THE CASE FOR JUDICIAL REVIEW OF DIRECT DEMOCRACY

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with a Preface by Suzanna Sherry[*]

PREFACE

Elise Hofer focuses on the last few weeks of the same seminar,[a] when we read three scholars' defenses of judicial review and judicial activism: Christopher Eisgruber's *Constitutional Self-Government*, Jonathan Siegel's "The Institutional Case For Judicial Review,"[b] and my own short essay, "Why We Need More Judicial Activism."[c] She asks how the various arguments – from political theory, institutional competence, and history – translate from the context of representative democracy to the context of direct democracy. This is an important question, as about half the states have some form of popular referendum. It is also a novel question, to which Elise gives a counter-intuitive answer: Judicial activism is even *more* justified and *more* necessary in the context of direct democracy. She supports her conclusion with fascinating information about the actual workings of the referendum process, which by itself makes the paper worth reading.

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[a] For a description of the seminar, see Suzanna Sherry, *Preface* to Will Marks, *Whose Majority Is It Anyway? Elite Signaling and Future Public Preferences*, 4 J.L. (1 NEW VOICES) 13, 13 (2014).
[b] 97 IOWA L. REV. 1147 (2012).
[c] Suzanna Sherry, *Why We Need More Judicial Activism*, *in* CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT (Giorgi Areshidze, Paul Carrese, and Suzanna Sherry eds., forthcoming 2014), *available at* http://ssrn.com/abstract=2213372; *see also* Micro-Symposium, *Suzanna Sherry's Why We Need More Judicial Activism*, 16 GREEN BAG 2D 449 (2013).

I.
INTRODUCTION

Numerous scholars have dealt with the apparent tension between judicial review and majoritarian democracy. Critics of judicial review have frequently cited the "counter-majoritarian difficulty" – that is, the argument that judicial review is illegitimate because it allows unelected judges to overrule the law-making of elected representatives, thus undermining the will of the people.[1] In response, the courts' defenders have traditionally advanced two arguments in favor of judicial review. The first is that judicial review is appropriate only to the extent that it secures rights necessary to a well-functioning democracy.[2] The problem with this argument, however, is that most people believe that judges should enforce some rights that bear little or no relation to the electoral or legislative process.[3] The second is that the courts *should* limit democracy in ways that promote justice and protect individual fundamental rights.[4] An obvious weakness with this latter argument is that it concedes that judicial review is, in fact, undemocratic.[5]

The three authors discussed in this paper are also defenders of judicial review, and advance three additional arguments in favor of judicial review, which attempt to rebut the counter-majoritarian difficulty in distinct ways. First, Christopher Eisgruber argues that judicial review thwarts the will of the *legislature*, not the will of the *people*, and that it is a mistake to equate the two.[6] Based on this distinction, he reconceives judicial review as a kind of democratic institution that is "well-shaped to speak on behalf of the people about

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[1] *See, e.g.*, Alexander M. Bickel, THE LEAST DANGEROUS BRANCH 16-23 (1962) ("[J]udicial review is a counter-majoritarian force in our system.").

[2] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[3] *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46-47 (2001) ("Judicial review is usually regarded as a constraint upon the American people's ability to act on their own judgments.").

[4] *Id*.

[5] *Id*.

[6] *See* EISGRUBER, *supra* note 3, at 49-50 ("It does not always follow that the best institution to represent the people will always be . . . thoroughly majoritarian.").

questions of moral and political principle" due to judges' life tenure and consequent disinterestedness.[7] Second, and relatedly, Jonathan Siegel posits that the judicial process has additional "institutional characteristics" (beyond life tenure) that make the judicial process "the superior method of constitutional enforcement" when compared to the electoral and legislative processes.[8] Finally, Suzanna Sherry summarizes the arguments of many scholars that the central problem of democratic government is protecting minorities from the tyranny of the majority; thus, Sherry argues, the courts have an obligation to act as a counter-majoritarian institution dedicated to protecting constitutional rights against legislative excess.[9] In other words, contrary to conventional wisdom, the judiciary's counter-majoritarian nature is its strength, not its weakness.

Notably, all three authors defend judicial review in the context of *representative* democracy. The question remains, however, whether their arguments hold in the context of *direct* democracy. Although most laws originate in a legislative body, the constitutions of approximately half the states authorize lawmaking by the electorate itself, usually in the form of statewide initiatives (which allow citizens to enact new statutes or constitutional amendments) or referenda (which allow citizens to repeal a statute enacted by the state legislature).[10]

Like legislative enactments, the results of voter enactments are subject to constitutional challenge, and have sometimes been invalidated on equal protection or other grounds.[11] Judicial opinions in

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[7] *Id*. at 3.

[8] Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1147 (2012).

[9] Suzanna Sherry, *Why We Need More Judicial Activism*, *in* CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT (Giorgi Areshidze, Paul Carrese, & Suzanna Sherry eds., forthcoming 2014) ("The courts *should* stand in the way of democratic majorities, in order to keep majority rule from degenerating into majority tyranny.").

[10] *See Initiative and Referendum States*, NATIONAL COUNCIL OF STATE LEGISLATURES (Sept. 2012), http://perma.cc/WB9R-4UEW (listing the twenty-six states with either statutory or constitutional provisions for direct democracy).

[11] Perhaps the best known example of this is Romer v. Evans, 517 U.S. 620 (1996), in which the Supreme Court held that Colorado's anti-gay rights initiative did not pass rational basis review under the Equal Protection Clause.

such cases have applied the same standards they would have applied to a legislative enactment.[12] A plausible argument can be made, however, that the judiciary should afford greater deference to exercises of direct democracy than it would to products of representative democracy. This is so for at least two reasons. First, if the legislature's inability to speak accurately on behalf of the people justifies, at least in part, judicial review of legislative enactments (as Eisgruber and Siegel claim), then the need for judicial review would seem to diminish when the people are able to speak for themselves, as in the context of direct democracy. Second, striking down an action taken directly by the public, rather than by their elected representatives, seems to make the counter-majoritarian difficulty even more readily apparent.

Notwithstanding these two arguments, I will argue in this paper that the results of direct democracy call for *more*, not less, judicial review. This is so because in the context of direct democracy, the judiciary is the only functioning check on majority power. While critics of judicial review are likely to reject the notion that the judiciary should be able to check the clear will of the people, this line of thinking incorrectly assumes that the outcomes of direct democracy accurately reflect majority will. Instead, I argue below that those outcomes are hardly a perfect reflection of majority will; rather, the same shortcomings of the electoral process plague both direct and representative democracy. Moreover, even if direct democracy results *were* accurate gauges of the majority's views, views do not become constitutional merely because they are majoritarian. To the contrary, the Framers were acutely aware of the threat that unchecked majorities pose to unpopular groups and viewpoints, and designed a system of government to combat that threat.[13] Thus,

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[12] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 938 (N.D. Cal. 2010) (holding that, although "[a]n initiative measure adopted by the voters deserves great respect," California had no rational basis in denying homosexuals marriage licenses), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *aff'd on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (holding petitioners lack standing to bring appeal).

[13] *See, e.g.,* THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 2003) ("Complaints are everywhere heard . . . measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an inter-

while strong judicial review of direct democracy may at times place courts in the precarious position of standing in the way of democratic majorities, it is both necessary and desirable in order to safeguard minority rights.

II.
THE AUTHORS' CASE FOR JUDICIAL REVIEW OF REPRESENTATIVE DEMOCRACY

In *Constitutional Self-Government*, Eisgruber refutes the notion that judicial review is undemocratic. He argues that, if we deepen our understanding of democracy, we can view the Supreme Court as a kind of representative institution that is sometimes better able than legislatures to speak on behalf of the people.[14] Eisgruber begins by noting that, in large nation-states (such as the United States), "the people" can never act in any direct way; instead, they act through a variety of institutions, including the legislature, none of which represent them perfectly.[15] This is so for two reasons.

First, democracy is governed by the *whole*, while a majority is by definition only a *fraction* of the people.[16] In order to truly speak on behalf of the people, Eisgruber contends, a government must take into account the interests and opinions of *all* the people, not just those of the majority.[17] Second, Eisgruber argues that both legislators and voters have incentives to make political decisions on the basis of self-interest.[18] In the case of legislators, the incentive is clear: to keep their jobs. This may lead them to disregard their own moral judgments in order to please voters. Of course, that would not be a problem if voters' preferences were good proxies for "the people's" values. Unfortunately, however, the office of "voter" also provides incentives for self-interested behavior for several reasons:

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ested and overbearing majority.").
[14] EISGRUBER, *supra* note 3, at 48-49.
[15] *Id.* at 49.
[16] *Id.* at 50-52.
[17] *Id.*
[18] *Id.* at 52-56.

> [V]oters act anonymously; they are neither required nor enabled to give reasons for their decision; and they must choose among a very limited set of options (for example, selecting one candidate from among a small set of competitors, or by voting "yes" or "no" on a ballot question). Moreover, each voter knows to a virtual certainty that her individual ballot will have no impact on the outcome of the election. The office of "voter" thus gives people very little incentive to take their responsibilities seriously . . . .[19]

After explaining why "the people" should not be equated with the legislature, Eisgruber argues that four crucial features of the judiciary make it the institution best suited to speak on behalf of the people on contested issues of morality.[20] First, judges have life tenure, and their consequent disinterestedness makes it more likely that they will decide contested moral issues on the basis of principled judgment, rather than self-interest.[21] Second, judges' votes often have a decisive impact on the outcome of a case; therefore, they have a much stronger incentive to take full responsibility for their choices.[22] Third, judges are held publicly accountable for their decisions and must give a public account of their reasoning.[23] Finally, judges are politically appointed and selected "on the basis of their political views and political connections," helping to ensure that the views of each judge are "unlikely to be radically at odds with the American mainstream."[24] For these reasons, Eisgruber concludes that judges, while unelected, are nevertheless representative of the people and are better able to protect rights and advance principles of justice than are legislatures.

In "The Institutional Case for Judicial Review," Siegel points to other institutional characteristics of the judicial process to reach the same conclusion: that judicial review is the superior method of constitutional enforcement when compared to the electoral and legisla-

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[19] *Id.* at 50.
[20] *Id.* at 71.
[21] *Id.* at 57-59.
[22] *Id.* at 60.
[23] *Id.* ("[Federal judges] are not required to stand for election, but they must quite literally *give a public account* of their reasoning.").
[24] *Id.* at 71.

tive processes.[25] The most important of these characteristics, according to Siegel, is that the judicial process is focused: it "resolves a specific claim raised by a specific plaintiff."[26] In contrast, the electoral process forces voters to choose between particular candidates; they are in essence voting for a package of positions on many different issues, and have no way to express their views on any one issue in particular.[27] For example, a voter may be forced to choose between a candidate who reflects her views on economic issues or one who reflects her views on social issues. Elections thus deliver results but no reasons, making it impossible for politicians to follow the voters' judgment on constitutional issues, given that they do not know for sure why they were elected in the first place or what the voters' positions are on any specific issue.[28] Siegel points to various other characteristics of the judicial process as well, and concludes that "[t]he full range of distinctive institutional characteristics, not just the political isolation of judges, normatively justifies judicial review."[29]

While Eisgruber essentially argues that judicial review is not really undemocratic, in "Why We Need More Judicial Activism," Sherry *embraces* the fact that judicial review is undemocratic, arguing that the "courts *should* stand in the way of democratic majorities, in order to keep majority rule from degenerating into majority tyranny."[30] Her argument rests on three grounds. First, she distinguishes between a pure democracy, in which the majority is entitled to enact its wishes into law, and a constitutional democracy, in which the Constitution places limits on the majority's power.[31] Because our Constitution establishes a constitutional democracy, constitutional *theory* suggests a need for judicial oversight of the popular branches.[32] Second, and relatedly, our own constitutional *history* confirms

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[25] Siegel, *supra* note 8, at 1147.
[26] *Id*. at 1169.
[27] *Id.* at 1169-70.
[28] *Id*. at 1173.
[29] *Id*. at 1147 (noting that judicial review is focused and mandatory, whereas the legislative process is unfocused and discretionary).
[30] Sherry, *supra* note 9, at 1.
[31] *Id.* at 7; *see also id.* ("The Constitution establishes liberty as well as democracy.").
[32] *Id*. at 7-9.

that the Framers saw a need for a strong bulwark against majority tyranny, and recognized that the remedy for legislative excess was judicial activism.[33] Finally, Sherry argues that an examination of constitutional *practice* shows that too little activism – or, in other words, the failure to invalidate a law that should be declared unconstitutional – produces worse consequences than does too much.[34] To illustrate this point, Sherry compiles a list of "condemned cases"[35] (consisting of such predictable names as *Plessy v. Ferguson*[36] and *Korematsu v. United States*[37]) and notes that each case on the list has at least two commonalities: first, it is universally recognized as wrong; and second, the Supreme Court *upheld* the challenged governmental action rather than invalidating it.[38] While there have clearly been unpopular decisions in which the Court struck down the challenged action (the Court's recent decision in *Citizens United v. Federal Election Commission*[39] immediately jumps to mind), Sherry's list nevertheless persuasively demonstrates that an overly deferential Court may not be as desirable as critics of judicial review suggest.

III.
THE CASE FOR JUDICIAL REVIEW OF DIRECT DEMOCRACY

Although the authors' arguments in defense of judicial review appear to have been articulated with representative democracy in mind (particularly in the case of Siegel), their arguments apply with equal – if not greater – force in the context of direct democracy. Democracy, whether direct or representative, reflects majority

[33] *Id.* at 9-11.

[34] *Id.* at 11 ("[W]e are better off erring on the side of too much judicial activism than too little.").

[35] *Id.* at 14-15.

[36] 163 U.S. 537 (1896) (upholding Louisiana's racially segregated railcars).

[37] 323 U.S. 214 (1944) (upholding an executive order excluding Japanese Americans from the West Coast during World War II).

[38] Sherry, *supra* note 9, at 16.

[39] 558 U.S. 310 (2010) (holding that the First Amendment prohibits the government from restricting political independent expenditures by corporations, associations, or labor unions).

will only when citizen participation in government is both widespread and informed. As I will explain below, however, in the United States few citizens vote in elections and even fewer are adequately informed of the issues at stake. Because these problems affect the outcomes of both direct and representative democracy, both direct and representative democracy fail to accurately reflect the will of "the people." Perhaps more importantly, even if exercises of direct democracy better reflect majoritarian preferences, they also uniquely facilitate majoritarian oppression of disfavored minority interests. The Framers designed our system of government with deviations from pure democracy that better protect such minority interests. Thus, I conclude that the case for judicial review is *stronger*, not weaker, in the context of direct democracy. I conclude by illustrating this point with examples of recent direct democracy measures that have consistently disfavored minority rights.[40]

A. Direct democracy fails to accurately reflect "the will of the people."

Given that "town hall democracy" is an impractical model for the United States,[41] the next best way to gauge majority sentiment would seem to be direct democracy, which allows each citizen to vote on issues rather than on candidates.[42] As a practical matter, however, popular votes do a flawed job of ascertaining what the people really want, even in the context of direct democracy. To begin with, only about half of the voting age population regularly votes, and this number drops even further in midterm election years.[43] Moreover, data demonstrate that significant numbers of

[40] Although other authors have occasionally called for increased judicial review of the products of direct democracy, they have not elaborated on the underlying reasons for doing so. *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (1996); Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237 (1999).

[41] EISGRUBER, *supra* note 3, at 49.

[42] *See* Siegel, *supra* note 8, at 1168-69 (discussing taking a case "to the polls" as a costly alternative to litigation).

[43] *See Voter turnout data for United States*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND

those who vote for candidates at the top of the ballot – already a reduced segment of the populace – fail to vote on initiatives and referenda (the "drop-off" problem).[44] Based on these facts, it seems unlikely that the small subgroup that actually does vote on these issues accurately reflects the preferences of the full citizenry. To the contrary, data indicate that those who are less educated, poorer, and younger are far less likely to vote on such measures.[45]

Given the complexity of the issues presented by direct democracy measures, voters who do respond to such measures are often confused, ignorant, or mistaken about what their vote really signifies. As Eisgruber explained, voters know that their own vote rarely affects the outcome of the election; thus, rational voters have little incentive to become well informed, regardless of whether they are voting for candidates or issues.[46] While Eisgruber made this point in the context of candidate-voting, it is especially true in the context of issue-voting, particularly because a ballot is rarely limited to a single measure. For instance, California's infamous Proposition 8 was just one of twenty-one statewide propositions on its 2008 ballot, in addition to 380 local ballot measures.[47] Such overloads are all but

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ELECTORAL ASSISTANCE, http://perma.cc/L2VD-28NG (archived Feb. 8, 2014) (showing that 53.6% of voting-age population voted in the 2012 election, and just 38.5% in the 2010 midterm election).

[44] *See, e.g.*, James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2155 (2013) (citing THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 66-67 (1989)) ("[B]allot propositions generally attract fewer voters, with significant ballot drop-off between the number participating in elections for office and those who vote on the ballot proposition.").

[45] *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 33-34 (1995) ("Voting on ballot propositions only amplifies the social class bias in participation, because those with lower incomes or less education tend to skip voting on ballot questions at much higher rates.").

[46] *See* EISGRUBER, *supra* note 3, at 50-51; *see also* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1331 (1994) ("Rational ignorance among voters . . . hinders achievement of the public interest under direct democracy."). *But see* Michael S. King, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1143 (2003) ("Despite their rational ignorance, voters can still make competent political choices. . . . Heuristic cues offer the best means of improving voter competence in direct democracy at low cost.").

[47] Shane Goldmancher, *All the local ballot measures fit for a vote*, CAPITOL ALERT, SACRAMENTO BEE (Oct. 16, 2008), http://perma.cc/PR2D-YSAL.

guaranteed to strain the voters' capacity for adequate research and education. Voter confusion is likely partly responsible for the drop-off problem, with many voters deciding to simply forego voting on a ballot measure altogether. On other occasions, however, it may lead voters to vote contrary to their own desires. Sometimes such incorrect voting may be attributable to the wording of the proposition; for example, those *in favor* of same-sex marriage in California were required to vote *against* Proposition 8.[48] In sum, the weaknesses of direct democracy can result in uninformed and even mistaken voting. And even fully informed voters can still vote only yes or no, which may not fully represent their position on a given issue.

B. Judicial review of direct democracy is necessary to protect against "the tyranny of the majority."

I do not mean to suggest that every, or even most, exercises of direct democracy are inaccurate reflections of the desires of those who vote. But even if direct democracy has a superior ability to convey the majority's viewpoint, the fact that a viewpoint is widely held does not make it constitutional. To the contrary, the Framers specifically designed our structure of government to guard against bare majoritarianism.[49] The goal in designing the structure of government was to "simultaneously empower and disempower popular majorities, to ensure democratic governance but nevertheless place a check on unfettered democratic rule."[50] Thus, the Framers chose a constitutional democracy over a pure democracy in order to place limits on the majority's power.[51] In addition, the Framers endorsed the separation of powers, in which the Constitution allocated the federal government's authority among three branches and, within Congress, divided the legislative power between two houses, each

[48] *Voter Information Guide*, CA. SECRETARY OF STATE 128 (2008), *available at* http://perma.cc/8VJS-JEFL.

[49] *See* Sherry, *supra* note 9, at 7-8 ("In a constitutional democracy, the role of the judiciary is to enforce the constitutional limits, and to put the brakes on popular tyranny and popular passions.").

[50] *Id.* at 7.

[51] *Id*.

elected by and accountable to different constituencies. In the event that a majority faction dominated one house of Congress, bicameralism would hinder that faction from controlling the legislative process. Moreover, the executive branch retained the authority to veto legislation, though presidential vetoes are subject to possible override by Congress. Finally, the Framers viewed the Constitution's division of governmental authority between the federal government and the states as the final safeguard against majoritarian tyranny.

Most of these checks and balances are missing from the direct democracy process, and their absence is most acute when direct democracy measures target minority groups. Direct democracy presents a unique opportunity for a bare majority to exercise its will over the minority, a situation against which the Framers tried to guard. The National Conference of State Legislatures' database, which lists all state ballot measures since 1892,[52] illustrates the frequency with which proposals to amend state constitutions to ban affirmative action and same-sex marriage are placed on ballots and submitted to the voters. As demonstrated by Figure 1 and Figure 2, the results of such measures overwhelmingly disfavored the minority groups at issue (racial minorities and homosexuals, respectively):

FIGURE 1. AFFIRMATIVE ACTION BANS

PASSED	**FAILED**
Arizona (Proposition 107, 2010)	Colorado (Amendment 46, 2008)
California (Proposition 209, 1996)	
Michigan (Proposal 2, 2006)	
Nebraska (Initiative 424, 2008)	
Oklahoma (State Question 759, 2012)	
Washington (Initiative 200, 1998)	

[52] *Ballot Measure Database*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://perma.cc/4SD8-GG6P (archived Feb. 8, 2014).

FIGURE 2. SAME-SEX MARRIAGE BANS

PASSED	**FAILED**[53]
Alabama (Amendment 774, 2006)	Maine (Question 1, 2012)
Alaska (Ballot Measure 2, 1998)	Maryland (Question 6, 2012)
Arizona (Proposition 102, 2008)	Minnesota (Amendment 1, 2012)
Arkansas (Constitutional Amendment 3, 2006)	Washington (Referendum 74, 2012)
California (Proposition 8, 2008)	
Colorado (Amendment 43, 2006)	
Florida (Amendment 2, 2008)	
Georgia (Constitutional Amendment 1, 2004)	
Hawaii (Constitutional Amendment 2, 1998)	
Idaho (Amendment 2, 2006)	
Kansas (Proposed Amendment 1, 2005)	
Kentucky (Constitutional Amendment 1, 2004)	
Louisiana (Constitutional Amendment 1, 2004)	
Michigan (State Proposal 2, 2004)	
Mississippi (Amendment 1, 2004)	
Missouri (Constitutional Amendment 2, 2004)	
Montana (Initiative 96, 2004)	
Nebraska (Initiative Measure 416, 2000)	
Nevada (Question 2, 2002)	
North Carolina (Amendment 1, 2012)	
North Dakota (Constitutional Measure 1, 2004)	
Ohio (State Issue 1, 2004)	
Oklahoma (State Question 711, 2004)	
Oregon (Measure 36, 2004)	
South Carolina (Amendment 1, 2006)	
South Dakota (Amendment C, 2006)	
Tennessee (Amendment 1, 2006)	
Texas (Proposition 2, 2005)	
Utah (Constitutional Amendment 3, 2004)	
Virginia (Marshall-Newman Amendment, 2006)	
Wisconsin (Referendum 1, 2006)	

[53] The Maine, Maryland, and Washington ballot measures were not technically same-sex marriage *bans*, but rather, proposals to *allow* same-sex marriage that passed, which may be coincidence or may serve as evidence in support of the contention that the wording of such measures affects outcomes.

These data demonstrate the ease with which majorities can trump minority rights using direct democracy measures. And the examples do not stop there: other minority groups, including immigrants[54] and persons charged with crimes,[55] have consistently been disadvantaged by the direct democracy process as well. In this context, the courts are the only institutional check and the only protector of minority rights. Indeed, many initiatives and referenda have subsequently been declared unconstitutional by courts. For instance, in 2012, the Sixth Circuit Court of Appeals overturned Michigan's voter-approved ban on affirmative action on equal protection grounds, concluding that "Proposal 2 reorders the political process in Michigan to place special burdens on minority interests."[56] Additionally, in 2010, a federal district court ruled that California's Proposition 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[57]

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[54] More than half of the states have passed measures to establish English as their official language or to require that all public schoolchildren be taught in English. *See, e.g.,* Ariz. Proposition 203 (2000) (limiting non-English instruction available in public schools); Ariz. Proposition 103 (2006) (establishing English as the official language of the state); Mass. Question 2 (2002) (requiring that all subjects be taught in English); Mo. Constitutional Amendment 1 (2008) (establishing English as the official language of the state); Okla. Question 751 (2010) (same); Utah Initiative A (2000) (same); *see also States with Official English Laws*, U.S. ENGLISH, http://perma.cc/7UKF-C99V (archived Feb. 8, 2014) (advocacy group's map of the thirty-one states with English-only laws). *But see* Colorado's Amendment 31 (2002) (failed amendment requiring English-only instruction in public schools); Oregon's Measure 58 (2008) (failed initiative that would have required "English immersion" in public schools).

[55] States have frequently passed measures to decrease the number of bailable offenses, *see, e.g.*, Texas's Proposition 13 (2007) (authorizing the denial of bail to a person who violates conditions of release in a felony or domestic violence case), and increased penalties for certain types of crimes, *see, e.g.*, Ariz. Proposition 301 (2006) (authorizing a prison term for a first-time offender of methamphetamine possession); Cal. Proposition 83 (2006) (increasing penalties and limiting early-release opportunities for sex offenders); Or. Measure 57 (2008) (increasing sentences for certain drug and property crimes). However, until recently, states have generally rejected measures to decriminalize the use and possession of small amounts of marijuana. *See* Alaska Ballot Measure 5 (2000); California's Proposition 19 (2010); S.D. Initiated Measure 1 (2008). *But see* Colo. Amendment 64 (2012); Wash. Initiative 502 (2012).

[56] Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 485 (6th Cir. 2012), *cert. granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

[57] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v.

IV.
CONCLUSION

Determining the will of the people is problematic whether articulated and implemented through the legislative process or through direct democracy. Additionally, unfettered majority rule has never been the goal of American democracy. To the contrary, our government has an obligation to all of its citizens, and the rights of individuals and minority groups must be protected against the actions of the majority. In the context of direct democracy, these protections can be enforced only by strong judicial review. Clearly, judicial resolution of constitutional issues will continue to generate controversy as judges interpret vague terms such as "due process" and "equal protection." Yet the ability of courts to engage in this function is necessary to protect individual liberties from majority encroachments; thus, the supposed counter-majoritarian difficulty should not foreclose judicial review of direct democracy initiatives.

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Brown, 671 F.3d 1052 (9th Cir. 2012). The Supreme Court ultimately ruled that proponents of initiatives such as Proponent 8 did not possess legal standing in their own right to defend the resulting law in federal court. The appeal was dismissed, leaving the district court's 2010 ruling in place and enabling same-sex marriages in California. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661-63 (2013).