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Liberty v. Elections: Minority Rights and the Failure of Direct Democracy

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I. Introduction

Lawyers are trained to have faith in process and rules.[1] They are trained in law school to believe in the adversarial process and that through trials and a fair play of the rules the truth will emerge and guilt, innocence, or liability will be correctly assessed.[2] Procedural justice is the hallmark of the American legal system.

Yet the rules of justice are not always neutral. The Innocence Project has demonstrated how often the criminal justice yields false positives, convicting individuals of crimes they did not commit only to have DNA or other evidence exonerate them, often years later.[3] Increasingly social science evidence demonstrates the unreliability of eyewitness identifications,[4] or that there is racial biases in the criminal justice system. This is demonstrated with statistics on racial profiling[5] and sentencing disparities.[6] Feminists have pointed to a persistent patriarchal bias in the American legal system that favors a male perspective,[7] and others note how "repeat players" generally make out better in the

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[1] *See*: Model Rule Pro. Conduct, Preamble, para. 5 (2012) (*describing* how attorneys should "demonstrate respect for the legal system").

[2] James J. Tomkovicz, an Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine, 22 U.C. Davis L. Rev. 1, 44-7 (1988).

[3] Jan Stiglitz, Justin Brooks, and Tara Shulman, The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education, 38 Cal. W. L. Rev. 413, 414-5 (2002).

[4] Deborah Davis and Elizabeth F. Loftus, The Dangers of Eyewitnesses for the Innocent: Learning from the past and Projecting into the Age of Social Media, 46 New Eng. L. Rev. 769, 784 (2012).

[5] MILT HEUMANN AND LANCE CASSAK, GOOD COP, BAD COP: PROFILING, RACE AND COMPETING VISIONS OF JUSTICE, New York: Peter Lang (2003).

[6] Jesse J. Norris, State Efforts to Reduce Racial Disparities in Criminal Justice: Empirical Analysis and Recommendations for Action, 47 Gonz. L. Rev. 493 (2011-12).

[7] Caroline A. Forell and Donna M. Matthews, A Law of Her Own: The Reasonable Woman as a Measure of Man, New York: NYU Press (2000); Catharine A. MacKinnon, Toward a Feminist

civil law system than do those who are "one shotters."[8]

These examples point to the fact that rule are outcome determinative and processes are not neutral. The rules justice are not neutral and the rules of the game determine how the game is played and influence who wins Or that the rules can be easily manipulated or constrained by background injustices that render fair or neutral application impossible. Procedural rules actually reflect substantive values. Rules reflect values, they reflect what is deem important. Similarly, the Constitution embodies substantive values. The original Constitution of 1787 reflected variety of values, some good, some bad. The commitments to limited government and opposition to tyranny of the majority federalism are found in the complex machinery of representation, checks, and balances, separation of powers, and federalism, all as tools to break up and limit political power. The Constitution also embodied some not so good values–such as slavery and the two-thirds compromise. John Hart Ely's *Democracy and Distrust*[9] describes the Constitution as generally process-oriented but it does embody one major substantive value–individual liberty or autonomy

The political process is not always neutral. There is an inner morality to the law and the political process,[10] and either following the rules of the game means that certain parties will be favored,[11] or certain background constraints will affect who wins or loses or how the game is played. The same is true when it comes to the rules of direct democracy. On November 6, 2012, voters in the State of Minnesota went to the polls to vote on two proposed amendments to the state constitution. One would have banned same-sex marriages in the state, despite the fact such relationships were already illegal in the state by statute and case law. The other measure would have mandated the display of a government-issued identification by individuals when voting in person. Advocates of these two amendments contended that votes on these two amendments was the essence of democracy–let the people decide. Despite the fact that the two amendments did lose, the vote on them demonstrated a truth–direct democracy such as this places minority rights at risk.

The Progressive Era reforms of initiative, referendum, and recall were adopted as a means to further democracy and break entrenched politics captured by interest groups. Ostensibly these reforms are politically neutral, yet it is not clear if these experiments in direct democracy have protected minority rights, let alone confined special interest politics. Majority rule and special interest politics can threaten individual rights, including those of people of color, the poor, and other

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Theory of the State, Cambridge: Harvard University Press (1991).

[8] Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc. Rev. 95 (1974).

[9] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, CAMBRIDGE: HARVARD UNIVERSITY PRESS (1980).

[10] LON L. FULLER, THE MORALITY OF LAW, New Haven: Yale University Press (1969).

[11] Archibald Cox, former Solicitor General for the United States, once privately commented to me that when it came to the issue of campaign finance reform that these rules were "the rules that determined the rules of the game which determined who won or lost elections." The same point applies here to the idea that rules are not always neutral but instead often are outcome determinative.

minority groups. The constitutional Founding Fathers understood this through their articulation of Madisonian democracy.

What this article will argue is that the Progressive Era experiment with direct democracy has failed, at least when it comes to the protection of minority rights. Direct democracy is fundamentally askew or in conflict with the fundamental insights of constitutional Framers who better understood what I will call the problem of politics.

Part one of this article outlines the problem of politics that the constitutional framers sought to address with the 1787 Constitution. It then describes the solutions offered with the original Constitution of 1787 and then with the addition of the Bill of Rights in 1791. Part one then describes the reasons and goals behind the Progressive direct democracy reforms of initiative, referendum, and recall. Part two then critiques the Progressive reforms, arguing that they are both inconsistent with the vision of Madisonian democracy but more importantly, they have largely failed when it comes to protecting minority rights and breaking the grip of special interests. While the conclusion of this article is not necessarily that the Progressive era reforms should be eliminated, but that at least when it comes to believing that they can be used to advance minority rights or the will of the people, that is often not the case.

I. The Logic of American Constitutionalism and Politics

A. Madisonian Democracy

The logic of American politics and constitutionalism is well described by political scientist Robert Dahl who said that the essence of Madisonian democracy resided in efforts to check majority faction or tyranny.[12] The concern is restraining the excesses of public opinion.

What is public opinion for James Madison and why is it a problem? In *Federalist* 47 and 49 Madison claims that "all government rests on opinion."[13] Public opinion is composed of the sentiments and passions of the majority of people organized together for particular purposes. Arguably the strength of republican government is that it rests upon public opinion, drawing its democratic impulse and authority from the consent of the government. This is the Lockean notion of the social contract, or later, as Abraham Lincoln would describe it in the Gettysburg Address, of the government "of the people, by the people, and for the people." The touchstone of a free society is the degree to which the will of the majority is generally respected. Yet, the weakness of republican government also rests upon public opinion. Alone, humans can be reasonable but not in crowds, at least this is the sentiment expressed in the *Federalist*. Crowds and the crowd sociology turns individual thoughts into restless sentiment and passion. Public opinion is both popular sentiment and popular sovereignty. The sentiment of public opinion is the ruler in a popular democracy yet this sentiment is not firm and stable but unstable, subject to frequent changes, and to fits of passion and excess. For Madison it is unwise for a government to make frequent appeals to

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[12] ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY, Chicago: University of Chicago Press, 4-34 (1965).

[13] James Madison , Federalist no. 49 , 327, 329, New York: Modern Library (1937).

popular sentiment and public opinion in order to decide political issues.[14] The reason for this is grounded in human nature.

In *Federalist* number 6 Hamilton states that: "[M]en are ambitious, vindictive, and rapacious."[15] Individuals are not always virtuous, but prone to self-interest, desire, and the passions. Yet these sentiments are not good for politics. Passion should not decide public issues. Instead, some mechanism is needed to calm or repress these passions and filter them out so that more rational and calm individuals can reach public choices. Madison further describes this view of human nature and the problem of the passions in both *Federalist* 10 and 51. In a popular government resting on opinion, passion will usually rule because men (and presumably women) will band together in groups that Madison called factions.

What is a faction for Madison and how do factions relate to speech and public opinion? According to Madison:

> By a faction, I understand a number of citizens, whether amounting to a majority of minority of the whole, who are united and actuated by some common impulse of passion, or interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[16]

Madison is saying four things about factions. One, people join factions because of some common interest or, two, because of some common passion. Three, factions can either be composed of a minority or a majority of the population. However, while Madison is concerned about both types of faction, his real concern is with majority factions because the regular votes of the majority and the weakness of the minority will prevent the latter from being a real threat to others. Finally, a faction is not defined as simply any band of people who share common impulses or interests. Their association must be destructive of the rights of others or of the interests of the entire community. The latter suggests that there is an identifiable commonweal that can be known and should be defended.[17] Individuals banding together, can do great things and pursue the public good, but they can also let their passions and interests run wild, thereby threatening the rights of others and the public good.

Individuals have a propensity to band together for common base interests and desires and this pursuit of desires can constrain or distort the rights of others including the community. This banding together in factions need not simply be equated with the hope of acquiring objects of desire. These factions can include men banding together pursuing similar opinions destructive to the republic. Factions can also be viewed as groups of individuals pursuing opinions and views that would oppress

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[14] James Madison , Federalist no. 49 , 327, 329, New York: Modern Library (1937).

[15] Alexander Hamilton, Federalist no. 6 , 327, 27, New York: Modern Library (1937).

[16] James Madison , Federalist no. 10 , 53, 54, New York: Modern Library (1937).

[17] RUSSELL HANSON, THE DEMOCRATIC IMAGINATION IN AMERICA: CONVERSATIONS WITH OUR PAST, 69, Princeton: Princeton University Press (1985).

minorities. Public opinion, especially the opinions of a large majority, can often be oppressive and operate to the destruction of the rational deliberation of public issues.

While the latent causes of faction are in the nature of men (Madison's choice of words), factions can be traced to the diversity in the faculties of men and in the differences in the rights to property that arise out of those different faculties.[18] For Madison, differences in property distributions are the most "common and durable" source of factions.[19] Inequalities, differences in occupations, and differences in talents all nourish factions. Yet to remove these sources of faction would not only be impossible but injurious to liberty.[20] The solution is not the classical republican technique of rendering the citizenry homogeneous in terms of similar tastes, interests, and beliefs. Such a task would be impossible, or at least a threat to individual liberty. The genius of American politics may be in encouraging diversity so that it controls the power of factions.

How are factions to be checked? As mentioned before, minority factions can be handled through the normal constraints of voting and by the majority.[21] Madison seemed to believe that the power of majority rule would be enough to control the threat that minorities pose. One can disagree with this claim, especially today in light of the power that well-financed and organized special interest groups or political action committees (PACs) yield. But for Madison, at least in 1787, he thought that the political process, through regular elections and majority rule, would take care of this problem. The real issue is how to prevent majoritarian opinions and factions from dominating.

According to Madison in *Federalist* 10, there are three competing goals that political society needs to address. First, there is the imperative to preserve a republican form of government. This is a government premised at least in part upon majority rule. A second goal is the protection of individual liberty. The third is to limit the threat of factions to both republican government and individual liberty.

Factions, if they are composed simply of a numeric minority of the population, can be handled by majority rule and elections. That is, the majority can out vote them. The real problem though is what to do with majority factions. Madison contends that one cannot eliminate the causes of faction because they are rooted in human nature. The issue is how to control their effects. Here is where Madison thus turns to a critical passage in *Federalist* 10 that summarizes the political or sociological dilemma the proposed constitution was meant to address.

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables

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[18] Federalist no. 10 at 55.

[19] Federalist no. 10 at 56.

[20] Federalist no. 10 at 56-7.

[21] *Id.* at 57.

> it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.[22]

The issue then is how to preserve individual liberty and republican government from the threats of majority faction. This is the core problem of politics that Madison, the *Federalist Papers*, and the constitutional framers sought to address. Phrased otherwise, the problem of politics, as Alexis DeTocqueville would later ask, is how can the American republic deal with the threats of the tyranny of the majority?[23] Another way of stating it: How to balance majority rule with minority rights? [24] How does one allow for majority opinion to rule, as it should in a popular government, but not let it become destructive, acting impulsively or rashly when threatened?

The Madisonian or constitutional solution to majority factions originally was a political one, residing in the creation of a complex machinery that involved an extended republic with representation, a bicameral legislature, checks and balances, separation of powers, and federalism. All of these mechanisms were set up in an effort to break up political power and slow down political change.

But even with all of these mechanisms built in to the Constitution, some did not seen them as sufficient to protect individual rights from a tyrannical national government. The Anti-Federalists opposed the new constitution for many reasons, with the most important objection being that they feared that the new government would be too powerful and that it would threaten individual rights.[25] Among their major criticisms of the new constitution was that it lacked a bill of rights.

In responding to these criticisms Hamilton and Madison made several arguments that a bill of rights was unnecessary. In *Federalist* 84 Hamilton dismissed the need for a bill of rights, arguing to include one would be to assert that the national government had some powers that it did not.[26] Hamilton's arguments were unsuccessful. Many state legislatures

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[22] *Id.* at 57-8.

[23] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, trans. George Lawrence, 250-3, New York: Harper & Row (1969).

[24] *See generally*: JAMES BRYCE, THE AMERICAN COMMONWEALTH, London: MacMillan & Co. (1891), ELISABETH NOELLE-NEUMANN. THE SPIRAL OF SILENCE, Chicago: University of Chicago Press (1993), and DAVID RIESMAN, INDIVIDUALISM RECONSIDERED, AND OTHER ESSAYS, Glencoe, IL: Free Press (1954) (*describing* the phenomena of social conformism and threat of majority preferences to minority rights in America).

[25] HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR, Chicago: University of Chicago Press (1981).

[26] Alexander Hamilton, Federalist no. 84, 555, 559-560.

adopted calls for bills of rights as they ratified the new constitution. Eventually James Madison relented, promising to introduce a bill of rights in Congress if the new constitution was adopted. The states did ratify the Constitution and Madison kept his promise. In 1789 he offered 17 amendments in the House of Representatives. Ten of these amendments once ratified in December 1791, became the Bill of Rights.

Adoption of the Bill of Rights was not only a triumph for the Anti-Federalists, but also conceptual and perhaps de facto recognition that the political process itself cannot police itself to protect rights. The adoption of the Bill of Rights represented a significant shift in how the national government was to operate. As originally envisioned in the *Federalist Papers*, the political process, through checks and balances, separation of powers, and the other constitutional mechanisms noted earlier, rights would be protected. Effectively, a well-designed political process would check abuses of power. One could rely then upon the political process and Congress perhaps to defend against the threats that public opinion and majority faction posed to the public good and the rights of minorities. Yet the Anti-Federalists were skeptical and they contended that the political process needed to be checked and that rights needed specification.

One way to think about what the Bill of Rights did is to argue that it took certain rights out of the political process and instead left them up to the courts to protect them. One cannot trust the political process to protect freedom of speech or press against the threats of majority faction. Instead, a Bill of Rights stood as a formal declaration that one cannot trust Congress and the people to respect rights. Pure majority rule, while the basis of a representative government, might produce a tyranny of the majority that could threaten individual rights. Some check on the majority too was needed. Some substantive limits need to be imposed on the political process so that these rights cannot be abused.

As Supreme Court Justice Robert Jackson stated in *West Virginia v. Barnette:* "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[27] The adoption of the Bill of Rights was a major change in how American democracy and the courts were supposed to operate. It addressed the majority faction problem very differently from the original Constitution. Neither elections nor politics should be potential threats to individual rights; the latter are not protected by the political process but are protected from it. If by some chance laws are adopted that threaten such rights, it would be the federal courts–with individuals not directly elected by the people–who would enforce and protect rights. Thus, protection of rights shifted from regulated political process described in the *Federalist Papers* to a clear statement of individual protections defended and defined by the judiciary.

Madisonian democracy, then, is premised upon the prevention of tyranny of the majority. It develops a twofold distinction that says that in most situations majorities get their way, but in some they do not. American democracy from its constitutionalism inception

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[27] 319 U.S. 624, 638 (1943).

is a qualified majority rule, balancing it against minority rights. It is not pure populism. When minority rights are threatened the courts step in to protect them. Thus when the political process seems incapable of functioning properly, this provides the rationale for judicial intervention.[28] This perhaps is the case for court intervention into the election field, recognition that the political process may malfunction, threatening the right and ability of discrete and insular minorities to use the normal channels of government to bring about change or protect their rights. Madisonian democracy's central insight is recognition of threats to individual rights and the need to place checks upon unqualified majority rule. Given the dark side to American history that has included the Salem Witch Trials, the Alien and Sedition Acts, slavery, the McCarthy Era, and Stonewall, fear that minority rights may be threatened is not unfounded.

B. Progressive Era Politics Direct Democracy

The Progressive Era of politics encompasses a period of American history from the end of Reconstruction to the end of World War I.[29] The era was marked by several characteristics, including a significant growth of corporate influence and power as well as by the concentration of wealth in the United States.[30] For some this concentration of wealth lead to concerns among many that the ideals and perhaps reality of American democracy were in danger of being lost.[31]

The threat to American democracy was especially manifested in how this concentration in wealth and power was a corrupting influence, affecting the purity and morality of its political institutions.[32] Thus, the capacity of legislatures across the country to act and represent the people was threatened because of the plutocratic control and domination of them by big business.[33] It was out of a fear that the entrenched power of special interests had infected politics, resulting in the incapacity of legislatures to act to serve the majority that Progressive politics was born.[34]

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[28] United States v. Carolene Products Company, 304 U.S. 144, 153 fn. 4 (1938).

[29] *See generally*: Robert H. Wiebe, The Search for Order: 1877-1920, New York: Hill and Wang (1967).

[30] *Id.* at 13.

[31] Richard Hofstadter, The Age of Reform, New York: Vintage Books, 5-6 (1955).

[32] *Id.*

[33] Hofstadter at 238.

[34] Hofstadter at 257.

Progressive politics held government and big business in contempt, seeing them as teaming together to be the enemy of the people.[35] Progressives sought to restructure American political institutions[36] and to wrestle power back to serve the people.[37] The solution to doing this resided in initiative, referendum, and recall.[38] William Munro of the National Municipal League, one of the prime supporters of these three reforms, described the Progressive animus behind these reforms as lying in public loss of hope in the ability of legislators to act.

> But a large section of the public has come to the conclusion that these channels do not afford adequate facilities for the assertion of popular sovereignty. [I]t can scarcely be urged that the old machinery of democracy is fulfilling its professed ends to the satisfaction of all.
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> Popular distrust of the present system of law-making is undeniably widespread and deep. But it is not based on the idea that the representatives of the people are incompetent to do their duty. Rather it arises from the notion that they are prevented from doing it. And these preventing influences, in the popular mind, are various organized interests–political machines and economic corporations–whose wishes do not usually run parallel to the electorate.[39]

According to Munro, the existing channels of legislation do not represent the "majority of the electorate"[40]; initiative and referendum will be a form of direct democracy, allowing the people to bypass legislators and special interests.[41] Similarly, Teddy Roosevelt contended in the same volume that initiative and referendum are "devices for giving better ane more immediate effect to the popular will."[42] Additionally, then governor and soon to be President Woodrow Wilson also wrote in that volume Progressive politics was rooted in the need to

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[35] Hofstadter at 257; Wiebe at 5.

[36] Wiebe at 181.

[37] Hofstadter at 259.

[38] Hofstadter at 261.

[39] William Bennett Munro, ed., The Initiative, Referendum, and Recall, New York: D. Appleton and Company, 16-17 (1912).

[40] *Id.* at 20.

[41] *Id.*

[42] Theodore Roosevelt, "Nationalism and Popular Will," in Munro, 52, 64.

address the concentrations of wealth damaging American political institutions,[43] and that initiative and referendum were tools to restore representative government for the people.[44] Moreover, Progressives saw in direct democracy tools to educate voters.[45]

Thus, the goal of initiative and referendum was to restore American representative democracy. It would do that by placing legislative power in the hands of the people, granting to majorities the powers to make the laws for themselves asa way of circumventing the corruption alliance of concentrated wealth and elected officials. In juxtaposition to Madisonian democracy which sought to limit the threat of majority faction by creating a complex political machinery with representative government, Progressives placed faith in direct democracy as a way to bypass the evils of representative government and restore power to the majority.

II. Failure of the Progressive Solution: The Threat to Minority Rights

In some cases initiative and referendum might be legitimate expressions of majority rule, in many cases it is not. Depending on one's political views, direct democracy has produced many important recent reforms including medical marijuana and the decriminalization of that drug,[46] physician-assisted suicide,[47] and important or political reform initiatives.[48]

Progressive Era politics may be noble in its goals to break the entrenched corruption and politics state politics at the close of the nineteenth and rise of the twentieth centuries by seeking a direct majority appeal to the people. Yet Progressives forgot or ignored the essential insights of the constitutional framers who saw in majoritarianism a threat to minority and individual rights.

A. Minority Rights Generally Lose

Generally minority rights lose in ballot initiatives. This is true despite the fact that in the 2012 elections same-same marriage was voted in to law in Maine, Maryland, and Washington, and an effort to in Minnesota to constitutionally ban it was also rejected by the

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[43] Woodrow Wilson, "The Issue of Reform," in Munro, 69, 85.

[44] Wilson at 87.

[45] Munro at 21, 24.

[46] California Proposition 215 in 1996 added Section 11362.5 to the California Health and Safety Code legalizing the use of marijuana for medical purposes.

[47] Measure 16 of 1994 established the state of Oregon's Death with Dignity Act, (ORS 127.800-995.

[48] For example in 1974 California voters enacted Proposition 9, enacting the Political Reform Act and creating the Fair Political Practices Commission.

voters. These four victories for supports of gay rights comes after 31 states had already limited via ballot initiatives the rights of same-sex couples to marry.[49]

Derrick Bell argues that while ballot initiatives for whites may be an expression of democracy at its finest, for the poor and people of color referenda it is a threat to their rights.[50] Use of initiative and referenda, while often seemingly neutral on their face, discriminate against specific groups.[51] Bell contends that while the Court will police direct democracy when the balance between majority rule and minority rights has been tipped to much against the latter, he asserts that the judiciary has generally not taken an aggressive enough action to look beyond apparent neutral processes to guard against abuses.[52] Bell's conclusion is that the initiative and referendum process is structurally biased against minority rights and therefore should be eliminated in light of the warnings of majoritarian tyranny that James Madison cautioned.[53]

Thomas Cronin notes in *Direct Democracy*[54] that minority rights are often targets of initiatives and referenda. While it is no doubt the case that some ballot measures have supported minority rights, the truth is that more often than not ballot measures have become another measures for special interest groups to push their agenda, often at the expense of individual rights. For Cronin, it is unlikely that debates on the rights of unpopular or minority groups or other politically salient issues can be adequately undertaken in a media campaign where dollars buy sound bites.[55] Deliberation of public policy requires more than that.

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[49] Nicole Neroulias, Gay marriage foes to fight expected Washington state law, http://www.reuters.com/article/2012/02/03/us-gay-marriage-washington-idUSTRE81204O20120203 (site last viewed on December 10, 2012).

[50] Derrick A. Bell, Jr., The Referendum: Democracy's Barrier to Racial Equality, 54 Wash. L. Rev. 1 (1978-1979).

[51] *Id.* at 7.

[52] Bell at 7-9 (*criticizing* the approach the Court took in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) and James v. Valtierra, 402 U.S. 137 (1971) where it respectively upheld laws requiring public approach for zoning changes to build a high rise apartment building and before a state public body could create a federally financed public housing project).

[53] Bell at 28-29.

[54] THOMAS CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL, 90-99 IUniverse (1999).

[55] Cronin at 116-123.

Numerous studies examining ballot initiatives have documented their hostility to minority rights.[56] David B. Magleby reviewed ballot measures between 1898 and 1978 and found that in general only 33% of them were supported by the voters. But Magleby does not indicate what percentage of those targeting minority rights are successful. Instead, one of the most comprehensive studies regarding the hostility of direct democracy to minority rights was undertaken by Barbara Gamble.[57] Gamble examined local and state ballot measures related to AIDS testing, gay rights, language, school desegregation, and housing/public accommodations desegregation from 1960 to 1993. She found that 78% of the 74 civil rights measures in her study defeated of minority interests.

Additionally, Sylvia Vargas updated and corroborated the Gamble study, examining ballot initiatives from 1960 to 1998. According to Largos: "In the eighty-two initiatives and referendums surveyed in this Article, majorities voted to repeal, limit, or prevent any minority gains in their civil rights over eighty percent of the time." Conversely, in efforts to extend civil rights protections, they success rate was barely one in six.[58]

Gays, lesbians, and other minority groups generally lose in ballot initiatives.[59] For example, inn 1977 St Paul, Minnesota adopted anti-gay discrimination legislation, only to see voters repeal it in a 1978 ballot initiative.[60] In addition to the 31 state initiatives since 2004 that have successfully target gay rights, Donald P. Haider-Markel and Kenneth J. Meier looked at the passage rights of ballot initiatives seeking to limit or extend rights to gays and lesbians.[61] They found that that 77% of the time efforts to repeal the rights of gays and lesbians were successful whereas only 16% of the efforts to extend rights were adopted. This anti-gay hostility did not stop after 1996 when the Supreme Court ruled in *Romer v. Evans* that a Colorado ballot initiative rescinding local gay rights laws was unconstitutional

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[56] David B. Magleby, Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. Colo. L. Rev. 13, 26-27 (1995). *See also:* DANIEL C. LEWIS, DIRECT DEMOCRACY AND MINORITY RIGHTS: A CRITICAL ASSESSMENT OF THE TYRANNY OF THE MAJORITY IN THE AMERICAN STATES, New York: Routledge (2012).

[57] Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 Am. J. Pol. Sci. 245, 246 (1997).

[58] Sylvia R. Lazos Vargas, Judicial Review of Initiatives and Referenda in which Majorities Vote on Minorities' Democratic Citizenship, 60 Ohio St. L.J. 399, 42-3 (1999).

[59] *See generally*: AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX, MINNEAPOLIS: UNIVERSITY OF MINNESOTA PRESS (2012) (*arguing* that in general anti-gay interests have been successful in using initiative and referendum to the detriment of gay rights), and Cronin at 94-5.

[60] Cronin at 95.

[61] Donald P. Haider-Markel & Kenneth J. Meier, Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles Over Lesbian and Gay Rights (unpublished manuscript presented at the 1995 annual meeting of the Midwest Political Science Association,

because the law singled out a specific group and imposed upon them a "broad and undifferentiated disability on a single named group."[62]

Overall, minority rights are held hostage to ballot initiatives and they should not be. In *Reitman v. Mulkey*[63] the Supreme Court invalidated a California ballot initiative that sought to repeal recently adopted legislation aimed at addressing racial discrimination in the real estate market. The Court ruled that the ballot measure had an "ultimate effect" in further state discrimination, thereby violating the Equal Protection clause. Ballot initiatives may be letting the people decide, but the people have no right to commandeer the government to discriminate.

B. Money Spent for Initiatives and Referenda Cannot be limited

In its 1978 decision *First National Bank v. Bellotti*[64] the United State Supreme Court declared that money on ballot initiatives was core political speech. *Bellotti* along with other decisions such as *FEC v. Massachusetts Citizens Concerned for Life,*[65] *Federal Election Commission v. National Right to Work Committee*,[66] *California Medical Association v. Federal Election Commission*,[67] and *Federal Election Commission v. National Conservative Political Action Committee*,[68] collectively stand for the proposition that limits on the amount of money spent or contributed to support ballot initiatives was unconstitutional More importantly, the Court stated in *Bellotti* that limits on corporate spending for issue advocacy violated the First Amendment.[69]

The importance of *Bellotti* for ballot initiatives is that when the people get to vote, the state cannot limit the amount of money spent by any party, including corporations. Hence, use of initiative and referendum opens an enormous hole in out existing campaign finance laws, permitting corporations and any other party to spend unlimited amounts of money to influence the outcome. The result is less a ballot proposition being a statement

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[62] 517 U.S. 620, 632 (1996). *See also:* William E. Adams, Jr., Can We Relax Now? An Essay About Ballot Measures & Lesbian, Gay, and Bisexual Rights After Romer v. Evans, 2 Nat'l J. Sexual Orientation L. 188, 190 (1996).

[63] 387 U.S. 369 (1967).

[64] 435 U.S. 765 (1978).

[65] 479 U.S. 238 (1986).

[66] 459 U.S. 197 (1982).

[67] 453 U.S. 182 (1981).

[68] 470 U.S. 480 (1985).

[69] 435 U.S. at t 784.

about populism and direct democracy and more one potentially about the ability of corporate interests to use their resources and interests to push their favored agendas.

C. Money Spent on Initiative and Referenda Circumvent Populism

Thomas Cronin indicates in his book *Direct Democracy* that money has a decisive influence on the outcome of ballot measures. For example, he notes that corporate-backed sponsors win 80% of the ballot initiatives and that when big money opposes a poorly funded ballot measure, "the evidence suggests that the wealthier side has about a 75% or better chance of defeating it."[70] In addition, evidence demonstrates strong correlations between the amount of money spent and the number of votes cast and that while money cannot guarantee victory, the amount of money spent is decisive in defeating a ballot proposition.[71]

Overall, the evidence suggests that a popular ballot measure is more often than not defeated by corporate and special interest money. Elisabeth Gerber reaches a similar conclusion that the role of money is that of defeating but not passing ballot measures.[72] Thus, she sees ballot initiatives both as targeting minority rights[73] while also at the same time undermining majoritarian preferences because of the ability of wealthy individuals to use money to thwart popular preferences.[74]

D. Big Money Distorts Public Deliberation

What big money buys in debates on ballot measures is media exposure. According to several studies, media exposure is the single most important factor influencing and swaying voter decisions.[75] Given the cost of the media, for the most part, the public will be asked to make critical public policy decisions based upon 15 second sound bites financed by interests that have the most money to spend on the media. Clearly our constitutional framers and the original supporters of initiative and referendum did not envision policy making premised upon sound bites and the cash nexus yet the evidence, as Cronin and Gerber indicate, suggests in California and other states that this is exactly what has happened.

Moreover, consider the structural differences between legislative deliberations and and ballot initiatives. Legislators are able to compromise, bargain, negotiate, and can find ways to take potentially incompatible propositions in legislation and make them work

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[70] Cronin at 109.

[71] *Id.* at110-113.

[72] Elisabeth R. Gerber The Populist Paradox, Princeton: Princeton University Press, 137-8 (1999).

[73] *Id.* at 142-3.

[74] *Id.* at 144.

[75] Cronin at 116-123.

together. Voters are given ballot initiatives as all-or-nothing propositions, and cannot vote for part of it.[76] Ballot propositions generally must adhere to a single subject,[77] yielding problems of compromise. Additionally voters may be asked to vote on contradictory propositions,[78] again without the ability like legislators to forge compromises or affect tradeoffs to render them compatible. Thus, the deliberative nature of representation that Madison and the Constitutional framers desired may often be missing in ballot initiatives. The result is the creation of faulty legislation that too may fail to adequately capture public sentiment on any of the propositions they are asked to render decisions upon.

E. Initiative and Referendum has Little Impact on Breaking Up Special Interests

Advocates of initiative and referendum claimed that letting the voters decide would help break the group that special interests had upon legislatures. It would do that in part by mobilizing citizens to outvote citizens. Only part of this Progressive hope has been realized. While some contend that ballot initiatives do not increase voter turnout,[79] more recent evidence contradicts that and finds that their placement do in fact mobilize more to participate.[80] However, research also indicates that interest groups have become effective in using direct democracy to further their causes, thus questioning a central tenet of initiative and referendum advocates that their use would break entrenched interests.[81]

F. Courts do not always Defer to Ballot Measures

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[76] Chris Chambers Goodman, *(M)ad Men: Using Persuasion Factors in Media Advertisements to Prevent a "Tyranny of the Majority" on Ballot Propositions*, 32 HASTINGS COMM. & ENT L.J. 247, 249 (2010).

[77] *See generally*: Daniel H. Lowenstein,, California Initiatives and the Single-Subject Rule, 30 UCLA L. Review, 936 (1983); Daniel H. Lowenstein, Initiatives and the New Single Subject Rule, 1 Elect. L. J, 35 (2002), and John G. Matsusaka and Richard L. Hasen, Aggressive Enforcement of the Single Subject Rule, 9 Elect L. J., 399 (2010) (*discussing* the single-subject rule).

[78] Michael D. Gilbert and Joshua M. Levine, *Less Can Be More: Conflicting Ballot Proposals and the Highest Vote Rule*, 38 J. LEGAL STUDIES, 383 (2009).

[79] Cronin at 226-7.

[80] Daniel A. Smith and Caroline Tolbert, *The Instrumental and Educative Effects of Ballot Measures: Research on Direct Democracy in the American States,* 7 STATE POL. & POL'Y Q. 416, 430-31 (2007).

[81] *Id.* at 432.

Another way in which the spirit of populism is frustrated by initiative and referendum is in the lack of deference the courts often have towards ballot measures.[82]

In general courts will defer to the will of legislatures so long as there is a rational basis to the policy adopted and there is some legislative finding of fact to support the policy. However, in the case of ballot measures, there is often very little if no finding of fact or legislative hearings to support the initiative or referendum.[83] Therefore, the courts are unwilling to afford the same deference to initiative and referendum as they would to acts of a state legislature.[84] Thus, any expression of populism that appears to occur as a result of ballot measures disappears once they face judicial review and challenges.

Conclusion

Direct democracy and majoritarian politics inconsistent with the broader substantive values of the Constitution and Bill of Rights which seeks to preserve minority rights. The two proposed constitutional Amendments defeated in Minnesota in 2012 were anti-democratic in divergent ways. The Marriage Amendment singled out a specific group for a special disability, contrary to the holding in *Romer v. Evans.* Second, by seeking to make the ban on same-sex marriage a constitutional amendment, it sought to circumvent the normal legislative process, thereby closing down the normal channels for political change in the future, contrary to the spirit of what footnote four of *Carolene Products* represents.

The Elections Amendment similarly sought to close down the channels of political change both by the fact that it was a constitutional amendment and by the fact that it would burden the right to vote for some. Moreover, this amendment was at odds with Minnesota's own constitutional history of amendments extending franchise and individual rights.[85]

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[82] *See:* Cody Hoesly, Reforming Direct Democracy: Lessons from Oregon, 93 Cal. L. Rev. 1191 (2005) (*noting* the decreased deference state courts were giving in Oregon to ballot measures) *See also:* Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single Subject Adjudication*, 40 J. LEGAL STUDIES, 333 (2011).

[83] Mihui Pak, The Counter-majoritarian Difficulty in Focus: Judicial Review of Initiatives, 32 Colum. J.L. & Soc. Probs. 237 (1999) (*discussing* the problems regarding standards of review the courts should take toward ballot initiatives).

[84] Cronin at 219-220. *See also:* MATT MANWELLER THE PEOPLE VS. THE COURTS: JUDICIAL REVIEW AND DIRECT DEMOCRACY IN THE AMERICAN LEGAL SYSTEM, Bethesda, MD: Academica Press (2004) (*finding* that the courts treat ballot initiatives differently from ordinary legislation and that they are less likely to defer to and uphold the former compared to the latter); KENNETH MILLER, DIRECT DEMOCRACY AND THE COURTS, New York: Cambridge University Press (2009).

[85] David Schultz, Constitutional contempt: The GOP's rush to amend is out of keeping with traditional Minnesota values, Minnpost, (February 8, 2012)

Defeat of these two amendments by direct democracy was a surprising victory for minority rights, but it should not mean that these tools should be considered viable mechanisms to balance majority rule with minority rights. The history of initiative and referendum, as this article has shown, is generally one hostile to minority rights.

American constitutionalism is not about pure majoritarianism and it never was. It is a country of checks and balances, limited power, and respect for individual and minority rights. The majoritarian politics reflected in these two constitutional amendments reflects the darker and uglier side of America, one that seeks to freeze prejudice in time. We need to understand that the rule of democracy sometimes unfair. Majoritarian politics produced slavery, Jim Crow, and Stonewall. The time has come to recognize that the Progressive Era embrace of direct democracy has generally failed when it comes to minority politics. As Justice Jackson so eloquently stated, certain rights should not be decided at the ballot box and going forward, initiative and referendum should exclude votes on any propositions that deal with minority rights.

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http://www.minnpost.com/community-voices/2012/02/constitutional-contempt-gops-rush-amend-out-keeping-traditional-minnesota-v (site last visited on December 10, 2012).