attempted to enact Alien Land Laws identical to those of the Californian legislature, while in 1946 Proposition 15 (a legislative referral to constitutionally entrench the Alien Land Laws into the Californian constitution) was also rejected by 58.9 percent of voters.[39] Likewise, after WWII, a number of states also commenced to repeal their Alien Land Laws after much of the damage had been done,[40] suggesting that a broader, more favourable shift in public attitudes toward Japanese-Americans predated the 1948 Supreme Court decision to finally invalidate Alien Land Laws.[41] Moreover, in 1954 in California, 71.9 percent of voters approved Proposition 18, a legislative referral which sought to amend a section of the state Constitution guaranteeing foreigners and aliens the same rights with respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native born citizens. In 1956, another legislative referral (Proposition 13) sought to repeal the 1920 Alien Land Law in its entirety. It also passed with 66.8 percent of voters supporting the measure. All these examples illustrate that courts were not leaders of social change and legislators were no better at protecting minority rights.

CODE §71.201-71.206; (2) LA. CONST. Art. 19, §21; (3) N.M. (1911) art. II, §22; (4) IDAHO CODE (1932) §23.101.23.112; (5) ORE. COMP. LAWS (1940) §61.101.111; (6) KAN. GEN. STAT. (1935) §67.701-67.711 (Kansas Laws 277, as *amended by* Act of July 1, 1939, ch. 180, §33, 1939 Kan. Laws 309); (7) Utah Laws (1943), p. 127; (8) Wy. Laws (1943), p. 33; (9) Ark. Acts 1943, p. 75. McGovney notes that Arkansas legislation, enacted by 'enlightened statesmen', expressly provided 'no Japanese or a descendent of Japanese shall ever purchase or hold title to any lands in the State of Arkansas' while in Wyoming, aliens were altogether barred from acquiring any interest in real property 'or having in whole or in part the beneficial use thereof'. See also Brian Niiya, *Japanese American History* (VNG, 1st ed, 1939) and Susheng Chan, *Asian Americans: An Interpretative History* (G.K. Hall, 1st ed, 1991).

36 *Ibid*., 7-8

37 Keith Aoki, 'No Right to Own?' (1998) 40 *Boston College Law Review* 37, 59.

38 *Korematsu v. United States*, 323 U.S. 214 (1944); Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943).

39 Brian Niiya, *Japanese-American History* (VNG, 1st ed, 1993) 65-67 (although the law passed was narrowly defeated in the Coloradan Upper House); Max Radin, 'Popular Legislation in California' (1947) 35 *California Law Review* 171, 183.

40 See generally Charles H. Sullivan, 'Alien Land Laws' (1962) 36 *Temple Law Quarterly* 15-53; Robert E. Lowe, 'Arizona Alien Land Laws' (1976) *Arizona State Law Journal* 253-276 (see footnote 4). DEL. LAWS (1921) (*repealed by* Act 1934, ch. 35 §1-2; 39 Del. Laws 1934); WASHINGTON CONST. Art. II, §33 24 and 29 (*repealed by* WASH. CONST. amend 42 (1966); 1923 Idaho Sess. Laws 160 (*repealed by* Act of March 4 1955, ch. 96, §1; 1955 Idaho Sess. Laws 219); ALA. CODE. Tit. 47 §1; CAL. CONST. Art. I § 21; CAL. CIV. CODE §671 (WEST 1954); COLO. REV. STAT. § 15-11-112 (1973); DEL. CODE Tit. 25 §306-308, tit. 12 §507 (1974); D.C. CODE §19-321, 45-1501 (1973); ME. REV. STAT. Tit. 33 §451 (1978); N.M. STAT. ANN. §7070-1-24 (1961).

41 *Oyama v. California*, 332 U.S. 633(1948); *Sei Fujii v. California*, 38 Cal.2d 718 (1952).

2 *The Death Penalty*

Nor is the legislative record on the death penalty any less inclined to its use than the CIR record. Although 26 of the 51 American states allow for direct citizen statutes or constitutional amendments, between 1976 and August 2011[42] over two-thirds (66.98 percent) of the executions in the United States occurred in states without any direct democracy whatsoever.[43] Indeed, if states without popular initiatives (i.e. only those with popular vetos) as well as Illinois and Mississippi are classified as 'representative democracies' because of the sheer practical difficulty of enacting laws via CIR, this figure rises to 69.82 percent. These results are not due to larger population sizes skewing the results. Of the 34 states that have executed at least one inmate between 1976 and 2011, the average per capita rate of executions in states with (all three varieties of) CIR is 0.0326 inmates being executed for every 10,000 people, while the figure for purely representative democracies is 0.073, more than double that of CIR states — indeed, 8 of the top 10 states with the highest executions per capita are purely representative democracies.[44]

Equally, states governed exclusively by 'enlightened statesmen' are just as likely to utilise the death penalty as states with CIR: 50 percent of the jurisdictions with the death penalty have CIR, while 50 percent without the death penalty also have CIR (all forms) — indeed, New Mexico abolished the death penalty in 2010 and voters, if they wanted to, could easily have repealed that piece of legislation with a popular veto.[45] They have not. Indeed, historically, legislatures have been more vigorous supporters of the death penalty than ordinary voters.[46] At least 10 legislative-referrals have been put

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42 1976 is not an arbitrary date: it is the year the Supreme Court reinstated the constitutionality of the death penalty: *Gregg v. Georgia*, 428 U.S. 153 (1976).

43 The number of executions that have occurred from 1976 till August 2010 is provided in brackets. The data for purely representative democracies is as follows: Texas (474); Virginia (109); Alabama (53); Georgia (51); North Carolina (43); South Carolina (43); Louisiana (28); Indiana (20); Delaware (15); Tennessee (6); Pennsylvania (3); Federal Government (3); Connecticut (1). The data for states with direct citizen statutes or direct constitutional amendments is as follows: Oklahoma (96); Florida (69); Missouri (68); Ohio (45); Arkansas (27); Arizona (28); Mississippi (15); California (13); Illinois (12); Nevada (7); Washington (5); Nebraska (3); Montana (3); Oregon (2); Colorado (1); Idaho (1); South Dakota (1), Wyoming (1). States with popular vetos only are: Kentucky (3); Maryland (5) and New Mexico (1). In total, 67.21 percent of (848 of the 1266) executions since 1976 have occurred in purely representative democracies. If Mississippi, Illinois and Wyoming are classed as representative democracies due to the sheer complexity and thus infrequent usage of CIR in these states the total is: 879/1266 = 69.43 percent. Note Mississippi adopted CIR in 1992; before this date 4 of the 15 executions have taken place. Data available from Death Penalty Information Centre, *Facts About The Death Penalty* (September 7 2011) <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

44 Data available from Death Penalty Information Centre, *State Execution Rates* (August 2011) <http://www.deathpenaltyinfo.org/state-execution-rates>

45 Jurisdictions with CIR and the death penalty are as follows: Arizona, Arkansas, California, Colorado, Florida, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Washington, Wyoming and Utah. Popular vetos only include: Kentucky and Maryland. Jurisdictions with the death penalty and without CIR are as follows: Alabama, Connecticut, Delaware, Georgia, Indiana, Kansas, Louisiana, New Hampshire, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia (plus the US Military and Federal Government). This is a total of 36, of which 18 have some form of CIR. Meanwhile there are 8 jurisdictions with CIR that do not have the death penalty. See Death Penalty Information Centre, *Facts About The Death Penalty* (September 7 2011) <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

46 Various landmark Supreme Court decisions have struck down statutes, but not CIR outcomes. See, for example: *Woodson v. North Carolina*, 428 U.S. 280 (1976) (a statute that

on the ballot box to extend the scope of the death penalty, with Californian legislators being the most avid supporters of the death penalty: over 93 percent of Californian Senators supported Proposition 195 and 196 to extend capital punishment to firearms compared to 85 percent of voters.[47]

By contrast, only five states have used CIR to extend the scope of the death penalty (to encompass vicious first degree murders), meaning the 34 states that have both CIR and the death penalty have it not due to CIR, but due to the Parliamentary process. Oregon abolished the death penalty via CIR in 1914, but it was reintroduced by a legislatively referred constitutional amendment in 1920. Arizona also abolished the death penalty via CIR in 1916, but reinstated it in 1918 for first degree murder. This was only invalidated 55 years later, when the Supreme Court ruled on the requirement for a degree of consistency in the application of the death penalty (leading to a temporary moratorium on capital punishment).[48] Indeed, many initiatives imposing the death penalty are simply political responses to 'activist' judges interpreting 'cruel and unusual punishment' to preclude the death penalty.[49] As will be argued later, virtually all of the more notorious CIRs are a result of voter black lash to judicial decisions which come across as being nothing more than being political in nature.

3 *Gay Rights*

What, then, should be made of cases like *Romer v. Evans*,[50] where the Supreme Court struck down Amendment 2, a CIR constitutionally prohibiting the Coloradan legislature from extending antidiscrimination laws to homosexuals? *Romer* cannot be

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made the death penalty mandatory for all convicted first degree murderers violated the Eighth Amendment); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (a Louisiana statute that made the death penalty mandatory for all convicted first degree murderers violated the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that Missouri statute violated the Eighth and Fourteenth Amendments because it imposed the death penalty on offenders who were under the age of 18 when their crimes were committed, reversing *Standford v. Kentucky*, 492 U.S. 361 (1989), which held the imposition of capital punishment in Kentucky on an individual for a crime committed at 16 or 17 years of age does not violate the Eighth Amendment); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding it is unconstitutional to impose the death penalty for the crime of raping a child, when the victim does not die and death was not intended).

47 The referrals range from a 1920 legislatively-referred state statute to bring back the death penalty in Oregon despite it being abolished via CIR, approved by 55.9 percent of voters, to a 2006 advisory legislatively-initiated referendum asking voters whether the death penalty should be enacted in the state of Wisconsin for cases involving a person who is convicted of first-degree intentional homicide, if the conviction is supported by DNA evidence, approved by 55.5 percent of voters. See, Centre for Research On Direct Democracy, *Direct Democracy Database* C2D <http://www.c2d.ch/votes.php?table=votes> (Type in the relevant inputs to find result).

48 *Arizona v. Endreson*, 109 Ariz. 117 (1973) applying *Furmann v. Georgia*, 408 U.S. 238 (1972) (holding the arbitrary and inconsistent imposition of the death penalty violates the Eighth Amendment).

49 For example, after the state Supreme Court invalidated the entire death penalty regime in California (*People v. Anderson*, 6 Cal. 3d 628 (1972)), Proposition 17, a 1972 Californian direct constitutional initiative, provided that all existing state statutes in effect from 1972 shall provide that all legislative death penalty statutes shall operate in full effect. Voters also responded in the 1978 Californian direct citizen statute simply declaring that the death penalty should not be construed to be cruel or unusual punishment for murder, approved by 71.1 percent of voters, which the courts upheld in *People v. Frierson* (1979) 25 Cal. 3d 145 (1979). See, Centre for Research On Direct Democracy, *Direct Democracy Database* C2D <http://www.c2d.ch/votes.php?table=votes> (Type in the relevant inputs to find result).

50 517 U.S. 620 (1996).

straightforwardly described as a countermajoritarian decision when viewed from a nationwide perspective, given that Oregon, Idaho and Maine all held initiatives attempting to ban antidiscrimination laws for homosexuals after the passage of Amendment 2 but before the *Romer* decision, and all three were defeated.[51] Equally, because *Romer* failed to designate homosexuals as a suspect class, with laws targeting gay men and lesbians instead being simply subject to rational basis review, it failed adequately to set out the basis for its decision, enabling circuit courts to reach contrary results on nearly identical facts.[52] In fact, of the five equal protection claims relating to gay rights after *Romer*, all five were distinguished on the facts from *Romer* and in none have the later courts chosen to follow it,[53] with these courts preferring instead to protect prevailing 'community values and character'.[54]

Although Californian Proposition 22 was the first and only direct citizen statute to limit marriage to one man and one woman,[55] 46 state legislatures also passed statutes banning gay marriage between 1974 and 2003, in addition to the United States Congress which enacted the *Defence of Marriage Act*.[56] In fact, 60 percent (18 of the

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51 See Figure 9.

52 Sylvia Vargas, 'Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship' (1999) 60 *Ohio State Law Journal* 399, 505.

53 *Equal Found. of Greater Cincinnati Inc v. City of Cincinnati*, 128 F.3d 289, 295-7 (6th Cir. 1997), *cert. denied* 525 U.S. 943 (1997) (upholding that a city initiative removing homosexual persons from antidiscrimination laws protection survived Romer because it was narrower in scope and impact); *Zehner v. Trigg*, 133 F.3d 459, 464 (7th Cir. 1997) (finding no broad restriction as occurred in *Romer*, given inmates were denied specific remedial rights in asbestos suit); *Bailey v. City of Austin*, 972 S.W.2D 180, 189-190 (Tex. App. 1998) (upholding an amendment adopted via a referendum that eliminated employee benefits for domestic partners because it did not target a discrete group but applied to all city employees); *Imprisoned Citizens Union v. Shapp*, 11 F.Supp. 2d 586, 595 (E.D. Pa. 1998) (upholding prison officials' consent decrees because Romer applies to facial challenges against statutes 'in their entirety'); *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (upholding an Alabama statute prohibiting the use of certain sexual devices did not involve the king of discrimination concerns addressed in *Romer*).

54 See, e.g., *Equal Found. of Greater Cincinnati Inc v. City of Cincinnati*, 128 F.3d 289, 295-7 (6th Cir. 1997) (holding a CIR removing homosexual persons from antidiscrimination laws protection survived *Romer* because it was narrower in scope and impact and promoted 'community values'); *Bailey v. City of Austin*, 972 S.W.2D 180, 189-190 (Tex. App. 1998) (upholding the amendment because denying homosexual basic rights simply is 'recognising and favouring legally cognizable relationships such as marriage').

55 In fact, prior to 1977, marriage was defined in Section 4100 of the Californian Civil Code as 'a personal relation arising out of a civil contract, to which consent of the parties making that contract is necessary'. While related sections of the law made references to sex, a State Assembly committee that was debating adding sex specific terms to it was not clear whether partners of the same sex could get married. That year, the legislature amended the legal definition of marriage to remove any ambiguity. In 1992 the legal definition of marriage was moved from the Civil Code to Section 300 of the Family Code. When Proposition 22 came before voters, marriage was already defined in the Family Code as 'a personal relation arising out of a civil contract between a man and a woman', but a separate provision, Section 308, governed recognition of marriages contracted elsewhere. This stated that a 'marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state'. It was not clear whether this loophole could allow same sex marriage. See California Secretary of State, *Rebuttal To Arguments Against Proposition 22* (2000) <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22norbt.htm> (noting '30 other states and the federal government have passed laws to close these loopholes').

56 In addition to those those state statutes, in Massachusetts, the Supreme Judicial Court has interpreted marriage to mean 'the union of one man and one woman': *Adoption of Tammy*, 619 N.E.2d 315 (1993). And in New Jersey, despite no specific language in the statutes

30) of constitutional amendments banning gay marriage were initiated by legislatures,[57] while only 21 of the 41 (51 percent) states with CIR did likewise (46 percent if Illinois and Mississippi are not in included, because they are often not regarded as being true CIR states).[58] Moreover, as Jane Schacter points out:

> [N]ineteen of the thirty states with anti-marriage constitutional amendments much more pervasively disadvantage same-sex couples than do states, like California, which recognize civil unions or broad domestic partnerships. These nineteen states more broadly deny legal protections to same-sex couples. In such states, the constitutional codification of inequality is subordinating in both a functional and an expressive sense. It might thus seem paradoxical and perverse to focus on California's choice to pursue functional but not expressive equality...[59]

In fact, of those 13 states that grant civil unions or domestic partnerships, 8 (62 percent) are states with CIR.[60] Of those 19 constitutional amendments which deny homosexuals equality in 'a functional and expressive sense', 13 out of the 19 (68 percent) were drafted, edited and approved by legislatures who certified the measure for the ballot.[61] Indeed, Arizonan voters rejected a CIR banning both gay marriages

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prohibiting same sex marriages, the meaning of marriage as a heterosexual institution was so firmly established that the court could not disregard its plain meaning and the clear intent of the legislature: *Rutgers Council v. Rutgers State University*, 689 A.2d 828 (1997).

57 The following constitutional amendments were referred via the legislature: Alaska (1998, 68%); Hawaii (1998, 69%); Georgia (2004, 76%); Kentucky (2004, 75%); Louisiana (2004, 78%); Mississippi (2004, 86%); Oklahoma (2004, 76%); Utah (2004, 66%); Texas (2004, 76%); Kansas (2004, 70%): Alabama (2004, 81%); Idaho (2004, 63%); South Carolina (2006, 78%); South Dakota (2006, 52%); Tennessee (2006, 81%); Virginia (2006, 57%); Wisconsin (2006, 59%); Arizona (2008, 56%). The following were ignited via CIR: Nebraska (2000, 70%); Nevada (2002, 67%); Arkansas (2004, 75%); Michigan (2004, 59%); Missouri (2004, 71%); Montana (2004, 67%); North Dakota (2004, 73%); Ohio (2004, 62%); Oregon (2004, 57%); Colorado (2004, 56%); Florida (2008, 62%); California (2008, 52%). Minnesota and South Carolina have scheduled in referrals to ban gay marriage. If successful, this would mean 63 percent of all constitutional amendments banning gay marriage were initiated by legislatures.

58 The following states do not have gay marriage but have CIR: Alaska, Arizona, Arkansas, California, Colorado, Florida, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming. The following states do not have CIR, nor do they have gay marriage: Alabama, Delaware, Georgia, Kansas, Idaho, Illinois, Indiana, Kentucky, Hawaii, Louisiana, Minnesota, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin. New Mexico, Rhode Island and New Jersey have no express laws on the matter. Massachusetts plus District of Columbia have gay marriage and CIR. New York, Connecticut, Iowa, Vermont, New Hampshire have gay marriage but do not have CIR.

59 Jane Schacter, 'Ely at the Alter' (2010) 109 *Michigan Law Review* 1363, 1409.

60 The 8 states with civil unions or domestic partnerships and CIR are California, Colorado, Maine, Maryland, Nevada, Oregon, Illinois and Washington. The other 5 states without CIR but which have broad domestic partnerships are Delaware (effective from January 2012), Hawaii, New Jersey, Rhode Island and Wisconsin.

61 The following referrals were drafted by legislatures: Alabama, Georgia, Kentucky, Idaho, Kansas, Louisiana, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Wisconsin (13). The following were drafted via CIR: Arkansas, Florida, Michigan, Nebraska, North Dakota and Ohio (6). Human Rights Campaign, *Statewide Marriage Prohibitions* (January 2010) <http://www.hrc.org/documents/marriage_prohibitions_2009.pdf> See also State Library of Kansas, *Kansas Constitution* <http://www.kslib.info/constitution/art15.html> North Carolina can be added to that list

and civil unions in 2006, but approved a legislative-referral banning marriage only in 2008 (Proposition 102). Furthermore, although 10 of the 19 (52 percent) have some form of CIR, only 8 (42 percent) of those 19 states have direct citizen-initiated constitutional amendments. The legislature therefore was not responding to any potential CIRs being ignited by special interests: the legislatively referred constitutional amendments in Idaho and Utah — where citizens only have the power to directly enact and veto statutes — were results of purely legislative discretion as there was simply no possible threat of citizens igniting a constitutional amendment via CIR. Thus, 58 percent of the constitutional amendments which have been described as discriminating against homosexuals in 'a functional and expressive sense' were drafted in states where direct constitutional amendments were not even possible.

What of the five U.S. states which do have gay marriage and do not have CIR (with only Massachusetts and Washington, D.C. being the exceptions to this rule, while Maine and California voters repealed gay marriage via CIR)?[62] A number of states may have introduced gay marriage if they had CIR, despite judicial and legislative inaction: in Maryland (which only has facultative referendums) a proposal for gay marriage died in committee in 2011, despite the fact only 35 percent of Marylanders in polls said they would vote to repeal same-sex marriage in a statewide referendum, while 52 percent would support retaining gay marriage.[63] The New Jersey legislature has yet to enact gay marriage and so far has twice rejected bills for gay marriage, despite 55 percent of voters in polls being in favour of gay marriage and 39 percent against as early as 2003.[64] Rhode Island has yet to even pass a gay marriage bill, despite 59 percent of polled voters supporting it.[65] The New York legislature twice rejected a bill for gay marriage prior to finally enacting it in 2011, despite polls showing public support for gay marriage being 53 for and 39 against as early as 2009.[66] In these jurisdictions the values held by legislators were not identical to those of its citizens. There is simply no 'fast and steady' rule to assume legislatures (or indeed judges) are more enlightened than voters: sometimes legislatures may be

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meaning 20 state constitutions now ban gay marriage, i.e. 14 out of 20 (or 70 percent) of the state constitutional bans on gay marriage were initiated by legislators.

62 Connecticut, Vermont, New York, New Hampshire and Iowa being the other states.

63 Equality Maryland, *Momentum For Civil Marriage Equality* February 2011 <http://www.equalitymaryland.org/2011/2/21/momentum-for-civil-marriage-equality-in-maryland-continues-to-rise> ('52 percent of all survey takers indicate they would not overturn the law and restrict legal allowances for same-sex couples compared to just 35 percent who would …')

64 *Johanna Ginsberg*, 'New Jersey Activist sees Gay Marriage as a question of Church and State', *New Jersey Jewish News* (March 2003) <http://njjewishnews.com/njjn.com/2005/031005/mwnjactivist.html>; see also Rutgers, *A Majority Would Not Challenge a Legislative Bill Legalising Gay Marriage* (18 November 2009) <http://eagletonpoll.rutgers.edu/polls/release_11-18-09.pdf> (46 percent of New Jersey residents favour legalizing same-sex nuptials, with 12 percent unsure).

65 Hannah Wareham, 'Rhode Island Voters Support Same Sex Marriage', *Bay Windows* (18 August 2010) <http://www.baywindows.com/index.php?ch=news&sc=glbt&sc2=news&sc3&id=109284> ('59 percent of those polled indicated that they would support marriage equality in the state, representing a ten-point increase since 2008. Of those, 38 percent said that they 'strongly favor' legalizing same-sex marriage.′)

66 Kenneth Lovett, 'Has Gay Marriage Reached a Tipping Point in New York?', *Daily News* (online), April 20 2009 <http://articles.nydailynews.com/2009-04-20/local/17920144_1_gay-marriage-civil-unions-paterson> ('A Siena College poll released Monday found that by 53% to 39% margin, those surveyed say the state Senate should pass legislation to legalize same-sex marriage')

slightly more progressive than voters. Sometimes voters may be slightly more progressive than legislatures.

Equally, while 12 CIRs have limited marriage to one man and one woman,[67] 26 court judgments have found no constitutional 'right' to same-sex marriage (23 of these being at first instance).[68] The other three decisions upheld traditional marriage by reserving lower court findings that such a 'right' did exist (on appeal).[69] Another three decisions, one of which struck down Proposition 8, are currently on appeal[70] while five

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[67] Nebraska (2000, 70%); Nevada (2002, 67%); Arkansas (2004, 75%); Michigan (2004, 59%); Missouri (2004, 71%); Montana (2004, 67%); North Dakota (2004, 73%); Ohio (2004, 62%); Oregon (2004, 57%); Colorado (2004, 56%); Florida (2008, 62%); California (2008, 52%).

[68] 1. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); 2. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); 3. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974); 4. *Dean v. DC*, 653 A.2d 307 (D.C. 1995) 5. *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996), *affirmed on other grounds; 6. Storrs v. Holcomb* 666 N.Y.S.2d 835 (Ct. App. 1997); 7. *Baker v. State*, 170 Vt. 194; 744 A.2d 864 (Vt. 1999); 8. *Frandsen v. Brevard*, 828 So. 2d 386 (Fla. 2002); 9. *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003) 10. *Forum For Equality PAC v. New Orleans,* 886 S0.2d 1084 (La. 2004) 11. *Lewis v Harris*, 908 A.2d 196 (N.J. 2006) 12. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); 13. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); 14. *Lewis v. Harris*,WL 23191114 (N.J.Super.L. Nov. 5, 2003); 15. *Morrison v. Sadler*, 2003 WL 23119998 (Ind. Super. Ct. 2003); 16. *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (2005); 17. *Forum for Equality PAC v. McKeithen* 893 So.3d 715 (La. 2005); 18. *Li v. Oregon* CC 0403-03057; CA A124877; SC S51612; 19. *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 2005); 20. *Smelt v. Orange County,* 447 F.3d 673 (9th Cir. 2006) (upholding county court ruling of *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (*Smelt I*) that DOMA was constitutional because it did not involve sex discrimination or a fundamental right and had a rational basis); 21. *Wilson v. Ake*, 354 F. Supp. 2d 1298 (U.S. Dist., M. D. Fla. 2005); 22. *In re Kandu,* 315 B.R. 123, 132 & 146 (Bankr. W.D. Wash. 2004) (bankruptcy decision rejecting Fourth, Fifth and Tenth Amendment challenges to DOMA); 23. *Benson v. Alverson* Hennepin County District Case No. CV 10-11697 (2011).

[69] *Citizens For Equal Protection v Bruning*, 455 F.3d 859 (8th Cir. 2006) (reversing 368 F. Supp. 2d 980 (D. Neb. 2005)) (holding 3:0 that a Nebraska CIR — Measure 416 — does not violate Fourteenth Amendment Equal Protection Clause, was not a bill of attainder, and does not violate the First Amendment. 'Laws limiting the state-recognized institution of marriage to heterosexual couples...does not violate the Constitution of the United States'); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (holding 5:4 that the DOMA does not violate the equal protection clause of the state constitution, thus overruling a lower county court ruling); *In The Matter of the Marriage of J.B. and H.B* 302 DF-09-1074 (Texas 2010) (a county judge ruled statutory and constitutional ban on same sex marriage in violation of the US constitution, but when appealed to 5th Texas Court of Appeals the court held a ban on same sex marriage is constitutional: thus the two homosexual plaintiffs married in Massachusetts do not have a right to a same sex divorce in Texas based on the full faith and credit clause of the U.S. Constitution, nor does a ban on gay marriage violates equal protection clause of the U.S. Constitution).

[70] *Perry v. Schwarzenegger* 704 F.Supp.2d 921 (N.D. Cal. 2010) (finding Proposition 8 violates the Equal Protection clause of the United States Constitution: Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concluded that Proposition 8 is unconstitutional); *Commonwealth v. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010) (definition of marriage section of DOMA violates the Tenth Amendment); *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass., 2010) (definition of marriage section of DOMA violates the 5th Amendment: these decisions are pending on appeal in the U.S. Court of Appeals for the First Circuit).

have upheld amendments banning same-sex marriage on procedural grounds.[71] Indeed, rather paradoxically, courts in states where there is popular support for gay marriage have been willing to find homosexuals to be 'politically powerless'— such as in Massachusetts (where pro-gay candidates were returned in the subsequent election and antigay candidates were ousted) and Connecticut (where voters rejected limiting marriage to relationships between one man and one woman in a 2009 referendum), rather than courts in states where the legislative process has been unremittingly hostile to those rights.[72]

It is true that some CIRs pass laws which liberals would regard as being tyrannical, but the same is true of any democratic (or un-democratic) decision making institution.[73] As judges, elected or not, are products of their time, they will often invoke prevailing societal values, concerns and prejudices in their judgments, and thus reflect the values of the majority itself. Furthermore, just because a CIR circumvents a deliberative 'filter', that does not explain why, even if judicial review of CIR is warranted, the level of judicial scrutiny should be heightened for CIRs because the processes by which CIRs are enacted are insufficiently deliberative.[74] This raises a broader question for the 'special review thesis': Is the output of legislatures just as (if not more) illiberal than that of ordinary voters? The theory of 'adverse selection' propounded by Nobel-laureate James Buchannan provides one plausible explanation:

> [S]uppose that a monopoly right is to be auctioned: whom will we predict to be the highest bidder? Surely, we can presume that the person who intends to exploit the monopoly power most fully, the one for whom the expected profit is highest, will be among the highest bidders for the franchise. In the same way, positions of political power will tend to attract those persons who place higher values on the possession of such power. These persons will tend to be the highest bidders in the allocation of political offices...Is there not the overwhelming presumption that these offices will be secured by those who value power most highly and who seek to use such power of discretion in the furtherance of their personal projects, be these moral or otherwise? Genuine public-interest motivations may exist and may even be widespread, but are these motivations sufficiently passionate to stimulate people to fight for political office, to compete with those whose passions include the desire to wield power over others?[75]

In other words, politicians have an incentive to 'bid up' rather than 'filter out' the prejudices of their constituents in order to retain their grasp on the perks of political

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71 *Baehr v. Mike*, No. 20371 (Hawaii Supreme Court 1999-12-09) (holding the constitutionality of same-sex marriage was moot in light of a constitutional amendment limiting same-sex marriage); *Martinez v. Kylongoski* 220 Or.App. 142 (2005) (complainant alleged that the amendment revises the constitution illegally in violation of separation of powers and violates a single subject rule for constitutional initiatives. The Circuit Court found Measure 36 to be valid); *O'Kelly v. Perdue* and *O'Kelly v. Cox* 278 Ga. 572, 604 S.E.2d 773 (2004) (upholding constitutional ban on gay marriage); *Strauss v. Horton,* 207 P.3d 48 (2009) (constitutional amendment upheld 6:1 as the Prop. 8 did not cover more than one issue; however the 18 000 same-sex marriages are also upheld); *McConkey v. Van Hollen* Case No. 2008AP1868 (Wis 2009) (holding 7:0 that the constitutional amendment banning gay sex marriage did not violate the single subject rule).

72 Schacter, above n 59, 1369.

73 Barry Friedman, *The Will Of The People* (Farrar Straus, 1st ed, 2010) (arguing courts over the long march of history move with the zeitgeist).

74 Mark Tushnet, 'Fear of Voting: Differential Standards of Judicial Review of Direct Democracy' (1996) 373, 377 (Tushnet argues such 'proceduralist considerations' are an inherently inappropriate standard because the effect of CIRs varies from case-to-case, making any uniform presumption somewhat elusive).

75 James Buchannan, *The Reason of Rules* (Liberty Press, 2nd ed, 2000) 53.

power. Unlike CIR campaigns where petitioners may be disinclined to put up full-blooded measures which voters are unlikely to stomach, U.S. legislators, given the polarised nature of American politics, might strategically split along party-lines in Parliamentary committees, thus being reluctant to compromise with others;[76] propose legislation drafted largely by well-funded lobbyists in order to secure campaign funds for their re-election; 'dog-whistle' in order to attract a small segment of swinging conservative voters in marginal seats, or even use the legislative process to disenfranchise minorities unlikely to vote for them via poll taxes and racial gerrymandering.[77] Legislation, far from involving deliberation, is sometimes drafted in the final days of a legislative session, and some legislators have little idea of what is being proposed in each of the hundreds of bills they must consider in the waning hours of a legislative session.[78] Legislators, like voters, sometimes do not read the actual text of any proposed bill, but rely instead on media influence or cues from the party leadership.[79] Thus, as this section of the paper has shown, the 'special review' thesis rests on inherently romantic, indeed unwarranted, assumptions about the nature of the legislative and judicial processes.

B *What if judges strike down meagre social reform?*

Strong rights-based judicial review could also strike down CIRs that human rights proponents might support. In fact, in America, progressive parties in the early 1900s endorsed CIRs as part of their political platform precisely because it was seen as a mechanism to increase the material living standards of the working classes, by preventing corporate interests from 'dominating the legislature...and touching even the ermine of the bench'.[80] However, the American labour movement soon faced stiff opposition in the courtroom due to the *Lochner* decision, which struck down eight-hour work laws which denied businessmen the right to liberty of contract.[81] In turn, the Supreme Court invalidated a CIR prohibiting employment agencies charging destitute workers exuberant upfront fees for finding work as it violated the fundamental 'guarantee of liberty secured by the Fourteenth Amendment',[82] which in turn legitimatised judicial decisions invalidating pension schemes,[83] minimum wage laws for women[84] and bans on child slavery.[85] In sharp contrast, from 1898 to 1948 at least 12 CIRs introduced old age pension and retirement schemes; 5 enacted welfare benefits for the visually impaired; 5 CIRs provided for workers compensation legislation; 5 introduced eight-hour work laws; 4 introduced safety nets for the disabled or destitute children; 2 introduced occupational health and safety regulations

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76 See, e.g., note at the end of Figure 12.

77 See Lynn Baker, 'Direct Democracy and Discrimination: A Public Choice Perspective' (1991) 67 *Chicago Kent Law Review* 707, 715-30 (describing reasons for why 'deliberation' in representative democracy is a myth).

78 Centre For Governmental Studies, *Democracy By Initiative* (CGS, 2nd ed, 2008) 321.

79 Jane Schacter, 'In Pursuit of Popular Intent' (1995) 105 *Yale Law Journal* 107, 165.

80 Howard Zinn, *Voices of a People's History of the United States* (Seven Stories Press, 1st ed, 2009) 229.

81 198 U.S. 45 (1905).

82 *Adams v. Tanner*, 244 U.S. 590 (1917). In *Lincoln Union v. Northwestern Co*., 335 U.S. 525, 535 (1949) Justice Black said that *Adams v. Tanner* was part of the laissez-faire 'constitutional philosophy' that struck down minimum wage laws and maximum working hours.

83 *Railroad Retirement Board v. Alton*, 295 U.S. 330 (1935).

84 *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Moorehead v. Tipaldo*, 298 U.S. 587 (1936).

85 *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

(Figure 1-2). Indeed, since the 1980s, 81 percent (12 of the 15) of CIRs raising the minimum wage have been approved, which would make many progressives of the 1920s cheer with joy if they were alive today (Figure 3).

Today, however, American politics, including CIR campaigns, are increasingly being hijacked by corporate interests.[86] The special review thesis argues that there should be no rigorous judicial oversight of CIRs which create new 'filters' such as campaign finance reforms.[87] Indeed, an intrinsic characteristic of a real democracy is its ability for self-repair: activists can use the tools of direct democracy to fix any perceived flaws in direct democracy itself. But this is the irony of judicial review in the United States: not only is judicial review no guarantee civil liberties will be upheld, but judicial review can itself prevent even meagre political reforms from being implemented — at least 20 judgments have invalidated initiatives designed to limit excessive corporate expenditure in general elections or initiative campaigns, with courts finding that limiting funds to thousand dollar per person donations was unacceptable.[88] Indeed, given current case law, any attempts to limit corporate expenditure in either elections or CIR campaigns would be held to violate the First Amendment.[89] Furthermore, courts have vigorously defended anonymous speech by invalidating regulations mandating that campaign posters during referendums must name the identity of the interest group behind the poster, while attempts to ban paid signature-gatherers has constantly been invalidated under free speech grounds, undermining the integrity and transparency of the initiative process itself.[90] Thus, because of (strong) rights-based judicial review which treats corporations as people, CIRs in the US today are plagued by the very corporate excesses that inspired many to

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86 Daniel Smith, 'The Instrumental and Educative Effects of Ballot Measures' (2007) 7 *State Politics and Policy Quarterly* 417, 425-7 (surveying the empirical literature showing the nefarious role of money in CIR campaigns).

87 Eule, above n 2, 1559-60.

88 See, for instance, *Bare v. Gorton*, 84 Wn.2d 380 (1974) (invalidating Measure 276, a Washington direct citizen statute approved by 72 percent of voters, which imposed which limited expenditure contribution limits); *Fair Political Practices Commission v. Superior Court*, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (invalidating Proposition 9, a direct citizen statute approved by 69.8 percent of Californian voters, restricting the ability of lobbyists to make gifts and political contributions and requiring them to disclose their transactions expenditures in ballot initiative campaigns and election campaigns) and *Vannatta v. Keisling,* 899 F. Supp. 488 (D. Ore. 1995) (invalidating Measure 6, a 1994 Oregon direct citizen statute, approved by 53.1 percent of voters which stipulates that candidates may use only contributions from district residents and not outer state finance contributions).

89 *Citizens United v. FEC*, 558 U.S. (2010) (holding that corporate funding of independent political broadcasts cannot be limited); Justin Levitt, 'Confronting the Impact of Citizens United' (2010) 29 *Yale Law and Policy Review* 217, 220 (noting '*Bellotti*, 435 U.S. 765 (1978) granted corporations the right to spend unlimited treasury funds to support or oppose ballot initiatives'); *Citizens Against Rent Control v. City of Berkeley***,** 454 U.S. 290 (1981) (holding that it is unconstitutional to limit the size of a contribution that can be given to a group working for or against a ballot question); *Buckley v. Valeo*, 424 U.S. 1 (1976) is generally understood to prevent imposing spending limits for CIR campaigns.

90 See Chesa Boudin, 'Publius and the Petition' (2011) 120 *Yale Law Journal* 2140-2182 (arguing petition gathering should be viewed as legislative law-making and not free speech). As an example of cases, see *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating legislation prohibiting initiative sponsors from paying circulators to distribute CIR petitions to deregulate the motor industry—paid petition circulators are protected by the First and Fourteenth Amendment) and *Terms Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470 (S.D. Miss. 1997) (invalidating under free speech grounds legislation that made it illegal for anyone to circulate an initiative petition until the circulator was a registered voter in the state and made it illegal to pay petitions by the signature).

adopt CIRs, with judicial pronouncements sometimes allowing for such full-blooded corporate influence.

C *Objections*

One objection to this analysis might be that judicial review acts as a doorstop when voters fail to consider the rights of others, that an occasional CIR invalidation by the courts to protect rights is defensible.[91] But this argument pretends that rights operate 'asymmetrically' (by ignoring corresponding loss of liberty). In the real world, however, rights operate in ruthlessly symmetrical couplets:[92] a putative 'right' to manufacture meat in accordance with religious dietary laws cannot exist without denying the putative 'right' of animals to be anaesthetised prior to being ritually slaughtered;[93] a putative 'right' for convicted rapists not to undergo compulsory (but private) HIV tests cannot exist without denying the putative 'right' of victims to have access to immediate medical treatment to treat any potential infection (given the virus is difficult to detect in its early stages); a putative 'right' for homosexuals to be granted access to antidiscrimination laws cannot exist without denying others the putative 'right' to freedom of association; a putative 'right' for corporations to spend unlimited amounts to buy up airtime during election campaigns cannot exist without denying other cash-strapped individuals a right to be heard; a putative 'right' to life for convicted mass murders cannot exist without denying the putative 'right' of victims to seek retribution for their deceased family members. Society may at present be committed to one set of rights, but it could in future hold other fundamental rights in higher regard, such as animal rights, a right to healthcare or freedom of contract. And of course the set of rights favoured by judges may not align with the set favoured by society. Moreover, society may be committed to many rights, some of which may be completely irreconcilable. Hence, allowing judges to prioritize which set of rights-allocations they think society supports does not explain why judges are thought to be better able to communicate the set of rights-allocations the people want than the people themselves.

Furthermore, because rights operate in context-bound couplets, opponents of judicial review can dodge any charge of being outright 'rights sceptics' by simply

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91 See Eule, above n 2, 1551 (embellishing his arguments with buzz-words like 'equality' and 'individual liberty', citing CIRs mandating compulsory HIV tests for convicted rapists as being somehow self-evidentially 'bad' and ignoring the dignity of the victims or people who could have been infect with a virus). Cf. Mark Tushnet, 'How Different Are Waldron's and Fallon's Cases For and Against Judicial Review?' (2010) 30 *Oxford Journal Legal Studies* 49-70 (noting reductionist arguments avoid scenarios where cherished rights collide with other cherished rights, as well as assuming that it is better that a bad law fail than a good one pass: Tushnet describes this as an intrinsically 'libertarian' assumption); Ronald Dworkin, *Freedom's Law* (Harvard University Press, 1st ed, 1996) 313.

92 Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1-23 (arguing rights are reciprocal, imposing corresponding burdens, costs and obligations, i.e. externalities, on others: Dr Sturges liberty to practice auscultation in his consulting room relies on abridging the freedom of Mr Bridgman to make confectionary using noisy mortars and pestles next door, and vice versa. The liberty of Mr Lefever to stack timber on his roof comes by imposing an obligation on Mr Bryant either to put up with a smoke filled room or to pay for a new chimney. The freedom of farmers to grow corn near the railway relies on abridging the freedom of railway owners to use locomotives not fitted with spark catchers. Conversely, the freedom of railway owners to run any locomotive relies on abridging the freedom of farmers to grow corn near the tracks).

93 In 1893, a Swiss CIR prohibited the ritual slaughter of animals without prior anaesthetisation. Centre for Research On Direct Democracy, *Direct Democracy Database*, C2D <http://www.c2d.ch/votes.php?table=votes>.

denying the existence of transcendental or 'asymmetrical' right-orientated truths: rights simply provide no self-evident guidance in making line drawing, first-order policy decisions, especially when fundamental rights are pitted against one another. Consider the ban on Minarets in Switzerland. Why should 'freedom of religion' be self-evidentially privileged over the 'right' of other minorities (atheists and feminists) to use the democratic process to send a message to radical Islam?[94] Furthermore, even if rights do operate asymmetrically, there is no reason to assume a judge's conception of rights is better than ordinary voters', given there is no universally agreed upon epistemological procedure, legal or otherwise, for ascertaining the precise scope of a right. Why cannot the general public itself exercise the judicial review by having a lively debate as to whether a ban on Minarets even limits this vague, amorphous right to 'freedom of religion' — indeed, proponents of the Minaret ban did just that, arguing Minarets themselves have nothing to do with religion given they are not even mentioned in the Koran or any Islamic scripture.[95] Asserting that judges alone can reach some epistemologically 'correct' answer implies that proponents of judicial review are opposed to the key proposition behind democracy itself — that external truths do not matter, but instead what matters are the results from internal democratic deliberation.[96] In short, democrats are not moral relativists, but simply not solipsistically arrogant enough to claim that their interpretation of rights or firmly-held beliefs should be privileged over those of others.

Indeed, if rights did not involve tradeoffs, if the 'right' answers were objectively determinable, we would have no need for Parliaments, 5:4 splits on courts or even referendums. Yet the reason these issues cannot be delegated to a panel of logic professors who could work out the correct answers from first principles is because these issues are not objective: democracy is not about implementing self-evident answers which are 'right' or 'wrong', but about aggregating what the diverse, individual members of society personally regard as 'right' or 'wrong' across time. Given the lack of any neutral, reliable or uncontested epistemic procedure to resolve disagreements — even among the experts — individual judgments (on one moral theory) or preferences (on another) are just that: individual judgments or preferences. Different people have different burdens of proof in order to support a proposal and different criteria about what is 'right' and 'wrong'. The proposition underpinning democracy is not that the majority is always 'right', but that there does not appear to be any self-evident principle (or even a universally agreed principle) by which the subjective policy preferences of certain individuals — no matter how passionately they believe in the self-evident 'rightness' of their own views — can be given greater

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94 Ayaan Hirsi Ali, 'Swiss Ban on Minarets was a vote for tolerance and inclusion' *Christian Science Monitor* (online), December 5 2009 <http://www.csmonitor.com/Commentary/Opinion/2009/1205/p09s01-coop.html>

95 Egerkinger Komitee, *Koran and Minarets* (May 2007) <http://www.minarette.ch/downloads/04-koran.pdf> ('The construction of a minaret has no religious meaning. Neither in the Qur'an nor in any other holy scripture of Islam is the Minaret expressly mentioned...The minaret is far more a symbol of religious-political power claim'); *SWISS INFO*! 3 May 2007 <http://www.swissinfo.ch/eng/Home/Archive/Rightwingers_want_nationwide_vote_on_minarets.html?cid=44268> (Ulrich Schlüer arguing 'A Minaret has nothing to do with religion: it just symbolises a place where Islamic law is established'); Egerkinger Komitee, *Koran and Minarets* (May 2007) <http://www.minarets.ch/fileadmin/webfiles/images/flyer-f.pdf> (quoting PM of Turkey that 'Mosques are our barracks, domes our helmets, minarets our bayonets, believers our soldiers. This holy army guards my religion', thus arguing Minarets are a political power symbol, not a religious symbol).

96 Allan Hutchinson, 'A Hard Core Case Against Judicial Review' (2008) 121 *Harvard Law Review* 57, 60-1.

weight than the opinions of others, i.e. in a world where everyone thinks their judgments and preferences should be privileged over those of others. Direct democracy relies on the proposition that, in aggregating individual judgments or preferences, none is privileged *a priori* above or before any other.[97] However, judicial review (whatever its form) operates under the implicit assumption that the judgments and preferences of the people who lived in 1791 (for originalists) or what individual judges believe society today values (for living constitutionalists) should be given greater weight over that of every other person.

One reply to this is to argue judicial review is more 'legitimate' than CIRs because the former comes closer to the ideal of deliberative democracy: judges have superior 'fact finding' abilities, conduct complex 'thought experiments' and must publicly justify their decisions, while CIR values the 'ignorant' and 'uneducated'.[98] But this is also highly debatable or contestable. First, lawsuits are often lodged in districts where one judge in the first instance is suspected to be sympathetic to a particular cause, and plaintiffs are selected by well-funded advocacy groups in order to embody the adversarial, one-sided perspective an interest group wants to push. The particular idiosyncrasies of the individual litigants usually drop out of sight by the time the Supreme Court addresses the issue, almost always in vague, general terms.[99] Secondly, oral argument takes little over an hour; judges often use it to signal to other judges where they are heading or to clarify facts; if judges meet at all to discuss opinions, they merely act as 'political animals' driving home their opinions on an issue.[100] They may well not read all the briefs submitted to them and their opinions, at least in the United States, are often written by their clerks.[101] Furthermore, not all interested persons have standing to appear in a court case, meaning courts hear arguments from only a limited number of parties and may not have all the information necessary to gain a comprehensive perspective on the social, political or economic fairness of a proposal.[102] Thirdly, criticizing voters for failing to reason like judges does not allow us automatically to conclude that the judicial approach, including the citing of obscure precedents, is somehow better than the everyday experiences of ordinary voters, whose bluntness might go straight to the nub of a problem.[103] The belief that the judicial process allows one to have a monopoly on wisdom is hardly self-evident, collapsing back into the questionable *a priori* privileging of some judgments and preferences over those of others as to how government should be structured. This point gains further traction once we also observe that the American

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97 Cf. *Coalition For Economic Equality v. Wilson*, 110 F.3d 1431, 1437 (9th Cir. 1997) (conceding 'a system which permits one judge to block with a stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy'). Even if only 40 percent of the voters actually vote in a CIR, the resulting decision is still much more widely supported than a judicial decision, in which only 0.0001 percent of the electorate.

98 Larry Kramer, *The People Themselves* (Oxford University Press, 1st ed, 2004) 246-48 (discussing elitists distrust of voters).

99 Waldron, above n 3, 1346.

100 Richard Posner, 'Foreword: A Political Court' (2005) 199 *Harvard Law Review* 35-90.

101 Kramer, above n 98, 240.

102 Christopher Eisgruber, *Constitutional Self-Government* (Harvard University Press, 1st ed, 2001) 165-73 (conceding this general point). Equally, the State Attorney-General or lawyers defending the CIR from being invalidated by the courts might personally support the court invalidating the CIR, therefore they might not put much effort or resources into defending the initiative.

103 Tushnet, above n 74, 383 (questioning the self-evident merits of 'deliberation', noting deliberation 'may overlook important information of the rough-and-tumble of daily life … not readily reducible to the forms of reasoned argument', thus undervaluing 'relevant concerns that appear emotional').

people have never expressly consented to the practice of rights-based judicial review of direct democracy.[104]

Furthermore, accusations of 'irrationality' or 'prejudice' seem nothing more than a way to shut down debate by limiting the ability of the opposition to ask uncomfortable questions (indeed, each side thinks the *other* side is the ignorant one). Moreover, larger voting bodies have an informational advantage over courts: while individuals may be poorly informed, collectively, voters can pool together all their information.[105] They can access information at their fingertips; they can read the exact text of an initiative at least four months before a vote and if they are suspicious about something (extravagant claims made, say, in an anonymous advert) they can check

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[104] When the judicial review of direct democracy was actually put to the voters, they upheld the idea that courts should *not* be able to invalidate laws enacted by the people themselves: COLO. CONST. Art. 6, §1 (1913) (disabling lower state courts to invalidate voter initiatives). This was invalidated in *People v. Western Union*, 70 Colorado 90 (1921); *People v. Max*, 70 Colo. 100 (1921) (invalidating this constitutional amendment which required judicial decisions to be put to the people – the court held judges, not the people, had the final power to interpret the constitution). Voters in Nevada also exempted voter initiatives' from judicial review and the executive veto: NEV. CONST. Art. XIX, §2 (1904). This too was ultimately ineffective as courts watered-down the provisions meaning by claiming we cannot presume that voters would want to enact unconstitutional legislation: *Caine v. Robbins*, 61 Nev. 416 (1942). There is no evidence of the electorate giving 'implicit consent' to judicial review of direct democracy or consent either for the institution of representative government itself: the American people never ratified the US *Constitution* via a referendum and many Supreme Court decisions lead to political disagreement, with voters overruling the interpretation of state constitutions made by lower courts and legislators on a state level. And even if the constitution was approved at a referendum, we cannot infer from one set of preferences how another set might have fared (i.e. status quo versus the Swiss system), or whether voters today agreed with their forefathers decisions. Moreover, we know voters have attempted to change the constitution (as with term limits) and on their state constitutions to overrule the judges, only for the judges to say no: (gutting a Nebraska courts could not invalidate voter initiatives); *Noy v. Alaska*, 83 P.3d 538 (Alaska 2003) (holding that Alaskans cannot overrule the courts as the initiative is limited to statutes, not the constitution). If all preferences, however, were to be freely aggregated it would seem arguable that direct democracy, where the people are the absolute sovereign by having the final say on all policy matters, might well be favoured in many affluent democracies: Shaun Bowler, 'Enraged or Engaged? Preferences for Direct Citizen Participation in Affluent Democracies' (2007) 60 *Political Research Quarterly* 351-362. This is not to say voters cannot adopt judicial review so judges can invalidate initiatives, but simply that they have never, to my knowledge, given their free and explicit consent for them to do so.

[105] Arthur Lupia, 'Dumber than Chimps? An Assessment of Direct Democracy Voters', in *Dangerous Democracy? The Battle over Ballot Initiatives in America,* Larry J. Sabato, Howard R. Ernst and Bruce A. Larson (eds) (Rowman & Littlefield, 2001) 66–70; Andrew McLennan, 'Consequences of the Condorcet Jury Theorem for Beneficial Information Aggregation by Rational Agents' (1998) 92 *American Political Science Review* 413–18 (arguing the Condorcet jury theorem offers a justification for direct democracy. The Condorcet theorem holds that the larger the voting group, the greater the enhancement of group competence above average individual voter competence by majority voting. However, if policy disagreements arise from different information rather than merely different underlying preferences, and if each person receives an informative signal about the 'right' course of action, aggregating the opinions of a million voters can be highly conducive to delivering 'right' answers if right is defined by their own underlying preference). Note the theorem presupposes that average individual competence is higher than fifty percent and that there is a self-evidently 'right' or 'wrong' answer: as argued above, the whole point of democracy is that there is not self-evidently 'right' or 'wrong' answers, but mere preferences on these matters which are formed in light of robust debate.

with community leaders, a trusted friend, colleagues, newspapers and online.[106] Indeed, the chaotic inter-textual nature of the public sphere thus provides the best evidence that CIRs are better than any judicial 'filter':[107] it is difficult to hide anything in a CIR campaign which involves criticisms from 'a sprawling and diffuse set of sources',[108] with opponents exaggerating flaws in initiatives arguably leading to a 'status quo' bias ('if you don't know, vote no'). The information-rich environment found in CIR campaigns has been shown to rival the effects of a formal education by fostering greater political engagement and civic awareness over pressing policy issues,[109] whilst also allowing voters to use the cues they receive from 'informed experts' (political leaders or academics) to cast votes identical to experts with an encyclopaedic understanding of a CIR proposal simply by matching information available to them against their underlying preferences.[110] Thus, voters are just as 'capable' as judges in

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[106] Johanningmeier, above n 4, 1140-1.

[107] Robyn Polashuk, 'Protecting the Public Debate' (1993) 41 *UCLA Law Review* 391, 402-3 (showing voters are reluctant to approve laws when their implications are unclear).

[108] Schacter, above n 79, 165.

[109] Daniel A. Smith and Caroline J. Tolbert, 'Direct Democracy, Public Opinion, and Candidate Choice' (2010) 74 *Public Opinion Quarterly* 85-108 (finding that exposure to minimum wage ballot measure campaigns in 2006 increased the saliency of the economy in general among voters and primed support for Democratic candidates up and down the ballot); Todd Donovan, Caroline J. Tolbert and Daniel A. Smith, 'Political Engagement, Mobilization, and Direct Democracy' (2009) 73 *Public Opinion Quarterly* 98-118 (Finding that independents relative to partisan voters exhibited greater awareness of midterm election due to ballot measures, suggesting that without the presence of salient ballot measures some episodic independent voters would not vote in midterm elections); Daniel A. Smith, Caroline J. Tolbert, and Daniel C. Bowen, 'The Educative Effects of Direct Democracy: A Research Primer for Legal Scholars' (2007) 78 *University of Colorado Law Review* 101-124 (finding that when given the opportunity to participate directly in policy decisions via the initiative process voters are generally more likely to hold more favourable opinions of state government); Caroline J. Tolbert and Daniel A. Smith, 'The Educative Effects of Ballot Initiatives on Voter Turnout' (2005) 33 *American Politics Research* 283-309 (research based on aggregate-level voter age population data indicates that ballot measures increase turnout in low-information midterm elections. On average, turnout in presidential elections increases by 0.70 percent with each extra initiative on the ballot, whereas turnout in midterm elections increases by 1.7 percent, all else equal): Matthias Benz and Alois Stutzer, 'Are Voters Better Informed When They Have a Larger Say in Politics?' (2004) 119 *Public Choice* 31-59 (finding that inhabitants of countries which held referendums on EU matters scored considerably better on 10 general questions about the EU than did inhabitants of countries where no referendum was held: the effect was just as great as the difference between people with an average income versus people with a low income). Benz and Stutzer also looked at to what degree direct democracy in Switzerland is practiced at cantonal level, which differs considerably from one canton to another, and compared this with the answers from Swiss citizens on three questions about general Swiss politics. Here too, the Swiss who lived in cantons with greater direct democracy had considerably more knowledge than the Swiss living in cantons with more representative systems. The impact was just as large as the difference between members of political parties and non-party members, or the difference between people with monthly incomes of 5000 versus 9000 Swiss francs).

[110] John E. Filer and Lawrence W. Kenny, 'Voter Reaction to City County Consolidation Referenda' (1980) 23 *Journal of Law and Economics* 179–90 (finding that citizens managed to vote and remain faithful to their interests in city/county consolidation referendums); Arthur Lupia, 'Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections' (1994) 88 *American Political Science Review* 63–76 (examining voting patterns on five complicated California insurance propositions in 1988 that were prima facie hard to distinguish. Based on exit surveys, Lupia classified voters into 'informed' and 'uninformed' groups based on whether they could correctly answer questions about the substance of the measures. He found that uninformed voters could emulate the

amassing available information and 'deliberating' with themselves and others whether a particular CIR would lead to a 'better' outcome.

II TYRANNY OF THE MAJORITY

Another common argument in favour of vigorous judicial oversight of CIR recites the oft-quoted observation made by James Madison that 'pure democracy', if left untamed, would lead to tyrannical abuses of minorities.[111] But merely asserting a CIR is 'tyrannical' does not make it so,[112] nor does it explain why tyranny of the minority is any better. Any loss will always appear disappointing to the losing minority. But in developed countries with the rule of law, countermajoritarian support for judicial review might (for some) become compelling only if a decisional or topical minority becomes a 'discrete and insular minority' i.e. if democratic outcomes systematically, materially and repeatedly disadvantage powerless minorities.[113] Indeed, the key reason James Madison desired a representative buffer to counter any majoritarian excesses

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voting patterns of informed voters simply by knowing the positions interest groups such as Ralph Nader and the insurance industry had taken on the measures. There was only a 3 percent difference in voting behaviour between the group of voters who were well informed and the group of voters who based their vote solely on shortcuts); Arthur Lupia, 'Are voters to blame? Voter competence and elite maneuvers in public referendum' in M.Mendelsohn and A Parkin (eds), *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (MacMillan, 2001) 191–210 (arguing it may also be true that polities encounter issues for which experts are themselves not well informed. In this case, there are two possible scenarios. In the first scenario, no one in the polity is sufficiently well informed. In such a case, letting the voters choose policy by direct democracy rather than leaving it to the legislature causes no loss in competence. In the second scenario, some elites are knowledgeable, but voters are not. This scenario can only occur in a 'closed society', where the channels of communication are centrally controlled, or in a society where effective channels of communication do not exist. In such a situation, letting voters make policy by direct democracy can do considerable damage. European and North American states, however, are not closed societies. Each has access to modern forms of communication and competitive political environments. Therefore, if someone in a direct democracy debate has the opportunity to expose the weakness of the opposing side, the competitive nature of politics provides a strong incentive to do so publicly. In such cases, it is possible, but unlikely, that competing elites will conspire to withhold important information from potential supporters in the electorate. In sum, if there are people who are willing to inform voters and if voters can use environmental factors such as institutions to better understand the motives of the people they listen to, then voters can cast the same votes they would have cast if more informed).

[111] Steven Marlowe, 'Direct Democracy Is Not Republican Government' (2001) 24 *Seattle University Law Review* 1035, 1048; Erwin Chemerinsky, 'Challenging Direct Democracy' (2007) *Michigan State Law Review* 301, 307. Putting aside the *argumentum ad verecundiam* here, the framers were in fact staunch supporters of popular sovereignty and majority rule — conflating the hatred of democracy with Republican virtues was by far the exception rather than the rule: see Akhil-Reed Amar, 'The Central Meaning of Republican Government' (1994) 65 *University Colorado Law Review* 749-786; 'The Consent of the Governed: Constitutional Amendment Outside Article V' 94 *Columbia Law Review* 457-488.

[112] Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge University Press, 1st ed, 1989) 48 (defining allegations of irrationality as affirmations of vernacular 'otherness', expected during *any* argument and simply to be brushed aside). The same could be said of the 'tyranny of the majority' argument.

[113] Waldron, above n 3, 1396-1404; Mark Tushnet, *Taking the Constitution Away From The Courts* (Princeton University Press, 1st ed, 1999) 159 ('Every law overrides the views of the minority that loses ...We have to distinguish between *mere* losers and minorities that lose because they cannot protect themselves in politics').

was in order to protect the economic and physical welfare of the propertied few[114] from the rebellious Shays — debtors who physically abused their creditors, using 'violence instead of law ... the destructive coercion of the sword in place of the mild and salutary magistrates'[115] in order to cancel their debts. Do CIRs result in material or repetitive symbolic losses for the minorities of today, i.e. do they really create 'discrete and insular minorities' or result in material, Shays-like economic losses for homosexual or racial minorities?[116] If not, there is no need for 'a tiny, unrepresentative elite: judges and their academic doppelgangers' to enter into 'the messiness — the ordinary politics — of the real world enterprise of popular sovereignty'.[117]

A *Material Abuses*

CIRs banning race-based affirmative action in universities located in Michigan (2006) and California (1996) were both invalidated in either the first or second instance as they were said to deny the right of minorities to access public institutions.[118] But what does the empirical evidence show?[119] Latinos and Chicano constitute 2.8 percent of all those admitted to Michigan State University for 2010, the same percentage when affirmative action was last in place in 2006. While blacks declined from 7.9 to 7.3 percent of all enrolments for the Fall, whites have also declined more dramatically from 75 percent to 71.5 percent. But this also seems largely due to the influx in international students who went from 7.3 to 10.5 percent of all university enrolments (Figure 4). Spring enrolments yielded similar results, with the decline in white and black enrolments preceding the ban on affirmative action (Figure 5). At the University of Michigan, Latinos, African-Americans and Native-Americans constituted 12.3

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114 John Matsusaka, *For The Many Or The Few* (University of Chicago Press, 1st ed, 2004) 119: ('Although it has become a mantra in the literature to cite the *Federalist* papers on the dangers of majority tyranny, it is seldom noted that the concern there was primarily about the rights of *economic* interests,') (Emphasis added).

115 Madison, above n 4, 111.

116 Curiously, early commentators of direct democracy observed the framers' fear of the 'tyranny of the majority'— whereby the poor would plunder and loot the rich propertied few — never really came to fruition: V.O. Key, *The Initiative and the Referendum in California* (University of California Press, 1st ed, 1939) 450.

117 Richard Parker, *Popular Sovereignty: Politics Without An End*, Democracy Foundation <http://demofound.org/symposium/library/parkerpaper.pdf>

118 Clint Bolick, 'Jurisprudence in Wonderland' (1998) 2 *Texas Review Law and Politics* 59-77 (the judgment in first instance was overruled on appeal); *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.* Nos. 08-1387/1389/1534; 09-1111 (the case is currently on appeal).

119 The literature suggests no systematic loss or decline in minority admissions: Richard Sander, 'Affirmative Action and the Chilling Effect' (August 2011) <http://weber.ucsd.edu/~kantonov/ChillingEffect.pdf> (finding no evidence that application or enrolment rates fell for minority admissions relative to other students after Proposition 209, or that minorities refused to apply to the University of California and its institutions because they no longer had affirmative action programs, noting there is 'no evidence of chilling effects in either applications or enrolment rates. In fact, our study provides consistent evidence of a modest warming effect'); Peter Hinrichs, 'The Effects of Affirmative Action Bans on College Enrolments, Educational Attainment and Demographic Compositions of Universities (2011) *Review Economics and Statistics* (forthcoming) (although the percentage of minorities did fall at elite institutions, affirmative action bans had no effect on the typical minority student and the typical college i.e. no change in aggregate underrepresented minority enrolments overall); David Card, 'Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants?' (2005) 58 *Industrial and Labor Relations Review* 416–434 (finding no evidence that highly qualified minority applicants reduced their rate of applying to top state institutions in response to affirmative action bans).

percent of all undergraduates in 2006 when affirmative action was last in effect. Although in 2010 this figure stands marginally lower at 11.2 percent, the intake of Asian-Americans also increased from 12 to 13.6 percent over the same period, suggesting in this case that affirmative action is a zero-sum game: the collective 'right' for affirmative action for African-Americans can only exist at the expense of other minorities such as Asian-Americans (Figure 6). In any event, the latest data for 2011 shows the number of new freshmen enrolments is up from 2006 in absolute terms for all racial groups (Figure 7). Moreover, at Wayne State University ethnic minorities constituted 31 percent of all enrolments in 2006, but in percentage terms rose to over 35.8 percent for every year since the ban on affirmative action. Blacks constituted 25.9 in 2006, but 26.5 percent in 2009 (Figure 8): at the University of Michigan the trough of black enrolments occurred in 2009, while the peak in black admissions at Wayne State occurred in 2009, implying some minorities are simply going to other universities.

Equally, the number of minority admissions at the University of California (all campuses) for the fall of 2011 — without the benefit of affirmative action — exceeds that of 1997 when affirmative action was last in effect, both in absolute numbers and the percentage of all those admitted. Latinos rose a staggering 168 percent, from 14.3 percent (5,745) of all freshman admissions in 1997 to 26 percent (15,418) in 2011.[120] African-Americans also rose 3.8 percent (1,628) in 1997 to 4.1 percent (2,624) of all those admitted in 2011, a 59 percent increase in absolute terms since 1997. Asian-Americans have gone from 32.4 percent (12,956) of all those admitted to 36.3 percent (21,467), while ironically the only major ethnic group to decline in percentage terms was whites, who went from 42.2 percent (17,077) of all freshmen admitted to 30.5 percent (18,123) – a mere 6 percent increase in absolute terms. The above statistics are unsurprising: after Proposition 209, a number of scholarship programs instead used race neutral class-based affirmative action, thus suggesting that administrative buffers can limit perceived CIR excesses.[121] Thus, in these instances, there is no evidence of any material or systematic detriment of CIRs banning affirmative action.

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[120] See data University of California, *StatFinder*, 1997 <http://statfinder.ucop.edu/library/tables/table_22-1997.aspx> University of California, *Resident Freshmen Counts*, 2011, <http://www.ucop.edu/news/factsheets/2011/fall_2011_admissions_table_3.pdf>

[121] Eryn Hadley, 'Did The Sky Fall In? Ten Years After Proposition 209' (2005) *BYU Public Law Journal* 20, 103 (arguing the sky did not fall in due to affirmative action bans, partly thanks to scholarships: in fact, the African-American graduation rates leapt by 6.5 percent at Berkley in 2000 while at the University of California, San Diego graduations rose even more dramatically from 26 percent in 1995 to 52 percent in 2001, suggesting a link between the abolition of affirmation action and a better-prepared student body selected exclusively on merit). A large literature argues that affirmative action injures rather than helps minorities: Richard Sander, 'A Systematic Analysis of Affirmative Action in American Law Schools' (2004) 57 *Stanford Law Review* 367-483 (finding black law students are nearly 2.5 times as likely as white law students not to graduate, 4 times more likely to fail the bar on their first attempt and 6 times as likely to never pass the bar. Around half of this disturbing gap can be explained by differences in lowering law school admission rates. See reply to his critics: Richard Sander, 'Measuring the Mismatch: A Response to Ho' (2005) 114 *Yale Law Journal* 2005-2010; Richard Sander, 'A Reply To Critics' (2005) 57 *Stanford Law Review* 1963-2016); Richard Sander, 'The Racial Paradox of the Corporate Law Firm' (2006) 84 *North Carolina Law Review* 1755-1823 (arguing aggressive racial preferences at law schools and law firm level tend to undermine in some ways the careers of young black and Hispanic attorneys and may, in the end, contribute to the continuing white dominance of large firm partnerships by reinforcing racial stereotypes and attrition between various races); Albert Yoon, 'Affirmative Action in Law School Admissions: What Do Racial Preferences Do?' (2008) 75 *University of Chicago Law Review* 649-714 (finding some mismatch comes from

In *Romer v Evans*, Kennedy J cited 'invidious [voters'] intent' aimed at causing 'continuing and real injuries' as a reason for invalidating a CIR that barred the extension of antidiscrimination laws to homosexuals.[122] But are there continuing material losses from such bans? One might they exacerbate the economic inequality faced by homosexuals. But lesbians already earn more than heterosexual women.[123] Homosexual men earn less than heterosexual men, but this is due at least in part to the fact that gay men work fewer hours than straight men, and work in lower paying female dominated service industries.[124] Moreover, recent studies have found (1) no evidence that anti-discrimination laws have any impact on the wages of lesbians;[125] (2) no effect whatsoever for gay men in areas of private employment but minor effects with a college degree in public employment;[126] (3) no evidence of lesbians in any sector averaging higher earnings or wages in areas with antidiscrimination policies, with the earnings of African-American lesbians and African-American gay men being lower in areas with antidiscrimination laws.[127] However, the latter study found a significant 'though not sizeable' effect for white men in the upper income bracket: they earn about 8 percent more per year working in the private sector than gay men in states without antidiscrimination laws. The reason is due to longer terms of employment, suggesting that the discrimination manifests itself via hiring or firing.[128] But at best, this proves antidiscrimination laws only benefit affluent white-collar males, not the

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less qualified black students who typically attend second or third tier schools, many of whom would not have been admitted to any law school without preferences).

122 517 U.S. 620, 634-35 (Kennedy J, concurring).

123 Heather Antecol, 'Sexual orientation wage gap' (2008) 61 *Industrial and Labor Relations Review* 518–543. Equally, one cannot argue that across the board discrimination exists if one group (gay males) takes a wage hit while the other group (lesbians) earns a payday: see Erik Plug, 'Effects of Sexual Preference on Earnings in the Netherlands' (2004) 17 *Population Economics* 117-131.

124 Dan Black, 'The Economics of Gay and Lesbian Families' (2007) 21 *The Journal of Economic Perspectives* 53-70.

125 Gary Gates, *Impact of Antidiscrimination Policies On The Wages of Lesbians and Gay Men* (November 14 2010) California Center for Population Research On-Line Working Paper Series <http://papers.ccpr.ucla.edu/papers/PWP-CCPR-2009-010/PWP-CCPR-2009-010.pdf> ('Unlike their male counterparts, there are no obvious wage disparities whereby lesbians earn less than other women...Perhaps it is not surprising then that analyses offer much weaker evidence of an effect of anti-discrimination policies on the wages of women in same-sex couples. Relative to all women, the findings suggest that the women in same-sex couples receive about a two percent wage premium if they live in a state with an anti-discrimination policy')

126 Marieka Klawitter 'Local antidiscrimination ordinances and the earnings of sexual minorities' in M.L. Badgett (ed), *Sexual orientation discrimination* (Routledge Press, 2007) 275–290. ('We found...statistically significant earning differentials from sexual minorities in areas that banned discrimination in public employment...the interaction effects for private sector workers were estimated to be very small and statistically insignificant').

127 Marieka Klawitter, 'Multivariate Analysis of the Effects of Antidiscrimination Policies on Earnings by Sexual Orientation' (2011) 30 *Journal of Policy Analysis and Management* 334, 352 ('In no case did lesbians differentially earn more in a state or local area with a policy. African American lesbians did not earn significantly more than married women, and their earnings were lower in places with local antidiscrimination policies. This adds to the puzzle of African American gay men earning less in states with policies. The samples of African American gay men and lesbians are very small and perhaps contribute to these anomalous findings').

128 *Ibid*. 335 and 355 ('There is, however, no evidence that lesbians in any sector average higher earnings or wages in areas with antidiscrimination policies. The strongest evidence of effects for antidiscrimination policies is for weeks of employment and for gay men who are in the private sector, white, and in the upper half of the earnings distribution').

poor and destitute workers whom egalitarian proponents of judicial review generally purport to have in mind. There is simply no evidence of any systematic or continuing injuries when a CIR repeals what are otherwise largely 'symbolic' laws. Thus, as CIRs discussed have not generated any deleterious material outcomes,[129] it is simply inappropriate for judicial umpires to bend the rules of the game and disenfranchise millions of voters, black or white, who voted in any ballot measure.

In addition to that there is also the consideration that the bureaucracy rarely enforces anti-minority initiatives. Indeed, when James Madison argued 'pure democracy' would result in the 'tyranny of the majority' he was referring to a society 'where a small number of people would administer the government in person', contrasting 'pure democracy' with a Republic 'which extends over a large region' and relies on representatives to administer the laws of the land.[130] However, 'direct democracy' is not comparable to 'pure democracy'. States like California have a population of 34 million (by no means a 'small society' by the standards of 1789 let alone those of today), so clearly the people do not 'administer the government in person'. All initiatives must be 'administered' by civil servants — teachers, university administrators, police officers — far away from the public gaze. Voters may very well be performing 'legislative functions' by enacting laws, but in the end they do not serve as judicial or 'executive magistrates'.[131] Voters cannot personally 'execute their plans of oppression' as they rely in good faith on third parties to execute and interpret the laws they have enacted. Accordingly, bureaucrats can find creative ways to avoid enforcing laws enacted by ordinary voters: in California, university administrators simply resorted to 'class-based' rather than 'race-based' affirmative action, while in Switzerland local councils continue to allow Muslims to erect 'Minaret-like' crescents by simply redefining what constitutes a Minaret.[132] All this raises the question of how CIRs lead to 'tyranny' when most of the notorious CIRs are not enforced or are substantially watered-down by the executive branch of government?[133]

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[129] There have, however, been bizarre outcomes. The following judgments were delivered on the same day: *Crawford v. Board of Education*, 458 U.S. 527 (1982) (upholding a CIR banning forced busing); *Washington v. Seattle School District (No.1)* 458 U.S. 475 (1982) (invalidating a CIR banning moves toward bussing and racial decomposition). The court held the two were 'distinguishable' due to 'racist' intent in the latter. Yet such judicial reasoning fails to explain what is so self-evidently 'good' about the outcomes of bussing: does it lead to higher scores for black students?

[130] Madison, above n 4, 52 (Federalist 10).

[131] *Ibid.*, 270-77 (Federalist 47).

[132] 'Minaret-like Structure erected', *20 Min* (Online), 5 October 2009 <http://www.20min.ch/news/ostschweiz/story/11984803> (The Islamic center in Frauenfeld (Thurgau canton) has a ventilation shaft that was adorned with a sheet metal cone topped with a crescent moon. The Council has declined to treat the structure as a 'Minaret' saying that it had been officially declared a ventilation shaft, and that the added crescent moon had not caused any controversy during the six years since its installation); Roman Neumann, 'This is NOT a Minaret!' *Blick* (online), 12 January 2009 <http://www.blick.ch/news/schweiz/das-ist-gar-kein-minarett-134719> (In Langenthal, a planned crescent to be erected was described as a 'Minaret-like' tower rather than a 'minaret'. As calls to prayer have been a frequent argument against minarets and the planned tower in Langenthal cannot be used for that purpose, therefore it is not a Minaret).

[133] See generally Elisabeth Gerber, *Stealing the Initiative* (Penitence Hall, 1st ed, 2001).

B *Repeated losses?*

Do CIRs create 'insular' or 'discrete' minorities i.e. a situation in which a minority loses on almost every issue almost every time?[134] The empirical evidence appears to show the contrary:

- Over 13 CIRs aimed at discriminating against homosexuals in public institutions were overwhelmingly rejected by the electorate, and both Washington and Arizonan voters have opposed CIRs banning civil unions (Figure 9);

- 12 states with antidiscrimination laws for homosexuals in employment have CIRs, with no attempts being made to repeal them (Figure 10);

- Switzerland and Liechtenstein have thus far (2012) constantly upheld every CIR expanding gay rights (Figure 11);

- Jurisdictions with CIR often also have gay marriage as in Massachusetts and Washington D.C. As well, Uruguay and British Columbia, together with Maryland and New Mexico, recognise gay marriages performed outside their jurisdiction (note that Indian tribes in Washington state also perform gay marriages);

- Coloradan voters rejected CIRs banning bilingual education, affirmative action, pornography, targeting illegal aliens and forbidding Japanese people owning private property at the height of World War II (Figure 12);

- Minarets aside, Swiss voters have constantly rejected, by a 2:1 margin, caps on immigrants or attacks on religious diversity (Figure 13);

- Switzerland abolished the death penalty via a CIR in 1938 (Figure 14), decades before Commonwealth realms (Figure 15). Nor have Liechtenstein, Uruguay, New Zealand, any German state or British Columbia made any attempt to reintroduce the death penalty (nor have these jurisdictions had a single CIR aimed at oppressing any minority group whatsoever);

- The views of the minorities themselves are insightful: when Californians were asked whether they thought state-wide CIR ballot propositions are a 'good thing', a 'bad thing' or 'does not make much difference', Latinos and Asian-Americans were most like to answer that they were a 'good thing', while whites were most likely to answer that they were a 'bad thing'.

Year	Asians		Blacks		Latinos		Whites	
	Good	Bad	Good	Bad	Good	Bad	Good	Bad
1979	80.0	3.3	60.0	12.9	83.2	1.1	87.2	4.2
1982	78.1	3.1	69.2	6.2	83.2	5.6	84.8	5.2
1997	76.9	1.9	56.9	8.6	72.8	3.3	72.6	11.5

[134] Elisabeth Gerber, 'Minorities and Direct Legislation' (2003) 64 *Journal of Politics* 154-177.

Source: John Matsusaka, *For The Few or The Many: The Initiative, Public Policy and American Democracy* (University of Chicago Press, 1st ed, 2004) 118.

C *Voter Backlash*

A different, but related, possibility is that it is an entrenched bill of rights that causes CIRs to materially hurt minorities. The experience with judicial review in the US suggests this might actually be the case. First, far from forcing us to take rights 'seriously', 'rights-talk' inflames the 'violence of faction'. This occurs because almost every social or moral controversy can be represented as a 'clash of rights', by creating hyper-individualistic and sometimes self-righteous moralisers at the expense of a sense of compromise or hospitality towards others.[135] Secondly, entrenching both a justiciable constitutional bill of rights and CIR procedures which allow for direct constitutional amendments has been described as tantamount to 'ignoring a crocodile in your bathtub'[136] as judges and voters simply attempt to overrule one another, generating divisive 'political hot potatoes'[137] which play into the hands of less moderate groups. This occurs by allowing these groups to conduct campaigns against 'activist' judges, thus diverting public discussion away from a calm, mature discussion regarding the rights of minorities and toward side-issues like the interpretative approaches used by judges (who ignore 'history' and the 'will of the people' in their judgments).

California's Proposition 13, which capped property taxes to nothing more than one percent of the value of the property, is one such initiative often said to have done more than any other CIR to entrench minority disadvantage by limiting local governments' abilities to fund education and infrastructure projects.[138] Proposition 13, however, was no mere tax revolt by the super-rich, as is traditionally believed.[139] If it was a mere tax revolt, why did newspaper reports at the time warn that Proposition 13 would result in further tax increases, not tax cuts?[140] If Proposition 13 was a mere tax revolt, why did 54 percent of the electorate reject the legislative counterproposal which also capped taxes to one percent and even offered more tax cuts than Proposition 13 for renters—what did they have to lose? If it was a mere tax revolt, why did voters twice reject by a 2:1 margin property tax caps in 1968 and 1972? (Figure 16) Something happened between the last time voters overwhelmingly rejected caps on property taxes and when they overwhelming approved them. That something was the *Serrano I-II* set of cases. Prior to 1974, property taxes in California were levied by local counties: local property taxes would go straight into funding local schools. However, *Serrano I* invalidated the entire property taxation system for violating the 'equal protection' clause of the Californian constitution: the status quo allowed wealthier districts to fund its schools with a lesser tax rate than the rate less affluent districts would have to set to yield the same funding per pupil.[141] In *Serrano II*, the court further held that wealth-based funding disparities between districts be reduced to less than 100 dollars by 1980.[142] In effect, only a flat tax distributed evenly would achieve the district-to-district parity mandated by *Serrano*. Voters, rich or poor, could no longer 'vote with their feet' by moving to a better school next door. Unsurprisingly, wealthier older

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135 See generally Mary-Ann Glendon, *Rights Talk* (Simon and Schuster, 1st ed, 1991).
136 Gerald Uelmen, 'Crocodiles in the Bathtub' (1997) 72 *Notre Dame Law Review* 113, 113-4.
137 Joseph Grodin, *In Pursuit of Justice* (University of California Press, 1st ed, 1989) 105.
138 Peter Schrag, 'Take the Initiative Please' (1996) 28 *Prospect* 1-3 <http://www.ppic.org/content/pubs/op/OP_998JCOP.pdf>
139 See generally David Smith, *Tax Crusaders* (Routledge, 1st ed, 1998).
140 William Fischell, 'Did Serrano Cause Proposition 13?' (2004) 51 *UCLA Law Review* 887, 899.
141 *Serrano v. Priest*, 96 Cal. Rptr. 601 (1971).
142 *Serrano v. Priest* 135 Cal. Rptr. 345 (1976).

voters in suburbs with a high number of students per household like Beverly Hills and El-Segund, despite rejecting property tax limits in 1972, experienced a 154 and 250 percent swing respectively in favour of Proposition 13.[143] These are precisely the electorates that previously would have been less responsive to anti-tax rhetoric as older voters tolerated local school spending if it added to the value of their homes or improved the quality of life of their grandchildren. But *Serrano* eliminated that direct link between local taxes and local expenditure — meaning homeowners without children became indifferent to local school quality and more sensitive to tax increases. With escalating house prices, and a legislature too gridlocked to meet the demands set out in *Serrano*, anti-tax crusaders seized the opportunity to attain what they could not before: a one percent cap on property taxes. Thus, because of the public backlash from *Serrano*, Proposition 13 inadvertently achieved the very thing it moved against: growing racial inequality.[144]

The gay community has also suffered from the effects of judicial fiat. Since courts in Hawaii and Massachusetts declared that restricting marriage to heterosexual couples violated the equal protection clauses of their state constitutions, some public backlash has occurred. Not only did Congress respond by enacting the Defence of Marriage Act, but 31 constitutional amendments — 12 of these were initiated via CIR — sought to preclude 'activist judges' from 'legislating' from the bench via their state constitutions.[145] Equally, when Proposition 22, a direct citizen statute defining marriage between one man and one woman, was struck down 4:3 by the California Supreme Court under their state constitution, Proposition 8, a direct constitutional amendment defining marriage between one man and one woman merely overruled the judges. But that was expected. As Corrigan J forewarned:

> Societies seldom make such changes smoothly. For some the process is frustratingly slow. For others it is jarringly fast. In a democracy, the people should be given a fair chance to set the pace of change without judicial interference. That is the way democracies work. Ideas are proposed, debated, tested. Often new ideas are initially resisted, only to be ultimately embraced. But when ideas are imposed, opposition hardens and progress may be hampered.[146]

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[143] Fischell, above n 145, 900-10; William Fischel, *Serrano and Proposition 13* (25 August 2008) Tax Professor <http://taxprof.typepad.com/taxprof_blog/files/49ST0535.pdf> In reality, all that was need to solve this simple problem were transfer payments which shifted funds to poor districts to achieve district-to-district parity, but both the courts and those responding to *Serrano* overlooked this simple possibility.

[144] *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992) (upholding, against an equal protection challenge, Proposition 13, a cap on property taxation).

[145] Jeffrey Rosen, 'The Most Democratic Branch' (Oxford University Press, 1st ed, 2006) 111 (arguing the gay marriage cases 'perhaps more than any other modem case, highlights the folly of Progressives turning to litigation in the face of legislative hostility'); Gerald N. Rosenberg, 'Courting Disaster: Looking for Change in All the Wrong Places' (2006) 54 *Drake Law Review* 795, 812 (arguing the result of these judicial victories has been nothing short of disastrous for the right to same-sex marriage'; the judicial pronouncements 'created a dramatic backlash,' with Rosenberg linking 'national opinion polls' disapproving of same-sex marriage); J. Harvie Wilkinson, 'Gay Rights and American Constitutionalism?' (2006) 56 *Duke Law Journal* 545, 573-78 (lamenting the proliferation of constitutional amendments that followed in the wake of the Massachusetts decision, claiming that constitutions should be 'articulations of fundamental rather than positive law' and that the amendment craze that followed the Massachusetts' decision exemplified the over-constitutionalization of state constitutions).

[146] *Re Gay Marriage Cases* 183 P.3d 384, 416 (2008) (Corrigan J, dissenting).

Indeed, of three 'official' arguments in favour of Proposition 8, including that it preserves the 'right' of children to a mother and a father, the second was that 'it overturns the outrageous decision of four activist Supreme Court judges who ignored the will of the people' — with all key political figures in favour of it arguing the point of the proposition was to 'overrule the activist judges'.[147] Thus, what rights-based judicial review sometimes does is to cause CIR campaigns to shoot the messenger rather than the message by creating a total disconnect between the majority and minority, with the latter simply portrayed as undemocratic and elitist. It contaminates political discourse with concerns that have little to do with the plight of minorities and more to do with appropriate modes of constitutional interpretation.

D *Procedural Rights*

One might argue a CIR is 'tyrannical' if minorities are banned from accessing the democratic process. Given that CIRS presuppose the need for political equality, this claim would go on to argue that courts should rigorously enforce procedural rights.[148] But procedural rights themselves give rise to substantiative questions. To avoid judicial preferences being elevated over those of the broader populace, there is no reason to assume that a vigilant citizenry, operating via the mechanisms of CIR, cannot enforce these procedural rights. After all, legislatures and courts worked together in systematically disenfranchising African-Americans, communists, anarchists and socialists.[149] In sharp contrast, every time the people have been given the chance to

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[147] Yes on 8, *Questions and Answers About Proposition 8* (2008) Protect Marriage <http://www.protectmarriage.com/files/faq.pdf> ('Because four activist judges in San Francisco wrongly overturned Proposition 22, we need to pass this measure as a constitutional amendment to restore the definition of marriage as between a man and a woman...Voting YES on Proposition 8 overturns the outrageous decision of four activist Supreme Court judges who ignored the will of the people'); Newt Gingrich, *Stop Imperial Judges* (2008) What is Prop 8? <http://www.whatisprop8.com/stop-imperial-judges.html> ('Stop Imperial Judges...Support Proposition 8'); John McCain, 'McCain Supports Efforts to Ban Gay Marriage', *USNews* (Online) June 2008 <http://www.usnews.com/news/campaign-2008/articles/2008/06/27/mccain-supports-efforts-to-ban-gay-marriage> ('I support the efforts of the people of California to recognize marriage as a unique institution between a man and a woman … I do not believe judges should be making these decisions').

[148] Jürgen Habermas, *Beyond Facts and Norms* (William Rehg, 1st ed, 1998) 135 (arguing 'law receives its full normative sense neither through its legal form *per se*, nor through an *a priori* moral *content,* but through a *procedure* of lawmaking that begets legitimacy'). Habermas, however, concedes 'is not self-evident' to have constitutional courts — meaning the case for having judicial review is far from being unquestionable: 238-40).

[149] *Williams v. Mississippi*, 170 U.S. 213 (1898) (unanimously holding that requirements that voters must pass literacy tests and pay poll taxes did not violate the Fourteenth Amendment as these were applied equally to all voters, irrespective of race); *Giles v. Harris*, 189 U.S. 475 (1903) (refusing to assist African Americans in Alabama who were systematically being denied the right to vote through literacy tests, poll taxes and violence); *Abrams v. United States*, 250 U.S. 616 (1919) (holding that criticism of US involvement in World War I was not protected by the First Amendment, because they advocated a strike in munitions production and the violent overthrow of the government); *Debs v. United States*, 249 U.S. 211 (1919) (holding that the Espionage Act of 1917, which convicted and sentenced Debbs to serve ten years in prison and disenfranchised him for life, did not violate a constitutional right to free speech); *Whitney v. California*, 274 U.S. 357 (1927) (upholding a Californian criminal syndicalism statute banning membership in the Communist Labor Party was not a violation to a constitutional right to free speech); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding convictions which held that the defendant by conspiring to overthrow the US government through his participation in the Communist Party was not in violation of his First Amendment rights); *League of United Latin American Citizens v. Perry*, 548 U. S. 399

adopt a CIR at a referendum they have seized the opportunity, never voting to abolish one, even though it is a straightforward exercise in calling a referendum in order to do so. Instead, voters have used CIR to prevent racial gerrymandering, abolish poll taxes and implement campaign finance reform. The only CIR which targeted politically unpopular minorities was a 1920 North Dakota initiative prohibiting socialist or Communistic symbols during public parades (Figure 17). In any event, historically, a polity about to make a democracy-destroying decision is unlikely to obey any court order, suggesting democratic rights are valuable only so far as society chooses to value them, and that it would be a terrible mistake to pin too much hope on the judiciary in times of crisis.[150]

Outside times of crisis, however, one cannot seriously defend democratic constitutional rights while simultaneously destroying democratic constitutional rights: every time a court strikes down a CIR, it reduces the scope of democratic debate on that specific issue, denying minorities access to rights to petition and to debate ideas in any meaningful way which precipitates reform via the political process.[151] An entrenched bill of rights is therefore not simply undemocratic (which suggests laws are enacted by unelected officials), but antidemocratic, disabling citizens from using the very procedural rights a bill of rights is supposed to ensure its citizens can use to vent their 'bottled up' frustrations. An entrenched bill of rights operates in a ruthlessly symmetrical couplet: a 'right' for judges to strike down CIRs denies the 'right' of activists to use the democratic process to bring about desired reform.

For example, *Romer* did not end the anti-gay bias in Colorado, nor should it have ended the progressive campaign there to change the hearts and minds of the extra 2.5 percent of voters needed to repeal Amendment 2. In 1996 Cincinnati voters banned antidiscrimination laws applying to homosexuals. The courts upheld the ban. In 2004, however, voters repealed the ban.[152] In 1997, Maine approved an antidiscrimination law based on sexual orientation, but 51.29 percent of voters repealed the law via a popular veto in February 1998. In 2005, 55 percent of voters repealed their previous ban. In 2008, 52 percent of Californian voters limited marriage to one man and one woman. But more recent polling shows supporters of gay marriage are in the majority: a CIR would introduce gay marriage if a CIR vote were held today.[153] Finding a constitutional 'right' to gay marriage denies activists the unparalleled legitimacy that would come with having gay marriage enacted by a direct vote of their fellow citizens. CIRs therefore allow activists to argue that laws once thought necessary serve only to oppress, by allowing voters to publicly endorse more liberal social policies and programs in light of emerging facts or circumstances.[154] CIRs should therefore be seen

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(2006) (holding there was no statewide gerrymandering scheme which violated the equal protection clause).

150 Learned Hand, 'The Contribution of an Independent Judiciary To Civilisation' in I. Dillard (ed) *The Spirit Of Liberty* (1952) 172, 181-82 (no court needs to save a society imbued with the 'spirit of moderation', but a society 'which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish').

151 Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal Legal Studies* 36-41.

152 *Greater Cincinnati Inc v. Cincinnati*, 128 F.3d 289, 295 (6th Cir. 1997) (holding that an amendment survived *Romer*).

153 Gay Marriage will be on the November 2012 Ballot in Maine and is widely expected to be approved by the voters.

154 Even in scientific communities the fact that a majority of scientists favour a particular view does not make the minority scientists think that they are wrong, though it does perhaps give them pause to think.

as an opportunity for minorities, [155] rather than something to be feared or regarded as a source of tyranny. In the absence of judicial review minorities can have a clear, positive dialogue with the general public itself, avoiding needless hyperbole 'which inhibits the sort of dialogue that is increasingly necessary in a pluralistic society'[156] and the unintended consequences which disproportionately burden racial minorities.

E *Federalism as a Bill of Rights*

Finally, while it is frequently asserted that 'the judiciary stands alone in guarding against the evils incident to transient, impassioned majorities',[157] it is often overlooked that when James Madison looked for ways to protect the rights of minorities from the 'tyranny of the majority' he alluded to federalism as one potential check. According to Madison, by taking contentious economic issues vested in state and local governments and making them instead the exclusive domain of the national government, federalism forces one to look at the bigger picture and consider 'a greater variety of parties and interests'.[158] Indeed, there are a number of ways federalism would protect minorities if CIR operated only at a state level. The Federal Parliament could introduce pro-minority legislation which has been repealed at a state level.[159] Alternatively, courts could strike down CIRs for being inconsistent with federal legislation.[160] In California, Proposition 187 made illegal aliens ineligible for public benefits, except in cases of emergency: it was invalidated because welfare benefits were the exclusive domain of the Federal government.[161]

Of course, a democrat (so long as direct democracy operates federally) can tolerate 'weak' judicial review based on the principle of federalism, even though he or she is opposed to 'strong' rights-based judicial review: federalism merely requires judges to apply laws enacted by another tier of government which is democratically-elected and thus accountable to the people, while rights-based judicial review wipes an

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[155] Hutchinson, above n 96, 62. Cf. Donald Greenberg, 'The Scope of the Initiative and Referendum in California' (1966) 54 *California Law Review* 1747–1748 ('One would hope that we will not fall prey to the elitist argument that the people do not know what is best for them and therefore need someone else to tell them...if an occasional bad measure is passed, let those who urge less democracy instead use the tools of democracy to convince the people of the 'rightness' of their views').

[156] Glendon, above n 135, 89.

[157] Eule, above n 2, 1209. This is not quite true: indirect initiatives require Parliament to filter out CIRs which violate jus cogens; there are Parliamentary publications which recommend to voters how they should vote; Parliament can draft a counterproposal i.e. a competing measure to any CIR: *Alaskan Constitution*, Art.XI, §4; *Bavarian Constitution*, Art.74(3); *Liechtenstein's Constitution*, Art.64(2); *Massachusetts Constitution*, Art.XLVIII, II, §4; *Swiss Constitution*, Art.139(4); *Washington Constitution*, Art.II, §1(a). Also there could be 'manner and form' provisions requiring CIRs to be passed in two elections in a row to be held valid or meeting a certain threshold (such as a two third majority nationwide with an absolute majority of states).

[158] Madison, above n 4, 54. Cf. Harry Gibbs, 'A Constitutional Bill of Rights' in Ken Baker (ed.), *An Australian Bill of Rights* (Institute of Public Affairs, 1986) 325 ('The most effective way to curb political power is to divide it. A federal constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedoms than a bill of rights').

[159] This happened with Proposition 14, which nullified the Californian Fair Housing Laws. Title VIII of the *Civil Rights Act* of 1968 introduced fair housing on a national level.

[160] U.S. Const, Art. VI; *Australian Constitution* §109.

[161] *LULAC v. Wilson*, 997 F.Supp 1244 (1997).

issue off the democratic stage altogether, especially if, as in the US, all levels of government are bound by a national bill of rights.[162]

But what if a minority is too weak, too lacking in real resources to mount constant campaigns to defend its interests? In some CIR systems a mere one percent of voters can ignite a referendum in a region to create new states within the existing federation if a minority believes it is being systematically tyrannised. Residents of the Jura region in Switzerland called for independence from the Bern canton. Whereas the canton of Bern was mostly German-speaking and Protestant, the Jura region was French-speaking and Roman Catholic and these Jura residents felt their views were underrepresented in existing governmental structures. Following a flood of petitions, in 1978 82 percent of Swiss voters supported splitting the canton; in 1979 the Jura canton joined the Swiss Confederation as a new member.[163] Latinos and African-Americans in California, by contrast, are stuck in a constitutional straightjacket. Given the difficulty of forcing both the state legislature and Congress to agree to create new American states,[164] it is unsurprising that California, due to its size, is fractured along racial and linguistic lines.[165] Although in Switzerland there is a sharp 'urban-rural divide' as public housing initiatives are frequently defeated because rural voters are not interested in financing minorities in other jurisdictions without receiving any benefit for themselves, such distributional conflict can always be mitigated by allowing smaller political units to become independent state governments, or on a cantonal level for groups to separate or unite with another region which they believe is better governed.[166] Federalism which allows minorities to create their own 'sanctuary states' saves minorities from going through the trouble of expensive, ongoing legal appeals, thus causing unrealistic expectations that judges will always protect them on a case-by-case basis.

Meanwhile, if CIR operates federally, and requires a majority overall as well as a majority in a majority of states, this lessens the likelihood that larger states will outvote smaller ones. But even this is imperfect: more liberal French and Italian speaking cantons in Switzerland are frequently outvoted by more conservative German-speaking majorities.[167] Indeed, Geneva, Vaud, Neuchatel (all French-speaking cantons) and Basel-city (the canton with the largest Muslim population) all rejected the Minaret ban, in addition to 16 other local districts.[168]

Of course no institutional structure, with or without CIRs, will deliver outcomes with which any single observer will always agree. Nevertheless, while rights-based judicial review allows judges to impose nationwide their 'one size fits all' preferences onto the public,[169] robust federalism allows for a decentralisation which empowers each group to choose — collectively — which policies it wants for its polity, but also allows each person — individually — to move to a polity which best accords with his

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[162] James Allan, 'Must a Majoritarian Democrat Treat All Constitutional Judicial Review as Equally Egregious?' (2010) 21 *Kings Law Journal* 233-256.

[163] Bruno Frey, 'FOCJ' (1996) 16 *International Review of Law and Economics* 315, 320.

[164] U.S. Const, Art. IV, §3.

[165] Zoltan Hajnal, *Are There Winners or Losers?* (Public Policy, 1st ed, 2001) 7-12; Michael Alvarez, 'The Revolution against Affirmative Action in California: Racism, Economics, and Proposition 20' 4 *State Politics and Policy Quarterly* 1-17.

[166] See generally Benjamin Barber, *Strong Democracy* (University of California Press, 1st ed, 2003).

[167] Nenad Stojanović, 'Direct Democracy' (2006) 8 *International Journal on Multicultural Societies* 183–202.

[168] Swiss Federal Statistics, *Swiss Statistics*, (29 November 2009) <http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/2009/05.html>

[169] James Allan, 'Bills of Rights as Centralising Instruments' (2007) 27 *Adelaide Law Review* 183-198.

or her own preferences. Robust federalism therefore provides an optimal trade off with liberty, on the one hand, and constraint on the other. In short:

> The federalist ... framework ought, at least to a considerable extent, to allay legitimate fears of unchecked direct democracy and the threat to liberalism and to value pluralism.[170]

IV CONCLUSION

We can now muster our 'hardcore' case against the judicial review of direct democracy. First, not only are the anti-minority laws frequently ascribed to the CIR process enacted at least as frequently by legislatures, thus weakening the case for 'special' judicial review of CIRs, but invocation of judicial review as the best institution to protect minorities ignores the fact that historically courts are lagging, not leading, indicators of social change. Indeed, the assertion that courts have a superior competence at distinguishing bad majoritarian tyranny from good majoritarian consensus itself depends more on abstract notions of judicial enlightenment, than on any empirical evidence. Secondly, CIRs do not cause any material, repetitive or systematic detriment to minorities to warrant judicial review, and in those isolated instances where they do, the judiciary has sometimes been the cause of these initiatives. Finally, executive buffers found in our existing structure of government, in tandem with a robust federalism, can adequately protect the rights of minorities without the anti-democratic excesses of a bill of rights. In short, citizens are governed best when they govern themselves.

FIGURE 1: LABOUR RIGHTS (UNITED STATES)

Year	State	Description of the Measure	Yes Vote (%)
1906	Oregon	A direct constitutional amendment allowing for printers compensation to be regulated by law at any time	86.9
1910	Oregon	A direct citizen statute for protection of labourers in hazardous employment and updating employer liability and occupational health and safety laws.	62.4
1912	Arizona	A popular (facultative) referendum on a law mandating semi-monthly pay. The law was upheld by voters..	69.0
1912	Colorado	A direct citizen statute introducing eight hour law for work in underground mines, smelters, mills and coke ovens.	51.8
1912	Colorado	A direct citizen statute introducing an eight hour employment law for women.	77.3
1912	Colorado	A facultative (popular) referendum providing eight-hour day for work in underground mines, smelters, coke ovens. The law was upheld by voters.	69.2
1912	Oregon	A direct constitutional amendment by big	45.1

[170] Maimon Schwarzschild, 'Popular Initiatives and American Federalism' (2004) 13 *Journal of Contemporary Legal Issues* 531, 555.

		business prohibiting union boycotting. The measured failed.	
1912	Oregon	A direct citizen statute introducing eight hour day on public works.	57.3
1913	Oregon	A facultative (popular) referendum on workers compensation act	70.3
1914	Arizona	A direct citizen statute prohibiting blacklisting	51.1
1914	Arkansas	A direct citizen statute prohibiting child labour and exploitation, aimed at preserving the health, welfare and safety of minors	80.0
1914	Washington	A direct citizen statute abolishing employment offices; INVALIDATED *Adams v. Tanner*	56.9
1916	Washington	A facultative referendum (popular) on a law which prohibits picketing. The law was vetoed.	31.9
1920	Colorado	A direct citizen statute fixing hours of employment in city fire departments	57.8
1936	Colorado	A direct constitutional amendment amending compensation act to benefit of employees.	63.9
1938	Arkansas	A direct constitutional amendment permitting the legislature to prescribe amount of compensation for injury or death of employees, to whom employers shall pay compensation	62.6
1944	Arkansas	A direct constitutional amendment ensuring the right to work. Similar rights were introduced in Nevada in 1952. Attempts to repeal them in 1954 and twice in 1956 failed.	54.6
1946	Arizona	A direct constitutional amendment introducing a Right to Work	55.5
1952	Nevada	A direct constitutional amendment introducing a Right to Work	50.7
1956	Arkansas	A direct constitutional amendment to increase the compensation of workmen	74.2

FIGURE 2: SOCIAL SECURITY RIGHTS

Year	State	Description of the Measure	Yes Vote (%)
1912	Colorado	A direct citizen statute providing aid to neglected and homeless children and mothers	68.5
1914	Arizona	A direct citizen statute introducing an old age pension and pensions for mothers	67.6
1916	Colorado	A direct citizen statute providing for care and treatment for the handicapped and mentally ill	80.6
1918	Colorado	A direct citizen statute providing relief for blind adults	93.3

1926	Missouri	A direct citizen statute establishing a pension system for police officers	65.4
1933	Ohio	An indirect citizen statute introducing old age pensions — modelled on a similar measure which in 1923 failed.	72.5
1935	Oklahoma	A direct citizen statute providing assistance to needy persons aged 65 or over, needy blind persons, needy crippled children, and needy persons aged fifteen or younger	64.7
1935	Oklahoma	A direct constitutional amendment increasing the old age pension	72.2
1936	Colorado	A direct citizen statute providing medical relief to patients suffering from indigent tuberculosis	57.0
1936	Colorado	A direct citizen statute providing 45 dollars per month old age pensions and designating certain taxes for the payment thereof	62.2
1936	Missouri	A direct constitutional amendment establishing pensions for teachers	56.1
1938	Colorado	A repeal of 45 dollars per month old age pension amendment and giving legislature power to provide for pensions (decreases)	36.5
1938	North Dakota	A direct citizen statute providing minimum wage for old age assistance: 40 dollars per month unless more than one member of a family received aid in which case it would be 30 dollars per month	66.3
1938	Oregon	A direct citizen statute which provided a guaranteed monthly pension of 200 dollars to every retired citizen age 65 or older, to be paid for by a form of a national sales tax of 2 percent on all business transactions, with the stipulation that each pensioner would be required to spend the money within 30 days.	55.1
1940	Washington	A direct citizen statute establishing an old age pension for all workers	58.0
1942	Idaho	A direct citizen statute which provides a minimum of forty dollars monthly and medical, dental, surgical, optical, hospital, nursing care, and artificial limbs, eyes, hearing aids, and other needed appliances to citizens over 65 years of age	68.0
1942	Oklahoma	A direct constitutional amendment allowing for retirement benefits for teachers and employees in public schools, colleges and universities	63.0
1944	Nevada	A direct citizen statute establishing an old age pension	53.5
1944	Colorado	A direct citizen statute appropriating funds for old age pensions	63.5
1948	California	A direct constitutional amendment increases maximum aid from 60 to 75 dollars monthly	51.0

		for aged persons, and from 75 to 85 dollars for blind persons and increases income and property exemptions	
1948	Oregon	A direct citizen statute appropriating funds for old age pensions	64.5
1949	California	A direct constitutional amendment providing old age security and aid to the blind	57.5
1950	Massachusetts	A citizen initiated statute providing for payments to blind persons who are 63 years of age or older	78.7
1950	Oregon	A direct constitutional amendment to establish WWII veteran compensation fund	52.2
1956	Colorado	A direct constitutional amendment establishing a monthly award of $100 to be adjusted to increased living costs, providing for a stabilization fund of 5 million dollars and a medical fund of not to exceed 10 million dollars annually	65.7

FIGURE 3: MINIMUM WAGE INCREASES VIA INITIATIVE

Approved	Arizona (2006), Colorado (2006), Missouri (2006), Montana (2006), Ohio (2006), Nevada (2004), Florida (2004), Washington (1998), California (1996), Washington (1988), Massachusetts (1986). Note in Nevada in 2006, a legislative referral mandating a rise in the minimum wage was also approved.
Rejected	Missouri (1996), Montana (1996), Arkansas (1960).
Total	11 out of 14 (79%) plus Nevada: 81 percent (12 out of 15)

FIGURE 4: RACIAL ENROLLEMENTS FALL (PERCENTAGE OF ALL STUDENTS)

Ethnicity	2004	2005	2006	2007	2008	2009
Hispanic	2.0	2.0	2.0	2.0	2.0	2.0
Chicano	0.9	0.9	0.9	0.8	0.8	0.8
Asian	5.2	5.3	5.2	5.1	5.1	5.1
Native	0.7	0.8	0.7	0.7	0.7	0.7
Black	7.8	7.9	7.7	7.3	7.3	7.3
Whites	75.1	74.8	74.4	73.9	72.5	71.5
International	7.4	7.3	7.7	8.4	9.7	10.7

Source: Calculated from data Office of the Registrar, *MSU* (2004-2011) <http://reports.esp.msu.edu/ReportServer/Pages/ReportViewer.aspx?/ROReports2005/UE-ComparisonEthnicOrigin&term_seq_id=1112>

FIGURE 5: RACIAL ENROLEMENTS SPRING (PERCENTAGE OF ALL STUDENTS)

Ethnicity	2004	2005	2006	2007	2008	2009	2010
Hispanic	1.9%	2.0%	2.0%	2.0%	2.0%	2.1%	2.0%
Chicano	0.9%	0.9%	0.9%	0.9%	0.8%	0.8%	0.8%
Asian	5.2%	5.2%	5.3%	5.2%	5.1%	5.1%	5.1%
Native	0.6%	0.7%	0.7%	0.7%	0.7%	0.7%	0.7%
Black	7.9%	7.8%	7.7%	7.6%	7.4%	7.2%	7.2%
Whites	75.2%	75.1%	75.0%	74.7%	74.3%	72.8%	71.6%
International	7.3%	7.3%	7.2%	7.6%	8.1%	9.5%	10.5%

Source: Calculated from data Office of the Registrar, *MSU* (2004-2011) <http://reports.esp.msu.edu/ReportServer/Pages/ReportViewer.aspx?/ROReports2005/UE-ComparisonEthnicOrigin&term_seq_id=1112>

FIGURE 6: UNDERGRADUATES UNIVERSITY OF MICHIGAN (BY ETHNICITY)

Race	Fall 2006	Fall 2007	Fall 2008	Fall 2009	Fall 2010
Blacks	1709 (6.7%)	1633 (6.3%)	1640 (6.3%)	1531 (5.8%)	1548 (5.7%)
Hispanics	1190 (4.7%)	1212 (4.6%)	1156 (4.4%)	1078 (4.1%)	1167 (4.3%)
Native	240 (0.9%)	242 (0.9%)	204 (0.7%)	168 (0.6%)	314 (1.2%)
Asians	3068 (12%)	3140 (12%)	3097 (11.9%)	3175(12.1%)	3688 (13.6%)
Whites	16380 (64%)	16685 (64%)	16508 (63.5%)	17038 (65%)	19553 (72.3%)
Not Indicated	1803 (7%)	1905 (7.3%)	2021 (7.8%)	1723(6.6%)	940 (3.5%)
International	1233 (4.8%)	1266 (4.9%)	1368 (5.3%)	1495 (5.7%)	1644 (6%)
Total	25 555	26 083	25 994	26 208	27 027
Minorities	12.3%	11.8%	11.4%	10.5%	11.2%

Source: University of Michigan, *Enrolment By Ethnicity* (11 March 2010) http://sitemaker.umich.edu/obpinfo/files/umaa_enrl_2010.pdf

FIGURE 7: NEW FRESHMEN ENROLLEMENT BY RACE

Race	Fall 2006	Fall 2007	Fall 2010
Blacks	330	334	352
Hispanics	274	267	275
Native	52	50	72
Asians	622	757	1026
Whites	3408	3741	4883
Not Indicated	476	592	55
Non-residents	237	251	265

Source: University of Michigan, *Freshmen Class Profile* (3 February 2010) <http://sitemaker.umich.edu/obpinfo/files/umaa_freshprofmaxfa10.pdf>

FIGURE 8: WAYNE STATE (ENROLLEMENTS BY ETHNICITY AND GENDER 2006-2010)

Identity	2006	2007	2008	2009	2010
Non-resident	2948 (8.9%)	2878 (8.7%)	2015 (6.5%)	1815 (5.7%)	1703 (5.4%)
Native American	131 (0.03%)	138 (0.04%)	146 (0.05%)	156 (0.05%)	132 (0.04%)
Asian	2116 (6.0%)	2167 (6.5%)	2198 (7.1%)	2202 (6.9%)	2276 (7.2%)
Black	8547 (25.9%)	8664 (26.0%)	8010 (25.8%)	8420 (26.5%)	7966 (25.2%)
Hispanic	792 (2.4%)	767 (2.3%)	708 (2.3%)	795(2.5%)	790 (2.5%)
White	16 484 (50.0 %)	16 449 (49.4%)	15 677 (50.5%)	15 882 (50.0%)	15 885 (50.4%)
Multiracial	-	-	-	-	159 (0.5%)
Unknown	1964 (6.0%)	2177 (6.5%)	2271 (7.3%)	2516 (7.9%)	2590 (8.2%)
Total Asian, Black, Native and Hispanic	31.93%	34.84%	35.25%	35.95%	35.8%

Source: Office of the Registrar, *Enrolments* (By Year), Fall 2007-2010 (2011), <http://reg.wayne.edu/data/enrollment.php>

FIGURE 9: GAY RIGHTS ON THE BALLOT BOX

Year	Jurisdiction	Short description	Yes (%)
1978	California	Proposition 6: a direct citizen statute which provides for filing charges against school teachers, teachers' aides, school administrators or counsellors for advocating, soliciting, imposing, encouraging or promoting private or public sexual acts defined in sections 286(a) and 288(a) of the Penal Code between persons of same-sex in a manner likely to come to the attention of other employees or students.	41.6
1986	California	Proposition 64: a direct citizen statute which declares that AIDS is an infectious, contagious and communicable disease and requires each person infected to be placed on the list of reportable diseases and conditions maintained by the Department of Health Services	29.3
1988	California	Proposition 102: a direct citizen statute which	

		declares that AIDS is an infectious, contagious and communicable disease and requires each person infected to be placed on the list of reportable diseases and conditions maintained by the Department of Health Services. The CIR implicitly targeted the gay community.	32.0
1988	California	Proposition 69: a direct citizen statute requiring doctors, blood banks and others to report patients and blood donors whom they reasonably believed to have been infected by or tested positive for AIDS virus to local health officers.	34.4
1988	Oregon	Measure 8: a direct citizen statute revoking an executive ban on sexual orientation discrimination.	52.8
1992	Colorado	Amendment 2: a direct constitutional amendment to repeal all gay rights ordinances within the state and to prevent the state or any political subdivision from passing new gay rights ordinances	53.2
1994	Oregon	Measure 7: a direct constitutional amendment limiting antidiscrimination laws to race, colour, religion, gender, age or national origin only. Thus, homosexuality is not a class requiring special protection of the law.	43.3
1994	Oregon	Measure 13: a direct constitutional amendment mandating that government cannot approve, create or classifications based on homosexuality; homosexuals cannot advise or teach children, students, employees that homosexuality equates legally or socially with race, other protected classifications including spend public funds in manner promoting or expressing approval of homosexuality, granting spousal benefits, marital status based on homosexuality or denying constitutional rights, services due under existing statutes	48.5
1994	Idaho	Measure 1: a direct citizen statute forbidding state and local governments from passing antidiscrimination ordinances Defeated by a margin of 3000 votes.	49.6
1995	Maine	Question 1: a direct citizen statute prohibiting homosexuality as a protected class within existing antidiscrimination laws; limiting protected classifications in future state and local laws to race, colour, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status, and repealing existing laws which expand those classifications	46.7
1997	Washington	Initiative 667: A direct constitutional amendment introducing laws prohibiting discrimination based on sexual orientation be prohibited in employment, employment agency, and union membership practice.	40.34

2000	Oregon	Measure 9: a direct citizen statute which prohibits public school instruction encouraging, promoting, sanctioning homosexual or bisexual behaviours	47.0
2006	Arizona	Proposition 107: a direct constitutional amendment which would ban both gay marriage and civil unions, holding that only a union between one man and one woman shall be valid or recognized as a marriage by this state or its political subdivisions and no legal status for unmarried persons shall be created or recognized by this state or its political subdivisions that is similar to that of marriage.	48.2
2009	Washington	Referendum 71: a popular veto asking voters whether they wanted to uphold a recent law granting homosexuals the right to civil unions and domestic partnerships.	53.1

FIGURE 10: ANTIDISCRIMINATION LAWS AND CIR (CIR STATES IN BOLD)

Category	State
Total protection	California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin
Protection in public employment only	Indiana, Michigan, Montana and Pennsylvania

Source: Human Rights Campaign, *State Laws* <http://www.hrc.org/laws_and_elections/state_law_listing.asp>

FIGURE 11: CIR AND GAY RIGHTS IN EUROPE

Year	Jurisdiction	Short description	Yes (%)
1992	Federal level	A facultative referendum on the reform of Swiss Federal legislation on sexual offences, which included the elimination of all discrimination against homosexuality from the Penal Code (homosexuality was already decriminalized far back as 1942).	73.0
1999	Federal level	A mandatory referendum to totally revise the constitution. Article 8 prohibits discrimination on the basis of way of life i.e., by logical implication, due to private sexual preferences.	59.2
2002	Zurich	A facultative referendum relating to a law allowing the registration of same-sex couples.	62.7
2005	Federal level	A facultative referendum on a Federal Law allowing the registration of same-sex partnerships (Partnership Act)	58.0

2006	Schaffhausen	A mandatory referendum on the revision of the Schaffhausen Constitution of 3 July 2006 allowing for the introduction of the Partnership Act i.e. same-sex registrations.	80.95
2006	Uri	A mandatory referendum law on the introduction of the Federal Law on the Civil Union (same-sex) couples.	55.75
2006	Uri	A mandatory constitutional amendment allowing same-sex registration.	58.73
2011	Liechtenstein	A facultative referendum on a law legalising same-sex couples with a civil partnership law. Gay and lesbian couples will receive the same tax, inheritance and welfare rights as heterosexual married couples.	68.8

FIGURE 12: COLORADO AND CIR

Year	Description of Measure	Yes vote
1893	A legislatively referred constitutional amendment giving women the right to vote	55.0
1912	Amendment 6: a direct constitutional amendment providing special funds for the state immigration bureau	35.9
1944	Amendment 3: a direct constitutional amendment providing that only aliens eligible to citizenship (i.e. people not of Asian origin) may acquire and dispose of real and personal property, and that provision shall be made by law concerning the right of aliens ineligible to citizenship to acquire and dispose of such property.	47.0
1976	Amendment 6: a direct constitutional amendment to repeal Sec. 29 of Art. 2 which section provides for equality of rights under the law on account of sex.	39.0
1992	Amendment 2: a direct constitutional amendment repealing local laws passed to ban discrimination based on sexual orientation and prevent similar new laws.	53.0
1994	Amendment16: a direct constitutional amendment that would allow the control of the promotion of obscenity by the state and any city, town or County to the full extent permitted by the First Amendment to the United States Constitution.	36.7
2002	Amendment 31: a direct constitutional amendment would have required that all public school students be taught in English unless they are exempted under the proposal.	49.2
2006	A legislatively referred constitutional amendment on whether to repeal domestic partnerships[1]	53.0
2008	Amendment 2: a direct constitutional amendment prohibiting affirmative action in public employment, public education and public contracting	49.0

[1] In 2011, the House Committee defeated a proposal for civil unions: the House Committee killed the bill 5 (yes):6 (no) <http://www.denverpost.com/legislature/ci_17747919>

FIGURE 13: CIR AND RELIGIOUS FREEDOM (SWITZERLAND)

Year	Description of Measure	Yes vote
1922	Measure 89: a popular initiative designed to tighten Swiss citizenship laws	15.9
1922	Measure 90: a popular initiative for the automatic expulsion of aliens (foreigners)	38.1
1937	Measure 123: a popular initiative to outlaw freemasonry*	31.3
1970	Measure 220: the Schwarzenbach initiative – a popular initiative against foreign emprise, limiting the foreign immigration to less than 10 percent of each canton	46.0
1974	Measure 242: a popular initiative limiting the foreign share of the population less than 12 percent of the entire population	34.2
1977	Measure 265: a popular initiative to limit the foreign population to no more than 12.5 percent of the entire Swiss population	29.5
1977	Measure 266: a popular initiative for a restriction of naturalizations to less than 4000 per year	33.8
1977	Measure 267: a popular initiative to require a referendum to implement immigration treaties (implicitly aimed to put pro-immigration treatises with Italy)	21.9
1988	Measure 355: a popular initiative against overforeignisation, including abolishing seasonal worker status, cross boarder commuters and emigration limits	32.7
1996	Measure 432: a popular initiative mandating illegal immigrants cannot seek asylum seeker status, but all illegal applications shall be rejected subject to the non-refoulment principle	46.3
2000	Measure 467: a popular initiative limiting the percentage of foreigners to 18 percent of the entire Swiss population	36.2
2002	Measure 491: a popular initiative mandating a general rejection of asylum seekers from 'safe countries'	49.9
2005	An optional treaty referendum on whether Switzerland should accede to the Schengen agreement i.e. free flow of people from other countries	55.98
2008	Measure 532: a popular initiative to allow municipalities or cantons to decide their own (stringent) criteria for naturalization applications (e.g. by holding referendums).	36.2
2009	An optional treaty referendum renewing an existing agreement allowing migrant workers into Switzerland and extending it to new EU members Bulgaria and Romania.	59.61
2010	A popular initiative mandates for the automatic deportation of foreigners (i.e. non-citizens) who commit murder, rape, welfare fraud or drug trafficking. The Danish Parliament later copied this law.	52.9

* See also Measure 3 (in 1866, 53.3 percent of approved asylum for Jewish refugees, including naturalized rights to be the same as Swiss citizens i.e. they could settle anywhere in Switzerland and to practise any profession); or Measure 236 (in 1974, 54.9 percent voted to repeal a federal decree banning Jesuit priests and the building of monasteries).

FIGURE 14: DEATH PENALTY (Switzerland)

Year	Measure	Description of the Measure	Abolished or Introduced?
1848	1	The death penalty was abolished for political crimes in the new Federal Constitution, which was attained the support of 72.8 percent of voters.	Abolition upheld
1874	12	In 1874 a total revision of the federal constitution took place: the death penalty was completely abolished throughout Switzerland. 63.2 percent of voters supported the new constitution.	Abolition upheld
1879	21	The Federal Parliament proposed a change to the Federal Constitution which involved the reintroduction of the death penalty. According to the new text, the death penalty could be reintroduced by the cantons, except for political crimes. 63.2 percent of voters supported the change and so Switzerland returned to the situation that existed at 1848.	Return to the 1848 position
1938	127	In 1898, a change in the constitution allowed the Federal Parliament to create uniform criminal law throughout Switzerland (Measure 55). In 1937, the Parliament took advantage of the measure and thereby decided to completely abolish death penalty during peacetime. In the facultative referendum that took place, the death penalty was discussed among many other aspects of the bill. 53.5 percent supported the bill.	Abolition upheld
1992	381	As noted, the death penalty was abolished in 1937 with one exception: as a part of special provision in Swiss military criminal law in the event of treason during wartime. In 1992, Parliament abolished the exception, resulting in a facultative referendum. 73.1 percent of voters approved the measure (abolition was always part of a broader package of legal measures).	Abolition upheld
1999	453	A further explicit prohibition of the death penalty occurred in the revised Swiss Constitution, which was approved by an obligatory referendum in 1999 by 59.2 percent of voters.	Abolition upheld

FIGURE 15: ABOLITION OF DEATH PENALTY

Jurisdiction	Abolished (Year)
Australia	1973
Austria	1950
Belgium	1996
Canada	1976
East Germany	1987
France	1981

Ireland	1990
Liechtenstein	1987
New Zealand	1961
Switzerland	1938
United Kingdom	1969
Uruguay	1914
West Germany	1949

FIGURE 16: PROPOSITION 13 TIMELINE

Date	Description of Event
November 5, 1969	Watson I initiative (Proposition 9) to limit property taxes defeated: 32 percent of voters said yes while 68 percent said no
August 30, 1971	*Serrano I* decided (6-1) and remanded to Los Angeles Superior Court for trial and judgment
November 7, 1972	Watson II initiative to limit property taxes defeated: 34.1 percent yes while 65.9 percent said no
March 21, 1973	*San Antonio v. Rodriguez* decided by United States Supreme Court (5:4), denying *Serrano* style equal protection claims at the federal level.
April 10, 1974	Judge Bernard Jefferson rules for *Serrano* plaintiffs in Los Angeles Superior Court: defendants decide to appeal.
December 30, 1976	*Serrano II* decided in favour of plaintiffs (4:3), sustaining lower court judgment.
September 2, 1977	AB 65, school finance bill intended to comply with *Serrano II*, passes legislature — property tax relief bill fails on same day.
December 29, 1977	Jarvis Initiative (Proposition 13) certified for June 1978 ballot.
March 3, 1978	Governor signs Behr Bill (SB 1), an alternative to Proposition 13, tying its implementation to passage of Proposition 8—a constitutional amendment allowing split roll, in which residential property could be taxed at a lower rate than other classifications.
June 6, 1978	Proposition 13 passes: 64.8 percent yes; 35.2 percent no. Proposition 8 (and thus the Behr Bill) defeated: 47 percent yes; 53 percent no.

Source: William Fischel, *Serrano and Proposition 13* (25 August 2008) Tax Professor <http://taxprof.typepad.com/taxprof_blog/files/49ST0535.pdf>

FIGURE 17: PROCEDURAL RIGHTS AND CIR

Year	State	Description of the Measure	Yes Vote (%)
2010	California	Proposition 20: a direct constitutional amendment which adds the task of redrawing congressional district boundaries to the independent commission created by Proposition 11.	61.3
2010	Florida	Amendment 5: a direct constitutional amendment relating to the drawing of legislative district	62.59

		boundaries in such ways that they establish fairness, districts which are equal in population as possible and the use city, county and geographical boundaries.	
2008	California	Proposition 11: a combined direct constitutional amendment and statute establishing an independent 14 member Redistricting Commission.	50.9
2000	Arizona	Proposition 106: a direct constitutional amendment creating an independent redistricting commission to redraw state and Congressional district lines	56.1
1956	Washington	Initiative 199: an initiative providing for the number and apportionment of the members of the legislature; increasing the membership of the state senate by three members; substituting census tracts as established by the United States Bureau of the Census for precincts as the basic geographical units from which legislative districts are formed; combining such census tracts to form newly created districts and to change the boundaries and population of some existing districts and repealing certain acts in conflict therewith	52.45
1930	Washington	Initiative 57: an initiative relating to, and providing for the number, districts and apportionment of, the members of the Senate and House of Representatives of the State of Washington, and repealing all acts and parts of acts in conflict therewith.	50.17
1920	North Dakota	A direct citizen statute allowing for the publication of legal materials in places other than official newspapers.	51.9
1920	North Dakota	A direct citizen statute prohibiting the display of red and black flags or signs bearing antigovernment inscriptions as well as prohibiting the carrying in parade or the display of any flag other than the national flag or the flag or a friendly nation.*	64.5
1914	Arizona	A direct statute making blacklisting prohibited and illegal.	51.1
1912	Oregon	Measure 35: a direct citizen statute that prohibits use of public speaking in over 5000 streets, parks and grounds in cities without a permit, giving town mayors authority to control street speaking.	

Source: Centre for Research On Direct Democracy, *Direct Democracy Database* C2D <http://www.c2d.ch/votes.php?table=votes> (Type in the relevant inputs to find result)
* It is unclear whether this law is still on the statute books, however a similar legislatively-enacted Californian laws was only invalidated after the 'red scare' was finally over: *Stromberg v. California*, 283 U.S. 359 (1931)