

**DIRECT TYRANNY: THE HUMAN RIGHTS ACT AS A  
SAFEGUARD AGAINST HARMFUL MAJORITARIANISM IN  
JACKSON V. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND  
ETHICS**

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I. INTRODUCTION

The history of direct democracy in America reveals great tensions between public initiatives, individual liberties, majoritarian campaigns, and the accountability of public officials to the electorate as a whole.<sup>1</sup> Though the initiative process certainly can be a method through which voters are able to voice valid frustrations with representative government and achieve reform, the process of direct democracy has long been feared as a threat to minority rights.<sup>2</sup> Direct democratic processes are antithetical to American governmental institutions.<sup>3</sup> American government is founded upon a healthy mistrust of majorities,<sup>4</sup> and, as James Madison long ago concluded, men are not angels.<sup>5</sup> Direct democracy, generally, and

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<sup>1</sup> See *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 105 (D.C. 2010), *cert. denied*, 131 S. Ct. 1001 (2011). Woodrow Wilson reasoned that the initiative and referendum were proposed “as a means of bringing our representatives back to the consciousness that what they are bound in duty and in mere policy to do is to represent the sovereign people who they profess to serve and not the private interests which creep into their counsels by way of machine orders and committee conferences.” John G. Matsusaka, *Disentangling the Direct and Indirect Effects of the Initiative Process* 3–4 (June 2007) (unpublished manuscript) (on file with author) available at [http://www-bcf.usc.edu/~matsusak/Papers/Matsusaka\\_Direct\\_vs\\_Indirect\\_2007.pdf](http://www-bcf.usc.edu/~matsusak/Papers/Matsusaka_Direct_vs_Indirect_2007.pdf) (quoting Woodrow Wilson, *The Issues in Reform, in THE INITIATIVE, REFERENDUM, AND RECALL XX*, 87–88 (William Bennett Munro ed., 1912)).

<sup>2</sup> See William E. Adams, Jr., *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 449–50 (1998).

<sup>3</sup> Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294 (2010).

<sup>4</sup> *Id.* at 295.

<sup>5</sup> See THE FEDERALIST NO. 51 (James Madison).

the ballot initiative, specifically, pose serious threats to vulnerable minorities in part because the process of adoption is devoid of the checks and balances that are integral to representative democracy.<sup>6</sup> Jurisdictions, therefore, must adopt proper safeguards to ensure that minorities are protected from majoritarian campaigns.

Ballot initiatives in recent years have focused on the legality of same-sex marriages, and this focus serves as an example of how jurisdictions can use the initiative process to limit the rights of a vulnerable sector of the general population.<sup>7</sup> In the recent District of Columbia Court of Appeals decision *Jackson v. District of Columbia Board of Elections and Ethics*, the court upheld the D.C. Board of Elections and Ethics' rejection of the "Marriage Initiative of 2009."<sup>8</sup> This decision exemplifies how safeguards can temper the most deleterious effects of the initiative process, ensuring that it is not used to promote discrimination, while allowing for a process of public-initiated reform. Moreover, given the current pervasive use of ballot measures to legislate social issues such as same-sex marriage,<sup>9</sup> the need for reform to limit the use of direct democracy is substantial. This Comment will argue the need for reform in the use of the ballot initiative to protect minority rights by adopting safeguards so that human rights measures cannot be put to the ballot.

This Comment will survey the origin and use of direct democracy in this country. Most significantly, this Comment will emphasize the need to adopt safeguards to ensure the protection of the rights of vulnerable minorities, generally, and gays and lesbians, specifically. In Part II, this Comment will briefly describe the processes comprising direct democracy. Part II will also survey the history of direct legislation in this country, the current use of the initiative in jurisdictions across the nation, and some of the criticisms and defenses of the initiative process, focusing on the criticism that initiatives can unduly target vulnerable minorities. Part III will address two of the many important recent cases, *Strauss v. Horton*<sup>10</sup> and *Jackson v. District of Columbia Board of Elections and Ethics*.<sup>11</sup> This

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<sup>6</sup> See David B. Magleby, *Governing by Initiative: Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 45 (1995).

<sup>7</sup> See Adam H. Morse, *Second-Class Citizenship: The Tension Between the Supremacy of the People and Minority Rights*, 43 J. MARSHALL L. REV. 963, 963-64 (2010).

<sup>8</sup> *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89 (D.C. 2010).

<sup>9</sup> See Nate Silver, *The Future of Same-Sex Marriage Ballot Measures*, N.Y. TIMES (June 29, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/06/29/the-future-of-same-sex-marriage-ballot-measures/>.

<sup>10</sup> *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

<sup>11</sup> *Jackson*, 999 A.2d 89.

Comment proposes that the District of Columbia Council's ("the Council") 1978 adoption of the Human Rights Act<sup>12</sup> in conjunction with the Initiative, Referendum, and Recall Charter Amendment Act ("CAA")<sup>13</sup> properly addresses the Council's legitimate concern that an unchecked initiative process can deleteriously impact the liberties of disfavored minorities. The outcome of this case stands in stark contrast to *Strauss v. Horton*,<sup>14</sup> in which the California Supreme Court upheld Proposition 8, an initiative limiting the rights of same-sex couples.<sup>15</sup> Part III then highlights Justice Moreno's dissent in *Strauss*, which echoes the concerns of the District of Columbia Council in adopting the Human Rights Act safeguard ("Human Rights Safeguard").<sup>16</sup>

Part IV will consider methods by which various jurisdictions have placed limits on direct democracy initiatives. Part V will provide a theoretical and practical argument for the need for safeguards against unchecked direct democracy, further arguing that the District of Columbia's use of the Human Rights Safeguard is effective to combat the potential threat of harmful majoritarianism while allowing the electorate to continue to participate in the initiative process. Part VI will conclude by reaffirming the need for reform to protect minorities from the adoption of ballot initiatives that curtail minority rights. Though an outlier in practice, the Human Rights Safeguard, which the District of Columbia uses, is important to the discussion of how direct democratic methods can work in a democratic republic, and ought to be considered in other jurisdictions that offer the right to the direct initiative.<sup>17</sup>

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<sup>12</sup> D.C. CODE § 2-1401 (West 2007)

<sup>13</sup> D.C. CODE § 1-204.101-07 (West 2001).

<sup>14</sup> *Strauss*, 207 P.3d 48.

<sup>15</sup> *Id.* As discussed in greater detail *infra* note 144, the United States Court of Appeals recently concluded that Proposition 8 is unconstitutional. *Perry v. Brown*, 671 F.3d (9th Cir. 2012) (formerly *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)). That ruling, while significant, does not affect the central argument in this Comment. See *infra* Part III.A.1.

<sup>16</sup> *Strauss*, 207 P.3d at 129 (Moreno, J., concurring in part and dissenting in part).

<sup>17</sup> This Comment is not an assessment of the overall value of direct democratic processes in the United States. There certainly are positive aspects of direct democracy. Prior scholarly writings have contributed to the discussion of direct democracy, and many scholars have addressed various issues related to the initiative and referendum process in this country. These writings include the arguments that courts should: use the Guarantee Clause, U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion . . ."), to nullify ballot initiatives that threaten minority rights; analyze popular measures under the scope of the

## II. THE HISTORY OF DIRECT DEMOCRACY IN AMERICA

Before discussing the current need for reform in the use of the ballot initiative to protect minority rights, it is helpful to examine the origins of direct democracy in the United States. First, this Part will define the processes entailing direct democracy.<sup>18</sup> It then will survey the origins of direct democracy, highlighting the goals of the Populist and Progressive Movements, and discuss the modern era of direct democracy beginning in the late 1970s.<sup>19</sup> This Part will conclude by briefly putting forth many contemporary criticisms of direct democracy in general, and the direct initiative specifically, paying particular attention to the concern that the direct initiative poses a threat to minority rights.<sup>20</sup>

A. *Direct Democracy Defined*

David V. Magleby, an esteemed scholar in the area of direct democracy, defines direct legislation as “the process by which voters directly decide issues of public policy by voting on ballot propositions.”<sup>21</sup> Julian N. Eule divides direct democracy into two primary subgroups: substitutive and complementary.<sup>22</sup> First, in substitutive direct democracy, the electorate can completely bypass all branches of government, thereby substituting direct, popular lawmaking for the traditional, representative lawmaking process.<sup>23</sup> The ballot initiative, or plebiscite, is the ordinary form of substitutive

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Fourteenth Amendment’s Equal Protection Clause, U.S. CONST. amend. XIV; and develop consistent standards with which to evaluate the ballot initiatives. *See, e.g.*, Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994); Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (1997). Moreover, in the aftermath of the *Strauss* decision and responding to Justice Moreno’s warnings, Anne Marie Smith has utilized political and constitutional theory to propose a revised initiative procedure that would not threaten minority rights. Anna Marie Smith, *The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton*, 45 U.S.F. L. REV. 517, 545 (2011). For a thorough discussion of many issues that scholars have discussed relating to the direct democracy debate, *see generally* Linda Maduz, *Direct Democracy*, 2 LIVING REVIEWS IN DEMOCRACY 1 (2010), available at <http://democracy.livingreviews.org/index.php/lrd/article/view/lrd-2010-1/21>.

<sup>18</sup> *See infra* Part II.A.

<sup>19</sup> *See infra* Parts II.B–C.

<sup>20</sup> *See infra* Part II.D.

<sup>21</sup> DAVID V. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 1 (1984).

<sup>22</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1510 (1990).

<sup>23</sup> *Id.*

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direct democracy, allowing for “voters to propose a legislative measure (statutory initiative) or a constitutional amendment (constitutional initiative) by filing a petition bearing a required number of valid citizen signatures.”<sup>24</sup>

The ballot initiative can be further subdivided as either a direct or indirect initiative.<sup>25</sup> A direct initiative is a constitutional amendment and/or statute “proposed by petition and submitted directly to the voters for approval or rejection without any action by the legislature.”<sup>26</sup> Jurisdictions that allow for direct initiative vary as to whether the electorate can put forth a statutory initiative, a constitutional amendment by initiative, or both.<sup>27</sup> Upon approval by the electorate, the proposal has the full force and effect of a state constitutional amendment or statute.<sup>28</sup> An indirect initiative is proposed by petition, which is first submitted to the state legislature for approval.<sup>29</sup> If the legislature fails to act on the proposal or if it amends the original proposal in a manner unacceptable to the proponents, the proponents may submit their original initiative to be placed on the ballot for a vote of the entire electorate.<sup>30</sup> Some states that permit indirect initiatives allow their legislatures, in the circumstances in which a legislature does not approve the submitted indirect initiative, to offer a substitute initiative on the same issue to be accompanied by the original on the ballot.<sup>31</sup> Eule characterizes an indirect initiative that the legislature adopts as a product of representative democracy and describes an initiative rejected by the legislature but ultimately voted on and adopted by the electorate as a product of direct substitutive democracy.<sup>32</sup>

Complementary direct democracy is most commonly known as the referendum.<sup>33</sup> The referendum, in contrast to the initiative, “refers a proposed or existing law or statute to voters for their approval or rejection.”<sup>34</sup> The electorate and legislature act in concert

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<sup>24</sup> THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* 2 (1989).

<sup>25</sup> Eule, *supra* note 22, at 1511.

<sup>26</sup> MAGLEBY, *supra* note 21, at 35.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 36.

<sup>31</sup> *Id.*

<sup>32</sup> Eule, *supra* note 22, at 1511.

<sup>33</sup> *Id.* at 1512.

<sup>34</sup> CRONIN, *supra* note 24, at 2.

in order to ratify a measure.<sup>35</sup> There are three types of referenda: the mandatory or compulsory referendum, the voluntary referendum, and the popular referendum.<sup>36</sup> The mandatory or compulsory referendum refers to a state constitutional provision that requires submitting certain legislative enactments to the electorate for ratification.<sup>37</sup> The voluntary referendum, on the other hand, gives the legislature the option to refer a legislative measure to the electorate.<sup>38</sup> Finally, under the popular referendum, the legislature enacts a measure and refers it to the electorate before the measure can go into effect.<sup>39</sup>

The recall is a third method typically grouped within the overarching category of direct democracy.<sup>40</sup> Through the use of the recall, the electorate may remove or discharge public officials by submitting a petition with the required number of signatures proposing the removal or discharge.<sup>41</sup> The entire electorate then has the opportunity to vote on the continued tenure of the elected official.<sup>42</sup> Though this Comment will only address the direct initiative, the recall has recently been implicated in the same-sex marriage debate.<sup>43</sup>

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<sup>35</sup> Eule, *supra* note 22, at 1512.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* As will be discussed in more detail below, *infra* note 379, at the time of this writing, New Jersey's use of the referendum was front-page news. See Patrick Murray, *Trenton's Referendum Mania*, POLITICKERNJ (Feb. 13, 2012), <http://www.politickernj.com/patrick-murray/54760/trentons-referendum-mania>. Governor Chris Christie and some members of the legislature called for referenda on important issues, including same-sex marriage. *Id.* These public officials have called for a public vote via referendum as a means to defeat the proposal where the legislature was posed to pass it. *Id.* Murray warns that the referendum process leaves pressing policy issues to the public, who "lacks both access to information and the ability to deliberate . . . which our founders specifically said should be left to an informed, deliberative system of representative government," concluding that "you don't put civil rights to a public vote." *Id.*

<sup>39</sup> Eule, *supra* note 22, at 1512.

<sup>40</sup> CRONIN, *supra* note 24, at 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> While this Comment will not specifically focus on the recall, the recall is nonetheless important to the discussion of direct democracy as it relates to minority rights, particularly to same-sex marriage debate. Its relevance is evidenced by the unprecedented recall of Iowa Supreme Court justices who were part of a unanimous decision to legalize same sex marriage in Iowa. Critics of the removal raise the same concerns addressed in this article about the implication of these popular methods on minority rights. See A.J. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

In the United States, the ballot-initiative process is used far more frequently than the referendum, and is generally considered to be more important and powerful than the referendum process.<sup>44</sup> Moreover, as the direct initiative allows the voters to completely bypass the representative democratic process, the proponents of an initiative are able to affect common governance without the filters and checks and balances constructed within the state constitutions and the U.S. Constitution to protect against the will of the majority.<sup>45</sup> This Comment will therefore focus on the substitutive form of direct democracy, the direct initiative.

*B. The Development and Adoption of Direct Democracy from the Populist and Progressive Movements*

As Thomas E. Cronin described, “[t]he initiative, referendum, and recall were born in an era of real grievances.”<sup>46</sup> In the early twentieth century, Populist and, subsequently, Progressive reformers proposed the adoption of the initiative, referendum, and recall as antidotes to “corrupt and unresponsive state legislatures.”<sup>47</sup> The genesis of direct democracy in this country is largely attributed to the Populists.<sup>48</sup> In 1885, two men from very different parts of the country became the first reformers to propose the initiative and referendum.<sup>49</sup> Father W. Haire, a labor activist from Aberdeen, South Dakota, and Benjamin Urner, a newspaper publisher and unsuccessful Greenback Party congressional candidate from Elizabeth, New Jersey, began a movement for direct democracy that would soon garner serious attention throughout the country.<sup>50</sup>

Prominent from 1875 to 1895, the People’s, or Populist, Party emerged from the nonpartisan Farmers’ Alliance, a group organized to ameliorate the impoverished conditions of the American farmer as well as the ills of the country as a whole, such as greedy capitalists and political corruption, which they believed to be the cause of the

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<sup>44</sup> INITIATIVE & REFERENDUM INST., COMPARISON OF STATEWIDE INITIATIVE PROCESSES 2, <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf> (last visited Nov. 12, 2012).

<sup>45</sup> See Eule, *supra* note 22, at 1525.

<sup>46</sup> CRONIN, *supra* note 24, at 6.

<sup>47</sup> *Id.* at 1.

<sup>48</sup> DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 5–10 (1989).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 5–10.

farmer's misfortune.<sup>51</sup> Promoters of the Populist form of democracy argued that direct democracy reforms would benefit the public at large.<sup>52</sup> Some of their selling points included that initiatives would promote government responsiveness and accountability and that initiatives were less susceptible to corruption and the influence of special interests than the legislatures.<sup>53</sup> Moreover, Populists proposed that initiatives would promote educated discourse among the populous and that direct democracy would lead to a more active, less apathetic electorate.<sup>54</sup> Initiatives could be used to address the tough issues that risk-averse elected officials shirk.<sup>55</sup> Reformers believed that the general public would not be as corrupt as the legislatures.<sup>56</sup>

The farmers' groups, joined by other labor groups, began organizing by rallying around their common plights.<sup>57</sup> The Populists held their first national convention in July 1892.<sup>58</sup> The first major success of the direct democracy movement came from the "Populist strongholds of the midwestern farmlands,"<sup>59</sup> as the movement for direct democracy or direct legislation gained credibility in the late 1890s throughout the West.<sup>60</sup> In 1898, South Dakota was the first state to adopt the initiative and referendum.<sup>61</sup> Yet, despite successes in a few states, Populism never became a permanent or majority party.<sup>62</sup> The Populist's campaign for direct democracy reached no further than Oregon, South Dakota, and Utah.<sup>63</sup>

At the turn of the twentieth century, Progressives took over the direct democracy campaign first fostered by the Populists.<sup>64</sup> The Progressives' stance against representative democracy was founded upon several beliefs: they distrusted the influence of party bosses and special interests, believed that the legislative process should be more transparent, and reasoned that public officials represented party

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<sup>51</sup> CRONIN, *supra* note 24, at 43–44.

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS 17 (1998).

<sup>57</sup> CRONIN, *supra* note 24, at 45.

<sup>58</sup> *Id.*

<sup>59</sup> SCHMIDT, *supra* note 48, at 7.

<sup>60</sup> CRONIN, *supra* note 24, at 50.

<sup>61</sup> *Id.* at 51 tbl.3.1.

<sup>62</sup> MATHEW MANWELLER, THE PEOPLE VERSUS THE COURTS: INITIATIVE ELITES, JUDICIAL REVIEW, AND DIRECT DEMOCRACY IN THE AMERICAN LEGAL SYSTEM 24 (2005).

<sup>63</sup> *Id.*

<sup>64</sup> CRONIN, *supra* note 24, at 56.



machinery, not the public interest.<sup>65</sup> The Progressives, though less radical than their Populist predecessors, sought reforms to ameliorate their concerns about government corruption, and continued the agitational role that the Populists originated.<sup>66</sup> Progressivism, at its core, was a movement to “restore popular control of government and the Constitution” by making governmental actors more accountable to the people.<sup>67</sup> Progressives pushed their direct democracy agenda by proposing such measures as popular election of U.S. senators, primary elections, the referendum, the recall, and the initiative.<sup>68</sup>

Academic scholars have criticized the Progressives’ political aspirations to rid governance from the sway of special interests and to manifest popular sentiment through the policymaking process.<sup>69</sup> Some scholars highlight the irony embedded in the Progressives’ motivation to eliminate the legislation of special interests, as the Progressives themselves were an interest group, while others criticize the Progressives for being too idealistic and for discounting the economic realities of the modern era of industrialization.<sup>70</sup> Still other scholars have discounted the Progressives’ criticism of representative democracy and state legislatures as exaggerated and have criticized the movement, arguing that the way to instill faith in the legislative process is to reform the process and the legislature, not to bypass it entirely.<sup>71</sup>

This spotlight on the imperfections of representative democracy at the turn of the twentieth century may be, in part, attributable to the increased responsibility of state legislatures for economic and public policy at the time of industrialization. During this era, state legislatures increasingly faced issues about social welfare, banks, railroads, mining and lumber interests, and land speculators.<sup>72</sup> The post-Civil War era marked the beginning of the modern age of complex governmental regulation.<sup>73</sup> The role of government in everyday life changed qualitatively and quantitatively, and public

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<sup>65</sup> *Id.*

<sup>66</sup> MANWELLER, *supra* note 62, at 24.

<sup>67</sup> LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 215 (2004).

<sup>68</sup> *Id.*

<sup>69</sup> CRONIN, *supra* note 24, at 57–58; *see also* MANWELLER, *supra* note 62, at 25.

<sup>70</sup> CRONIN, *supra* note 24, at 57–58.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 55.

<sup>73</sup> *See generally id.*

mistrust grew correspondingly.<sup>74</sup> As such, this period of change and heightened awareness of government action saw a surge in the involvement of special interest groups in legislative affairs.<sup>75</sup>

World War I brought an end to Progressivism and to the direct democracy movement, most significantly because the war gave rise to new national priorities.<sup>76</sup> Nevertheless, regardless of the criticisms levied against them, the Populist and Progressive movements remained present on the political terrain across the country. The various direct democratic structures that these movements inserted into many state constitutions continue to be an important part of the law-making process in many states.

### C. *The Modern Era of Direct Democracy*

#### 1. Resurgence of the Use of the Initiative

The debate over direct democracy and whether voters should weigh in directly on current policy issues has a long history.<sup>77</sup> Resurgence of the use of direct initiatives in recent years has rekindled this debate.<sup>78</sup> Prior to the 1970s, direct legislation was not a phenomenon of major significance; only a few states east of the Mississippi River demonstrated an interest in extensively using direct legislation.<sup>79</sup> In the 1970s, however, attention to direct legislation expanded beyond its traditional western base.<sup>80</sup> The nature of the salient issues of the period, most notably a renewed and growing distrust in government and frustration with state legislatures, at least partially explains the surge in direct legislation in the states.<sup>81</sup> While corruption on the state and local level may not be as pervasive today or in the 1970s as it was in the early 1900s, the influence of special interests is as prevalent as ever.<sup>82</sup>

According to Professor Matthew Manweller, most scholars agree that the modern era of the initiative and referendum began in 1978 with California's passage of Proposition 13.<sup>83</sup> Proposition 13 was a

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<sup>74</sup> *See id.* at 55.

<sup>75</sup> *Id.*

<sup>76</sup> SCHMIDT, *supra* note 48, at 10.

<sup>77</sup> MAGLEBY, *supra* note 21, at ix.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 59.

<sup>82</sup> CRONIN, *supra* note 24, at 3.

<sup>83</sup> MANWELLER, *supra* note 62, at 25.

June 1978 California ballot initiative allowing Californians to vote to cut statewide property taxes by more than half.<sup>84</sup> The proposition brought national attention to the controversial initiative process and affected nationwide trends in the use of the direct initiative.<sup>85</sup> First, it spurred similar tax-slashing measures in other states.<sup>86</sup> Second, and more importantly for the purposes of this Comment, Proposition 13 inspired conservative interest groups to organize campaigns to achieve their social and political goals, including measures favoring the death penalty, English-only regulations, prayer in public schools, and opposing pornography, abortion, and homosexuality.<sup>87</sup> Following the success of Proposition 13, the use of the ballot initiative surged in the late 1970s, a time when many controversial ballot issues appeared in various states.<sup>88</sup> According to the Council of State Governments, the “initiative revolution,” which began in California in 1978, has not only continued, but has accelerated in recent years.<sup>89</sup>

While historians emphasize Proposition 13 in 1978 as a landmark in the modern era of direct legislation,<sup>90</sup> other developments during this period are important to the discussion of the initiative’s impact on minority civil rights. First, in the Supreme Court’s 1967 decision of *Reitman v. Mulkey*, the Court held that the California Supreme Court could invalidate an initiative the electorate passed authorizing housing discrimination.<sup>91</sup> The Court found such overt state affirmation of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>92</sup> Equally significant to the conflict between minority rights and direct legislation was Evangelist singer Anita Bryant’s 1977 campaign to repeal the sexual orientation anti-discrimination ordinance in Dade County, Florida, which began the first wave of anti-gay initiatives.<sup>93</sup>

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<sup>84</sup> CRONIN, *supra* note 24, at 3.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 3–4.

<sup>89</sup> John G. Matsusaka, *2004 Initiatives and Referendums*, THE BOOK OF THE STATES 2005, at 388 (2005), available at <http://www.csg.org/knowledgecenter/docs/BOS2005-InitiativesReferendums.pdf>.

<sup>90</sup> See MANWELLER, *supra* note 62, at 25 (noting that most scholars agree that the modern era of the initiative process commenced with the Proposition 13 campaign in 1978).

<sup>91</sup> *Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>92</sup> *Id.*

<sup>93</sup> See William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 606 (1994).

Contemporaneously, California State Senator John Briggs led a campaign that placed Proposition 6 on the ballot.<sup>94</sup> Proposition 6 had the effect of severely limiting the rights of homosexual public school teachers in the state by “permitting school boards to fire any teacher who advocated, solicited, encouraged, or promoted public or private homosexual activity.”<sup>95</sup> While Proposition 6 ultimately failed,<sup>96</sup> it is important to acknowledge the role of these events when considering the evolution of the same-sex marriage debate as it relates to the ballot initiative.

## 2. The Initiative in the States: By the Numbers

To date, twenty-four states and the District of Columbia have approved the initiative process; meanwhile, nearly every state legislature and the United States Congress have considered adopting some type of initiative process.<sup>97</sup> Approximately four-fifths of the states that have adopted initiative procedures are west of the Mississippi River.<sup>98</sup> Fifteen of the twenty-four states allow for the use of the initiative for statutes and constitutional amendments.<sup>99</sup> Three allow its use only for constitutional amendments, while six states and the District of Columbia allow the initiative procedure only for statutes.<sup>100</sup> Fourteen states and the District of Columbia use only the direct initiative, the process by which a ballot question is posed directly to the electorate upon the proper number of petition signatures; five states exclusively use the indirect initiative, the process by which the ballot measure is only posed to the electorate upon adoption by the legislature; three states use the indirect initiative for statutes while allowing the direct initiative for constitutional amendments; and two states use the direct and indirect initiative for statutes.<sup>101</sup>

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<sup>94</sup> CRONIN, *supra* note 24, at 94.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> DUBOIS & FEENEY, *supra* note 24, at 28 (the jurisdictions that have adopted the initiative, in the order in which the initiative was adopted are: South Dakota, Utah, Oregon, Nevada, Montana, Oklahoma, Maine, Michigan, Missouri, Arizona, Colorado, Arkansas, California, Idaho, Ohio, Nebraska, Washington, North Dakota, Massachusetts, Alaska, Florida, Wyoming, Illinois, District of Columbia, and Mississippi).

<sup>98</sup> SCHMIDT, *supra* note 48, at 10.

<sup>99</sup> *Id.* at 27.

<sup>100</sup> *Id.* As the District of Columbia is not a state, it does not have its own constitution. Constitutional rights in the District of Columbia are derived solely from the United States Constitution. *See generally* U.S. CONST. art. IV, § 3, cl. 2.

<sup>101</sup> *See generally* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in*

*D. Criticisms of Direct Democracy and Plebiscitary Procedures*

## 1. An Overview of Contemporary Criticisms and Justifications for the Initiative

While direct democracy has many supporters, its critics are equally vocal. There are many objections to the use of initiatives and referenda, but the essential argument against the use of the initiative is that “[p]lebiscitary processes are less likely than representative ones to generate decisions that reflect common conceptions of the public interest or social welfare.”<sup>102</sup> In other words, a public vote is less likely to result in an outcome that is sound, balanced, and most beneficial for all.<sup>103</sup> Implicit in this concern is the idea that a mere aggregation of will is insufficient to produce sound, ideal social decisions and that “universal and rational pursuit of self-interest does not necessarily generate an optimal collective result.”<sup>104</sup>

In critiquing the modern initiative process in light of the Progressives’ goals, political scientist Betty Zisk concluded that the goals of the Progressives have not been met.<sup>105</sup> Rather than replacing interest groups’ influence, ballot initiative campaigns provide interest groups with an alternative method to influence lawmaking.<sup>106</sup> Moreover, some of the common criticisms of direct democracy include the belief that the average voter is not sufficiently informed, sophisticated, or competent enough to understand complex issues and make sound policy decisions, and that advertising, media, special interests, and money can unduly influence the process.<sup>107</sup> Additionally, opponents of direct democracy argue that direct legislation benefits special interest groups, not the people at large; direct legislation results in long, complex ballots and frivolous proposals; voters are not sophisticated enough to understand the proposals and navigate the convoluted media campaigns surrounding initiatives; the legislative process is superior to direct legislation for policy-making; direct legislation will not serve to educate the public and will not enhance public involvement; and direct legislation poses a threat to democracy and minority rights.<sup>108</sup> This discussion provides

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*Local Government Law*, 86 MICH. L. REV. 930 (1988).

<sup>102</sup> *Id.* at 932.

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* at 933–34.

<sup>105</sup> BETTY ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 250 (1987).

<sup>106</sup> *Id.*

<sup>107</sup> CRONIN, *supra* note 24, at 11.

<sup>108</sup> MAGLEBY, *supra* note 21, at 30; *see also* MANWELLER, *supra* note 62, at 25.

only a cursory overview of the criticisms of direct democracy, and scholars and opponents have put forth many noteworthy criticisms of the initiative process.<sup>109</sup> This Comment will limit its discussion to the impact that the initiative can have on minority rights and, specifically, the use of the initiative as implicated in the same-sex marriage debate.

## 2. An Introductory Focus on Issues of Equality and Minority Rights

Though the initiative process certainly provides means through which voters are able to voice valid frustrations with representative government, the process of direct democracy has, nevertheless, long been feared as a threat to minority rights.<sup>110</sup> According to William E. Adams, Jr., “[b]allot measures directed toward various minorities are frequently used by contemporary society.”<sup>111</sup> Detractors of direct democracy posit that eliminating the safeguards built into representative government poses a special threat to disfavored and powerless groups.<sup>112</sup> Such detractors point to initiatives proposed to ban school busing to enhance racial integration, to permit private discrimination in the sale of real property, and to declare English the official language of a locality.<sup>113</sup> During the last thirty years, and continuing to the present, gays and lesbians remain one of the most targeted minority groups in initiative campaigns.<sup>114</sup>

In this regard, Barbara S. Gamble studied the incidence of minority discrimination through ballot initiatives.<sup>115</sup> Analyzing data after a three-decade study of ballot initiatives and referenda from 1959–1993, and focusing on five major civil rights areas, including gay rights, Gamble concluded that initiatives seeking to limit civil rights experience greater electoral success than all other initiatives and referenda.<sup>116</sup> Strikingly, voters have approved over three-quarters of initiatives limiting civil rights, while approving only one-third of all

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<sup>109</sup> See generally *id.* (for a comprehensive analysis of the many criticisms of direct democracy).

<sup>110</sup> Adams, *supra* note 2, at 450.

<sup>111</sup> Adams, *supra* note 93, at 603.

<sup>112</sup> Charlow, *supra* note 17, at 529–30.

<sup>113</sup> *Id.* at 530.

<sup>114</sup> Adams, *supra* note 2, at 458.

<sup>115</sup> Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245 (1997).

<sup>116</sup> *Id.* In addition to those affecting gays and lesbians, Gamble also surveyed civil rights initiatives targeted to limit the rights of ethnic, racial, and language minorities, as well as individuals with AIDS. *Id.*

initiatives and referenda.<sup>117</sup> Moreover, Gamble found that the public has placed the rights of gays and lesbians on the ballot for a popular vote more often than any other minority group, as nearly sixty percent of civil rights initiatives during the period of her study targeted gays and lesbians.<sup>118</sup> A more recent article confirmed Gamble's conclusion, finding that minorities are likely to lose at the ballot box.<sup>119</sup>

Many state initiatives in the past decade have sought to proscribe same-sex marriages.<sup>120</sup> For instance, California's Proposition 8 and Alaska's Ballot Measure 2 are examples of initiatives limiting marriage to opposite-sex couples.<sup>121</sup> During the November 2008 election, Arizona, California, and Florida voted on same-sex marriage ban initiatives, while in 2004, eleven states voted on similar measures.<sup>122</sup>

The hostility surrounding same-sex marriage first seized widespread public attention in 1993, with the Supreme Court of Hawaii's ruling in *Baehr v. Lewin*.<sup>123</sup> In *Baehr*, the Hawaii Supreme Court held that refusing to grant marriage licenses to same-sex couples qualified as sex discrimination under that state's constitution.<sup>124</sup> In 1998, Hawaii state legislators responded by proposing a referendum defining marriage as between one man and one woman, which was approved by a margin of sixty-eight to thirty-

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 257.

<sup>119</sup> Donald P. Haider-Markel & Kenneth Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles over Lesbian and Gay Civil Rights*, 20 REV. POL'Y RES. 671, 676 (2003).

<sup>120</sup> Morse, *supra* note 7, at 963.

<sup>121</sup> *Id.* at 964. In 2009, Vermont became the first state in which the legislature acted without judicial mandate to allow same-sex marriage. *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L COUNCIL OF STATE LEGISLATURES (July 14, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>. Maine and New Hampshire followed suit the same year. *Id.* Before a single same-sex marriage was performed in Maine, however, a successful November 2009 ballot measure repealed the newly adopted law. *Id.* In November 2012, voters responded by passing a ballot measure allowing for same-sex marriage. Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN, Nov. 7, 2012, available at <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage/index.html>.

<sup>122</sup> Tiffany Sharples, *Ballot Initiatives: No to Gay Marriage, Anti-Abortion Measures*, TIME, Nov. 5, 2008, available at <http://www.time.com/time/politics/article/0,8599,1856820,00.html>

<sup>123</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); see MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 1–2 (1997).

<sup>124</sup> Ballotwatch 2008, *Same Sex Marriage: Breaking the Firewall in California*, INITIATIVE AND REFERENDUM INSTITUTE 1 (Nov. 2008), available at <http://www.iandrinstitute.org/BW%202008-2%20%28Marriage%29.pdf>; EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 44–45 (2004).

two percent.<sup>125</sup> Around this time, opponents of same-sex marriage in other states—Alaska in 1998 and California, Nebraska, and Nevada in 2000— placed “defense of marriage” measures on their ballots; the states’ electorates approved all of these measures.<sup>126</sup> Unlike the other states, which sought the ban by constitutional amendment, through the passage of Proposition 22, California approved the ban by a statutory initiative.<sup>127</sup> According to the Initiative and Referendum Institute, same-sex marriage has been a particularly pervasive issue since the February 2004 Massachusetts Supreme Judicial Court case of *Goodridge v. Department of Public Health*,<sup>128</sup> in which that court found a right to same-sex marriage in the state’s constitution.<sup>129</sup> Responding to the 2004 decision, same-sex marriage opponents throughout the country organized to adopt state constitutional amendments defining marriage as that between a man and a woman in order to thwart a similar ruling in their respective states.<sup>130</sup> For instance, the highest profile initiative in 2009 was Maine’s Question 1, which repealed a statute legalizing same-sex marriage, by a fifty-three to forty-seven percent margin.<sup>131</sup> As of November 2009, electorates across the country have rejected same-sex marriage in thirty-three of thirty-four ballot measures.<sup>132</sup> The conflicting case law analyzed in Part III evidences the tensions between direct democracy and vulnerable and disempowered minorities.

### III. THE BALLOT INITIATIVE IN THE SAME-SEX MARRIAGE CONTROVERSY: A CASE-BY-CASE COMPARISON OF TWO RECENT CASES

This section will discuss two recent cases, *Strauss v. Horton* and *Jackson v. District of Columbia Board of Elections and Ethics*, in which the respective courts considered the validity of initiatives, one statutory and one constitutional, attempting to restrict the rule of law allowing same-sex couples to marry.<sup>133</sup> The review of these two cases and their disparate holdings will lead to the discussion of the District of

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<sup>125</sup> Ballotwatch 2008, *supra* note 124.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>129</sup> Ballotwatch, *Election 2009: Same-Sex Marriage and TELS*, INITIATIVE AND REFERENDUM INSTITUTE 1 (Nov. 4, 2009), available at <http://www.iandrinstitute.org/BW%202009-2%20Results%20%28v1%29.pdf>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Jackson v. Bd. of Elections & Ethics*, 999 A.2d 89 (D.C. 2010); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).



Columbia's use of the Human Rights Safeguard to protect minority rights against an omnipotent attack via direct initiative. Moreover, the comparison will advance the proposition that other jurisdictions ought to adopt direct initiative reforms modeled after the District of Columbia's Human Rights Safeguard.

A. *Strauss v. Horton*

1. Background and Majority Opinion

Legislating by initiative has been an important feature of California governance since the process's adoption in 1911.<sup>134</sup> On November 4, 2008, a majority of California voters approved notorious Proposition 8, which was the center of the controversy leading to the California Supreme Court's decision in *Strauss v. Horton*.<sup>135</sup> Proposition 8 added the following section to the state's constitution: "Only marriage between a man and a woman is valid or recognized in California."<sup>136</sup> California's initiative procedure distinguishes between constitutional amendments, which are permissible subjects of direct initiatives, and constitutional revisions, which are not.<sup>137</sup> A revision is characterized as a "wholesale or fundamental alteration of the constitutional structure that appropriately could be undertaken only by a constitutional convention," while an amendment includes "any and all of the more discrete changes to the Constitution that thereafter might be proposed."<sup>138</sup> This distinction was important to the court's analysis in determining the validity of Proposition 8.<sup>139</sup> In *Strauss*, the question before the California Supreme Court was whether Proposition 8, a constitutional initiative defining marriage in the state as marriage between a man and a woman, was a constitutional amendment, and therefore valid under California's Constitution, or a constitutional revision, and therefore invalid and unconstitutional.<sup>140</sup>

In upholding the validity of Proposition 8, the majority reasoned that its role was not "to determine whether the provision at issue is wise or sound as a *matter of policy*" or whether the justices "believe[d]

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<sup>134</sup> DUBOIS & FEENEY, *supra* note 56, at 3.

<sup>135</sup> *Strauss*, 207 P.3d at 59.

<sup>136</sup> Proposition 8, located at CAL. CONST. Art. I, § 7.5; *see Strauss*, 207 P.3d at 59.

<sup>137</sup> *Strauss*, 207 P.3d at 61.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 60. Oregon also draws this distinction between a constitutional amendment and a constitutional revision. OR. CONST. art. XVII, § 2.

<sup>140</sup> *Strauss*, 107 P.3d at 59.

it *should* be a part of the California Constitution.”<sup>141</sup> Holding that Proposition 8 constituted a mere amendment, the majority reasoned that “the act of limiting access to the designation of marriage to opposite-sex couples does not have a substantial or, indeed, even a minimal effect on the *governmental plan or framework of California*” existing prior to Proposition 8.<sup>142</sup> In holding that the new constitutional amendment denying the recognition of same-sex marriages carved out merely a “limited exception” to the scope of the state constitution’s equal protection clause and principles,<sup>143</sup> the court effectively held that the designation of “inalienable” rights in California’s constitution did not signify that these rights are exempt from limitation or restriction by popular vote.<sup>144</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 62.

<sup>143</sup> *Id.* at 78.

<sup>144</sup> *Id.* at 116. As noted *supra*, note 15, a recent decision of the United States Court of Appeals for the Ninth Circuit concluded that Proposition 8 is unconstitutional. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (formerly *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)). In *Perry*, a three-judge panel of the 9th Circuit affirmed the judgment of the United States District Court for the Northern District of California, concluding that the initiative power may not be employed to single out a disfavored group for unequal treatment and to strip that group, without a legitimate justification, of a right as important as the right to marry. *Id.* at 1064. In so ruling, the court acknowledged but did not address what the majority characterized as “[b]roader issues”: “[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry a right that has long been enjoyed by opposite-sex couples, is an important and highly controversial question” and “currently a matter of great debate in our nation. . . over which people of good will may disagree, sometimes strongly.” *Id.* Instead, the court adhered to the principle of only ruling on the constitutional questions squarely presented in the case and, thereby, decided the case on a much narrower basis. *Id.* More specifically, the court focused its analysis on the “singular and limited change” that Proposition 8 worked to the California State Constitution, namely “stripp[ing] same-sex couples of the right to have their committed relationships recognized by the State with the designation of ‘marriage,’ which the state constitution had previously guaranteed them,” while leaving in place all of their other rights and responsibilities that are identical to those of married spouses and integral to a partnership. *Id.* at 1076.

The court went on to phrase the question presented for its consideration as follows:

[D]id the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of ‘marriage,’ and to compel the State and its officials and all others authorized to perform marriage ceremonies to substitute the label of ‘domestic partnership’ for their relationships?

*Id.* at 1079. Answering this question in the negative, the court considered and rejected a series of proffered justifications in support of Proposition 8, including furthering the state’s interest in childrearing and responsible procreation, protecting religious freedom, and preventing children from being taught about same-sex marriage in schools. *Id.* at 1076–79. In so ruling, the court expressly relied heavily

2. Justice Moreno's Dissent: The Promise of Equality,  
Compelling "the Will of the Majority to Be Tempered  
by Justice"<sup>145</sup>

Justice Moreno sharply criticized the majority's finding that Proposition 8 was merely a constitutional amendment and not a constitutional revision.<sup>146</sup> In response to the majority's holding, Justice Moreno asserted that:

[d]escribing the effect of Proposition 8 as narrow and limited fails to acknowledge the significance of the discrimination it requires. But even a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment that has pervaded the California Constitution since 1849. Promising equal treatment to some is fundamentally different from promising equal treatment to all. Promising treatment that is almost equal is fundamentally different from ensuring truly equal treatment. Granting a disfavored minority only some of the rights enjoyed by the majority is fundamentally different from recognizing, as a constitutional imperative, that they

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on the reasoning of the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), particularly the presence or absence of a legitimate state interest constituting a rational basis for the proposition, and rejected as inappropriate any reliance on *Crawford v. Board of Education*, 458 U.S. 527 (1982). *Perry*, 671 F.3d at 1083–84 (firmly rejecting the position that "unless the Fourteenth Amendment actually requires that the designation of 'marriage' be given to same-sex couples in the first place, there can be no constitutional infirmity in taking the designation away from that group of citizens, whatever the People's reason for doing so"). Ultimately, the court concluded that the absence of any legitimate purpose for Proposition 8 compelled "the inevitable inference that the disadvantage imposed is borne of animosity toward, or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, 'the class of persons affected.'" *Id.* at 1080 (quoting *Romer*, 517 U.S. at 634). Judge Smith filed a partial concurrence and partial dissent, in which he said he would have distinguished *Romer* because of certain differences he identified between Proposition 8 and the Colorado state constitutional amendment at issue in *Romer*. *Id.* at 1096 (Smith, J., concurring in part and dissenting in part).

Though the court in *Perry* invalidates Proposition 8 under a rational basis analysis and not because Proposition 8 violates an individual's human rights per se, the *Perry* decision is important because the court restrains the right to initiative, prioritizing equal protection under the law over the majority's right to direct democracy. *Id.* at 1064 ("The People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry. Accordingly, we affirm the judgment of the district court.").

<sup>145</sup> *Strauss*, 207 P.3d at 130 (Moreno, J., concurring in part and dissenting in part).

<sup>146</sup> *Id.*

must be granted all of those rights.<sup>147</sup>

Justice Moreno reasoned that Proposition 8 does not merely amend, but instead revises the California Constitution because it struck the core of the constitutional guarantee of equal treatment by limiting the rights of the disfavored minority.<sup>148</sup> In so doing, Justice Moreno rejected the majority's reasoning that Proposition 8 is only an amendment because it alters *only* certain rights of a small segment of the population.<sup>149</sup> Justice Moreno further reasoned that the Equal Protection Clause's role in protecting vulnerable minorities from the will of the majority constitutes an underlying principle of California's Constitution.<sup>150</sup> Therefore, the disintegration of a fundamental right enjoyed by gays and lesbians as inflicted by Proposition 8 amounted to a constitutional revision, not a mere amendment.<sup>151</sup>

Contending that Proposition 8 should be invalidated because of its implications on the fundamental rights of gays and lesbians, and warning about the impact of the majority's ruling on the rights of vulnerable minorities, Justice Moreno further disagreed with the majority:

Unlike modifying legislative or judicially created remedies, withholding a fundamental right from a minority group on the basis of a suspect classification is inherently antithetical to the core principle of equal protection that minorities are to be protected against the prejudice of majorities by requiring that laws apply equally to all segments of society.<sup>152</sup>

Justice Moreno emphasized the intrinsic inequality in withholding a fundamental right from a minority group on the basis of a suspect classification, stressing that equal protection means protecting minorities against the whim of the majority.<sup>153</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 133–34.

<sup>151</sup> *Strauss*, 207 P.3d at 134.

<sup>152</sup> *Id.* at 136. California Attorney General Edmund G. “Jerry” Brown proposed an interesting alternative argument to Justice Moreno’s argument. Attorney General Brown argued that the court should find Proposition 8 invalid because it abrogated inalienable rights protected by Article 1, Section 1 of the California Constitution without a compelling justification. Attorney General’s Response to Amicus Curiae Briefs, *Strauss v. Horton*, No. S168047 2009 WL 853622 (Cal.), at \*2. While Attorney General Brown analyzed Proposition 8 under a fundamental rights framework and Justice Moreno based his analysis on an equal protection framework, both analyses resulted in the same conclusion—that Proposition 8 was an unlawful constitutional amendment under the California Constitution.

<sup>153</sup> *Strauss*, 207 P.3d at 133.

Justice Moreno recognized that the initiative process in California was intended to remedy government corruption, serving as an antidote to powerful special interests and the state legislature's "own self-serving inertia."<sup>154</sup> Justice Moreno likewise acknowledged that it was well-known that the widespread adoption of the direct initiative came from the Progressive movement, but found no evidence that the Progressives intended to preclude the court's protection of vulnerable minorities from the will of the majority, or to abolish the judiciary's role as protector of the fundamental rights of the politically vulnerable.<sup>155</sup> Justice Moreno distinguished between preventing the influence of politically powerful minority groups, a key purpose for direct initiatives, and "preventing courts from protecting the rights of disfavored minorities unable to obtain equal rights through the usual majoritarian processes."<sup>156</sup>

Proposition 8 began as a reaction to the consolidated California Supreme Court case, *In re Marriage Cases*.<sup>157</sup> In *In re Marriage Cases*, the California Supreme Court decided by a four to three margin that California's exclusion of same-sex couples from civil marriage violated the state constitution's equal protection guarantee.<sup>158</sup> Critics characterize Proposition 8 as a "statement of disapproval."<sup>159</sup> By limiting the use of the term "marriage" to opposite-sex couples, Proposition 8 implicitly rendered same-sex couples unacceptable and abnormal, labeling same-sex couples inferior and disfavored.<sup>160</sup> Justice Moreno proposed that equal protection is not simply a discrete constitutional right, but a "basic constitutional principle that guides all legislation and compels the will of the majority to be tempered by justice."<sup>161</sup>

Rather than take the technical, quantitative approach the *Strauss* majority utilized, Justice Moreno appeared to adopt a more holistic, qualitative approach to analyzing the constitutionality of Proposition 8, finding that the proposition drastically altered the nature and operation of the California system of government.<sup>162</sup> Therefore, such a far-reaching change could not be achieved by constitutional

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<sup>154</sup> See *id.* at 136.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>158</sup> *Id.*

<sup>159</sup> See Morse, *supra* note 7 at 984.

<sup>160</sup> *Id.*

<sup>161</sup> *Strauss*, 207 P.3d at 130.

<sup>162</sup> *Id.* at 129.

amendment, but rather only by revision.<sup>163</sup> Moreover, Justice Moreno warned that the majority's holding weakened the status of California's Constitution "bulwark of fundamental rights for minorities protected from the will of the majority."<sup>164</sup> Even near-equal treatment, according to Justice Moreno, violates the promise of equality under the law.<sup>165</sup> This concern is also evident in the District of Columbia's utilization of the Human Rights Safeguard in its direct initiative process.<sup>166</sup> The importance of the Human Rights Safeguard as a tool to protect minority rights is evidenced in the case of *Jackson v. District of Columbia Board of Elections and Ethics*.<sup>167</sup>

#### B. *Jackson v. District of Columbia Board of Elections and Ethics*

This section seeks to compare the disparate outcomes of the *Strauss* and *Jackson* decisions. In *Strauss*, the majority validated a direct initiative that limited the rights of same-sex couples.<sup>168</sup> While the *Jackson* decision addressed the same issue, the *Jackson* majority came to an entirely different conclusion by ultimately upholding the rights of same-sex couples.<sup>169</sup> The long and technical history of the District of Columbia's sovereignty is also important in order to place the significance of the *Jackson* decision in its proper context, and therefore it is addressed below, along with a detailed discussion of the case itself.

##### 1. Home Rule for the District of Columbia

To understand the importance of the Human Rights Safeguard as part of the District of Columbia's initiative process, it is essential first to consider the recent history of the District's home rule, which created the Council and gave the Council the authority to adopt the initiative process.<sup>170</sup> The District of Columbia Court of Appeals has characterized the District of Columbia as "a unique and complex governmental structure."<sup>171</sup> Article I of the United States Constitution

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 131 ("Promising treatment that is almost equal is fundamentally different from ensuring truly equal treatment.").

<sup>166</sup> See *infra* Parts III.B.1–2.

<sup>167</sup> *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89 (D.C. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

<sup>168</sup> *Strauss*, 207 P.3d 48.

<sup>169</sup> *Jackson*, 999 A.2d 89.

<sup>170</sup> See Pub. L. No. 93-198, 87 Stat. 777 (1973).

<sup>171</sup> *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 916 (D.C. 1981).

grants Congress complete legislative authority over the District of Columbia.<sup>172</sup> The fight for sovereignty in the District of Columbia has a long history.<sup>173</sup> In 1912, United States Representatives Tavenner and Prouty introduced home rule bills that incorporated initiative and referendum procedures.<sup>174</sup> Neither of the bills passed, and it was not until 1973 that Congress granted the District of Columbia partial home rule.<sup>175</sup> Direct democracy soon followed the successful campaign for sovereignty.

The 1973 passage of the District of Columbia Self-Government and Government Reorganization Act (“Home Rule Act”) brought home rule to the District.<sup>176</sup> The District of Columbia Charter, Title IV of the Home Rule Act, established the District’s ruling elected body, the District of Columbia Council.<sup>177</sup> The Charter granted the Council considerable legislative authority.<sup>178</sup>

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<sup>172</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>173</sup> See generally SCHMIDT, *supra* note 48.

<sup>174</sup> *Id.* at 228.

<sup>175</sup> *Id.*

<sup>176</sup> Pub. L. No. 93-198, 87 Stat. 777 (1973). Importantly, the original Home Rule Act contained two types of legislative vetoes. First, there was a two-house veto for most actions, whereby Congress could block the District of Columbia Council’s actions by majority vote of both houses. There was also a distinct one-house veto from criminal laws, whereby one house could block the Council’s actions in the criminal law context by a majority vote. Memorandum from Richard A. Hauser, Deputy Counsel to the President, to J. Steven Rhodes, Assistant to the Vice President for Domestic Policy 1 (Apr. 6, 1984), available at <http://www.reagan.utexas.edu/roberts/Box09JGRChadhareDistrictofColumbia10.pdf>. The landmark decision of *INS v. Chadha*, which invalidated the one-house legislative veto provision of the Immigration and Nationality Act as unconstitutional, called into question the validity of any previously enacted law that contained a legislative veto mechanism. *Immigration & Naturalization Services v. Chadha*, 462 U.S. 919 (1983). Due to the constitutional questions raised by the *Chadha* decision, Congress replaced the legislative vetoes in the Home Rule Act with a joint resolution of disapproval, which places the burden on Congress to nullify an act of the Council. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 286 (1993), available at <http://www.loufisher.org/docs/lv/legveto93.pdf>.

<sup>177</sup> Subject to Congressional oversight, as required by article I, section 8, of the United States Constitution, the Home Rule Act delegated legislative self-rule to the District of Columbia, authorized the election of local officials by the D.C. electorate, granted District of Columbia citizens the powers of self-government, “modernize[d], reorganize[d], and otherwise improve[d] the governmental structure” of the District, and relieved Congress of the burden of legislating local issues for the District. D.C. CODE § 1-102(a) (2001).

<sup>178</sup> *Id.* at § 1-203.03. Generally, once the Council passes legislation, it becomes effective after a thirty-legislative-day layover so long as the D.C. mayor does not veto the act within ten days of its passage. *Id.* at § 1-206.02(c)(1). Congress may disapprove a measure by passing a concurrent resolution to defeat it. *Id.*

## 2. The Human Rights Act: A History of Prioritizing the Eradication of Government-Sanctioned Discrimination

The Human Rights Act in the District of Columbia is not only significant to the holding in *Jackson*, but critical to understanding the policy priorities in the District. The District's historical prioritization of human rights is evidenced by the adoption of the Human Rights Safeguard.<sup>179</sup> The pre-Home Rule Council adopted the first manifestation of the Human Rights Act in 1973, as Title thirty-four of the D.C. Rules and Regulations, known as the "Human Rights Law."<sup>180</sup> On June 16, 1977, members of the Council of the District of Columbia introduced the "Human Rights Act of 1977," Bill-2-179, by which the Council intended to codify the Human Rights Law to make it a permanent part of the District Of Columbia Code.<sup>181</sup> The Committee on Public Services and Consumer Affairs Chairperson, John A. Wilson, reported that the codification of the Human Rights Law would serve three primary purposes: (1) to remove any questions "as to certain provisions of Title thirty-four because of its present status as a police regulation issued by the pre-Home Rule city government;" (2) to reinforce the Council's stance that the Act was among the District's "most important laws" and was to be "vigorously enforced by all agencies and officials" of D.C. government; and (3) to assure that licensing laws and other provisions of the code are interpreted and enforced to give full effect to the provision.<sup>182</sup> To resolve concerns, the Council enacted the Human Rights Act of 1977, which put the Human Rights Law on "firm legal footing"<sup>183</sup> by bestowing upon it "the increased dignity and force of a statute."<sup>184</sup>

With the codification of the preexisting Human Rights Law as

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<sup>179</sup> See generally D.C. Council Comm. on Pub. Serv. and Consumer Affairs Report, B. 2-179, at 1 (July 5, 1977) [hereinafter 2-179 Report] (on file with author).

<sup>180</sup> *Blodgett v. Univ. Club*, 930 A.2d 210, 217 (D.C. 2007) (citing 34 DCRR § 3.1) (1973).

<sup>181</sup> 2-179 Report, *supra* note 179. The bill made no substantive changes to the "Human Rights Law" as part of the then-current D.C. Rules and Regulations. *Id.*

<sup>182</sup> *Id.*; see *Blodgett*, 930 A.2d at 217 (positing that the Council re-enacted the Human Rights Law regulation as a statutory provision in order to give the Human Rights Law the force and effect of a statute). With re-enactment of the Human Rights Law, the Council hoped to both clarify the district's commitment to the protection of human rights and to facilitate the enforcement of the law in the post-Home Rule district. *Id.* at 217-18.

<sup>183</sup> 2-179 Report, *supra* note 179.

<sup>184</sup> *Id.* Furthermore, in the committee report, Chairman Wilson acknowledged that several court cases had questioned the pre-Home Rule government's authority to enforce some of the provisions contained in Title 34. *Id.* at 2. The Chairman was concerned about the efficacy and enforceability of the Human Rights Law in light of various D.C. Court of Appeals decisions at the time. *Id.* at 5.



the Human Rights Act, the Council reaffirmed its commitment to eliminating discrimination in the District as “the highest priority.”<sup>185</sup> In this regard, the D.C. Code provides:

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.<sup>186</sup>

i. The Initiative, Referendum, and Recall Charter Amendment Act of 1977

While one might think that a measure allowing for the ballot initiative would be unrelated to human rights concerns, the District of Columbia’s experience proves quite the opposite.<sup>187</sup> As discussed in the previous section, the District of Columbia’s history of sovereignty demonstrates a prioritization of human rights.<sup>188</sup> A concern for the preservation of human rights is likewise evident throughout the District of Columbia Council’s process to adopt the direct initiative in the District.<sup>189</sup> This prioritization would ensure that

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<sup>185</sup> *Id.* at 4.

<sup>186</sup> D.C. CODE § 2-1401.01 (West 2001). The original, pre-Home Rule Human Rights Act explicitly precluded discrimination based on the following categories: “race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business.” *Jackson v. Dist. of Columbia Bd. of Elections & Ethics*, 999 A.2d 89, 97 (D.C. 2010), *cert. denied*, 131 S. Ct. 1001 (2011). The Council has left the Human Rights Act largely unchanged since 1977, but has amended it to include new classifications to the list of protected categories. In *Blodgett*, the court enumerated the following amendments to the original act: “[P]hysical handicap’ replaced with ‘disability,’ D.C. Law 10-129, 41 D.C.Reg. 2583 (June 28, 1994); ‘familial status’ added by D.C. Law 12-242, 46 D.C.Reg. 952 (April 20, 1999); ‘genetic information’ added by D.C. Law 15-263, 52 D.C.Reg. 237 (April 5, 2005); ‘gender identity or expression’ added by D.C. Law 16-58, 53 D.C.Reg. 14 (March 8, 2006); ‘status as a victim of an intrafamily offense’ added by D.C. Law 16-273, 54 D.C.Reg. 18 (May 4, 2007).” *Blodgett*, 930 A.2d at 218 n.4.

<sup>187</sup> See *supra* text accompanying notes 179–86; see *infra* text accompanying notes 201–27.

<sup>188</sup> See *supra* text accompanying notes 179–86.

<sup>189</sup> See *infra* text accompanying notes 201–27.

the advent of the direct initiative would not mean the demise of minority rights in the district.

The 1977 Initiative, Referendum, and Recall Charter Amendment Act ("CAA") authorized the initiative process for citizens in the District of Columbia.<sup>190</sup> The District of Columbia's original Charter, as adopted in 1973, did not contain any initiative, referendum, or recall procedures.<sup>191</sup> The Charter set forth an amendment procedure to allow for flexible governing.<sup>192</sup> Before submission to Congress for a layover period, the Council must pass a proposed amendment and a majority of registered voters must ratify it.<sup>193</sup> The process to adopt the CAA began in 1976, when D.C. Council Member Julius W. Hobson, Sr., made the first serious attempt to adopt an initiative procedure.<sup>194</sup> The Council passed the CAA in 1977 and, following ratification by a majority of registered voters on November 7, 1977, Congress approved the CAA as part of the District's Charter.<sup>195</sup>

In a memorandum from Councilman-at-Large and bill sponsor, Julius W. Hobson, to his fellow councilmembers, Councilman Hobson heralded the CAA as the "only means through which the people of the District of Columbia can participate directly in their government."<sup>196</sup> Councilman Hobson further described the impetus for the CAA: in the post-Watergate atmosphere of the time, public-opinion polls suggested that the public had become increasingly suspicious of public officials and the traditional political process, both of which were largely influenced by high-paid lobbyists and special interests.<sup>197</sup>

Section 1(a) of the CAA defines "initiative" as a "process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval."<sup>198</sup> The CAA became effective on March 10, 1978, following concurrent resolution by the Senate and

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<sup>190</sup> *Jackson*, 999 A.2d 89, 96 (discussing 24 D.C. Reg. 199 (July 8, 1977)).

<sup>191</sup> *Id.*

<sup>192</sup> *See* D.C. CODE § 1-203.03 (West 2001).

<sup>193</sup> *Id.*

<sup>194</sup> SCHMIDT, *supra* note 48, at 228.

<sup>195</sup> *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 12 (D.C. 1991).

<sup>196</sup> Memorandum from Julius Hobson, Councilman-at-Large, D.C. Council, to all Councilmembers 1 (Jan. 3, 1977) [hereinafter Jan. 1977 Memo] (on file with author).

<sup>197</sup> *Id.* at 3.

<sup>198</sup> D.C. CODE § 1-204.101 (West 2001).

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House of Representatives.<sup>199</sup> As adopted, the CAA was not self-executing, and did not include specific procedures to ensure its implementation.<sup>200</sup>

ii. The Human Rights Act as a Safeguard Embedded in the Initiative Process

The CAA authorized the D.C. Council to adopt implementing legislation.<sup>201</sup> As codified, the CAA provided the Council with the authority to adopt acts “necessary to carry out the purpose of this subpart within 180 days of the effective date . . . .”<sup>202</sup> In addition to adopting technical procedures to facilitate implementation, the Council promptly debated a proposal to substantively limit the scope of initiative issues by “tie-barring”<sup>203</sup> the Human Rights Act to the Initiative, Referendum, and Recall Procedures Act of 1979 (“IPA”).<sup>204</sup> Prior to inclusion, the Council extensively debated incorporating the Human Rights Act.<sup>205</sup> Ultimately, in June 1979, the Council approved implementing legislation, the IPA, which included the Human Rights Act Safeguard.<sup>206</sup>

Nationwide events implicating gay rights occurring simultaneously with the Council’s decision to include the Human Rights Safeguard in the IPA undoubtedly played a role in the Council’s deliberations. This influence is evidenced by the *Jackson* court noting that “recent events would have afforded the Council good reason to anticipate that an initiative or referendum that would have the effect of authorizing discrimination could be a threat to the peace and to life and limb.”<sup>207</sup> In June 1977, activist and evangelist Anita Bryant led a successful campaign to repeal a Dade County, Florida ordinance prohibiting discrimination based on an

<sup>199</sup> D.C. Council Comm. on Gov’t Operations Report, B. 3-2, at 1 (Jan. 31, 1979) [hereinafter 3-2 Report] (on file with author).

<sup>200</sup> *Jackson v. Bd. of Elections & Ethics*, 999 A. 2d 89, 96–97 (D.C. 2010).

<sup>201</sup> *Convention Ctr. Referendum Comm. v. Bd. of Elections & Ethics*, 399 A.2d 550, 551 (D.C. 1979).

<sup>202</sup> D.C. CODE § 1-204.107 (2012).

<sup>203</sup> Tie-barring is a legislative tactic by which one bill is written to correspond to, or be read in tandem with, a provision in another bill or statute.

<sup>204</sup> *Jackson*, 999 A.2d at 97.

<sup>205</sup> See D.C. COUNCIL COMM. ON GOV’T OPERATIONS, B. 2-317, 2–11. (May 3, 1978) [hereinafter 2-317 Report] (on file with author). The legislative history, legal background, and public commentary surrounding the adoption of the IPA are evidence that the Council extensively debated the inclusion of the Human Rights Act.

<sup>206</sup> *Id.*

<sup>207</sup> *Jackson*, 999 A.2d at 112 n.44.

individual's sexual orientation.<sup>208</sup> Bryant's campaign incited violent clashes between the opponents and proponents of the campaign.<sup>209</sup> Bryant's efforts to repeal the sexual orientation anti-discrimination ordinance in Dade County marked the first wave of anti-gay initiatives.<sup>210</sup> Contemporaneously, California State Senator John Briggs successfully led a campaign to place Proposition 6 on the ballot,<sup>211</sup> which, if passed, would have severely limited the rights of homosexual public school teachers in the state.<sup>212</sup> The court in *Jackson* reasoned that, at the time the Council included the Human Rights Act in the IPA, recent events gave the Council good reason to anticipate that the direct initiative could be used to threaten civil rights and, therefore, that the Council had grounds to cautiously incorporate the Human Rights Safeguard into the IPA.<sup>213</sup>

This heightened awareness of the prevalence of anti-gay and anti-lesbian social campaigns is evident in the legislative history of the IPA; interest groups' support also weighed into the Council's deliberations.<sup>214</sup> As the D.C. Court of Appeals noted, many individuals who testified before the Council's Committee on Government Operations expressed support for the adoption of the Human Rights Safeguard as a part of the implementing legislation.<sup>215</sup> Importantly, the Gay Activists Alliance of Washington, D.C. and other citizens participated in the public hearings and deliberations, providing materials expressing support for the human rights exception from the right to the initiative.<sup>216</sup> Prior to the committee's public hearing on the IPA, the staff "received myriad telephone calls" supporting an amendment that would limit initiatives promoting discrimination.<sup>217</sup> Given the record of support for the inclusion of the Human Rights Act, one can fairly infer the connection that the *Jackson* court expressly drew between the heightened attention to the first wave of anti-gay and anti-lesbian initiatives<sup>218</sup> and the Council's incorporation of the Human Rights Safeguard in the IPA.

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Adams, *supra* note 93, at 606.

<sup>211</sup> CRONIN, *supra* note 24, at 94.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See 2-317 Report, *supra* note 205, at 4-6.

<sup>215</sup> *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 97 (D.C. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

<sup>216</sup> See 2-317 Report, *supra* note 205, at 4-5.

<sup>217</sup> *Id.* at 5.

<sup>218</sup> Adams, *supra* note 93, at 606.

*Reitman v. Mulkey*<sup>219</sup> also played a prominent role in the Council's deliberations on limiting the scope of the electorate's authority to directly legislate through initiative.<sup>220</sup> *Reitman* was a landmark decision.<sup>221</sup> Proposition 14, the California initiative at issue in *Reitman*, forbade the state from abridging the rights of an individual to sell or not to sell his or her property as he or she chose.<sup>222</sup> Its drafters designed Proposition 14 to overturn state laws that prohibited the practice of housing discrimination involving the state affirmatively endorsing racial discrimination related to property rights.<sup>223</sup> The United States Supreme Court upheld the Supreme Court of California's decision to invalidate Proposition 14 as violative of the Fourteenth Amendment's Equal Protection Clause.<sup>224</sup> The Council's Committee on Government Operations reasoned that *Reitman* turned on whether the state could allow an initiative that affirmatively promoted discrimination as a matter of law, not whether the initiative violated a constitutional right.<sup>225</sup> The Committee determined that "the initiative process may not be used to place the government in the posture of affirmatively condoning discrimination" and that an initiative stripping the government of "neutrality toward protected minority classifications" must fail.<sup>226</sup> Reflecting on the framework of *Reitman*, the Committee on Government Operations concluded that to establish an initiative and referendum procedure that allowed for discrimination "would involve the District government in condoning and assisting with discrimination."<sup>227</sup>

### 3. Background and Facts of the Case

The D.C. Court of Appeals considered *Jackson* at a time of tremendous conflict over gay rights in the District of Columbia.<sup>228</sup> In 2009, the District of Columbia Council passed two statutes promoting same-sex marriage: the Jury and Marriage Amendment Act of 2009 ("JAMA")<sup>229</sup> and the Religious Freedom and Civil Marriage Equality

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<sup>219</sup> 387 U.S. 369 (1967).

<sup>220</sup> 2-317 Report, *supra* note 205, at 10-11.

<sup>221</sup> *Id.*

<sup>222</sup> *Reitman*, 387 U.S. at 370-71.

<sup>223</sup> *Id.* at 374.

<sup>224</sup> *Id.* at 370-71.

<sup>225</sup> 2-317 Report, *supra* note 205, at 10.

<sup>226</sup> *Id.* at 9.

<sup>227</sup> *Jackson v. D.C. Board of Elections & Ethics*, 999 A.2d 89, 112 (D.C. 2010).

<sup>228</sup> *See id.* at 93.

<sup>229</sup> *Id.* (citing D.C. CODE § 46-405.01 (2009)).

Amendment Act of 2009.<sup>230</sup> The Council's approval of same-sex marriage provoked action by citizens opposed to same-sex marriage, leading to the proposal of the "Marriage Initiative of 2009."<sup>231</sup> The *Jackson* court considered the validity of this initiative.<sup>232</sup> In May 2009, the District of Columbia Council passed the JAMA, which recognized the validity of same-sex marriages entered into in other jurisdictions.<sup>233</sup> In an effort to undo the effects of JAMA, on September 1, 2009, appellants filed a proposed initiative, the "Marriage Initiative of 2009," with the District of Columbia Board of Elections and Ethics ("Board").<sup>234</sup> Appellants proposed an initiative aimed to amend Title 46, Subtitle I, Chapter 4 of the D.C. Code ("Code") to state: "Only marriage between a man and a woman is valid or recognized in the District of Columbia."<sup>235</sup> During the course of the *Jackson* proceedings, the D.C. Council adopted the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 ("Marriage Equality Act"), which expanded the legal definition of marriage in D.C. to provide for same-sex marriages.<sup>236</sup> It became effective as D.C. Law 18-110 on March 3, 2010.<sup>237</sup> The passage of the Marriage Initiative Act therefore would have nullified both JAMA and the Marriage Equality Act.<sup>238</sup>

The D.C. Code permits the Board to reject a proposed initiative if it finds that the measure is "not a proper subject of initiative or referendum."<sup>239</sup> The Code explicitly outlines what types of measures are improper, requiring the Board to reject any measure that

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<sup>230</sup> *Id.* (citing 57 D.C. Reg. 1833 (Mar. 5, 2010)).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> D.C. CODE § 46-405.01 (2010).

<sup>234</sup> *Jackson*, 999 A.2d at 93.

<sup>235</sup> *Id.* The language proposed in the initiative is the standard text for a Defense of Marriage Act. Nevertheless, this version was milder than other acts in that it did not repeal previously recognized same-sex marriages. See ANDREW KOPPLEMAN, SAME SEX, DIFFERENT STATES 137-48 (2006). Koppleman explains that many states adopted "mini-DOMA" statutes in three waves in response to the progress of the same-sex marriage movement. *Id.* at 137. The first wave occurred in 1970s following a few lawsuits filed by same-sex couples seeking the right to marry, while the second phase occurred in the 1990s following the 1993 Hawaii Supreme Court case *Baehr v. Lewin*, leading many opponents to worry that the state would soon recognize same-sex marriage. *Id.* at 137-138; see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The final wave occurred in the 2000s, following the Massachusetts and Vermont State Supreme Court decisions constitutionally mandating the recognition of same-sex marriage. *Id.* at 138.

<sup>236</sup> *Jackson*, 999 A.2d at 93.

<sup>237</sup> *Id.*

<sup>238</sup> See *id.*

<sup>239</sup> D.C. CODE § 1-1001.16(b)(1) (2012).

“authorizes, or would have the effect of authorizing, discrimination prohibited under [the Human Rights Act].”<sup>240</sup> After a public hearing on October 26, 2009, the Board rejected the Marriage Initiative Act, finding that it was not a proper subject of initiative under the CAA because it had the effect of authorizing discrimination.<sup>241</sup> The Board concluded that “[w]hile neither the HRA nor its legislative history explicitly mentions same-sex marriage, it is without question that the HRA must ‘be read broadly to eliminate the many proscribed forms of discrimination in the District.’”<sup>242</sup> Appellants, following the applicable procedures, then sought a writ of mandamus requesting that the D.C. Superior Court review and certify the initiative.<sup>243</sup> The Superior Court found in favor of the District, holding that the Human Rights Act is a valid limitation on the initiative process and that the Marriage Initiative of 2009 would authorize discrimination.<sup>244</sup> An appeal followed the Superior Court’s ruling.<sup>245</sup>

#### 4. The D.C. Court of Appeals’ Holding and Analysis

Before the District of Columbia Court of Appeals, appellants argued that the Human Rights Safeguard of the IPA improperly expanded the Council’s authority under the CAA, and therefore the Council lacked the authority to reject appellants’ initiative.<sup>246</sup> To provide historical context, the court observed that a comparison to other jurisdictions’ initiative mechanisms would not be constructive

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<sup>240</sup> § 1-1001.16(b)(1)(C).

<sup>241</sup> *Jackson*, 999 A.2d at 93.

<sup>242</sup> Marriage Initiative of 2009, No. 09-006 11 (D.C. Bd. of Elections & Ethics Nov. 17, 2009) (Memorandum Opinion and Order) (quoting *Dean v. District of Columbia*, 653 A.2d 307, 320 (D.C. 1995)), available at [http://www.dcboee.org/popup.asp?url=/pdf\\_files/09006.pdf](http://www.dcboee.org/popup.asp?url=/pdf_files/09006.pdf). In *Dean v. District of Columbia*, the District of Columbia Court of Appeals upheld a decision denying a same-sex couple a marriage license. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). The court found that the District of Columbia’s marriage statute did not include same-sex marriages despite being written to be gender-neutral, that denying the license did not violate the Human Rights Act, and that denying the license did not violate the U.S. Constitution. *Id.* at 309. The Board found *Dean* instructive in that *Dean* clarified that a court must look to the legislative history, current statutory context, and legislative intent when determining whether a particular form of discrimination is proscribed by the HRA. Marriage Initiative of 2009, No. 09-006 11 at 10–11. Unlike when *Dean* was decided, when the Board was deliberating, the Council had already enacted JAMA. Therefore, it held that denying couples who fall within JAMA’s purview the same benefits afforded heterosexual married couples would contravene the HRA. *Id.*

<sup>243</sup> *Jackson*, 999 A.2d at 93.

<sup>244</sup> *Id.* at 94.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 99.

because of the unique nature of D.C.'s governmental structure.<sup>247</sup> Moreover, as the District of Columbia is its own distinct jurisdiction, any comparison is merely instructive. In the states, the people retain certain authority for themselves by granting power to the legislature through the ratification process.<sup>248</sup> In the District of Columbia, however, Congress granted legislative authority to the Council, and, through the CAA, the Council has granted certain power to its residents.<sup>249</sup> Essential to the court's determination of whether the Human Rights Act Safeguard was a valid limitation on the people's right to avail themselves of the initiative process was establishing the intent of the Council when enacting the CAA to share certain legislative power with the electorate.<sup>250</sup>

Considering this question, the court focused on the legislative history of the HRA and, more specifically, on the District's progressive tradition of being at the forefront of human rights and anti-discrimination legislation.<sup>251</sup> A co-sponsor of the HRA, Councilmember Rolark, publicly testified about the importance of the HRA in light of the hard-fought battle for rights for all of the District's citizens.<sup>252</sup> Historically, the District of Columbia has housed a predominately minority population;<sup>253</sup> the Council's awareness of the significance of minority rights, or lack thereof, undoubtedly played a role in its deliberations.<sup>254</sup>

The court found that the HRA Safeguard was not contrary to the purpose of the CAA,<sup>255</sup> and that it would be inconceivable for the Council to adopt the CAA in a form that would allow the public to circumvent the HRA.<sup>256</sup> Moreover, the court held that the Council had the authority to direct the Board to review the subject matter of a proposed initiative prior to an election to determine if the initiative addresses a proper subject matter.<sup>257</sup> The court further agreed with

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<sup>247</sup> *Id.* at 101.

<sup>248</sup> *Id.*

<sup>249</sup> *Jackson*, 999 A.2d at 100–01.

<sup>250</sup> *Id.* at 100.

<sup>251</sup> *Id.* at 110.

<sup>252</sup> *Id.*

<sup>253</sup> See generally U.S. CENSUS BUREAU, DISTRICT OF COLUMBIA QUICKFACTS FROM THE U.S. CENSUS BUREAU (2010), available at <http://quickfacts.census.gov/qfd/states/11000.html>. While African-Americans comprise 12.6% of the U.S. population, African Americans make up 50.7% of the District of Columbia's population. *Id.*

<sup>254</sup> See *Jackson*, 999 A.2d at 110.

<sup>255</sup> *Id.* at 106.

<sup>256</sup> *Id.* at 110.

<sup>257</sup> *Id.* at 115.



the Board that the initiative would have the effect of discriminating based on sexual orientation.<sup>258</sup> In so ruling, the court focused closely on the CAA's legislative history.<sup>259</sup> The Council's Committee on Government Operations Report reveals the legislative intent behind the adoption of the CAA, noting that, "the initiative, referendum, and recall political processes are designed to provide direct and continual accountability of public officials to the electorate."<sup>260</sup> The court reasoned that if the broad purpose of the CAA is to provide for the accountability of the elected to the electorate, then the Council could reasonably have intended that this measure was necessary to fulfill that purpose: "the purpose of helping to ensure that the Council was accountable to the entire electorate."<sup>261</sup> The Council's intention was to proscribe the use of the initiative "to enact legislation that would have the effect of discriminating against sectors of the electorate who might need protection" from threats of discrimination.<sup>262</sup>

In affirming the district court's ruling that the HRA safeguard in the IPA was consistent with the CAA's intent, the D.C. Court of Appeals pointed to the Committee on Government Operations' reliance on Supreme Court Justice Douglas's concurrence in *Reitman v. Mulkey*.<sup>263</sup> In *Reitman*, Justice Douglas responded to the argument that Proposition 14 represented the will of the people by quoting James Madison, who warned about the necessity of protecting minorities from the "acts in which the Government is the mere instrument of the major number of the Constituents."<sup>264</sup> Focusing on Madison's teachings, Justice Douglas suggested that the will of the majority is not only an insufficient justification to condone a discriminatory policy, but that the will of the majority constitutes an especially powerful danger that can lead to oppression without proper resistance.<sup>265</sup> To allow the will of the majority to oppress others in the community is tantamount to government-sanctioned discrimination.<sup>266</sup> Therefore, the Committee on Government

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<sup>258</sup> *Id.* at 116.

<sup>259</sup> D.C. COUNCIL COMM. ON GOV'T OPERATIONS REPORT, B. 2-2, 2-3 (Mar. 16, 1977) [hereinafter 2-2 Report] (on file with author).

<sup>260</sup> *Id.*

<sup>261</sup> *Jackson*, 999 A.2d at 105.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 105 n.27 (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967) (Douglas, J., concurring)).

<sup>264</sup> *Reitman*, 387 U.S. at 387 (Douglas, J., concurring).

<sup>265</sup> *Id.*

<sup>266</sup> See 2-317 Report, *supra* note 205, at 9.

Operations concluded that “[t]he teaching of *Reitman* is that the initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination.”<sup>267</sup>

In summary, the court concluded that the Council did not contravene its authority under the CAA and the HRA when it adopted the Human Rights Safeguard of the IPA.<sup>268</sup> Finding that the proposed Marriage Initiative Act of 2009 would authorize discrimination proscribed under the HRA, the appellate court agreed with the district court that the Board properly determined that the initiative was invalid.<sup>269</sup>

The advantageous effects of the Human Rights Safeguard are evident in the *Jackson* decision. Before one can assess whether the Human Rights Act Safeguard is a desirable component of the initiative process, it is instructive to first examine other regulatory methods that other jurisdictions currently use in the direct democracy process.

#### IV. CURRENT METHODS UTILIZED TO REGULATE DIRECT DEMOCRACY

Jurisdictions across the nation employ various methods to regulate the direct democratic process, but no jurisdiction has a method as substantively comprehensive as the District of Columbia’s Human Rights Safeguard.<sup>270</sup> This section will assess various measures that jurisdictions use to regulate the initiative process. First, many jurisdictions implement pre-election legislative and administrative review of proposed initiatives.<sup>271</sup> Some jurisdictions also use subject-matter restrictions on the right to use the initiative as a means of regulating the content of proposed initiatives.<sup>272</sup> Nevertheless, no other jurisdiction proscribes all initiatives infringing upon any human rights, as does the District of Columbia.<sup>273</sup> Finally, this part will evaluate the efficacy of judicial review to temper the initiative process. This section will not argue that current methods to regulate the initiative process are ill-founded. Rather, this section will suggest that the current methods are insufficient to regulate the initiative

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<sup>267</sup> *Id.*

<sup>268</sup> *Jackson v. Bd. of Elections & Ethics*, 999 A.2d 89, 120 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

<sup>269</sup> *Id.*; *see generally* *Jackson v. D.C. Bd. of Elections & Ethics*, No. 2009 CA 008613 B, 2010 WL 171913 (D.C. Super. Jan. 14, 2010).

<sup>270</sup> *See, e.g., infra* text and notes accompanying Parts IV.A–C.

<sup>271</sup> *See, e.g., infra* text and notes accompanying Part IV.A.

<sup>272</sup> *See infra* text accompanying notes 291–97.

<sup>273</sup> *Id.*

process to protect minority rights. As such, further regulation is necessary. To that end, the Human Rights Safeguard, though an outlier in practice, is a valuable reform measure that other jurisdictions ought to adopt to ensure that direct democracy does not lead to oppression by the many of the few.<sup>274</sup>

*A. Pre-Election Legislative and Administrative Review*

State legislatures that have authorized an indirect initiative procedure generally hold hearings to discuss a proposal.<sup>275</sup> This process serves as an opportunity to educate the legislators and public about the implications of adopting a proposal.<sup>276</sup> California is the only state that uses a direct initiative that formally requires a legislative hearing, even though the legislature has no authority to change the proposed initiative.<sup>277</sup> While informative, these hearings generally do not garner public or media attention.<sup>278</sup> There are no studies that discuss the extent to which these hearings and subsequent reports are later used, but it does not appear that these hearings impact the overall discourse concerning the initiative process.<sup>279</sup>

In most states, the official who conducts the pre-election administrative review of a proposal is not authorized to review its legality under state and federal law.<sup>280</sup> The official merely reviews the initiative's format and the sufficiency of the signature-gathering process.<sup>281</sup> Seven states authorize regulatory oversight with greater review powers.<sup>282</sup> None approach the breadth of the District of Columbia's review to ensure that an initiative does not contravene the broad range of rights protected under the Human Rights Act.<sup>283</sup>

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<sup>274</sup> See generally 2-317 Report, *supra* note 205, at 9.

<sup>275</sup> DUBOIS & FEENEY, *supra* note 56, at 42; see *supra* Part II.A for a discussion on the difference between an indirect and a direct initiative. While the indirect initiative must be submitted to the legislature for approval, a direct initiative is submitted directly to the electorate for approval or disapproval.

<sup>276</sup> DUBOIS & FEENEY, *supra* note 56, at 42.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 39.

<sup>281</sup> *Id.*

<sup>282</sup> DUBOIS & FEENEY, *supra* note 56, at 39–40. Alaska, Arkansas, Massachusetts, Missouri, Nebraska, Oregon, and Utah authorize various methods of review that have more regulatory bite than the other states. *Id.* Additionally, seven jurisdictions, including the District of Columbia, provide for some form of drafting review. *Id.* at 42.

<sup>283</sup> *Id.* at 39.

For instance, in Massachusetts, prior to a petition's circulation, the Attorney General has the authority to preliminarily review a proposal to ensure that the measure does not include any matters that are excluded from the initiative process by the state's constitution.<sup>284</sup> Nevertheless, the Massachusetts Attorney General is not authorized to review the constitutionality or validity of the proposal, but must certify only that the proposal facially conforms to the explicit requirements and subject-matter exclusions set forth in the state's constitution even when there are other constitutionality concerns outside the precise restrictions on the initiative process.<sup>285</sup> The exclusion of certain subjects restricts the right to utilize the initiative process, but is not nearly as all-encompassing as the Human Rights Safeguard.<sup>286</sup> Specifically, the Attorney General will not certify a petition that relates to matters concerning the following: religion and religious institutions; judges and the court; local government; and specific appropriations of money.<sup>287</sup> Accordingly, a petition related to the rights of gays and lesbians would not be precluded under the Massachusetts Constitution.<sup>288</sup> Therefore, even if the Attorney General questioned the constitutionality of such a provision, the Attorney General would still be obligated to certify the petition if it conforms to the other requirements.<sup>289</sup>

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<sup>284</sup> Alexander Gray, Jr. & Thomas Kiley, *The Initiative and Referendum in Massachusetts*, 26 NEW ENG. L. REV. 27, 29 (1991); see MASS. CONST. amend. art. XLVIII, pt. 2, § 2. While review of proposed initiatives is more comprehensive in Massachusetts than in most jurisdictions, Massachusetts does not proscribe a human rights violation in its initiative procedure. Moreover, in Mississippi, the state department makes advisory recommendations regarding the language of the initiative, which the sponsor of the initiative can either accept or reject. INITIATIVE AND REFERENDUM INSTITUTE, COMPARISON OF STATEWIDE INITIATIVE PROCESSES 8, <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf>. While twelve states require some form of pre-election review regarding language, content or constitutionality, in all but four of these states, the results of the review are advisory only. *Id.*

<sup>285</sup> Gray & Kiley, *supra* note 284, at 40–41; see MASS. CONST. amend. art. XLVIII, pt. 2, § 3 (outlines the criterion for the Attorney General's certification).

<sup>286</sup> See MASS. CONST. amend. art. XLVIII, pt. 2, § 2.

<sup>287</sup> *Id.*

<sup>288</sup> *See id.*

<sup>289</sup> Gray & Kiley, *supra* note 284, at 40–41; see MASS. CONST. amend. art. XLVIII, pt. 2, § 3 (outlining the criterion for the Attorney General's certification).

*B. Subject-Matter Restrictions*

Most states' initiative processes include some type of restriction on the use of the initiative.<sup>290</sup> The most common restriction is the "single-subject rule," which limits the subject matter of a proposal to one certain area of change.<sup>291</sup> Similarly, four states enforce a waiting period for reintroducing a measure that previously failed.<sup>292</sup> Moreover, all states forbid an initiative to address an issue that is beyond the purview of the state legislature.<sup>293</sup> Alaska, Massachusetts, and Wyoming prohibit initiatives creating courts or otherwise impacting the judicial process.<sup>294</sup> In this regard, Mississippi and Massachusetts go further than other states in limiting initiatives.<sup>295</sup> Massachusetts excludes any initiative broaching religious issues, as well as initiatives limiting the right to free speech, to trial by jury, to just compensation for property takings, and to court access; Mississippi prohibits initiatives that would impact its state constitution's Bill of Rights and right to work guarantee.<sup>296</sup> Both Mississippi and Massachusetts prohibit an initiative that would change the initiative process itself.<sup>297</sup> In sum, while states have implemented some limitations on the right to employ the initiative process, no state has a restriction that mirrors the District of Columbia's Human Rights Safeguard.<sup>298</sup>

*C. Judicial Review: A Crucial Component of the Initiative Process*

While courts play an important role in the effective functioning of the initiative process, the function of the courts proves insufficient in protecting the rights of minorities whose liberties are put to a majority vote. Generally, the courts become engaged in the initiative process only after a majority of voters have approved an initiative, as the courts must interpret and enforce initiatives that the jurisdiction's electorate has approved.<sup>299</sup> Courts generally are reluctant to review

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<sup>290</sup> See text accompanying notes 270–72.

<sup>291</sup> DUBOIS & FEENEY, *supra* note 56, at 81.

<sup>292</sup> *Id.* at 82.

<sup>293</sup> INITIATIVE AND REFERENDUM INSTITUTE, *supra* note 284, at 13.

<sup>294</sup> *Id.*

<sup>295</sup> DUBOIS & FEENEY, *supra* note 56, at 82.

<sup>296</sup> *Id.*; see MASS. CONST. art. XLVIII, pt. 2, § 2; MISS. CONST. art. 15, §273(5).

<sup>297</sup> *Id.*

<sup>298</sup> See *supra* text accompanying notes 201–27.

<sup>299</sup> DUBOIS & FEENEY, *supra* note 56, at 43. Additionally, courts are sometimes called upon to determine whether the procedural requirements for submission or adoption have been satisfied, whether the initiative falls within the jurisdiction's specified subject-matter limitations, see *supra* text accompanying notes 291–98 or

substantive constitutional challenges prior to election.<sup>300</sup> There also is concern that pre-election judicial review can slow down the initiative process and place the judiciary in the middle of a contentious political debate.<sup>301</sup> Nevertheless, one could argue that pre-election judicial review is more efficient, as resources and energies could be reserved at the front end of the process, before any campaign or vote ever takes place.<sup>302</sup> Furthermore, many scholars argue for broader judicial scrutiny, because the traditional vetting and deliberation process inherent in the legislative process is generally absent in the direct initiative process.<sup>303</sup>

Most jurisdictions allow pre-election judicial review concerning issues of procedural compliance, while about half of jurisdictions allow pre-election judicial review for questions about whether the subject matter of a proposal complies with subject-matter restrictions.<sup>304</sup> Still, as courts generally are reluctant to review questions of constitutionality prior to an initiative's placement on the ballot,<sup>305</sup> ballot measures implicating the rights of minorities will routinely go on the ballot without review by the judiciary.<sup>306</sup> Legal scholar and former jurist Hans Linde warns of the increased likelihood of direct initiatives "to enact ordinary laws . . . in the form of constitutional text so as to insulate a law from change by elected lawmakers as well as from review of its constitutionality."<sup>307</sup> Most scholars agree that direct initiatives ought not to be insulated from

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whether the initiative is valid under the federal or state constitutions. DUBOIS & FEENEY, *supra* note 56, at 43.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* Because a majority of jurisdictions require that a statewide initiative be placed on the general election ballot, INITIATIVE AND REFERENDUM INSTITUTE, *supra* note 284, at 22, pre-election judicial review has the potential to delay the consideration of an initiative depending on the point at which the initiative is considered in the election cycle and exacerbate timing issues.

<sup>302</sup> DUBOIS & FEENEY, *supra* note 56, at 43.

<sup>303</sup> Ronald Steiner, *Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny*, 14 NEXUS: CHAP. J. L. & POL'Y 81, 82 (2009).

<sup>304</sup> DUBOIS & FEENEY, *supra* note 56, at 43.

<sup>305</sup> *Id.*

<sup>306</sup> For the purposes of further explaining the deficiencies of the current practice of judicial review, it is important to note that prior to the approval of Proposition 8, the petitioners in the case of *Strauss v. Horton* sought a stay of the initiative or, in the alternative, injunctive relief pending judicial review in November 2008. See *Strauss v. Horton*, No. S168047, 2008 WL 5516861, at \*2, \*7 (Cal. Nov. 7, 2008). Nevertheless, the Court did not issue a decision as to the validity of Proposition 8 until May 2009, after the approval by a majority of voters on November 4, 2008. *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009).

<sup>307</sup> Hans Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 710 (1994).

scrutiny and that courts should inspect ballot initiatives with greater vigor than ordinary legislative measures.<sup>308</sup> Without change or other safeguards, such as the Human Rights Safeguard, the will of the majority remains a threat to minority interests.

Moreover, even when ballot measures are ultimately reviewed, the courts apply inconsistent standards of review.<sup>309</sup> Scholars complain about the divergent manner in which courts review ballot measures.<sup>310</sup> Federal and state courts, for example, use varying standards.<sup>311</sup> Furthermore, while some courts apply a more deferential standard of review, reasoning that a direct initiative comes directly from the people, other courts apply a stricter level of scrutiny.<sup>312</sup> To combat the harmful majoritarianism that initiatives pose, scholars argue that courts should preemptively and stringently enforce constitutional protections and technical requirements.<sup>313</sup> Because the structural protections of checks and balances inherent in the ordinary legislative process are absent in the direct initiative process,<sup>314</sup> compelling reasons exist for stricter review of direct initiatives.

#### V. THE INSUFFICIENCY OF PRE-ELECTION REVIEW AND JUDICIAL INTERVENTION: THE HUMAN RIGHTS ACT SAFEGUARD AS A MODEL FOR REFORM

As current and customary methods used to regulate the direct initiative process reveal, the Human Rights Safeguard is an outlier and is otherwise unprecedented in every other jurisdiction in this country.<sup>315</sup> Nevertheless, while unique in practice, the Human Rights Safeguard embodies an essential tool to mitigate the threat of oppression. Other jurisdictions ought to follow the District of Columbia and adopt similar reforms.

##### A. *A Political Philosophical Justification for Reform*

Regulating direct democracy poses a particular challenge precisely because it is antithetical to the American form of

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<sup>308</sup> Steiner, *supra* note 303, at 90.

<sup>309</sup> See Tushnet, *supra* note 17, at 1.

<sup>310</sup> MANWELLER, *supra* note 62, at 27.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> Adams, *supra* note 93, at 628.

<sup>314</sup> Chemerinsky, *supra* note 3, at 296.

<sup>315</sup> See *supra* Parts IV.A–C.

government.<sup>316</sup> As Erwin Chemerinsky notes, the structure of the United States Constitution is largely guided by distrust of majorities.<sup>317</sup> The debate about the power that the people should properly hold in a modern democracy is as old as government itself.<sup>318</sup> Scholars and leaders have struggled to find a balance between self-government and fair and equal representation of all of society's voices.<sup>319</sup> Thomas Jefferson, whose philosophy many proponents of direct democracy revere, proposed the ideology that government is invalid unless founded upon the will of the people.<sup>320</sup> Town hall-style government, under which everyone gathers to discuss and debate policy, while perhaps ideal, certainly is impractical in an expansive and diverse nation: "In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws."<sup>321</sup>

Political thinkers have long posited theories cautioning against the government by the will of majority factions.<sup>322</sup> While a government may well be founded upon the will of the people, the government also must be constructed to rein in that will when necessary and appropriate. James Madison, architect of the United States Constitution, warned of the need for establishing checks and balances to protect the governed from the proclivities of human nature: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."<sup>323</sup> Eschewing the notion of true direct democracy, Madison and his peers determined that, while elected representatives should be sensitive to the governed, regular elections served as a sufficient measure to ensure that officials were attuned to the wishes of the people, and, accordingly, America would function under a republican democracy.<sup>324</sup> The founders structured a representative democracy devoid of a national right to create laws via popular initiative.<sup>325</sup>

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<sup>316</sup> Chemerinsky, *supra* note 3, at 294.

<sup>317</sup> *Id.* at 295.

<sup>318</sup> *Id.*

<sup>319</sup> See CRONIN, *supra* note 24, at 18–20.

<sup>320</sup> *Id.* at 40.

<sup>321</sup> John Adams, *quoted in* CRONIN, *supra* note 24, at 14 (discussing John Adams, *Thoughts on Government* (1776)).

<sup>322</sup> See generally Chemerinsky, *supra* note 3, at 296. Chemerinsky argues that the framers' support of representative democracy did not result from elitism, but from the framers' study of history and of their well-founded fear of the tyranny of consolidated power in government. *Id.* at 295.

<sup>323</sup> THE FEDERALIST No. 51 (James Madison).

<sup>324</sup> CRONIN, *supra* note 24, at 8.

<sup>325</sup> Chemerinsky, *supra* note 3, at 295. Chemerinsky also notes that the framers



The founders' wariness of direct democracy stemmed from their fear of the tyranny of the majority, especially in regard to minority rights oppressed by the will and fancy of the politically powerful.<sup>326</sup> A healthy fear of tyranny of the majority has remained a constant consideration from America's beginning and certainly remains today.<sup>327</sup> From the founding of this nation, the pervasive struggle to find the proper balance between effective government and individual rights and liberties has plagued both the governors and the governed.<sup>328</sup> Ultimately, the framers drafted the Constitution to ensure that no institution could assume a concentration of power by "(i) investing primary lawmaking authority in representatives rather than the people themselves; (ii) dividing the power of the lawmakers so that each unit may check the others; and (iii) placing certain principles beyond the reach of ordinary majorities."<sup>329</sup> Direct democratic procedures, such as the direct ballot initiative, serve to break down this wall, allowing ordinary majorities to affect principles not otherwise alterable by popular will.<sup>330</sup>

While the framers of the Constitution purposefully created an indirect democracy—a republican democracy—the use of, and campaign for, direct democracy dates back to the English settlers.<sup>331</sup> This campaign has resurfaced throughout American history, as seen in the Populist and Progressive Movements, and again in the 1970s through today.<sup>332</sup> While this nation has progressed from an emerging republic to an established and powerful democracy, jurisdictions utilizing direct democracy would be well advised not to forget the lessons of the founding fathers. Casting aside the founders' experience risks violence to the liberties upon which this country was established.

As Magleby notes, the issue of checks and balances in direct democratic processes is particularly important when dealing with measures targeting minority groups.<sup>333</sup> By the very nature of direct legislation, campaigns "appeal to passions and prejudices, spotlight

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would have strongly condemned a national plebiscite and that direct democracy is inconsistent with the structure and philosophy of the U.S. Constitution. *Id.* at 294–95.

<sup>326</sup> See CRONIN, *supra* note 24, at 19.

<sup>327</sup> *Id.* at 90.

<sup>328</sup> See *id.* at 21.

<sup>329</sup> Eule, *supra* note 22, at 1549.

<sup>330</sup> See generally Chemerinsky, *supra* note 3.

<sup>331</sup> CRONIN, *supra* note 24, at 1.

<sup>332</sup> See *supra* Parts II.B–C.

<sup>333</sup> Magleby, *supra* note 6, at 45.

tensions, and may foster even greater conflict and disagreement.”<sup>334</sup> While there has always existed a tension between the will of the electorate and the potential for tyranny and oppression, political leaders and thinkers historically have tempered this tension through representative governmental structures.<sup>335</sup> The introduction of direct democratic practices, as has been established, has reinforced this persistent tension, and therefore is more properly addressed through regulatory reform.

*B. Initiatives Addressing Same-Sex Marriage: A Compelling Argument for Reform*

Professor Adam Morse proposes that “initiatives addressing same-sex marriage provide an ideal case study for balancing the political rights of minority groups with those of the majority.”<sup>336</sup> Ballot initiatives aimed at defining marriage as between opposite-sex couples have the effect of rendering gays and lesbians second-class citizens, and raise serious questions about the rights of political participation in the United States.<sup>337</sup> A significant issue that remains unaddressed is whether gays and lesbians fall precisely within the suspect classification characterized in footnote four of *United States v. Carolene Products Company*: “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>338</sup> Nevertheless,

<sup>334</sup> *Id.* at 44.

<sup>335</sup> See generally CRONIN, *supra* note 24, at 8–9.

<sup>336</sup> Morse, *supra* note 7, at 963.

<sup>337</sup> *Id.*

<sup>338</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The debate about whether gays and lesbians qualify as a suspect class highlights the fact that the legal status of this group is in flux. Many current court decisions and political and scholarly debates focus on the issue of the legal protections gays and lesbians should be afforded. Such discussions will not be examined in detail, but it is nonetheless important to highlight the current uncertainty surrounding this ongoing debate. See generally Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); see also *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (finding a state constitutional right to same-sex marriage under the equal protection clause); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Letter from Eric H. Holder, Jr., Attorney General, the U.S. Dep’t of Justice, to John A. Boehner, Speaker of the House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter “Holder Letter”]. The Attorney General Eric Holder notified the House Speaker John Boehner that sexual orientation should receive heightened scrutiny, and therefore declared his opinion that the Defense of Marriage Act (“DOMA”) is unconstitutional as applied to legally married same-sex couples. He further stated that Section 3 of DOMA violates the equal

initiatives addressing same-sex marriage raise critical concerns regarding the interplay between minority and majority political rights in part because gays and lesbians are a minority group that the federal courts have yet to identify as a suspect or quasi-suspect class.<sup>339</sup>

The initiative process allows individuals harboring “animus towards disempowered minorities to make careless and unexamined decisions without ever enduring a sustained confrontation with the individuals who stand to lose a great deal as a direct result of their voting decisions.”<sup>340</sup> Any philosophical rationale for giving deference to ballot initiatives targeting vulnerable minorities seems constitutionally unwarranted, and appears contrary to the original intellectual justifications for the process of direct democracy.<sup>341</sup> Proponents of such measures frequently supply misinformation, which offsets any educative advantage of direct democracy.<sup>342</sup> The use of these proposals does not merely provide an alternative to the republican democracy, but can supplant it by weakening the power of elected officials to consider these issues.<sup>343</sup> Furthermore, the use of initiatives in this area “demonstrate[s] the problems of permitting voters to contemplate complex, emotionally charged issues.”<sup>344</sup> Without proper checks and balances, the majority can, will, and already has subjugated minority rights through the use of ballot initiatives.<sup>345</sup> The town hall ideal does not accurately reflect reality, and without proper limitations, direct democracy threatens the balance that the founders deliberately wove into the Constitution.

*C. Judicial Review as a Necessary but Insufficient Safeguard Against Discrimination*

Responding to the criticism that initiatives lead to a tyranny of the majority, scholar David D. Schmidt argues that lawmaking by popular vote cannot lead to such tyranny in part because constitutional initiatives are subject to federal judicial review and

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protection component of the Fifth Amendment. Further, the Attorney General invited the Speaker to defend the constitutionality of DOMA because the President and his administration could not and would not defend DOMA. The importance of this letter cannot be understated.

<sup>339</sup> Morse, *supra* note 7, at 963.

<sup>340</sup> Smith, *supra* note 17, at 545.

<sup>341</sup> Adams, *supra* note 93, at 601.

<sup>342</sup> *Id.* at 602.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> See *supra* text accompanying notes 97–117.

therefore must conform to the United States Constitution.<sup>346</sup> Nevertheless, same-sex couples continue to be the target of successful initiative campaigns throughout the country and judicial review has not proven to be a sufficient safeguard.<sup>347</sup> Until recently, gays and lesbians have not been deemed to be a suspect or quasi-suspect class.<sup>348</sup> Accordingly, judicial review of ballot measures is simply an insufficient safeguard in all cases.<sup>349</sup>

Eule argues that the judiciary must play a larger role in reviewing measures adopted by initiative because of the absence of the filtering system inherent in representative democracy; consequently, “the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate.”<sup>350</sup> Eule further proposes that where the people choose to eschew representation, as with the use of the direct initiative, the courts must step in to “protect the Constitution’s representational values.”<sup>351</sup> Under Eule’s reasoning, the courts should be suspicious of and strictly scrutinize plebiscites that concern individual rights and equal treatment under the law.<sup>352</sup>

Nonetheless, some argue that the judiciary, deferential to methods of direct democracy such as the ballot initiative, is insufficient in fully protecting minority rights from majority political action.<sup>353</sup> Moreover, empirical research suggests that both state and federal courts are inconsistent in their approach to judicial review of ballot initiatives.<sup>354</sup> While some courts apply a strict standard, others are more deferential to the initiatives.<sup>355</sup> This concern is compounded by the problem of federal courts sometimes applying different standards than state courts.<sup>356</sup> Therefore, greater uniformity in judicial review on the state and federal level is necessary to protect

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<sup>346</sup> SCHMIDT, *supra* note 48, at 37.

<sup>347</sup> See Ballotwatch, Election 2009, *supra* note 129; Sharples, *supra* note 122.

<sup>348</sup> See Holder Letter, *supra* note 338.

<sup>349</sup> This argument is not to suggest that judicial review is never sufficient to protect minority interests. As is evident in the case of *Reitman v. Mulkey*, for instance, the judiciary can serve as a watchdog for minority rights. *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967). Instead, I argue that because of inconstant standards of review and the unpredictable application of the rational basis standard, the judiciary is an insufficient safeguard.

<sup>350</sup> Eule, *supra* note 22, at 1525.

<sup>351</sup> *Id.* at 1559.

<sup>352</sup> *Id.*

<sup>353</sup> See Gamble, *supra* note 115, at 262.

<sup>354</sup> MANWELLER, *supra* note 62, at 27.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

minorities from majority political action. Without proper review and in the absence of safeguards, minorities remain vulnerable.

Moreover, while courts may strike down a measure affirmatively promoting discrimination, the direct repeal of preexisting legal protections may not trigger judicial intervention.<sup>357</sup> For example, in the District of Columbia, the legislative history of the IPA reveals that the Council was concerned that, in light of the *Reitman* holding, “the mere repeal of an anti-discrimination statute might not be sufficient to warrant judicial intervention.”<sup>358</sup> While the distinction is nuanced, it is also significant. Courts are more likely to strike down a ballot initiative that imposes a policy of discrimination than one that repeals an anti-discrimination civil rights protection that the legislature previously enacted.<sup>359</sup> While courts likely will strike down government-sanctioned discrimination, they may not nullify a measure that “merely” repeals protections that the legislature deemed necessary, so long as the initiative does not explicitly promote discrimination.

Furthermore, one scholar has warned that so-called “initiative elites,” a term used to identify individuals who are believed to have professionalized the initiative process, have become frustrated with the courts’ inconsistent and intervening role in the direct democratic process.<sup>360</sup> As Professor Matthew Manweller warns, if the courts serve as the sole mechanism charged with the duty to maintain “Madison’s system of minority protections,” they will frequently have to strike down measures, ultimately leading to resistance.<sup>361</sup> Initiative elites respond to the courts’ involvement in the initiative process in order to protect their continued reliance on the autonomy of the process.<sup>362</sup> Moreover, initiative elites have become increasingly frustrated and openly hostile to the courts.<sup>363</sup> The initiative elites have pursued two different courses of action to adapt to judicial intervention and nullification: first, they have utilized the initiative process to restrict the role of the judiciary in the process;<sup>364</sup> second, they have attacked

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<sup>357</sup> Gamble, *supra* note 115, at 262.

<sup>358</sup> 2-317 Report, *supra* note 205, at 9; *see also* Gamble, *supra* note 115, at 262.

<sup>359</sup> Gamble, *supra* note 115, at 262.

<sup>360</sup> MANWELLER, *supra* note 62, at 209.

<sup>361</sup> *Id.* at 209–10.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 194.

<sup>364</sup> *Id.* For example, activist Don McIntire of Oregon drafted and qualified for the 2002 ballot Measure 21 and 22, both as a result of what the sponsor believed to be a too activist court. Measure 21 would have required that, in any judicial election, an option of “None of the Above” must be listed on the ballot. If this option received

the judiciary through the use of the recall or other tactics such as influencing judicial election campaigns to unseat jurists.<sup>365</sup> For instance, the recall of three Iowa Supreme Court justices after the court's unanimous decision legalizing same-sex marriage is a testament to this argument.<sup>366</sup> Initiative elites also might bear the burden of information costs in a judicial election in order to inform the public about a decision of a particular jurist, either by drafting candidates or by providing opposition research.<sup>367</sup>

The initiative elites' reactionary behavior likely will result in a more politicized court and less confidence in the judiciary's impartiality and accountability.<sup>368</sup> While further discussion of this potential phenomenon's impact on the courts is beyond the scope of this Comment, it is important to note that additional safeguards, such as the Human Rights Safeguard, are essential to the protection of minority rights in part because the courts are an insufficient watchdog in the face of the ever-increasing use of ballot initiatives to govern in the name of moral supremacy.

#### D. *The Time for Reform*

Nineteen of the twenty-five jurisdictions with an initiative procedure in place adopted the initiative before 1919.<sup>369</sup> Since that time, "there has been relatively little systematic review of the initiative procedure."<sup>370</sup> While most states have kept their initiative procedures in roughly the same form as when first adopted, the world has changed considerably since then.<sup>371</sup> We undoubtedly still live in an "era of real grievances."<sup>372</sup> Nevertheless, the issues of the day during the Progressive years, social ills arising due to modernization and an increased presence of government in one's everyday life, are not the same as many of today's concerns, particularly the "family values"

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more votes than any judge listed, a special election would be held. *Id.* at 204–05. Even though this measure failed, such a measure may influence a judge the next time he or she is presented with a challenged ballot initiative on the docket. *Id.* at 209.

<sup>365</sup> MANWELLER, *supra* note 62, at 194–95. Manweller notes that initiative elites can do little to respond to federal courts that nullify initiatives, as federal judges are appointed for life and are therefore largely insulated from political pressures. *Id.* at 196.

<sup>366</sup> See Sulzberger, *supra* note 43.

<sup>367</sup> MANWELLER, *supra* note 62, at 198–99, 209.

<sup>368</sup> *Id.* at 210–11; see Sulzberger, *supra* note 43.

<sup>369</sup> DUBOIS & FEENEY, *supra* note 56, at 232–33.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 233.

<sup>372</sup> CRONIN, *supra* note 24, at 6.

issues typically targeted in modern ballot initiative campaigns.

Although states adopted initiative processes to combat powerful political machinery and special interests and to ensure state legislatures' responsiveness to those they represent, in *Strauss v. Horton* Justice Moreno found no evidence that the Progressives intended to preclude the protection of vulnerable minorities from the will of the majority.<sup>373</sup> There is a stark difference between protecting against politically powerful minority groups and allowing the majoritarian process to impede the rights of disfavored and politically powerless minorities.<sup>374</sup>

Yet, it is true that direct democracy is not purely a source of oppression. The initiative has been and can continue to be a source of positive political reform. For instance, women's suffrage was a target of early state initiatives.<sup>375</sup> Moreover, in Maryland and Maine, ballot initiatives legalizing same-sex were passed by the majority of voters in the 2012 election.<sup>376</sup> But, despite the benefits that direct democracy provides, the initiative process continues to pose a serious risk to minority groups.<sup>377</sup> While some may argue that the mere act of allowing civil rights to be put to a popular vote sharpens divisions in society,<sup>378</sup> ballot initiatives are a reality and the ever-increasing utilization of ballot initiatives emphasizes the need for reform to ensure that ballot initiatives do not strip away the rights of vulnerable minorities.<sup>379</sup>

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<sup>373</sup> *Strauss v. Horton*, 207 P.3d 48, 133 (Cal. 2009) (Moreno, J., concurring in part and dissenting in part).

<sup>374</sup> *See id.*

<sup>375</sup> Magleby, *supra* note 6, at 45.

<sup>376</sup> *Election 2012: Same-Sex Marriage Passes in Maryland, Main*, CNN WIRE (Nov. 7, 2012), <http://www.abc15.com/dpp/news/national/election-2012-same-sex-marriage-passes-in-maryland-maine>.

<sup>377</sup> Adams, *supra* note 93, at 603.

<sup>378</sup> *See* Gamble, *supra* note 115, at 262.

<sup>379</sup> For instance, as briefly discussed above, *supra* note 38, the authorization of same-sex marriage, whether by legislative initiative or popular referendum, is a controversial issue currently facing citizens and government officials in New Jersey. Around the time of this writing, the New Jersey State Legislature passed legislation authorizing gay marriage, while New Jersey Governor Chris Christie has vetoed any such legislation. Kate Fernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 7, 2012, available at <http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html>. Instead, the Governor proposed to put the question to the voters as a popular referendum, publicly stating: "this is not an issue that should rest solely in the hands of the Senate, or in the hands of the Speaker [of the New Jersey General Assembly] or the other 118 members of the Legislature. Let's let the people of New Jersey decide what is right for the state." *Transcript: Gov. Christie Speaks in Bridgewater on Gay Marriage*, ASBURY PARK PRESS, Jan. 24, 2012, available at <http://www.app.com/article/20120124/NJNEWS10/301240066>

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/TRANSCRIPT-Gov-Christie-speaks-Bridgewater-gay-marriage. The Governor also indicated a belief that “if New Jersey is seriously looking to overturn hundreds of years of societal, legal and religious tradition, we need to give this issue the weight it merits” by “giving New Jerseyans the ability to give voice to the support or opposition of this measure.” *Id.* The Governor caused some controversy among civil rights leaders when he indicated at a press conference that, “[p]eople would have been happy to have a referendum on civil rights rather than fighting and dying in the streets in the South.” Matt Katz, *Christie Calls for Same-Sex Marriage Referendum*, PHILA. INQUIRER, Jan. 25, 2012, available at [http://articles.philly.com/2012-01-25/news/30663269\\_1\\_gay-marriage-bill-marriage-referendum-marriage-equality/3](http://articles.philly.com/2012-01-25/news/30663269_1_gay-marriage-bill-marriage-referendum-marriage-equality/3).

Currently pending in the New Jersey Legislature is a concurrent resolution: the constitutionally prescribed mechanism for placing public questions on the ballot at a general election, amending the state constitution to define “marriage” as “the legally recognized union of two persons of any gender.” SCR-88, 215th Sen. (N.J. 2012). The current situation in New Jersey represents a somewhat unusual twist on the facts surrounding the public initiatives discussed elsewhere in this Comment. There are mixed views among proponents as to whether to proceed with the referendum. Governor Christie opposes same-sex marriage, but has indicated he would accept the results of any public referendum on the topic, while a majority of the Legislature, but not a veto-proof majority, support same-sex marriage, but not a public referendum. Katz, *supra* (noting that Senate President Stephen Sweeney announced that “[c]ivil rights will not be placed on the ballot”). Moreover, the public initiative is phrased as an expansion, rather than a reduction, of the currently existing rights of same-sex couples in contrast to the circumstances in California and Colorado, for example. Though anomalous in this regard, Governor Christie’s attempt to circumvent the legislature emphasizes the conflict between minority rights and direct democracy and suggests that direct democratic processes must be restrained.

The debate over same-sex marriage and the use of direct democratic processes is not limited to New Jersey. On February 13, 2012, Washington Governor Chris Gregoire signed into law a measure that would legalize same-sex marriage. *Washington Gov Signs Gay Marriage Bill into Law*, USA TODAY, Feb. 13, 2012, available at <http://www.usatoday.com/news/nation/story/2012-02-13/washington-state-gay-marriage-law/53079236/1>. The law would not take effect until June 7, 2012, and soon after Governor Gregoire signed the measure into law, opponents of same-sex marriage were preparing to challenge the measure, including a ballot initiative to be proposed for the November 2012 election that would require voters to either approve or overturn the new measure. *Id.* Washington voters ultimately voted to uphold the law allowing for same-sex marriage. *Same-Sex Marriage Wins on the Ballot for the First Time in American History*, THE ATLANTIC, Nov. 7, 2012, available at <http://www.theatlantic.com/sexes/archive/2012/11/same-sex-marriage-wins-on-the-ballot-for-the-first-time-in-american-history/264704/>. In early 2012 in Maryland, the state legislature’s House Judiciary and Health and Government Operations Committees conducted hearings on a bill that would legalize same-sex marriage. *Md. Advocates Pack Gay Marriage Hearing, Delegate Says Child Abuse Attempt Formed his View*, ASSOC. PRESS, Feb. 10, 2012, available at [http://www.washingtonpost.com/local/md-house-panels-to-hear-gay-marriage-arguments-committees-will-consider-dueling-bills/2012/02/10/gIQAt6Y02Q\\_story.html](http://www.washingtonpost.com/local/md-house-panels-to-hear-gay-marriage-arguments-committees-will-consider-dueling-bills/2012/02/10/gIQAt6Y02Q_story.html). Opponents of same-sex marriage threatened to challenge the measure, if passed, via a 2012 general election referendum. *Id.* The law passed, and Maryland voters ultimately upheld the law by voting against a ballot measure in opposition to the law in the November 2012 election. John Wagner, Paul Schwartzman, & Ned Martel, *Maryland Approves Same-Sex Marriage Law*, WASH. POST (Nov. 7, 2012), [http://articles.washingtonpost.com/2012-11-07/local/35505987\\_1\\_marriage-law-marriage-measure-maryland-and-maine](http://articles.washingtonpost.com/2012-11-07/local/35505987_1_marriage-law-marriage-measure-maryland-and-maine).



*E. States Should Adopt Reforms Mirroring the District of Columbia's Human Rights Safeguard*

Just as the District of Columbia Council was attuned to the events at the time of the enactment of the Safeguard, so too should states recognize that the initiative is sometimes used today to target politically vulnerable minorities. As contemporaneous events afforded the District of Columbia Council good reason “to anticipate that an initiative or referendum that would have the effect of authorizing discrimination could be a threat to the peace and to life and limb,”<sup>380</sup> modern state governments ought to take notice of the District of Columbia’s experience and recognize that ballot initiatives are being used, not to achieve social progress, but to target minority rights. The District of Columbia’s continuous prioritization of protecting minority rights is evidenced by the District having the most stringent subject-matter limitation on the right to utilize the initiative process. Moreover, the Council’s focus on the *Reitman* decision is persuasive. The Human Rights Safeguard ensures that citizens cannot use the initiative to strip a government of “neutrality toward protected minority classifications.”<sup>381</sup> Without a safeguard, a majority of the electorate can use the ballot initiative to put the government in a position of sanctioning discrimination.

By focusing on particular constitutionally defined rights or provisions as opposed to the government’s sanctioning of discrimination, there may always remain a segment of the population unprotected by the will of the majority. The Human Rights Safeguard provides a strong, preemptive check on potentially threatening majoritarian politics. The courts play an integral role in the direct democratic process and in the protection of minority rights, but the Human Rights Safeguard ensures that the fate of minority rights are not left to judicial intervention.

The Populists and Progressives originally promoted the initiative as a means of making the elected accountable to the electorate;

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Meanwhile, voters approved a constitutional amendment banning same-sex marriage in North Carolina in May 2012. David Zucchino, *North Carolina Passes Ban on Gay Marriage*, L.A. TIMES, May 9, 2012, available at <http://articles.latimes.com/2012/may/09/nation/la-na-gay-marriage-20120509>. Minnesota voters also defeated a measure that would have allowed for same-sex marriage in November, 2012. Debbi Wilgoren, *Minnesota Rejects Same-Sex Marriage Ban*, WASH. POST (Nov. 7, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/07/minnesota-voters-reject-same-sex-marriage-ban/>.

<sup>380</sup> *Jackson v. Bd. of Elections & Ethics*, 999 A.2d 89, 112 n.44 (D.C. 2010), cert. denied, 131 S. Ct. 1001 (2011).

<sup>381</sup> See 2-317 Report, *supra* note 205, at 9.

similarly, the broad purpose of the CAA was to provide accountability of the elected to the electorate.<sup>382</sup> The *entire* electorate means just that—if certain minority segments of a community can be targeted by others, the initiative process cannot serve its intended purpose. By allowing the Board to reject any initiative that would place the District in the posture of condoning discrimination,<sup>383</sup> the District's citizens can use the initiative process to hold their government accountable and promote policy change while promoting accountability to the *entire* electorate. The Human Rights Safeguard, therefore, supplements judicial intervention, allows for direct democratic methods to affect social change, and ensures that politically powerful majorities cannot limit minority rights through ballot initiatives.

#### VI. CONCLUSION

Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction that it would be to wish annihilation of air, which is essential to animal life, because it imparts to its destructive agency.<sup>384</sup>

Liberty must be moderated. As Gamble has aptly concluded, how a society treats a “threat to political minorities is one of the most volatile issues a society can face.”<sup>385</sup> The way a society treats its most vulnerable is a testament to the value that society places on humanity, democracy, and liberty. And while the process of direct democracy may have its place in a representative democracy, direct democracy must be tempered by justice.

The initiative remains popular in this country, and as current trends seem to indicate,<sup>386</sup> direct democratic processes are prevalently used to legislate minority rights and civil liberties. Furthermore, it is more likely that additional states will adopt initiative procedures than it is that any state will repeal them.<sup>387</sup> The increasing popularity of the initiative suggests the need for immediate reform. Absent the checks that representative democracy provides, minorities cannot be

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<sup>382</sup> *Jackson*, 999 A.2d at 105.

<sup>383</sup> See 2-317 Report, *supra* note 205, at 9.

<sup>384</sup> Smith, *supra* note 17, at 563.

<sup>385</sup> Gamble, *supra* note 115, at 262.

<sup>386</sup> See, e.g., *supra* note 379.

<sup>387</sup> Richard B. Collins & Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That do and Don't Work*, 66 U. COLO. L. REV. 47, 56 (1995).

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protected without adequate safeguards, and the threat to vulnerable minority groups will become more pervasive without action to reform initiative procedures to account for the direct threat to minority rights.

Jurisdictions ought to adopt the Human Rights Safeguard, as exemplified in the District of Columbia. Keeping human rights off of the ballot and out of the reach of majoritarian politics is essential to the promise of liberty upon which this county is founded. Moreover, the Human Rights Safeguard reform can preserve the attributes of direct democracy, allowing the electorate a voice to participate in governance and to hold elected officials accountable. Further, with such a reform, courts will not be the only shield against human rights violations by initiative, and the rights of vulnerable minorities will thereby be protected.