Taking the Initiative: Political Parties, Primary Elections, and the Constitntional Gnarantee of Repnhlican Governance

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> Then I don't suppose that tyranny evolves from any constitution other than democracy . . . .[1]

> [T]hough a democracy is more liable to error than a monarch or a body of nobles, the chances of its regaining the right path when once it has acknowledged its mistake are greater also.[2]

INTRODUCTION

In recent years, electoral law has been cast to the forefront of both American politics and American legal jurisprudence. Largely because of the perceived unfairness of the 2000 presidential election, numerous states and localities have attempted, with varying levels of success, radical transformations in their electoral processes: in 2002, for example, San Francisco took the lead in electoral reform by enacting the innovation known as instant-runoff voting;[3] similarly, in 2004, citizens of Colorado sent to the ballot box Amendment 36, which would have eradicated the traditional winner-take-all system for presidential electors.[4] These reforms, in stark contrast to most substantive legislation, are noteworthy precisely because they affect not any one area of voter intrigue, but the very process of *choosing how to choose* elected representatives.

This Note seeks to remove itself one additional step from the complexities of most substantive law. It focuses instead on several of the innovations that have become inextricably interwoven with the American system of political governance. The relationships among elections, political parties, and the electorate itself creates legal

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1. PLATO, THE REPUBLIC 234 (G.M.A. Grube trans., C.D.C. Reeve rev., Hackett Publishing Co. 1992).

2. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231 (Phillips Bradley ed., Francis Bowen rev., Alfred A. Knopf 1945) (Henry Reeve trans., 1835) (1835).

3. Steven Hill, Open Forum, *S.F. Takes Lead with Instant-Runoff Voting*, SAN FRANCISCO CHRON., Oct. 11, 2004, at B7.

4. *See* LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, ANALYSIS OF THE 2004 BALLOT PROPOSALS, RESEARCH PUBLICATION NO. 527-1, at 10–11 (2004), *available at* http://www.state.co.us/gov_dir/ leg_dir/lcsstaff/2004/ballot/2004BluebookforInternet.PDF (last visited Oct. 20, 2005).

and political difficulties that have not yet been entirely addressed by our legal and political institutions. While it is impossible to isolate the legal ramifications of this relationship from the political consequences, it is the legal intricacies that form the crux of this Note.

Over the past half century, the American political system has experienced a dramatic influx of legislation passed through direct democracy.[5] The electorate as a whole, through the populist innovations of the initiative and referendum, has become willing to broach subjects too divisive for professional politicians or otherwise unsuitable for the traditional legislative process. While these professional politicians are frequently hesitant to reform the same electoral system that placed them in power, the rest of the populace has not always been so timid. As election law—and potential electoral reform—has come to comprise the subject matter of casual, intellectual, and political discussion across the nation, it has also begun to occupy a place amongst the vast array of topics proceeding directly to the ballot box.

Over the past decade, the voters of California have sent to the ballot box multiple initiatives altering—or attempting to alter—the structure of primary elections within the state.[6] In the early twentieth century, the Supreme Court declared the overall constitutionality of the processes of direct democracy to be nonjusticiable. However, it is the contention of this Note that certain legislation passed through the mechanism of direct democracy poses unique difficulties for constitutional analysis, regardless of whether the legislation would be constitutional if passed by the State legislature. Specifically, the alteration of a political party's primary system via citizen initiative—as was the case with California's Propositions 198 and 62—works a constitutionally problematic infringement on the rights of political parties.

Part I of this Note briefly traces the history of the initiative process. Part II then details the United States Supreme Court's treatment of the initiative process and argues that the Court need not always treat the constitutionality of this process as nonjusticiable. Part III contends that there are some far-reaching circumstances in which legislation may not be passed through a system of direct democracy. Part IV then details the rights of political parties, most notably their First Amendment guarantee of associational freedom as it applies to a party's right to control its internal affairs and to determine the shape of its primary elections. And finally, Part V identifies a complex interaction between political parties and the initiative process, arguing that the reformation of primary elections—traditionally a party affair—may not be compelled through direct initiative without potentially violating the guarantees of the United States Constitution. While this Note focuses almost entirely on the legal aspects of this dilemma, it is nonetheless important to acknowledge the fundamental role that politics plays in the determination of any electoral scheme.

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5. *See, e.g.*, M. Dane Waters, *Comments on the Initiative Industry: The New Kid on the Block or an Old Friend?*, 13 J. CONTEMP. LEGAL ISSUES 571 (2004).

6. In 1996, Proposition 198 successfully, albeit temporarily, altered the structure of California's primary elections. In 2004, Proposition 60 sought to indoctrinate the requirement that each political party fielding a candidate at the primary election be guaranteed a place on the general election ballot, and Proposition 62 attempted to create a nonpartisan primary system in the state. For a more thorough discussion of this legislation and the legal consequences, see *infra* notes 154–68 and accompanying text.

I. THE HISTORY OF THE INITIATIVE

In the late nineteenth century, a Rhenish democrat named Moritz Rittinghausen proposed a system of direct legislation by the people.[7] According to this system, the citizenry was to be divided into sections, each containing a thousand inhabitants.[8] Each section would then meet at a pre-arranged location in order to elect a president, who would preside over the section's intellectual discourse and eventually transmit any vote to the higher authorities.[9] In the language of German sociologist Robert Michels, in Rittinghausen's scheme "[t]he will of the majority would be decisive."[10]

While this particular system of direct democracy never materialized in the form of an actual legislative proposal, similar procedures have been implemented in various societies over the past millennia. In ancient times, Athenian democrats guaranteed to the citizens of the grand city-state both the equal right of speech and the equal participation of all citizens in the exercise of power;[11] referenda were used frequently in Europe during the French Revolution and its immediate aftermath;[12] and, much more recently, several New England colonial—and then state—legislatures mandated that certain legislation be passed only in town meetings, an exercise, of course, in direct democracy.[13] While direct democracy is neither unique to the American political culture nor new to contemporary governance, the modern-day usage of the initiative and referendum certainly represents direct democracy on a much grander scale than most previous experiments.

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7. ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 63 (Eden and Cedar Paul trans., Collier Books 1962) (1915).

8. *Id.*

9. *Id.*

10. *Id.* After detailing a few of the intricacies of Rittinghausen's system, Michels vehemently criticizes government by direct democracy: "The system here sketched is clear and concise, and it might seem at the first glance that its practical application would involve no serious difficulties. But if put to the test it would fail to fulfil the expectations of its creator." *Id.* at 64. Michels argues first that this legislative system would fail largely because the masses are overly susceptible to suggestion, to the dictates of eloquent oratory, and to panic. *Id.* at 64–65. The resulting legislation would, therefore, be more "a manifestation of the pathology of the crowd" than the corollary of intense communal deliberation. *Id.* Michels further suggests that the masses are incompetent and otherwise ill-equipped to carry on the affairs of society through direct democracy. *Id.* at 65–66. While these arguments are of immense philosophical value, their importance to this Note is largely academic.

11. Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377, 1393–94 (2004). As early as 399 B.C., for example, Socrates was convicted and sentenced by a jury of the 501 adult male citizens of Athens. *See* PLATO, *Apology*, *in* THE TRIAL AND DEATH OF SOCRATES 21, 21 (G.M.A. Grube trans., Hackett Publishing Co. 1975).

12. Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 54 (1995).

13. *See* DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 23–24 (2000). In Massachusetts, for example, town meetings were required to place on their agenda "any item supported by a petition of ten citizens." *Id.* at 23.

After briefly tracing the birth of the modern initiative and referendum in America, this section turns to the more recent proliferation of the processes.

A. Birth of the Initiative and Referendum

In an 1820 letter, Thomas Jefferson manifested what would become the theoretical underpinnings of an eventual move, almost a century later, toward direct democracy. Said Jefferson: "I know no safe depository of the ultimate powers of the society but the people themselves, and, if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education."[14] Despite the fact that direct democracy can be traced back as far as ancient Athens, not until the end of the nineteenth century did the modern initiative begin to take root in America.

Journalist David S. Broder documents the social and economic upheaval during this era that gave birth to populist politics:

> At the same time that workers in many of the burgeoning urban areas found their wages were being eroded by waves of cheap immigrant labor, farmers were caught in a cycle of declining commodity prices and calamitous weather. . . .
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> The political reaction to these twin economic forces took two forms: first, the Populist movement, a farmer-worker protest challenging corporate power; and later, the Progressive movement, a middle-class and intellectual movement bent on cleaning up government corruption.[15]

Although the two movements were born of different forces, the one economic and the other largely intellectual, they did share a common mistrust of government.

While most of the actual Populist platform was economic in nature, it also called for the direct election of senators and "the legislative system known as the initiative and referendum."[16] Similarly, Progressive Party thinkers believed that institutional mechanisms such as the initiative and referendum would replace bourgeoning governmental corruption with a purer form of popular government.[17] Former

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14. John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 231 (1998).

15. BRODER, *supra* note 13, at 25–26. For a more complete history of both movements, see THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989).

16. BRODER, *supra* note 13, at 26.

17. *Id.* at 28. Broder quotes at length from historian Richard Hofstadter's 1955 book, *The Age of Reform*:

> What the majority of the Progressives hoped to do in the political field was to restore popular government as they imagined it to have existed in an earlier and purer age. This could be done, it was widely believed, only by revivifying the morale of the citizen, and using his newly aroused zeal to push through a series of changes in the mechanics of political life—direct primaries, popular election of Senators, initiative, referendum, recall, the short ballot, commission government, and the like. Such measures, it was expected, would deprive machine government of the advantages it had in checkmating popular control, and make government

Wisconsin governor Robert La Follette, a leading Progressive, lamented the degree to which moneyed special interests had become entrenched in American society.[18] "In such a crisis," argued La Follette, "nothing but the united power of the people expressed directly through the ballot can overthrow the enemy."[19] One analyst has described the debate over the initiative and referendum—the direct expression through the ballot to which La Follette refers—as "the latest chapter" in the age-old debate over the proper amount of political power that should be retained by the electorate.[20]

B. Contemporary Resort to Direct Democracy

Beginning with South Dakota in 1898, nineteen states adopted the initiative during the Progressive Era and its immediate aftermath.[21] At present, twenty-six state constitutions "authorize voters to initiate legislation or to demand the referral of legislative enactments."[22] Thirty-six states provide for one form or another of statutory referenda, and only Delaware does not require amendments to the state constitution to be approved by the electorate.[23] In addition, plebiscites—legislation passed through the processes of direct democracy—have become an increasingly significant source of law at the local level,[24] and the past decades have even witnessed a movement to enact a nationwide initiative.[25] Indeed, the sheer number of initiatives that invade the ballot boxes in many states each year leaves little doubt as to the present popularity of direct democracy.[26]

> accessible to the superior disinterestedness and honesty of the average citizen. Then, with the power of the bosses broken or crippled, it would be possible to cbeck the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government.

Id. (quoting RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955)).

18. *Id.* at 27.

19. *Id.*

20. Cooper, *supra* note 14, at 231.

21. Collins & Oesterle, *supra* note 12, at 54. Between 1898 and 1918, four additional states adopted some version of the popular referendum. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 113 (1995).

22. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1509 (1990); *see also* Schacter, *supra* note 21, at 168 (listing the sources of authority for the twenty-one states and the District of Columbia that permit the statutory initiative).

23. Eule, *supra* note 22, at 1509–10. For a discussion of the various forms of direct democracy, see *id.* at 1510–13. *See also* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 531–33 (1994).

24. Charlow, *supra* note 23, at 528. While the annual number of statewide referenda in the 1970s and early 1980s seldom surpassed 400, the total number of referenda nationally, including local measures, may have been as high as ten or fifteen thousand per year as early as 1970. *Id.* at 528 n.1.

25. Collins & Oesterle, *supra* note 12, at 54; *see generally* CRONIN, *supra* note 15, at 157–95 (exploring the desirability of direct democracy at the national level).

26. Professor Eule of the University of California at Los Angeles documents his initial shock at the degree to wbich direet democracy has taken a bold on California politics in particular:

> Sometime in mid-October a massive booklet arrived in my mailbox. At first I thought it was the local phone directory. Closer examination revealed it to be a "Ballot Pamphlet" from California's Secretary of State. Its contents included a

Neither praise nor criticism of the political and sociological consequences of the plebiscite system is difficult to discover,[27] but thorough analyses of the legal intricacies surrounding the initiative and referendum—and the constitutionality of the system—remain surprisingly rare.

II. THE COURTS' TREATMENT OF DIRECT DEMOCRACY: *PACIFIC STATES TELEPHONE & TELEGRAPH CO. V. OREGON*

Article IV of the United States Constitution guarantees "to every State in this Union a Republican Form of Government."[28] While the Constitution does not manifest any specific form that satisfies the definition of republican government, James Madison utilized *The Federalist Papers* to clearly distinguish between a "pure Democracy," in which citizens jointly administer the state, and a "Republic" based on government by representative.[29] According to Madison, democracy requires "a Society, consisting of a small number of citizens, wbo assemble and administer the Government in person," whereas a republic implements a "scheme of representation."[30] Madison continued:

> The two great points of difference between a Democracy and a Republic are, first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.[31]

> staggering array of bond acts, proposed constitutional amendments and statutory initiatives. . . .
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> Just as I was struggling through the state ballot pamphlet and beginning to wonder how I had graduated law school with a reading level below that of a third-year college student, the postal service delivered another ballot pamphlet. This one was compiled by the Los Angeles City Clerk and contained text, summaries, arguments—pro and con—and rebuttals for approximately half-a-dozen city ballot measures. Although the pages were fewer—the 1988 version ran sixty-four pages—and smaller . . . I was too dazed to exhibit the proper appreciation. By the time a third pamphlet arrived, a gift from the County Registrar-Recorder with information concerning the county measures, earthquakes were starting to look appealing.

Eule, *supra* note 22, at 1508–09.

27. For a discussion of the degree to which the mechanisms of direct democracy have satisfied its aims, see Collins & Oesterle, *supra* note 12, at 55–63, 126 (citing four concrete aims of direct democrats—"empowerment of ordinary citizens; 'good government' aims such as increased participation, involvement, and public discussion; majority rule as an ideal; and countering [sic] governmental inefficiency"—and concluding that "the initiative can work as an important check on representative and administrative government"). For a criticism of these same devices, see Cooper, *supra* note 14, at 237–69.

28. U.S. CONST. art. IV, § 4.

29. THE FEDERALIST NO. 10, at 43 (James Madison) (Buccaneer Books 1992).

30. *Id.*

31. *Id.* Again, in the *The Federalist No. 39*, Madison defines a republic as "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour." THE FEDERALIST NO. 39 (James Madison), *supra* note 29, at 190.

To what extent, then, may the Constitution, which requires by its language a republican form of government, be reconciled with the mechanisms of direct democracy?

The Supreme Court has spoken rarely and indirectly to this issue, but federal jurisprudence regarding the so-called Guaranty Clause may be summarized by two dicta: first, there can be little doubt that the Constitution mandates that each state maintain a republican form of government;[32] and second, the Supreme Court has steadfastly refused to declare the precise dictates of this form of government.[33]

The Court first had occasion to address the requirements of the Guaranty Clause in the 1874 case of *Minor v. Happersett*.[34] In holding that individual states may constitutionally deny women the right of suffrage without infringing on their status as citizens, the Court pronounced that the Constitution designates no "particular government" as republican in form.[35] The Constitution, according to the *Happersett* Court, did not alter the state governments in existence at the time of ratification—these governments "were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide."[36] These early governments, however, made no allowance for a system of direct democracy comparable to that instituted over a century later with the rise of the voter-initiated ballot proposal.[37]

Soon after the infusion of the initiative into American politics, the Supreme Court had occasion to address the constitutional permissibility of this particular instrument of direct democracy. In 1902, Oregon amended its state constitution to give the people the power to enact legislation directly, "independent of the legislative assembly."[38] In a pair of cases decided a decade later, the Court held that enforcement of the Guaranty Clause belonged solely to the political department and therefore declared the constitutionality of the initiative process to be non-justiciable.[39] In *Pacific States*

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32. Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 710 (1994). Justice Linde cites the 1874 Supreme Court case of *Minor v. Happersett* as standing for this principle. *Id.* at 710 & n.3.

33. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). *See also* Linde, *supra* note 32, at 710–11.

34. 88 U.S. 162 (1874).

35. *Id.* at 175.

36. *Id.* at 175–76.

37. *See supra* notes 21–26 and accompanying text (citing South Dakota as the first state to adopt the initiative, in 1898). In the early days of the Republic, many states *did* require the adoption of a state constitution to be ratified by a vote of the electorate. BRODER, *supra* note 13, at 23–24 (citing a referendum conducted in 1788 to adopt Massachusetts's new constitution and one conducted in New York three decades later to adopt that state's revised constitution). As referenda are initiated by the legislatures themselves, they are easily distinguished from citizen initiatives.

38. *Pac. States Tel. & Tel. Co.*, 223 U.S. at 133–34.

39. *See id.*; Kiernan v. Portland, 223 U.S. 151 (1912). In *Kiernan*, it should be noted that the state court *did* reach the merits of the federal question, finding the initiative process not in conflict with Article IV of the Constitution. *See* Kiernan v. Portland, 112 P. 402 (Or. 1910). Said the Supreme Court of Oregon: "[I]n all states, whatever may be the restriction placed upon their representatives, the people . . . have had, and have, the power to directly legislate, and to change all or any laws so far as deemed proper—limited only by clear inhibitions of the national Constitution." *Id.* at 406. The court adopted an expansive definition of "republican form of

Telephone & Telegraph Co. v. Oregon, which has come to stand for the proposition that questions arising under the Guaranty Clause will be deemed political in nature, the Court was asked to invalidate a law passed through the initiative process that exacted a tax on certain classes of corporations.[40] Relying heavily on its decision in *Luther v. Borden*,[41] a case decided more than half a century earlier, to support the conclusion that questions arising under the Guaranty Clause are non-justiciable, the Court declared the constitutionality of the initiative to be "a question for the determination of the political department."[42] Precedent proved a severely limited tool in *Pacific States Telephone*, however, for the Supreme Court had never previously been asked to address the constitutionality of a government that was non-republican in form.

Chief Justice White's unanimous opinion in *Pacific States Telephone* justifies the Court's decision—or, rather, the Court's refusal to reach a decision on the merits—by recourse to the nature of the law at issue. Said the Chief Justice:

> [The] essentially political nature [of the statute] is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which . . . is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.[43]

While to say that the law is political in nature may be little more than a play on words, the non-justiciability of the initiative process has become well-settled law. Indeed, the Guaranty Clause is the *only* constitutional clause that the United States Supreme Court has steadfastly held to be "judicially unenforceable."[44]

Because of its uniform refusal to examine the merits of Guaranty Clause claims, the Supreme Court has *never* held initiative procedures to be compatible with representative government.[45] Rather, its dismissal for want of jurisdiction in *Pacific*

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government," accepting any government in which supreme power lies with the people as republican. *See id.* at 404–08. This overly broad definition was not explicitly accepted by the Supreme Court.

40. *Pac. States Tel. & Tel. Co.*, 223 U.S. at 135.

41. 48 U.S. 1 (1849).

42. *Pac. States Tel. & Tel. Co.*, 223 U.S. at 149. As discussed in *Pacific States Telephone*, the judicial officers in *Luther* were placed in the awkward position of deciding which of the two opposing governments of Rhode Island was legitimate. *Id.* Because the issue was political in nature, the Court refused to choose between two competing governments, both of which governed by representation. *See Luther*, 48 U.S. at 3–6.

43. *Pac. States Tel. & Tel. Co.*, 223 U.S. at 150–51.

44. *In re* Initiative Petition No. 348, State Question No. 640, 820 P.2d 772, 784 (Okla. 1991) (Opala, C.J., concurring in result) (citing J. Andrew Heaton, *The Guarantee Clause: A Role for the Courts*, 16 CUMB. L. REV. 477, 478 (1986)).

45. A handful of state courts have found initiative procedures to be both justiciable and constitutionally permissible. *See, e.g.*, Kiernan v. Portland, 112 P. 402 (Or. 1910); Iman v. S. Pac. Co., 435 P.2d 851 (Ariz. Ct. App. 1968). Prior to *Pacific States Telephone*, the Oregon Supreme Court held the initiative and referendum procedures of the state's constitution to be in accord with a republican form of government. Kadderly v. City of Portland, 74 P. 710, 719–20

States Telephone indicates that a contrary decision by the state court would have similarly been outside the purview of the Court.[46] Unfortunately, state courts have failed to seize upon a harmonized standard by which initiative procedures may be examined.[47]

III. WHEN A LAW MAY *NOT* BE PASSED THROUGH DIRECT DEMOCRACY

Currently at issue is not the overall constitutionality of the initiative, for the Supreme Court seems unwilling to even address this question. Rather, at issue for the purposes of this Note is the debatable proposition that some laws may present unique constitutional difficulties when passed through direct initiative.[48] Justice Hans Linde of the Supreme Court of Oregon has argued, for example, that initiative procedures should not be deemed in keeping with Article IV of the Constitution when they fail to satisfy "guaranteed standards of representative deliberation."[49] While Justice Linde has

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(Or. 1903). Justice Bean wrote for the unanimous *Kadderly* Court:

> [T]he initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government . . . .

Id. at 720. For a brief criticism of the *Kadderly* decision, see Linde, *supra* note 32, at 715–16 (arguing that Justice Bean's legal defense of initiatives is logically flawed).

46. *See* Linde, *supra* note 32, at 714. Justice Linde acknowledges several state court cases, decided in the aftermath of *Pacific States Telephone*, that he believes misinterpreted the Court's decision. *Id.* at 714 & n.21 (citing three state court decisions—in Colorado, South Dakota, and Arizona—in which the court refused to invalidate initiative processes because of the Supreme Court's holding in *Pacific States Telephone*). In the last of these decisions, *Iman v. Southern Pacific Company*, the Arizona Court of Appeals, after holding that republican government is a question solely for the legislature, nonetheless reached the merits and sustained the initiative as consistent with the Guaranty Clause. *Iman*, 435 P.2d at 854–55.

47. In a 1980 Colorado case, for example, the court had no trouble declaring the justiciability of the processes of direct democracy: it held the power of initiative to be "a fundamental right at the very core of our republican form of government." McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980) (comparing the power of initiative to the fundamental right to vote). This decision exists in stark contrast to those decisions that have found such questions to be for the political department alone under *Pacific States Telephone*. *See* Linde, *supra* note 32, at 714 & n.21.

48. Although the term "rcferendum" will occasionally appear throughout this Note, it is helpful—for the purposes of legal analysis—to distinguish between the two primary mechanisms of direct democracy. The crux of this Note's argument focuses on the questionable legality of the initiative, not the referendum: as the referendum is a case-specific delegation of legislative power *by the legislature*, the constitutional questions it poses differ dramatically from those posed by the citizen initiative.

49. Linde, *supra* note 32, at 724. Among those initiatives that should be disqualified, according to Justice Linde, are those that stigmatize a social group, those that are directed against an identifiable social group, those that are proposed in a context that leaves no doubt that the initiative asks voters to choose for or against such a group, and those that make emotional appeals to impose majoritarian values that offend other groups in the community. *Id.* at n.56; *see also* Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159 (1989).

focused his attack on the propensity of initiatives to lead to overly majoritarian results,[50] the debate between majority rule and minority rights rarely transcends political theory. It is the contention of this Note that, even if government by direct initiative is deemed "representative" within the meaning of the United States Constitution, special problems arise when the subject matter of these proposed laws either adversely affects minority groups or is presented to the electorate in an unnecessarily complex fashion. In either case, the result of the initiative process will likely fail to satisfy Justice Linde's "standards of representative deliberation."

A. Initiatives and Majoritarianism

Majoritarian democracy, despite its potential shortcomings, is at the very core of our constitutional system.[51] James Madison wrote in favor of the nascent Constitution in *The Federalist No. 39*: "It is *essential* to such a [republican] government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."[52] This notion was echoed half a century later by Alexis de Tocqueville, who wrote that "[i]n the United States the majority governs in the name of the people, as is the case in all coantries in which the people are supreme."[53] To some extent, the emergence of the direct initiative may be considered the modern pinnacle of majoritarianism, for the majority not only controls *who* legislates but also decides *which* legislation is enacted. Nonetheless, the Supreme Court has been willing to invalidate legislation passed through direct democracy—whether or not it reflects the will of the majority—when such legislation inappropriately infringes on the rights of a minority group.[54]

In *Hunter v. Erickson*, for example, the Court hesitated only briefly before striking down a section of a city charter that prevented the city council from enacting any ordinance concerning racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters.[55] The effect of the law, which was

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50. *See* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Linde, *supra* note 49.

51. Eule, *supra* note 22, at 1513.

52. THE FEDERALIST NO. 39 (James Madison), *supra* note 29, at 190 (emphasis in original).

53. 1 DE TOCQUEVILLE, *supra* note 2, at 173.

54. It should be noted at this point that several commentators have suggested that even direct democracy does not accurately reflect the will of the majority. *See generally* BRODER, *supra* note 13 (arguing that the amount of capital necessary to run a successful initiative campaign has become so large that powerful elites have come to overwhelmingly control even the mechanisms of direct democracy); Charlow, *supra* note 23, at 602–09 (contending that both the representative system and the system of direct democracy allow for a phenomenon that the author refers to as the "less-than-majority-backed laws"); Eule, *supra* note 22, at 1513–30 (suggesting that "popular votes do a flawed job of discovering what 'the people' really want" for reasons such as low levels of voter participation). Obviously, the notion that initiatives may not always represent majority will undercuts much of Justice Scalia's argument.

55. Hunter v. Erickson, 393 U.S. 385 (1969). Section 137 of the City Charter of Akron, Ohio provided in part that

> [a]ny ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color,

placed on the ballot at a general election and passed by a majority of the electorate,[56] was to substantially disadvantage those who would benefit from laws barring certain types of discrimination.[57] Explained Justice White: "[F]or those who sought protection against racial bias, the approval of the City Council was not enough. A referendum was required by charter at a general or regular election . . . ."[58] Despite the fact that the law was neutral on its face, the city charter actually made the enactment of ordinances protecting minority groups siguificantly more difficult to secure.[59] Consequently, the reservation of power to the people was deemed, in this case, unconstitutional.[60] Notwithstanding a majority vote of the citizens of Akron, Ohio, the Court invalidated a law—passed through direct democracy and requiring the submission of certain matters to the same mechanisms of direct democracy—with an adverse effect on certain minority groups.

In more recent years, the effect of the initiative on minority groups has become most prevalent in voters' attempts to alter the legal status of homosexuals. Relying partially on the U.S. Supreme Court's decision in *Hunter*, the Supreme Court of Colorado declared a 1992 amendment to the state constitution—passed via initiative—to be violative of the Equal Protection Clause. Favored by over fifty-three percent of the state's voters, Amendment 2 prohibited the state legislature from enacting any legislation that would entitle homosexuals to protected legal status or to claims of discrimination.[61] The court, in invalidating the amendment, upheld the trial court's determination that the Fourteenth Amendment protects "the fundamental right to participate equally in the political process" and that any legislation "which infringes on this right by 'fencing out' an independently identifiable class of persons" must be presumed unconstitutional.[62] Commentators have suggested two possible explanations for the state court's decision: the court found relevant either the fact that Amendment 2 was a constitutional provision or the fact that the amendment was popularly enacted.[63]

> religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.

Id. at 387.

56. *Id.* at 387.

57. *Id.* at 387, 390–91.

58. *Id.* at 390.

59. *Id.* at 390–91 ("[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that.").

60. Incredulous at the Court's decision, Justice Black wrote in dissent: "In this Government, which we boast is 'of the people, by the people, and for the people,' conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court!" *Id.* at 397 (Black, J., dissenting).

61. Evans v. Romer, 882 P.2d 1335, 1338 (Colo. 1994), *aff'd on other grounds*, 517 U.S. 620 (1996).

62. *Id.* at 1339 (quoting from the court's decision in Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993)).

63. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1007 (2d ed. 2002). Professor Issacharoff and his colleagues declare it "implausible" that the Colorado Supreme Court would have reached the same decision if the legislature "had simply pre-empted all local anti-

A majority of the United States Supreme Court did not explicitly address the so-called "political process" argument on which the state court relied; it instead utilized traditional equal protection analysis to uphold the lower court's decision.[64] In pursuing this analysis, however, the Court found problematic any "law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government."[65] While this statement involves no reference to the mechanisms of direct democracy that caused Amendment 2 to be enacted, it nonetheless serves to manifest the notion that the protection of minority groups is well within the purview of both the courts and the government.[66]

Over the past half century, the Court has continued to treat with significant distrust laws enacted through the mechanisms of direct democracy that establish barriers to minority demands or that restrict minority rights.[67] While no decision goes so far as to

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discrimination ordinances." *Id.*

64. *See* Romer v. Evans, 517 U.S. 620 (1996).

65. *Id.* at 633.

66. Justice Scalia's vigorous dissent, in which Chief Justice Rehnquist and Justice Thomas joined, resorted—much like the state court—to an analysis of the relative political power of homosexuals. *See id.* at 636–53 (Scalia, J., dissenting). Rather than finding the minority status of homosexuals to be determinative, however, Justice Scalia found relevant the disproportionate level of political power enjoyed by this particular minority group. *Id.* at 636, 645–46 (referring to homosexuals as a "politically powerful minority"). Argued Justice Scalia:

> [B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.

Id. at 645–46 (citations omitted). Unlike the state court, for whom a lack of political power led to the presumptive invalidity of the legislation, Justice Scalia's dissent implicitly found the majoritarian nature of the initiative process necessary in order to curb the *surplus* of political power experienced by a minority group.

67. In addition to *Hunter* and *Romer*, see Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474–75 (1982) (striking down an initiative that prohibited school boards from requiring any student to attend a school other than the one nearest or next nearest his or her home, thus removing "the authority to address a racial problem . . . from the existing decisionmaking body, in such a way as to burden minority interests"); Gordon v. Lance, 403 U.S. 1 (1971) (upholding a West Virginia supermajority statute requiring that political subdivisions of the state not incur bonded indebtedness or increase tax rates without the approval of sixty percent of the voters); Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736–37 (1964) (holding that the implementation of a change in legislative structure through popular referendum does not immunize that change from Fourteenth Amendment review). In *Gordon*, the Supreme Court observed that the law does not require states to govern by majority rule: "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." *Gordon*, 403 U.S. at 6. For similar state court decisions, with an emphasis on the State of Oregon, see Linde, *supra* note 50, at 20 & nn.3–5.

Recently, the Ninth Circuit Court of Appeals addressed the constitutionality of a statute passed via direct democracy that burdened the political influence of a majority of California's electorate. In *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), the court

say that an otherwise constitutional law has been rendered unconstitutional by the overtly democratic manner in which it was passed, the implication is nonetheless present: there exists a need, long existent both in American politics and in American jurisprudence, to protect minority groups from the so-called "tyranny of the majority." Legislation that is passed through the traditional mechanisms of representative government—state legislatures—tends toward the institutional protection of minority groups, for, as Justice Scalia observed in his *Romer* dissent, the political power of these groups is frequently far greater than their numbers.

B. The Competence of the Electorate: Complexity of Legislation, Conflict of Initiatives, and Interpretive Dilemmas

In his Pulitzer Prize–winning study of the American Revolution and its aftermath, historian Gordon Wood notes that the Founders "sought to construct a society and governments based on virtue and disinterested public leadership and to set in motion a moral movement that would eventually be felt around the globe."[68] However, the realities of individual self-interest immediately began to hinder this communal morale. Laments Professor Wood:

> [T]he ink on the Declaration of Independence was scarcely dry before many of the revolutionary leaders began expressing doubts about the possibility of realizing these high hopes. The American people seemed incapable of the degree of virtue needed for republicanism. Too many were unwilling to respect the authority of their new elected leaders and were too deeply involved in trade and moneymaking to think beyond their narrow interests or their neighborhoods and to concern themselves with the welfare of their states or their country.[69]

Not only could the electorate at the time of the founding not be trusted with a democracy, but it could scarcely be trusted with a republic. In addition to the problems inherent in the majoritarian nature of plebiscites, the question exists whether the citizenry is *competent* to make legislative decisions on a grand scale.

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upheld as constitutional Proposition 209, an affirmative action initiative that prohibited the state or its political subdivisions from granting preferential treatment to any individual or group on the basis of "race, sex, color, ethnicity, or national origin." *Id.* at 696. Proposition 209, according to the plaintiffs, placed procedural burdens "in the path of women and minorities, who together constitute a majority of the California electorate." *Id.* at 704. For this reason, *Wilson* was easily distinguishable from precedent cases that invalidated statutes and constitutional amendments designed to hinder the political power of a minority. Relying on the Supreme Court's statement in *Hunter* that "[t]he majority needs no protection against discrimination," the *Wilson* court declared that "[i]t would seem to make little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." *Id.*

68. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 229 (1991).

69. *Id.* Wood goes on to observe that "a new breed of popular leader"—one "who was far less educated, less liberal, and less cosmopolitan" than most revolutionaries had expected—began emerging in the nascent state legislatures. *Id.* "These new popular leaders were exploiting the revolutionary rhetoric of liberty and equality to vault into political power and to promote the partial and local interests of their constituents at the expense of what the revolutionary gentry saw as the public good." *Id.*

It should seem manifest that constraints on voters' time and energy will frequently prevent a thorough understanding of the intricacies of proposed legislation. The long-term health of the locality will more often bow to immediate desires in a system of direct democracy than in a republican model. And the dramatic influx of initiative campaigning has increased the likelihood that interested parties will seek to deceive or confuse voters by bombarding them with advertisements that either over-simplify or otherwise distort an issue.[70]

1. Single-Subject Rules

In order to control the complications arising from the processes of direct democracy, states have occasionally relied on so-called "single-subject rules" for initiatives, intended to limit the scope of legislation established by the citizenry.[71] As an example, California's state constitution was amended in 1948 to limit proposed initiatives to a single subject.[72] Despite the apparent simplicity of the rule, however, the courts were left with the somewhat daunting task of determining its precise contours.

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70. Professors Richard Collins and Dale Oesterle of the University of Colorado present three grounds on which long and complex initiatives may be criticized. *See* Collins & Oesterle, *supra* note 12, at 84–86. First, constitutional stability may be undermined by initiatives that "alter state government too much" because these initiatives may "entrench a measure beyond the reach of the legislature." *Id.* at 84–85. Second, highly complex initiatives will increase the level of voter confusion and the level of voter irritation. *Id.* at 85 ("When a [sic] initiative is long and complicated . . . it exacerbates the problem of informing voters. The tendency to compress the debates over initiative issues into thirty second television spots means that the debate over multi-issue initiatives will focus on one or two issues . . . . Voters will simply not know about, much less understand in any depth, many of the sub-issues."). And third, when a proposed initiative contains multiple issues, voters are prohibited from passing legislation on one issue without also passing judgment on other issues. *Id.* at 85–86. Thus, legislation may be passed through direct democracy even when certain issues contained within that legislation would be unable to garner a majority vote if they stood alone.

71. *See, e.g.*, CAL. CONST. art. II, § 8(d) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.").

72. Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 936 (1983). The original language of this amendment read:

> Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose.

Id. at 953 n.69. In 1966, the rule was reworded in its present form. *Id.* For the present language, see *supra* note 71.

Professor Lowenstein has proposed two major purposes for this: the simplification and clarification of initiatives in order to avoid voter confusion, and the prevention of "logrolling" that could subvert the will of the majority. *Id.* at 954–65. While Lowenstein does not suggest that initiatives containing multiple issues could become constitutionally problematic even without California's single-subject rule, he does acknowledge the role that these purposes play, often implicitly, in state court decisions determining the precise contours of the rule. *See id.* at 942–44, 951–53. Lowenstein's proposals echo the criticisms of Professors Collins and Oesterle. *See supra* note 70.

In the months following the passage of California's single-subject rule, the necessity of establishing the legal extent of a "single subject" became apparent.[73] The plaintiffs in *Perry v. Jordan* claimed that an initiative put before the electorate in the 1948 general election which would repeal Article XXV of the state constitution violated the newly enacted rule.[74] Comparing the single-subject rule for initiatives to a similar rule applicable to acts of the legislature, the *Perry* court adopted an exceedingly broad interpretation of this rule. Said the court: "the [single-subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, all parts of whicb are reasonably germane."[75] Despite the fact that opponents of the initiative referenced eighteen incidental purposes of the repeal measure, the court determined these to be mere "administive [sic] details."[76]

Unlike the average voter, legislators typically possess the time, resources, and expertise to determine the implications and consequences of proposed legislation: any court decision equating the position of ordinary citizens to that of legislators certainly fails to account for numerous differences on which our republican system of governance is based. The problems of direct democracy are exacerbated by overly complex initiatives, which jettison not only the traditional legislative power to *make* law but also the legislative competence to *understand* it.[77]

Further, the breadth of the "reasonably germane" standard articulated by the *Perry* court creates such a flexible test that it does not necessarily require the separate provisions of an initiative "to be related to each other in any particular manner."[78] While the single-subject rule likely does not extend as far as Professor Daniel Lowenstein's initial suggestion that "[t]he mere fact that the provisions [of an

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73. *See* Perry v. Jordan, 207 P.2d 47 (Cal. 1949).

74. *Id.* at 48–49. Article XXV of the California State Constitution provided for certain "pensions for the needy aged and blind . . . ." *Id.* at 48.

75. *Id.* at 50 (quoting Evans v. Superior Court, 8 P.2d 467, 469 (Cal. 1932) (pertaining to the scope and application of the article of the state constitution prohibiting acts of the legislature from embracing more than one subject)).

76. *Id.* Of the two purposes of single-subject rules proposed by Professor Lowenstein, *see supra* note 72, only the latter seems to be entirely in keeping with the *Perry* decision. Professor Lowenstein's suggestion that single-subject rules serve to simplify ballot initiatives in order to avoid voter confusion is somewhat undercut both by the manner in which the *Perry* court analogizes the initiative process to the typical legislative process and by the broad standard developed by the court.

77. Professors Collins and Oesterle advocate several reforms to Colorado's processes of direct democracy. Among these: require a majority vote from a minimum portion of the electorate in order to enact a constitutional amendment; limit constitutional amendments to a single subject, but "be less strict about the scope of statutory initiatives"; impose a word limit on both constitutional amendments and statutes passed through the initiative process; and require the final text of constitutional initiatives to be drafted by the state's attorney general, legislative counsel, or other official. Collins and Oesterle, *supra* note 12, at 108–09. Collins and Oesterle also recommend the use of the indirect initiative, through which citizens first petition the legislature itself for constitutional or statutory change and only if rebuffed may they force a popular vote. *Id.* at 107. Obviously, any increased involvement of the legislature in the legislative process reduces the likelihood that the process infringes upon a proper separation of powers.

78. Lowenstein, *supra* note 72, at 943–44.

initiative] have been put together in one measure makes them constitute a 'single subject,'"[79] only the most blatantly diverse initiatives would likely be struck down under the *Perry* standard.[80] Indeed, no justice adhering to the "reasonably germane" standard has *ever* voted to invalidate an initiative on the grounds that it violates California's single-subject rule.[81]

As a matter of policy, multi-subject initiatives frequently serve to further complicate an already complicated process. As a matter of practicality, they may be seen as a brief retreat from the system of majoritarian rule that is thought to be at the very heart of direct democracy. But as a matter of constitutionality, no court has ever deemed complex initiatives to be more or less suspect than any other democratic enactment instigated by the same processes. Nonetheless, the expertise of the electorate certainly does not extend so far as advocates of an unlimited power of initiative would suggest. By permitting the scope of an initiative to go unrestricted, states effectively circumvent not only the dictates of representative government but also the very purposes that this form of government was intended to serve.

2. Competing Initiatives

The inexperience—or, to use the term that comes most naturally, incompetence—of voters attempting to legislate at the polls is frequently manifested by the outcomes of initiative elections. In recent elections, the explosion in the number of initiated statutes and constitutional amendments presented to the electorate can partially be explained by

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79. *Id.* at 942.

80. *Id.* at 944.

81. *Id.* For an example of a bill that was invalidated on single-subject grounds, see *In re* House Bill No. 1353, 738 P.2d 371 (Colo. 1987) (per curiam). In that case, decided under Colorado's single-subject rule for legislative enactments, the Supreme Court of Colorado declared the invalidity of a bill that was forty-four pages long and contained forty-six sections. *Id.* at 372. Although the various sections were united by a desire to increase state revenues, they covered

> such disparate subjects as reduction of state contributions to various state employees' retirement funds, creation of a commission on information management in the department of administration, imposition of a charge against accounts of inmates of the department of corrections for each medical visit, imposition or increase of fees to be charged by various state agencies, addition of a surcharge to be imposed on insurance carriers based upon worker's compensation insurance premiums received, transfer of certain state severance tax moneys to the general fund, extension of the termination date of the joint review process with respect to permits and licenses relating to the development of natural resources, direction to the state personnel director to use salary and fringe benefit surveys conducted by nonstate agencies to determine comparable rates concerning employees in the state personnel system, revision of the statutory formula for medicaid reimbursements to nursing homes, provision for forfeiture of abandoned intangible property held by banking and financial organizations and for crediting the proceeds to the state, and elimination of state aid for instructional television.

Id. at 372–73. *But cf.* Parrish v. Lamm, 758 P.2d 1356 (Colo. 1988) (upholding a health care bill that pertained both to certain health insurance abuses committed by health care providers and to the advertisement of these practices).

an increasing resort to alternative or competing initiatives—multiple initiatives on the same ballot that address the same issue and are often in direct conflict with one another.[82] While these conflicting initiatives may appear as though they simply increase voter choice, in actuality they amplify voter confusion, offer unique opportunities for moneyed interests to deceive voters, and present difficult interpretive dilemmas for judicial officers.

Of the seventeen measures presented to the voters of California in the 1990 general election, at least eight were so-called alternative initiatives.[83] That state's 1988 general election ballot contained four competing initiatives that would reform automobile insurance rates to different degrees.[84] The 1992 general election ballot in Colorado contained four different constitutional amendments "address[ing] gambling in different areas in the state."[85] But the occasionally perverse results of conflicting initiatives reached a crescendo in the aftermath of the California primary election in June of 1988.

In *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*,[86] the Supreme Court of California addressed two competing initiatives concerning campaign finance reform, both of which were *passed* by the electorate. Under California state law, when a conflict between two measures passed at the same election occurs, the conflicting provisions "of the measure receiving the highest

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82. K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1186 (1995).

83. *See id.* at 1189–91 & n.48. In the most startling example of initiative warfare, environmentalists first introduced "Big Green," a comprehensive measure that would "curtail the felling of ancient forests, halt the spraying of dangerous pesticides and restrict offshore oil drilling." *Id.* at 1190 (quoting Jorge Casuso, *California Gets Dizzy from Initiative Fever*, CHI. TRIB., Sept. 30, 1990, at C1). Because this measure was not radical enough for some "anti-logging militants," Proposition 130 was introduced as an even more stringent restriction on deforestation. *Id.* at 1190 & n.36. Fearing that simply mounting an opposition to the environmentalist measures would he insufficient, the timber industry countered with Proposition 138, "a more moderate regulation of timber harvesting." *Id.* at 1190. In response to Big Green's restrictions on pesticide use, farm groups and chemical manufacturers successfully introduced Proposition 135, which would control pesticide use but require less stringent regulations than its alternative. *Id.* (noting that in the 1986 election cycle these same groups had simply opposed a pesticide initiative but "were clobbered").

On the same ballot, several California groups introduced a statute that would impose an additional tax on alcoholic beverages. *Id.* (referencing Proposition 134). The alcohol industry then helped fund Proposition 136, a measure that Justice Mosk of the Supreme Court of California would refer to as a "Trojan horse." *See* Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220, 1246 n.1 (Cal. 1990) (Mosk, J., concurring in part and dissenting in part). According to Professor DuVivier, Proposition 136 operated "[u]nder the guise of a taxpayer's right to vote on new taxes," but the measure contained a provision that could have completely invalidated Big Green, Proposition 134, *and* two crime control measures. DuVivier, *supra* note 82, at 1191.

Interestingly, not one of the measures addressing the environment or taxation passed in the 1990 election cycle. *Id.* The ballot also contained two initiatives concerning term limits for elected officials. *Id.* at 1191 n.48 (referencing Proposition 140 and Proposition 131). Proposition 140 did pass. *Id.*

84. *Id.* at 1191.

85. *Id.* at 1191–92.

86. 799 P.2d 1220 (Cal. 1990).

affirmative vote shall prevail."[87] The court first held the two propositions to be in irreconcilable conflict.[88] Then, in consonance with the state constitution, the court decreed that only the conflicting provisions of Proposition 73, which was passed by a greater margin than its alternative, would be deemed operative.[89] However, in the months preceding the state court's decision in *Taxpayers to Limit Campaign Spending*, the United States District Court for the Eastern District of California invalidated Proposition 73 as violative of political candidates' First Amendment rights.[90] Thus, despite the passage by the electorate of two separate—albeit conflicting—propositions pertaining to campaign finance reform, the legal intricacies surrounding alternative initiatives had the ironic, and blatantly anti-majoritarian, effect of leading to the invalidation of *both* measures.

3. Judicial Interpretation of Initiative Legislation

Multiple commentators have asserted that statutes and constitutional amendments passed through the advent of direct democracy pose interpretive dilemmas that are simply not present in traditional legislative enactments.[91] While these potential problems with the interpretation of so-called plebiscites—problems based largely on the inability of courts to properly determine "popular intent"—are no doubt interesting, they deserve only brief mention as their relevance to this Note is strictly academic.

IV. THE RIGHTS OF POLITICAL PARTIES

The broad legal and pragmatic difficulties of direct democracy notwithstanding, this Note confines itself to the following assertion: with the Supreme Court having established the non-justiciability of most claims under the Guaranty Clause, there is something unique about a state's decision to alter the structure of its primary elections that renders the initiative system especially problematic.[92] To no small extent, the distinctiveness of this assertion is contingent upon the fact that primary elections have traditionally been considered a party affair. As such, the constitutionally guaranteed

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87. CAL. CONST. art. II, § 10(b). Eleven of the initiative states maintain constitutionally enacted procedures for resolving conflicts if competing measures are passed at the same election. *See* DuVivier, *supra* note 82, at 1212 n.184. Three additional states maintain similar statutory procedures. *See id.*

88. *Taxpayers to Limit Campaign Spending*, 799 P.2d at 1226. The court explained: "Both the differences [in the details of the measures], and the manner in which the two propositions were drafted and presented to the voters, clearly indicated that they were offered as alternative regulatory schemes." *Id.* As further evidence, the court cited the manner in which both measures would add different provisions to the same chapter and title of the state code and the manner in which the ballot arguments alerted voters to the presence of the two propositions as alternatives. *Id.*

89. *Id.* at 1236–37. With 99% of the precincts reporting, 58% of the electorate approved Proposition 73; only 53% approved its alternative, Proposition 68. *Id.* at 1230 n.7.

90. *See* Serv. Employees Int'l Union v. Fair Political Practices Comm'n, 747 F. Supp. 580 (E.D. Cal. 1990), *aff'd*, 955 F.2d 1312 (9th Cir. 1992).

91. *See, e.g.*, Charlow, *supra* note 23; Eule, *supra* note 22; Schacter, *supra* note 21.

92. *See also infra* Part V.

rights of political parties are critical to any analysis of the manner in which primary elections are held.

A. Background on Political Parties

A thorough examination of the United States Constitution will manifest no provision either requiring or explicitly permitting the formation of political parties. Indeed, prior to the establishment of a national government, James Madison raged against the "dangerous vice" of factionalism.[93] Madison believed that factions—which he defined as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion . . . adverse to the rights of other citizens," a definition that would most certainly include political parties—introduced "instability, injustice and confusion" into democratic governance.[94] This desire to prevent factionalism from taking root in American society was echoed a decade later by President Washington in his farewell address.[95]

Nonetheless, it was during the debates over the enactment of the fledgling Constitution that a primitive party structure could first be observed in American politics: those who framed the debate were conveniently labeled "Federalists" and "Anti-Federalists," with their opinion of the Constitution itself being the determinative factor.[96] After George Washington's presidency, deep divisions in the American conscience—over issues as diverse as foreign relations and the formation of a national bank—served as the building blocks for the institutionalization of a party system.[97]

This growth in the power of political parties, however, was limited almost entirely to the actual party leadership; candidates for public office were chosen not by the citizenry (or even the party rank-and-file) through primary elections, but by party leaders through caucuses and conventions.[98] During the Progressive Movement at the end of the nineteenth century, the same populist rhetoric that led to the radical invention of direct democracy also led to the popularization of partisan primary

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93. THE FEDERALIST NO. 10 (James Madison), *supra* note 29, at 43.

94. *Id.* at 107 (referring to these vices as "the mortal diseases under which popular governments have everywhere perished").

95. Sean M. Ramalcy, Comment, *Is the Bell Tolling: Will the Death of the Partisan Blanket Primary Signal the End for Open Primary Elections?*, 63 U. PITT. L. REV. 217, 220 & n.24 (2001). In his farewell address, President Washington argued that "[t]he alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissention, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism." *Id.* at 220 n.24.

96. *Id.* at 220.

97. *See* THE MAKING OF THE AMERICAN PARTY SYSTEM 1789 TO 1809, at 28 (Noble E. Cunningham, Jr. ed., 1965). One commentator has suggested that the presidential election of 1824, in which John Quincy Adams was elected by the House of Representatives after no candidate successfully garnered a majority of electoral votes, bolstered the strength of national parties because the controversial nature of the election led to a "four-year, grass-roots campaign" by Andrew Jackson and his populist followers. *See* Ramaley, *supra* note 95, at 221 & n.29 (quoting from ALICE DEGANTON SCHRANK, POLITICAL PARTIES: PROMISE AND PERFORMANCE 11 (1975)).

98. *See id.* at 221–22.

elections.[99] In 1904, Wisconsin became the first state to adopt a mandatory primary election, and over the course of the next twelve years most states implemented similar electoral mechanisms.[100]

While the right of states to enact legislation requiring partisan primaries has never been seriously questioned, the courts have consistently invalidated legislation deemed violative of other constitutionally guaranteed rights of political parties. Most importantly, the courts—frequently in the guise of the U.S. Supreme Court—have recognized, to one extent or another, an extensive right of free association enjoyed by parties.[101]

B. Political Parties' Right of Free Association Before California Democratic Party v. Jones

In recent decades, a theory of the First Amendment concerned primarily "with identifying and protecting private expression against governmental regulatory excesses" has become entrenched in American jurisprudence.[102] Thus, any First Amendment inquiry into party activity utilizes a relatively rudimentary balancing test: a regulation's infringement upon private rights of association and expression is balanced against the necessity of the governmental regulation affecting these rights.[103] In that vein, the Supreme Court has consistently and dogmatically held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[104]

While the First Amendment does protect the right of citizens to associate and form political parties for the advancement of common political ideals,[105] states may

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99. *See id.*

100. *Id.* Most, but not all, of the systems of primary elections developed by states were also mandatory. *See id.*

101. *See* Lucas Carscadden, Trevor Creel, Brendhan Flynn, Liane Groth, Richie Kosmala, Karen Levy, Jason Morris & Gavin Rose, The American Electoral System: Governability and Representativeness 5–8 (Fall 2004) (unpublished essay, Indiana University) (on file with author). Carscadden and his co-authors focus on the right of political parties to control internal party affairs, noting implicitly that this right is contingent upon parties' associational freedom and arguing that "[p]arties, like individuals, possess First Amendment rights of association that are implicated when an outsider to the party attempts to dictate who may participate in party activities." *Id.* at 6.

102. Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1951 (2003). Professor Magarian describes this new approach to the First Amendment as the "private rights theory," as opposed to the "public rights theory," which emphasizes the rights of the public to receive and disseminate information. *See id.* at 1972–73 ("[The First Amendment] was written to clear the way for thinking which serves the general welfare."); *see also* Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights when the Primary Election Process is Construed Along a Continuum*, 88 MINN. L. REV. 159, 169 & n.67 (2003).

103. Hancock, *supra* note 102, at 169.

104. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 31 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963).

105. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 615–16 (1996) ("A political party's independent expression not only reflects its members' views about the

nonetheless enact reasonable regulations of parties, elections, and ballots—largely for the purpose of reducing election and campaign-related disorder.[106] Thus, in *Burdick v. Takushi*, Hawaii's ban on write-in voting was upheld as a reasonable, politically neutral regulation.[107] While it imposed a slight burden on the right to vote, this burden was justified by Hawaii's interest in "avoid[ing] the possibility of unrestrained factionalism at the general electionwe"[108] and preventing "party raiding"—a process by which blocs of voters switch from one party to another in order to manipulate the other party's primary election.[109]

Similarly, in *Timmons v. Twin Cities Area New Party*,[110] in which the Court upheld Minnesota's ban on fusion tickets,[111] Chief Justice Rehnquist expounded a series of state interests capable of justifying a governmental infringement on the associational rights of its parties: the protection of "the integrity, fairness, and efficiency of . . . ballots and election processes"; the desire to prevent minor parties from capitalizing "on the popularity of another party's candidate"; and the maintenance of a stable political system that "may, in practice, favor the traditional two-party system."[112] From both a political and a legal standpoint, this last justification is especially noteworthy because of the Court's explicit acknowledgment of the state's limited right to prohibit certain minority voices—those of third parties and their members—from receiving an equal voice in American governance.[113]

More than a decade before *Timmons* was decided, the Court spoke directly to the party's right to determine who may vote in a primary election. In 1984, the Republican

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philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure."). Justice Breyer's opinion of the Court goes on to say that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Id.* at 616 (citing as an example Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989)); *see also* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981) (holding that "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions" and, therefore, that a party may freely elect to exclude those who refuse to associate with the party); Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (explicating that political parties and their adherents "enjoy a constitutionally protected right of political association").

106. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ."). Justice White quotes a 1974 decision of the Court: "'[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

107. *Id.* at 441–42.

108. *Id.* at 439 (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986)) (alteration in original).

109. *Id.*

110. 520 U.S. 351 (1997).

111. Minnesota's anti-fusion statutes prohibited a candidate from appearing on the ballot as the candidate for more than one party. Hancock, *supra* note 101, at 170 & n.72.

112. *Timmons*, 520 U.S. at 364–67.

113. *See* Carscadden, et al., *supra* note 100, at 8 ("[M]uch leeway is given to political parties, *especially the two major parties*, as groups themselves worthy of representation on a grander scale.") (emphasis added).

Party of Connecticut adopted a rule that allowed independent voters to vote in Republican primary elections for state and federal offiee.[114] Permitting the inclusion of independent voters in the partisan primary, it was believed, would "broaden the base of public participation in and support for its activities," likely leading to the nomination of candidates capable of proving victorious at the general election.[115] However, this party rule was in direct violation of a provision of Connecticut's election code that required voters in a partisan primary to be registered members of that party.[116] After weighing the associational rights of the party against the state's interest in regulating elections, the Supreme Court upheld the district court's conclusion that "[a]ny effort by the state to substitute its judgment for that of the party on . . . the question of who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process . . . substantially impinges on First Amendment rights."[117] Appearing to apply strict scrutiny in its analysis of the Connecticut statute, the Court found itself unable to identify any compelling state interest that would justify the requirement that all participants in a party's primary election be registered members of that political party.[118]

In retreating from the overtly political nature of the case, Justice Marshall noted that it was not the role of the judicial department to determine whether the state legislature acted wisely in precluding independent voters from participating in primary elections, nor was it the role of the judicial department to determine whether the Republican Party acted wisely in departing from this practice.[119] Rather, a politically neutral analysis of the rights of both parties to the suit led the Court to once again articulate an expansive right of free association to be enjoyed by political parties.

C. Associational Rights and the Modern Open Primary: California Democratic Party v. Jones

In 1996, the electorate of California passed Proposition 198 by direct initiative.[120] Supported by an overwhelming majority of the populace, Proposition 198 effectively ended the closed primary system previously employed by California—in which only registered members of a political party were eligible to vote in that party's primary

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114. Tashjian v. Republican Party, 479 U.S. 208, 210 (1986) (5–4 decision).

115. *Id.* at 214.

116. *Id.* at 210–11. In pertinent part, the statute provided that "[n]o person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party." *Id.* at 211 n.1.

117. *Id.* at 213 (quoting Tashjian v. Republican Party, 599 F. Supp. 1228, 1238 (D. Conn. 1984), *aff'd*, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 479 U.S. 208 (1986)) (alteration in original) (omissions in original).

118. John R. Labbé, Comment, *Louisiana's Blanket Primary After* California Democratic Party v. Jones, 96 NW. U. L. REV. 721, 733 (2002). The Court rejected four proposed state interests: limiting the administrative burdens presented by the inclusion of independent voters in partisan primaries, preventing party raiding, avoiding voter confusion, and protecting the integrity of the two-party system and the responsibility of party government. *See Tashjian*, 479 U.S. at 217–25.

119. *Tashjian*, 479 U.S. at 223.

120. Labbé, *supra* note 118, at 734.

election—in favor of a blanket primary system of nominee selection.[121] Under this system, "all persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate's political affiliation."[122] The candidate of each party "who receives the highest number of votes at a primary election" then becomes the nominee of that party at the ensuing general election.[123]

After the passage of Proposition 198, four of the state's recognized political parties—the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party—brought suit in the United States District Court for the Eastern District of California, alleging primarily that the blanket primary system recently adopted by the voters interfered with the parties' constitutionally guaranteed freedom of association.[124] Although the district court concluded that the blanket primary "imposes a significant but not severe burden" on the associational rights of parties,[125] a decision that was affirmed and adopted verbatim by the Ninth Circuit Court of Appeals, the Supreme Court was not willing to similarly constrict the rights of political parties.[126]

In finding that the system of primary elections put into effect by Proposition 198 violated the First Amendment principles established by such cases as *La Follette* and *Tashjian*, Justice Scalia's majority opinion declared that "Proposition 198 forces political parties to associate with . . . those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."[127] The Court reiterated the somewhat obvious conclusion that "a corollary of the right to associate is the right not to associate"[128] and, in keeping with its jurisprudential tradition, balanced the parties' associational rights against the asserted state interests in regulating primary elections in this manner.[129] Ultimately, the Court found the provisions of Proposition

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121. *Id.* at 734–35.

122. CAL. ELEC. CODE § 2001 (West 1996) (repealed 2000).

123. CAL. ELEC. CODE § 15451 (West 2003).

124. *See* Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1293–94 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000).

125. *Id.* at 1300–01.

126. *See* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

127. *Id.* at 577. The Court proceeded to distinguish California's blanket primary from both the closed primary, implemented by California prior to 1996, and the open primary, implemented by numerous other states. *Id.* at 577 & n.8. Regarding the closed primary system, Justice Scalia noted that "even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'cross over,' at least he must formally *become a member of the party* . . . ." *Id.* at 577 (emphasis in original). Proving less willing to distinguish the blanket primary from an open primary system, Justice Scalia quoted at length from Justice Powell's dissenting opinion in *La Follette* before concluding that "[t]his case does not require us to determine the constitutionality of open primaries." *Id.* at 577 n.8.

128. *Id.* at 574.

129. *See id.* at 572–86. After analyzing the blanket primary's infringement on party autonomy, the Court systematically rejected seven proposed state interests as insufficient to justify the implementation of a blanket primary system: (1) producing elected officials who better represent the electorate, (2) affording voters more choice, (3) providing an effective vote to disenfranchised voters, (4) increasing voter participation, (5) expanding debate, (6) protecting voter privacy, and (7) promoting fairness. *See id.* at 582–86. For a detailed version of these

198 too burdensome on the parties' associational freedom to constitute appropriate state regulation.[130]

Despite this ruling, the Court did articulate several areas related to the electoral system in which the First Amendment rights of political parties do not trump the state's regulatory interests. It is, for example, "too plain for argument" that a state may require parties to conduct primary elections in order to select their nominees.[131] Similarly, states may impose barriers to the ballot access of parties that lack "a significant modicum of support."[132] However, the processes through which political parties select their nominees, despite the likely effect of these processes on the social and institutional framework of society, are not wholly public affairs subject to free and intensive state regulation.[133]

The invalidation of California's partisan blanket primary notwithstanding, the Court manifested the likely constitutionality of a *nonpartisan* blanket primary. Justice Scalia detailed the contours of such a system:

> [U]nder [the nonpartisan blanket primary], the State determines what qualifications it requires for a candidate to have a place on the primary ballot.... Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: *Primary voters are not choosing a party's nominee.*[134]

Thus, the Court carved out an exception to its holding in *Jones* that appeared to render constitutional the primary system maintained by the State of Louisiana for the past three decades.[135]

The primary system in *Jones* was deemed unconstitutional because of the manner in which it would operate, not because of the manner in which it was chosen. Thus, while the Court did find relevant the fact that—nnder the provisions of Proposition 198—unregistered primary voters would have the power to elect a party's nominee, no

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arguments, see Brief for Respondents at 39–47, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (No. 99-401).

130. *Jones*, 530 U.S. at 581–82 ("Proposition 198 forces petitioners to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome . . . of changing the parties' message. We can think of no heavier burden on a political party's associational freedom.").

131. *Id.* at 572 (quoting Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974)).

132. *Id.*

133. *Id.* at 572–73. Justice Stevens, writing in dissent, argued that "an election, unlike a convention or caucus, is a *public* affair." *Id.* at 595 (Stevens, J., dissenting) (emphasis added). *See also id.* at 595 n.5. The majority concedes the public nature of an election, but argues that "when an election determines a party's nominee it is a party affair as well, and . . . the constitutional rights of those composing the party cannot be disrcgarded." *Id.* at 573 n.4.

134. *Id.* at 585–86 (emphasis added).

135. *See* Ramaley, *supra* note 95, at 230. For an argument that Louisiana's blanket primary is distinguishable from the system endorsed by the *Jones* Court, see Labbé, *supra* note 118, at 748–50 (suggesting that, despite the brief discussion in *Jones*, Louisiana's primary system "is not clearly constitutional").

special relevance was attached to the fact that the legislation mandating a partisan blanket primary was passed through direct initiative.

V. CONSTITUTIONAL PROBLEMS WITH THE SELECTION OF A SYSTEM OF PRIMARY ELECTIONS THROUGH DIRECT DEMOCRACY

This Note focuses on the interplay between two relatively recent electoral innovations. Although the United States Supreme Court has addressed, to one degree or another, the legality of various manifestations of each system—the system of initiative and referendum that has come to occupy the political mentality of numerous states, and the system of primary elections that has become vital to the nominating process itself—the courts have never addressed the specific interaction between these two systems as a question worthy of separate constitutional consideration. The remainder of this Note addresses the following contention: *assuming* that the initiative process is not directly judiciable, and *assuming* that a state's system of primary elections is not itself unconstitutional, there is something uniquely problematic about the utilization of the direct initiative in order to effect a change in the structure of a state's primary elections.

In proceeding, it is important to distinguish between normative arguments, which generally concentrate themselves on the wisdom of a given electoral system, and legal arguments, which focus instead on the constitutional ramifications present in the system itself. While the difference is occasionally subtle—and the ensuing analysis likely one of degree—the focus of this Note is on the actual *legality* of selecting a system of primary elections through the advent of direct democracy.

As of 2001, thirteen states and the District of Columbia employed a traditional closed primary system.[136] Thirteen additional states employed a modified version of the closed primary system in which unaffiliated citizens are permitted to vote.[137] Of the remainder, twenty states employed one version or another of the open primary system, and four utilized a blanket primary to determine which candidates advance to the general election.[138]

After the Supreme Court's decision in *Jones* invalidated California's blanket primary, the voters of that state sent to the ballot an initiative modeled after the Louisiana nonpartisan blanket primary that was specifically exempted from constitutional nullification by the *Jones* Court.[139] While California does not present the only occasions in which primary systems were determined by the electorate as a whole,[140] this Note focuses on the specific initiatives of California as a telling example

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136. Ramaley, *supra* note 95, at 219.

137. *Id.*

138. *Id.* The four states employing a blanket primary were Alaska, California, Louisiana, and Washington, although California's primary was deemed unconstitutional in *Jones*, and Alaska, which possessed a similar primary scheme, was subsequently forced to abandon its electoral system. *See* Labbé, *supra* note 118, at 741–42.

139. *See* CAL. SEC'Y OF STATE, VOTER CHOICE OPEN PRIMARY ACT, CALIFORNIA PROPOSITION 62 (2004).

140. *See, e.g.*, INITIATIVE & REFERENDUM INST., 1998 ELECTION POST-ELECTION REPORT, tbl.2.2.1998 (Sept. 2, 2002), *available at* http://iandrinstitute.org (under "IRI Reports" choose "1998 General Election") (indicating that in 1998 Arizona passed Proposition 103, which

for two reasons. First, California has resorted to the initiative system to alter its electoral scheme repeatedly, and the presence of an active advocacy system in the state increases the likelihood that similar future initiatives will be submitted to the electorate. Second, the most recent initiative intended to alter the state's electoral system would have done so in such a way that appears to pass First Amendment muster, and thus presents an opportunity to study a primary election proposition that would most likely not be invalidated on grounds independent of the manner in which it was chosen.

This section presents three separate reasons that the legality of an initiative altering the structure of a state's primary elections should be severely questioned. First, the size and substance of political parties is such that parties should be deemed a minority culture in American society, and their rights should therefore be protected against blatant majoritarianism in the tradition of *Hunter v. Erickson*. Second, the pure complexity of legislation dealing with the intricacies of a state's electoral infrastructure suggests that such legislation should not be relegated to popular rule. And third, permitting independent voters and members of other parties a voice in determining the shape of a party's primary elections effectively—and unconstitutionally—grants the electorate as a whole the power to establish the extent of political parties' associational freedoms. Implicit in each of these arguments is the desire to infect American lawmaking with what Justice Hans Linde referred to as "standards of representative deliberation."[141]

A. Political Parties, Primary Elections, and Majoritarianism

In February of 1995, more than a year before the passage of Proposition 198, slightly more than eighty-six percent of registered voters in California were members of one of the two major political parties.[142] By 2003, the proportion of registered members of the major political parties had dropped to 78.6%.[143] Over the same time period, the percentage of registered voters unaffiliated with any party rose by more than five percent.[144] Indeed, the *Jones* Court noted that the total number of votes cast for candidates in the first primary elections after the implementation of California's blanket primary system was, in some races, "more than *double* the total number of

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allowed "any registered voter in the state to vote in a partisan primary election"). In 2003, the Ninth Circuit Court of Appeals invalidated Arizona's open primary law as violative of political parties' First Amendment rights of association. *See* Ariz. Libertarian Party v. Bayless, 351 F.3d 1277 (9th Cir. 2003).

141. *See* Linde, *supra* note 32, at 724.

142. CAL. SEC'Y OF STATE, STATE PROPOSITIONS ON THE MARCH 1996 BALLOT: PROPOSITION 198 (1996), *available at* http://www.sen.ca.gov/sor/REPORTS/REPORTS_BY_YEAR/1996/PROP198.TXT. Forty-nine percent of Californians were members of the Democratic Party, thirty-seven percent were members of the Republican Party, and smaller proportions belonged to the American Independent Party, the Green Party, the Libertarian Party, and the Peace and Freedom Party. *Id.* Over ten percent of registered voters refused to register with any political party. *Id.*

143. *See* CAL. SEC'Y OF STATE, REPORT OF REGISTRATION: HISTORICAL REGISTRATION STATISTICS 2 (Feb. 10, 2003), *available at* http://www.ss.ca.gov/elections/ror/regstats_02-10-03.pdf#search='california%20political%20party%20registration.

144. *See id.*

registered party members."[145] In *no* election over the past decade and a half has the proportion of voters registered with any one political party constituted a majority of California's electorate.[146]

The fact that the majoritarian determination of a state's system of primary elections necessarily affects associations comprised of a minority of the electorate should not go unnoticed, for this tradition of permitting a democratic majority to establish the scope of minority rights was the precise practice condemned by the Supreme Court in *Hunter v. Erickson*.[147] An astute critic will readily observe that *Hunter* involved the barriers to racial equality that the Court's Fourteenth Amendment jurisprudence has long since considered especially heinous, but the Court's pronouncement was given greater breadth by its subsequent decision in *Romer v. Evans*.[148] The *Romer* Court, although somewhat tacitly, applied the *Hunter* doctrine to majoritarian legislation limiting the rights of homosexuals, a group that has not received the same historical protections as have racial minoritics.

In addition to comprising a minority of the electorate, racial minorities and homosexuals also gcnerally comprise a minority of the state's legislative body. This marginalization does not exist in the case of political parties. Despite the fact that more than twenty percent of California's voters no longer identify with either major political party, the state assembly consists exclusively of Democrats and Republicans.[149] Consequently, legislation affecting a party's electoral scheme that is passed through traditional republican methods—as opposed to legislation passed through the devices of direct democracy—likely does not present the same majoritarian concerns as does legislation affecting other minority groups. Regulatory schemes passed by the state legislature, therefore, are usually enacted with the advice and consent of the parties themselves. In this manner, political parties generally possess the power to dictate the parameters of their own electoral institutions. When the Louisiana state legislature adopted the nonpartisan blanket primary system in 1975, for example, it did so with the acquiescence of the state's political parties.[150]

One commentator, in arguing for a hard judicial look at some laws passed by initiative, claimed that "direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest."[151] The proper method of compensating for these "process defects" is not, like some suggest,[152] an increased resort to the initiative; rather, Professor Eule of the University of California

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145. Cal. Democratic Party v. Jones, 530 U.S. 567, 578 (2000) (emphasis in original).

146. *See* CAL. PROP. 198, at 2.

147. *See supra* notes 55–61 and accompanying text.

148. *See supra* notes 61–68 and accompanying text.

149. *See* CAL. STATE ASSEMBLY, ASSEMBLY MEMBER LISTING, http://www.assembly.ca.gov/acs/acsframeset7text.htm (last visited Oct. 25, 2005).

150. Labbé, *supra* note 118, at 743, 746. As a result of the parties' acquiescence, Louisiana's blanket primary has never been challenged on the grounds that the system violates political parties' First Amendment rights of free association. *Id.* at 745–46.

151. Eule, *supra* note 22, at 1549.

152. *See, e.g.*, Richard L. Hasen, *Parties Take the Initiative (And Vice Versa)*, 100 COLUM. L. REV. 731, 746 (2000) ("The parties' ultimate success in the area of party regulation . . . depends upon taking their case to the people.").

at Los Angeles suggests that the judiciary itself must "serve as the first line of defense for minority interests."[153] The government, says Eule,

> has an obligation to all of its citizens; the rights of individuals and minority groups must be protected against the actions of the majority. The Constitution seeks to enforce this obligation 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.[154]

The relevant question in determining whether a specific issue is fit for the process of popular decision making is *not* whether an issue is capable of garnering sufficient public support to pass at the ballot-box; rather, the relevant question is "whether a system of deliberative, checked-and-balanced representative government lessens the probability that minority interests will be neglected, undervalued, or invaded."[155] The legislative process, despite its occasional shortcomings, affords minority groups—especially, for obvious reasons, the political parties—a role that they lack in a system of direct democracy.

By acknowledging the minority role that political parties have come to play in the otherwise majoritarian system of contemporary America, any student versed in the intricacies of electoral law should be able to reach the conclusion that regulating parties through direct democracy is, at least, constitutionally problematic. At most, the system, unquestionably violative of the principles of representative deliberation, is downright unconstitutional.

B. Political Parties, Primary Elections, and Complexity of Legislation

Most of the legal bases for insisting that legislators—either members of the legislative body or, in the case of direct democracy, the electorate—exhibit a minimum level of institutional competence are embodied in state statutory enactments. The single-subject rules implemented by some states, for example, have restricted the scope of proposed legislation in such a manner as to promote intelligible lawmaking.[156] Similarly, most states have enacted statutes limiting the participatory rights of specific members of the electorate in an otherwise democratic system.[157] Although electoral specifics are generally not the province of the federal government, the United States Constitution nonetheless designates certain minimum qualifications that a person must meet before he or she is deemed competent to vote. The Twenty-Sixth Amendment does, after all, prohibit citizens less than eighteen years of age from attaining suffrage.

153. Eule, *supra* note 22, at 1549.

154. *Id.* at 1548–49.

155. *Id.* at 1550.

156. *See supra* Part III.B.1.

157. *See, e.g.*, ARIZ. CONST. art. 7, § 2(c) (prohibiting any citizen "adjudicated an incapacitated person" from voting); TEX. CONST. art. 6, § 1(a)(2) (prohibiting "persons who have been determined mentally incompetent by a court" from voting); CAL. ELEC. CODE § 2101 (West 2003) (prohibiting citizens "in prison or on parole for the conviction of a felony" from voting).

Thus, despite the guarantee of the Founders that "all men are created equal" and "endowed by their Creator with certain unalienable Rights,"[158] a provision designed to ensure that citizens possess rudimentary competence before participating in the democratic system is at least somewhat ingrained in the Constitution.

It is the contention of this Note that the complexities involved in selecting a system of primary elections are far too numerous and far too sizable for the electorate to be considered sufficiently competent to tackle the issue. Proposition 62, the nonpartisan blanket primary act that Californians sent to the ballot box in November of 2004, totaled fifty-six pages.[159] It contained ninety-five separate amendments to the state's elections code, amended one article of the state constitution, and would have formalized seven additional sections of legislative text.[160]

Proposition 62 was joined on the ballot by Proposition 60, a far simpler initiative intended simply to reiterate a portion of the electoral system already in effect that guaranteed a place on the general election ballot to the candidate of each party who received the greatest number of votes at the primary election.[161] Neither initiative, either by its own language or by the language of the legislative analysis provided to voters, manifested the contradictory nature of the two proposals. *If* the electorate had passed both initiatives, then a provision of California's state constitution would have given effect only to the initiative with the highest number of affirmative votes.[162] However, the fact that only one of these initiatives passed presents its own intellectual difficulties.

On November 2, 2004, Proposition 60 garnered 67.3% of the public's approval.[163] By comparison, Proposition 62 was only able to garner 45.7% of the vote.[164] Curious for the purposes of this section, however, is *not* the proportion of the electorate that supported either proposition; rather, the most profound observation that can be drawn from the election results is that thirteen percent of the electorate apparently supported *both* initiatives.[165] How can it be said that a system of legislating meets Justice Linde's "standards of representative deliberation" when sincere deliberation would surely have

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158. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

159. *See* CAL. SEC'Y OF STATE, VOTER CHOICE OPEN PRIMARY ACT, CALIFORNIA PROPOSITION 62 (2004).

160. *See id.*

161. *See* CAL. SEC'Y OF STATE, TEXT OF PROPOSED LAWS: PROPOSITION 60 (Nov. 2004).

162. *See* CAL. CONST. art. II, § 10(b).

163. CAL. INST. FOR FED. POLICY RESEARCH, SPECIAL REPORT: CALIFORNIA RESULTS FROM GENERAL ELECTION HELD ON NOVEMBER 2, 2004, at 6 (2004), *available at* http://www.calinst.org/pubs/vote2004.pdf.

164. *Id.*

165. Proposition 62 was opposed by 54.3% of California's electorate, a number thirteen percentage points below the 67.3% of the electorate that supported Proposition 60. *See id.* The fact that Proposition 60 was passed by a greater margin than that by which Proposition 62 was defeated indicates that a significant number of voters failed to acknowledge that the two initiatives were in diametric opposition. However, thirteen percent of the electorate, or slightly less than a million votes, is a proportion sufficiently large that it is unlikely to be adequately explained by any factor other than voter confusion. It is this thirteen percent of the electorate, at a minimum, that supported both the nonpartisan blanket primary and a system whereby the leading nominee of each politieal party is guaranteed a place on the general election ballot.

disclosed a rudimentary hostility between two statutory proposals that was not recognized by a *million* voters?

This Note does not pretend to achieve the level of vanity required to suggest that people do not have the constitutional right to be stupid. However, certain procedural protections against uninformed decision making—for example, laws that disenfranchise minors, felons, or the mentally incompetent—have become so ingrained in America's legal culture that the parallel between the common sense nature of these protections and the need to prevent those ill-equipped to deal with complex legislation from actually dealing with complex legislation is not frequently drawn. Nonetheless, the telling example presented by California's recent election suggests that that portion of society known somewhat ominously as "the people" may not be sufficiently adept at deciding certain issues, such as the proper structure of a state's primary system.

C. Political Parties, Primary Elections, and the Freedom of Association

In *Tashjian v. Republican Party of Connecticut*, the Supreme Court affirmed a political party's right to open its primary elections to independent voters.[166] A decade and a half later, the Court manifested the party's corresponding right to prevent non-members from participating in its primary elections.[167] In each of these cases—first in *Tashjian* and subsequently in *California Democratic Party v. Jones*—regulatory legislation affecting the rights of political parties was invalidated. The Court made it clear not only that political parties possess First Amendment rights of association, but also, despite the apparent public purpose of a state's elections, that these rights are implicated by the parties' selection of an electoral scheme. In determining whether a state regulation unnccessarily infringes upon the rights of the party, the Court has generally balanced the party's associational rights against the state's interests in regulating party activity.[168]

In the case of the nonpartisan blanket primary of California's Proposition 62, the state interests involved likely do not extend significantly further than the interests in increasing voter participation and in nominating candidates representative of the electorate that the Court found insufficient in *Jones*.[169] Nonetheless, while invalidating the blanket primary of Proposition 198, the *Jones* Court appeared to carve out an exception to its ruling for an electoral scheme similar to that of Proposition 62. But the voters' selection of an alternative system of primary elections—regardless of the constitutionality of the shape of that system—necessarily signals an end to the electoral system in place before reformation. In that manner, the party's associational freedoms are still jeopardized: whether the voters opt for a partisan or for a nonpartisan primary, they have forced their collective voice, and their collective will, into the internal operations of the political party.

If the right *not* to associate is a corollary of the right *to* associate, then surely a political party's interest in not having the state dictate which electoral scheme it must adopt should be considered interwoven with the party's interest in not having the state dictate which electoral scheme it must jettison. Had Proposition 62 been enacted, not

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166. *See* Tashjian v. Republican Part of Connecticut, 479 U.S. 208 (1986).
167. *See* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).
168. *See generally id.*
169. *See supra* note 129 and accompanying text.

only would it have infused the nonpartisan blanket primary into California politics, but it would have terminated the primary system favored by the state's political parties. The electorate—that ominous whole comprised of numerous partisan factions—would have effectively dictated the terms of primary elections to each party. Insofar as a majority of the electorate qualifies as a "non-member" of any individual political party, permitting the form of primary elections to be selected through the initiative process resembles the precise intrusion into private affairs that was condemned by the Supreme Court in both *Tashjian* and *Jones*. In essence, the state, through the electorate as a whole, has forced political parties to associate with "those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."[170]

Thus, despite the Court's—and the parties'—failure in *Jones* to address the fact that Proposition 198 had been passed through the processes of direct democracy, it should be clear that the *Jones-Tashjian* line of cases likely condemns the types of initiatives that Californians have become accustomed to seeing on the ballot. As a practical matter, however, the Court has given little indication—*Hunter v. Erickson* notwithstanding—that it is prepared to invalidate legislation passed by the citizenry as a whole simply *because* it was passed by the citizenry as a whole.

CONCLUSION

While both the processes of direct democracy and the rights of political parties have been studied at length at nearly every level of legal, intellectual, and political discourse, the interaction between these two populist innovations has scarcely been broached. To no small extent, this Note has ignored most issues of public policy on either side of the debate, opting instead to focus on the legal consequences inherent in using the initiative process to limit the scope of freedoms traditionally enjoyed by political parties. Any originalist interpretation of the Constitution, as it relates to this issue, is necessarily futile, for the Founders anticipated neither popularly enacted legislation nor the dominant role that political parties would come to play in our society. Consequently, the regulation of partisan activities has become subject to the Supreme Court's emerging First Amendment doctrine, the precise contours of which are, as of yet, not entirely clear.

This Note has argued that the regulation of political parties through the initiative process is constitutionally problematic, *whether or not* the state legislature could permissibly enact similar legislation. The Constitution guarantees to the people a republic, not a democracy—a government run by proxy, not a government run directly by the people. Ironically, it was the perceived corruption over a century ago of this representative government that led to the innovation of direct democracy in the first place, an innovation that appears to have since become a mainstay in American politics. At the same time as the popularity of direct democracy is steadily increasing, however, both the strength and the size of political parties are on the decline. Rapidly escalating numbers of independent and third-party voters have created an additional incentive for citizens to limit the power of those partisan organizations that once monopolized the political scene.

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170. *Jones*, 530 U.S. at 577.

Despite the somewhat romantic plea for an idealized version of democracy, the Supreme Court can—and should—prevent the continued exploitation of the initiative process to effect overtly majoritarian ends. Political parties, like direct democracy, are a mainstay in American culture, and their rights, as organizations both legally and morally worthy of protection, should extend somewhat further than our national jurisprudence has heretofore permitted.