

COMMENT

THE GOVERNMENT WE DESERVE? DIRECT DEMOCRACY, OUTRAGED MAJORITIES, AND THE DECLINE OF JUDICIAL INDEPENDENCE

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Omnipotence in itself seems to me a bad and dangerous thing. . . . Therefore, when I see the right and wherewithal to do all accorded to any power whatsoever, whether it be called people or king, democracy or aristocracy, and whether it be exercised in a monarchy or a republic, I say, therein lies the seed of tyranny, and I seek to live elsewhere, under different laws.¹

I. INTRODUCTION

Frustrated by the perceived ineffectiveness and unresponsiveness of their elected representatives,² Americans are increasingly enamored of direct democracy as a means to advance their public policy agendas. The tools of direct democracy include the direct initiative, which allows citizens to enact new statutes or constitutional amendments; the indirect initiative, which allows citizens to direct their elected representatives to do the same; the popular referendum, which allows citizens to repeal a statute enacted by the state legislature; and the recall, which allows citizens to remove an elected official before the end of his or her term.³ From 1991 to 2000, 389 statewide initiatives appeared on ballots across the country,⁴ up 44 percent

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1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* vol. 1, pt. 2, ch. 7, 290 (Arthur Goldhammer trans., The Library of America 2004).

2. Caroline J. Tolbert, *Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same*, in *THE BATTLE OVER CITIZEN LAWMAKING* 35, 38–40 (M. Dane Waters, ed., Carolina Academic Press 2001).

3. See, e.g. JOHN HASKELL, *DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT: DISPELLING THE POPULIST MYTH* 48–49 (Westview Press 2001); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 35–36 (Johns Hopkins Univ. Press 1984); M. DANE WATERS, *INITIATIVE AND REFERENDUM ALMANAC* 11 (Carolina Academic Press 2003) [hereinafter *I and R Almanac*]. Unless otherwise stated, this comment is concerned with the direct initiative and the popular referendum only.

4. *I and R Almanac*, *supra* note 3, at 533 (App. D). It is important to distinguish statewide initiatives (and referenda) from their local equivalents, which are available to residents of thousands of American counties, cities, and towns. INITIATIVE AND REFERENDUM INSTITUTE, INITI-

from the preceding decade and 33 percent from the previous record set in the years 1911 to 1920.⁵ While advocates and opponents debate the desirability of this trend and what it portends, none dispute that the instruments of direct democracy are powerful, if also blunt.⁶

The initiative and referendum are powerful because they enable the majority to determine the content and scope of minority rights; they are blunt because they enable citizen lawmakers to act without the constraints and incentives that temper their elected representatives. As direct democracy expands, the risk therefore grows that a tyranny of the majority will emerge, eclipsing the rights⁷ of persons outside the American mainstream. While direct democracy proponents are inclined to downplay this risk, data from recent studies confirm the growing vulnerability of persons of color, gays and lesbians, non-English speakers, and other “outsiders.” This vulnerability in turn implicates a seemingly unavoidable irony of direct democracy: the more common policymaking by plebiscite becomes, the more frequently the judiciary—i.e., the “least democratic branch” of government, is called upon to uphold minority rights.⁸

The judiciary confronts significant risk in fulfilling its obligations in this regard. Americans are captivated by an increasingly totalitarian brand of politics that targets judicial review and the judges who employ it as problems in their own right. The uproar over “judicial activism”⁹ is symptomatic of the overall politicization of the judiciary—a trend caused in part by interest group influence over state judicial elections¹⁰ and at the federal level, partisan exploitation of the judicial nomination process by Republi-

ATIVE AND REFERENDUM IN THE UNITED STATES: A PRIMER 5 (M. Dane Waters, ed., Citizen Lawmaker Press 2002), available at <http://iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Waters%20-%20I&R%20Primer%20Complete%20IRI.pdf>. Many jurisdictions that do not have statewide plebiscites (including Texas and New York) allow local units of government to facilitate citizen lawmaking. *Id.* In fact, one-third to one-half of all American cities—including fifteen of the twenty largest—allow local initiatives. John G. Matsusaka, *I & R in American Cities: Basic Patterns, in I and R Almanac, supra* note 3, at 31, 36. This comment addresses direct democracy at the statewide level only.

5. *I and R Almanac, supra* note 3, at 533.

6. See, e.g., Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 537 (1994) (noting that in contrast to the representative system, initiatives and referenda allow “only isolated [yes/no] votes on single issues”); Michael Vitiello & Andrew J. Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?*, 31 LOY. L.A. L. REV. 1275, 1288 (1998) (noting that “the initiative process does not allow for modification or compromise” when new information emerges).

7. For the purposes of this comment, the term “rights” denotes “civil rights” as defined by *Black’s Law Dictionary*: “The individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include esp. the right to vote, the right of due process, and the right of equal protection under the law.” BLACK’S LAW DICTIONARY 263 (8th ed. 2004).

8. See, e.g., RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 176 (Univ. Press of Kansas 2002).

9. See *infra* note 102.

10. See *infra* note 130.

cans and Democrats alike.¹¹ More fundamentally, the growing politicization of state and federal courts arises from an erroneous belief among Americans that judges are (or should be) accountable *in the same way* legislators and executives are—in other words, that their decisions should be “constituent-driven.”¹²

The convergence and interplay of these two trends—the expansion of direct democracy on the one hand and the increasing politicization of the courts on the other—foreshadow a troubling period in the evolution of our society. The influence of well-financed interest groups over both plebiscites and judicial elections in key states is of particular concern, but the larger issue is Americans’ growing inability to recognize the value of courts as *necessarily* counter-majoritarian guardians of the Constitution. This comment will summarize the history of direct democracy in the United States and reflect on the connections between plebiscites, minority rights, and the decline of judicial independence. It ultimately concludes that unless we re-examine our unqualified fidelity to “majority rule,” Americans may lose the very essence of the democracy we strive to maintain.

II. DIRECT DEMOCRACY, MINORITY RIGHTS, AND THE ROLE OF THE COURTS

A. *The Rise of Direct Democracy in the United States*

Direct democracy first emerged as a prominent influence on the American political scene as part of the Progressive Movement in the early 1900s.¹³ The Progressives sought to end the growing influence that big business and party bosses exercised over state legislatures and elected officials, and to reclaim politics for the common man.¹⁴ The Progressives’ broader aim was, in the words of one writer, to restore the “civic purity”¹⁵ they associated with “America’s mythic roots.”¹⁶ This idealistic vision suc-

11. David A. Yalof, *Dress Rehearsal Politics and the Case of Earmarked Judicial Nominees*, 26 CARDOZO L. REV. 691, 691–94 (2005) (discussing the trend toward more prolonged and ideologically charged confirmation processes for federal judges).

12. Paul J. DeMuniz, *Judicial Selection in Oregon: Money, Politics, and the Initiative Process*, 39 WILLAMETTE L. REV. 1265, 1265–66 (2003). See also *infra* notes 145–51 and accompanying text.

13. MAGLEBY, *supra* note 3, at 21.

14. *Id.* at 21–22.

15. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 18 (1997) (quoting Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 5–6 (1955)).

16. *Id.* (associating New England town hall meetings with these “mythic roots”). It is important to note that the Progressives were not the only turn of the century reformers to idealize the common man and his place in American democracy. Key elements of Progressive ideology are traceable to the Populists, who were active in the rural South and Midwest through the 1890s. HASKELL, *supra* note 3, at 28–29. Deeper treatments of direct democracy’s origins discuss both groups and differentiate their approaches: while Populists advocated direct democracy as a *replacement* for representative government, Progressives saw it as an improvement on the existing

ceeded in capturing the public imagination and inspiring an enduring legacy: from 1898 to 1918, twenty-two states amended their constitutions to incorporate one or more instruments of direct democracy.¹⁷

For the Progressives, direct democracy was both a good unto itself and a vehicle for advancing a particular policy agenda.¹⁸ Convinced that government action was necessary to mitigate the socially destructive consequences of industrialism, they promoted reforms ranging from minimum wage, antitrust, and food safety regulations to Prohibition, women's suffrage and the graduated income tax.¹⁹ To the extent that legislatures beholden to corporate interests were certain to reject many of these reforms on principle, direct democracy was a critical vehicle for achieving social change. In essence, direct democracy made legislatures moot by empowering average citizens to directly enact and repeal state laws.

The Progressives won their first victory for direct democracy in South Dakota, which adopted the statewide initiative in 1898.²⁰ Utah, Oregon, and other states followed over the next twenty years, with North Dakota becoming the last of nineteen jurisdictions²¹ to place this powerful lawmaking tool in citizens' hands before World War I temporarily halted the direct democracy movement.²² It was not until 1956 that another state (Alaska) adopted the statewide initiative,²³ followed by Wyoming in 1968 and Illinois and Florida in 1970 and 1972, respectively.²⁴ In 1992, Mississippi became the twenty-fourth and most recent state to incorporate initiative lawmaking.²⁵ Twenty-one of the twenty-four jurisdictions that allow statewide initiatives

system. *See, e.g.*, Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1058–60 (2001). Miller posits that these distinctions continue in the debate over direct democracy today, with contemporary Populists striking a more radical anti-government tone than their Progressive, “good government” counterparts—many of whom are growing increasingly disenchanted with citizen lawmaking. *Id.*

17. Persily, *supra* note 15, at 15.

18. *Id.* at 22–23; THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 58–59 (Harvard Univ. Press 1989); TOLBERT, *supra* note 2, at 40.

19. CRONIN, *supra* note 18, at 58–59.

20. *I and R Almanac*, *supra* note 3, at 12.

21. *Id.*

22. Fearing the implications of German aggression for the U.S., Americans lost their taste for civic experimentation and equated patriotism “with defense of the status quo rather than its alteration.” *Id.* at 4 (quoting CARL H. CHRISLOCK, *THE PROGRESSIVE ERA IN MINNESOTA 1899–1918* (Minn. Hist. Soc’y 1971)).

23. *Id.* at 6 (noting that Alaska’s constitution provided for the initiative and referendum when the Union admitted it in 1959).

24. *Id.* at 12.

25. *Id.* Jurisdictions with the direct statutory and/or constitutional initiative are Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.* The most active states, in terms of number of statewide initiatives on the ballot from 1904 to 2002, are Oregon, California, Colorado, North Dakota, and Arizona, respectively. *Id.* at 8.

today also have popular referenda,²⁶ while three states allow the latter alone.²⁷

Initiative use has fluctuated greatly over the past one hundred years.²⁸ It declined steadily from the Progressives' heyday through the 1970s,²⁹ then rebounded dramatically after Californians enacted the widely publicized and controversial Proposition 13 in 1978.³⁰ In the 1980s, 289 statewide initiatives appeared on ballots across the country; in the nineties, the total leapt to a record 396.³¹ Although initiative use appears to be decreasing slightly in the first decade of the twenty-first century,³² some of the most divisive and important policy questions of the foreseeable future, including questions of constitutional rights, will undoubtedly be decided by citizen lawmakers.³³

Numerous factors have contributed to the dramatic growth of direct democracy over the past quarter-century. Activists on the political Left and Right have discovered that regardless of whether initiatives or referenda pass, the campaigns and intense media coverage surrounding them generate broad popular awareness of the underlying issues.³⁴ The awareness in turn

26. *Id.*

27. *I and R Almanac*, *supra* note 3, at 12 (noting that citizens of Kentucky, Maryland, and New Mexico can repeal state laws via the popular referendum but cannot place statewide initiatives on the ballot).

28. David Magleby, *Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s*, 21 PS: POL. SCI. & POL. 600, 603 (1988); M. Dane Waters, *Testimony before the California Commission on the Initiative Process*, THE INITIATIVE PROCESS IN AMERICA: AN OVERVIEW OF HOW IT WORKS AROUND THE COUNTRY 2 (Dec. 18, 2000), available at http://www.cainitiative.org/pdf/initiative_process_iri.pdf (last visited Apr. 2, 2007).

29. Waters, *supra* note 28, at 2.

30. Proposition 13, which sharply limited the power of local governments to tax, became a catalyst for a nationwide "taxpayer revolt" and the direct democracy movement in general. CRONIN, *supra* note 18, at 3-4; *I and R Almanac*, *supra* note 3, at 6; MAGLEBY, *supra* note 3, at 5-6.

31. Waters, *supra* note 28, at 3.

32. *I and R Almanac*, *supra* note 3, at 8. The decrease comes in spite of broad popular support for citizen lawmaking. According to various polls, somewhere between two-thirds and three-quarters of citizens favor the opportunity to vote on statewide ballot propositions. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1507 n. 16 (1990); Waters, *supra* note 28, at 3. One survey found that as many as eighty-five percent of Californians thought that voting on ballot propositions was "a good idea." MAGLEBY, *supra* note 3, at 9. Notwithstanding the initiative's popularity, observers attribute its slowing (or at least static) usage rate to increased regulation of direct democracy processes. *I and R Almanac*, *supra* note 3, at 8-9.

33. Kenneth P. Miller, *The Courts and the Initiative Process*, in *I and R Almanac*, *supra* note 3, at 459; see also, *I and R Almanac*, *supra* note 3, at 8-9; Eric Lane, *Men are Not Angels: The Realpolitik of Direct Democracy and What We Can Do about It*, 34 WILLAMETTE L. REV. 579, 582-83 (1998).

34. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 28-29 (1995); Magleby, *supra* note 28, at 604. An especially brazen use of the initiative to boost an issue's visibility is evident in circumstances where interest groups draft and sponsor ballot items they know to be unconstitutional and therefore doomed to failure in a post-election court challenge. See Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 60-65 (1995).

catapults the issues onto local and national policy agendas.³⁵ Candidates for statewide office endorse and sponsor initiatives to benefit their campaigns,³⁶ and sitting legislators use initiatives to avoid voting on divisive issues, in favor of “let[ting] the voters decide.”³⁷ Other factors include the growth of a highly profitable initiative industry;³⁸ increasing voter hostility toward government itself;³⁹ the career-launching potential of initiatives for individual activists;⁴⁰ the emergence of counter-propositions on ballots;⁴¹ the appeal of direct democracy’s immediate and tangible impact on public policy (relative to candidate elections);⁴² and rapidly changing demographics.⁴³

From 1898 through the 1980s, initiatives across the country were distributed relatively equally among issue categories such as housing, taxation, business regulation, public health, morality, and welfare.⁴⁴ These categories continue to reflect the topics initiatives address, but since the late 1970s, a majoritarian backlash against the progress of minorities has significantly influenced the overall *direction* of citizen lawmaking.⁴⁵ The most provocative data establish that when minority rights are the express subjects of bal-

35. Magleby, *supra* note 34, at 28–29; *see also*, Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referenda in which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L.J. 399, 471–472 (1999). Even failed initiatives appear to have an additional and socially destructive “side effect”: increasing public animosity toward unpopular minorities. *See, e.g.*, William E. Adams, Jr., *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 468–70 (1998) (discussing the correlation between initiative campaigns and increases in hate crimes perpetrated against gay men and lesbians).

36. ELLIS, *supra* note 8, at 80 (noting the “increasingly prominent role” elected officials and candidates play in authoring and/or sponsoring initiatives).

37. *Id.*

38. Magleby, *supra* note 34, at 30–31.

39. MAGLEBY, *supra* note 3, at 14–15.

40. *Id.*

41. Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the States*, in *CITIZENS AS LEGISLATORS* 1, 10 (Ohio St. Univ. Press, 1998) (defining a counterproposal as “a rapidly qualified initiative designed to deflect attention from an opponent’s initiative”).

42. Magleby, *supra* note 34, at 30–31.

43. *See* Caroline J. Tolbert & Rodney E. Hero, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & POL. 325, 325–327 nn.10–11 (1990) (noting that many commentators view the “English-only movement” as a backlash against an increasing number of immigrants, and citing the exclusive reliance of “English-only proponents” on direct democracy instruments over “a mix of legislative, administrative, and judicial action”).

44. Magleby, *supra* note 28, at 603.

45. *See* Lazos Vargas, *supra* note 35, at 421 (“In the late 1970s and early 1980s, initiatives and referendums increasingly became a democratic device through which majorities opposed integration and anti-discrimination laws.”); Adams, *supra* note 35, at 458 (“During the past two decades, the number of ballot measures aimed at limiting or reversing legal protections of lesbians and gay men have proliferated.”); HASKELL, *supra* note 3, at 109 (discussing journalist Peter Schrag’s argument that Californians’ predilection for tax-cutting initiatives reflects “an effort by the white middle class to reassert its control over California politics . . . just when ethnic minorities are finally able to wield some power in the legislature. . .”).

lot propositions, citizens vote to limit or eliminate those rights as often as eight out of ten times.⁴⁶

B. Direct Democracy and Minority Rights

Among the many arguments for and against direct democracy,⁴⁷ one of the most widely debated questions is whether direct democracy infringes minority rights at a rate greater than representative democracy.⁴⁸ Some of the disagreement stems from the absence of a uniform definition of “minority” in this context.⁴⁹ A lack of empirical data showing how minority rights fare in legislatures *relative to* plebiscites adds further ambiguity. In spite of these complexities, analyses drawing on thirty years of experience with the initiative and referendum are beginning to compel the conclusion that for many minority groups, “the more direct democracy becomes, the more threatening it is.”⁵⁰

In a widely cited 1978 article, Professor Derrick Bell, Jr., argues that Americans’ increasing reliance on direct democracy portends a crisis for racial and other minorities.⁵¹ According to Bell, the rise of citizen lawmaking is problematic for two reasons. First, the pervasive nature of racism in America compels low-income whites to prioritize “[p]reserving white superiority” above “mounting a unified attack” on the economic advantages that affluent whites have over *both* blacks and poor whites.⁵² Second, unlike their elected representatives, voters may act on racial motivations alone; they are unencumbered by professional aspirations and unmotivated by practical incentives to compromise with fellow lawmakers.⁵³ For Bell, the convergence of racism and referenda yields an all too predictable result: when white voters have the opportunity to repeal any law remediating racial disparity, they seize it.⁵⁴ Bell observes that

46. Lazos Vargas, *supra* note 35, at 399.

47. A discussion of these arguments (outside of those touching on the issue of minority rights) is beyond the scope of this comment but widely available in the literature on direct democracy. See e.g. CRONIN, *supra* note 18, at 10–12; MAGLEBY, *supra* note 3, at 27–30.

48. See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 709 (1991); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245 (1997).

49. See *infra* notes 59, 62 (discussing why two researchers opted to exclude women from their definitions of “minority” for the purposes of analyzing initiative and referenda outcomes).

50. Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 1 (1978–79).

51. *Id.* at 2.

52. *Id.* at 10–11.

53. *Id.* at 13–14.

54. *Id.* at 12–13. Bell’s discussion begins with two Supreme Court decisions involving states’ attempts to ensure affordable housing for low-income persons, many of whom are also persons of color. In *James v. Valtierra*, 402 U.S. 137 (1971), Bell writes, a 5-3 majority upheld Article 34 of the California constitution over a challenge brought by poor blacks and Mexican-Americans. *Id.* at 2–3. Under Article 34, state public bodies were prohibited from developing federally financed low income housing without the prior approval of voters in local referenda. *Id.*

despite our wealth, we lag behind [numerous other] countries . . . in addressing basic problems of poverty, slum housing, public health, and prison reform, because in those countries, “there is no parallel to the corrosive and pervasive role played by race in the problem of social neglect in the United States.” . . . Americans refuse to support social reforms because they sense such reforms would mainly aid undeserving blacks.⁵⁵

In short, Bell’s basic premise is that the deeply entrenched racism of white voters will operate to transform popular referenda—*regardless* of the policy issues those referenda address (for example, housing, public health, and local taxation)—into vehicles for maintaining racial inequality.

Bell’s concern about the destructive potential of direct democracy finds support in two studies analyzing the effect of initiatives and referenda on minorities over time.⁵⁶ The first of these studies, conducted by Professor Barbara Gamble, establishes that majorities routinely utilize direct democracy to decide issues of minority rights, and that anti-minority initiatives are extraordinarily successful at the ballot box.⁵⁷ Specifically, Gamble analyzed state and local ballot propositions focused on minority rights from 1959 through 1993, and concluded that minority interests were defeated 78 percent of the time.⁵⁸ She found that across five policy areas, including minority housing, school desegregation, gay rights, English-language use, and

at 3. Because Article 34 did not rely on “distinctions based on race,” Bell suggests, the majority refused to subject it to even a “token” (rational basis) Equal Protection review, notwithstanding the *de facto* hardship Article 34 created for minorities. *Id.* at 3–5. “As long as the disadvantage to minorities [from mandatory referenda] is not intentionally racial and arguably furthers a reasonable interest,” Bell concludes, “judicial intervention is not forthcoming.” *Id.* at 5.

In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), the Court upheld a provision in the charter of suburb Eastlake, Ohio, which conditioned all zoning changes on a “yes” vote from 55 percent of local referendum voters. Bell, *supra* note 50, at 6. The Ohio Supreme Court had determined that the mandatory referendum provision “frustrated a multi-family, high rise apartment project, in violation of the owner-developer’s due process rights.” *Id.* Reflecting on the implication of *Valtierra* and *City of East Lake* for minorities, Bell opines that in these cases, “the seemingly neutral, proper encouragement of direct community control implemented through a popular referendum established direct democracy as a constitutionally sanctioned vehicle for excluding the poor and, therefore, minorities.” Bell, *supra* note 50, at 7 (emphasis added).

55. *Id.* at 12–13 (quoting economist Robert Heilbroner, *The Roots of Social Neglect in the United States*, in *IS LAW DEAD?* 288, 296 (E. Rostow ed., 1971)). Many commentators link seemingly race-neutral, tax-related initiatives such as California’s Proposition 13 to white, middle-class hostility toward economic and social justice for poor persons and minorities. See, e.g., Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 733 (1994) (noting that these populations were disproportionately hurt by Proposition 13).

56. Gamble, *supra* note 48; Lazos Vargas, *supra* note 35.

57. Gamble, *supra* note 48, at 261.

58. *Id.* at 254; but see Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020, 1020 (1998) (critiquing Gamble’s analysis because it fails to account for “the scale over which [direct] democracy is practiced,” and arguing that statewide elections are more likely than local ones to produce “pro-gay policy outcomes”).

AIDS,⁵⁹ voters repealed civil rights laws that were already in effect, passed laws that prohibited legislatures from protecting minorities, and overruled legislators who sought to expand civil rights guarantees.⁶⁰ Gamble's findings are consistent with an analysis Professor Sylvia Lazos Vargas conducted of initiatives and referenda from 1960 through 1998.⁶¹ Drawing from a comprehensive review of nationwide ballot propositions on the rights of racial/ethnic and cultural/language minorities, gay men and lesbians, and illegal immigrants,⁶² Lazos Vargas concluded that more than 80 percent of the time, direct democracy "decreased the content of, or staved off advances in, minority rights."⁶³

These data raise two questions central to the arguments of Bell and others: does direct democracy infringe minority rights to any greater extent than representative democracy does, and if so, why?⁶⁴ After all, as Thomas Cronin writes in response to this question, "the record of representative government is an imperfect one."⁶⁵ Notwithstanding the lack of empirical data on the relative performance of these two systems,⁶⁶ two realities about the political process compel the conclusion that state legislatures protect minority rights more reliably than citizen lawmakers.

59. Gamble, *supra* note 48, at 246. Gamble analyzed ballot items affecting the rights of "racial, ethnic, and language minorities, gay men and lesbians, and people with AIDS." *Id.* at 252. Her study *excluded* initiatives and referenda deciding questions of women's rights, because women form an electoral majority and their advocates "have a marked advantage" relative to other groups in relation to generating favorable outcomes through direct democracy. *Id.* at 252-53. The exclusion of women's rights issues from her study, Gamble notes, is significant because commentators on direct democracy who are skeptical that direct democracy facilitates a "tyranny of the majority" generally "bolster their case by pointing to [the fate of] women's rights issues" at the ballot box. *Id.* at 253. *Accord* Lazos Vargas, *supra* note 35, at 422.

60. Gamble, *supra* note 48, at 254.

61. Lazos Vargas, *supra* note 35, at 422-23.

62. Lazos Vargas excluded ballot items concerning women's rights issues because even though they fit her definition of a minority group, "women appear to be a special case," in part because they comprise more than 50 percent of the population. *Id.* at 404 n. 14.

63. *Id.* at 424-25.

64. Professor Clayton Gillette and others are skeptical that initiatives are more likely to produce anti-minority outcomes than are laws enacted by legislatures. Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 621-22 (1998).

65. CRONIN, *supra* note 18, at 91-92 (discussing, *inter alia*, the internment of Americans of Japanese heritage in the 1940s); *see also* Julian N. Eule, *Representative Government: The People's Choice*, 67 CHI.-KENT L. REV. 777, 787 (1991) ("Legislators can be bigots too."); Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign against Homosexuality*, 72 OR. L. REV. 19, 35 n. 69 (1993) (discussing the role of "passions" in motivating state legislatures' actions).

66. Eule, *supra* note 32, at 1551-52 (noting that "reliable empirical studies [comparing the performance of direct democracy and representative democracy] do not exist"). Comparative data would be impracticable, if not impossible, to generate. The number of legislative acts researchers would have to consider is but one of many barriers. For example, ballots across the nation included a record-setting 102 statewide measures in 1996; in the same year, the legislatures of the twenty-four direct democracy states enacted more than 17,000 laws out of an unspecified number of bills considered. Waters, *supra* note 28, at 1-2.

First, when a legislator casts her vote on a bill addressing any subject, she is accountable to a constituency.⁶⁷ A citizen lawmaker, in contrast, is accountable only to himself. Unlike the legislator, he need not worry over angry phone calls or e-mail messages awaiting his return from the ballot box.⁶⁸ He need not reflect on his express or implied promise to *represent* as many of his constituents as he can, as well as he can. And from a purely pragmatic standpoint, he need not worry about securing minority constituents' votes if and when he seeks reelection. Some legislators' districts are more demographically and ideologically diverse than others', but *all* representatives are accountable to a portion of constituents who oppose the majority's position on any given issue. As Professor Bell observes,

Throughout this country's history, politicians have succumbed to the temptation to . . . appeal[] to the desire of whites to dominate blacks. More recently, however, the growing black vote has begun to have an impact and even effected "Road to Damascus" conversions on more than a few political Pauls, some of whom even claim "born again" experiences during mid-term. This impact may be subverted if voting majorities may enact controversial legislation directly.⁶⁹

Second, compromise, coalition-building, and logrolling (that is, vote-trading) inhere in the legislative process.⁷⁰ Accordingly, there are powerful incentives for a legislator to avoid alienating colleagues whose support she may later require. By withholding support from a measure that the majority of her peers consider too divisive or extreme, she protects her ability to gain others' votes on bills more important to her constituents. While some may speculate that this check on extreme positions is waning as legislatures become increasingly polarized, it is unquestionably the case that an individual voter has *no* incentive—even in theory—to moderate his actions at the ballot box in order to preserve maneuvering room for later pieces of legislation.

This comment accepts the validity of the foregoing arguments,⁷¹ but its central concerns do not rely on the conclusion that plebiscites are *more*

67. Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 6–7 (1997) (discussing the fact that representatives, unlike individual voters, are accountable to the "common good"); Lane, *supra* note 33, at 594 (stating that representatives, not voters, must consider a variety of factors, including their constituents' views).

68. In a 1983 poll of nearly 10,000 registered California voters, eighty-six percent agreed with the statement, "Initiative and referendum would allow the public to decide issues where the public officials are hesitant to act for fear of offending certain groups." Thomas E. Cronin, *Public Opinion and Direct Democracy*, 21 PS: POL. SCI. & POL. 612, 614 (1988) (citation omitted).

69. Bell, *supra* note 50, at 13 (citations omitted).

70. On the relationship between protecting minority rights and the political realities of logrolling and coalition-building, see Lane, *supra* note 33, at 591–92.

71. The arguments are subject to spirited debate, as are all arguments from theory. Professor Lynn Baker has argued from public choice theory that rational, self-interested racial minorities will not necessarily prefer representative over direct lawmaking processes. Baker, *supra* note 48,

likely than legislatures to infringe minority rights when given the chance. The point is that as direct democracy expands, citizen lawmakers are increasingly in a position to determine the scope of minority rights—and more often than not, these rights are curtailed when subject to a popular vote.

C. *The Critical Role of the Courts*

The judiciary is the only functioning check on majority power in the context of direct democracy. While most direct democracy proponents accept a counter-majoritarian role for the courts, at least to a degree,⁷² a few decry the very notion that a check is needed. What could be more elitist—more un-American, even—than the idea that “the People” must be protected from the exercise of their own will? This line of thinking is problematic because it assumes that plebiscitary outcomes actually reflect majority will. Moreover, even if initiatives and referenda were accurate gauges of the majority’s policy preferences, such preferences are not *ipso facto* constitutional.⁷³ Our founders were acutely aware of the threat unchecked majorities pose to unpopular groups and viewpoints, and they created a judiciary strong enough to overcome that threat. The involvement of the courts in safeguarding the Constitution from citizen lawmakers’ overreaching is not only necessary, but proper.

In the twenty-six direct democracy states, courts are minorities’ last and only protection against unconstitutional initiatives for reasons both structural and political. Structurally, legislators in ten of these states—including three of the five with greatest initiative use—are either absolutely prohibited or materially limited from repealing or amending statutory initiatives.⁷⁴ One common limitation prohibits legislators from amending or appealing an initiative for periods from two to seven years after enactment.⁷⁵ From the political standpoint, while legislators in eleven states can amend

at 710; *but see* Eule, *supra* note 65 (refuting Baker’s four central conclusions) and HASKELL, *supra* note 3, at 111 (noting that Baker’s arguments have largely been discredited).

72. In responding to direct democracy critics who are concerned about minority rights, proponents cite the safety net provided by judicial review. HASKELL, *supra* note 3, at 112.

73. *See* Charlow, *supra* note 6, at 544–45 (Unlike their elected representatives, citizen lawmakers have no “explicit constitutional obligation” to see that their actions comport with the Constitution. Moreover, citizen lawmakers have no “particular incentive or ability” to discern what the Constitution requires.); *see also* Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 295 (1981) (asserting that “voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation”) (*quoted in* Eule, *supra* note 32, at 1505–06).

74. *I and R Almanac*, *supra* note 3, at 27 (California legislators cannot appeal or amend at any time; a range of limitations inhibit legislators’ ability to do so in Alaska, Arizona, Arkansas, Michigan, Nevada, North Dakota, Utah, Washington, and Wyoming.). As stated in note 25, the five states with the greatest initiative use are Oregon, California, Colorado, North Dakota, and Arizona.

75. *I and R Almanac*, *supra* note 3, at 27.

or repeal a statutory initiative at any time,⁷⁶ they are arguably unlikely to do so.⁷⁷ Minorities cannot depend on these legislators to amend or repeal the outcomes of direct democracy; the political costs of doing so would be ruinous. At this moment in America, after all, there can be no epithet more damning for a politician than “elitist.”⁷⁸

Even if one accepts the premise that our laws should be whatever “the People” desire at any given moment, one must still ask, does the outcome of a statewide plebiscite actually reveal the majority will? For a variety of reasons, the answer from many social scientists is a resounding “no.”⁷⁹ First, fewer than 50 percent of American adults regularly vote,⁸⁰ and of those who do, “voter fatigue” and other factors cause some electors to vote only for the candidates on their ballots, not the issue propositions.⁸¹ Moreover, those who vote on propositions do not accurately reflect the electorate itself.⁸² Second, misleading issue campaigns, ambiguous proposition language, and the emergence of counterproposals on ballots have contributed to widespread voter confusion and miscast votes.⁸³ Third, interest groups and wealthy individual activists wield enormous power in shaping what are later accepted as the policy preferences of “the majority” because these groups—not the voters themselves—select and draft the ballot questions.⁸⁴ Finally, proponents of public choice theory posit that as a result of “the paradox of voting,” a plebiscite will never accurately determine the popular will.⁸⁵ In light of the foregoing problems, two commentators go so far as to

76. *Id.* (noting that in these states, legislative repeal or amendment requires just a simple majority vote in both houses).

77. ELLIS, *supra* note 8, at 126.

78. See THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA* 113–37 (Metro. Books 2004).

79. See e.g. Sherman Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Eule, *supra* note 32, at 1513–22; HASKELL, *supra* note 3, at 121–46; Vitiello & Glendon, *supra* note 6, at 1285–89.

80. Eule, *supra* note 32, at 1514.

81. *Id.* at 1515; CRONIN, *supra* note 18, at 75–77.

82. CRONIN, *supra* note 18, at 77 (citing a survey of Massachusetts voters that showed “people with higher incomes, Republicans, liberals, and males were more likely than others to vote on ballot propositions”); Eule, *supra* n. 32, at 1515 (noting that those who vote on ballot propositions are, relative to voters in general, “disproportionately well-educated, affluent, and white”).

83. Eule, *supra* note 32, at 1517.

84. ELLIS, *supra* note 8, at 77–79.

85. HASKELL, *supra* note 3, at 13. Haskell summarizes the four central tenets of public choice theory as follows:

1) The paradox of voting concerns the relationship of individual choice to group choice. The paradox is that whereas an individual can make a rational, logical, and coherent ordering of choices, options, or candidates presented to him or her, it is often impossible for a group, even one made up of well-informed and rational individuals, to order its choices coherently.

2) Majorities in electoral party politics are really unstable coalitions of minorities that rarely if ever express clear and comprehensive policy instructions.

3) Different legitimate and widely used methods of voting often produce different winners.

suggest that independent judges may better reflect a *broad consensus* on divisive social issues than the initiative process does.⁸⁶

Setting aside the myriad problems inherent in determining the will of “the People,” it is important to remember that unfiltered majority rule has never been the quest of American democracy.⁸⁷ Our founders created a system with numerous *counter-majoritarian* elements,⁸⁸ including a Senate capable of mitigating the variable and occasionally “unenlightened” policymaking of the larger and more directly accountable House of Representatives.⁸⁹ In a prescient passage on the necessity of bicameralism, James Madison wrote, “[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.”⁹⁰

Another counter-majoritarian institution our founders created is an independent judiciary⁹¹ capable of “guard[ing] the Constitution and the rights of individuals from the effects of those ill humors . . . which sometimes disseminate among the people themselves” and occasionally give rise to “serious oppressions of the minor party in the community.”⁹² Admittedly, the founders designed the judiciary to check the power of citizens’ *representatives* to the federal government; after all, initiatives and referenda “were virtually unknown to them.”⁹³ But no leap of imagination is required to conclude that had the founders envisioned the rise of direct democracy, they would have deemed an independent judiciary necessary to safeguard the Constitution not only from the people’s representatives, but from *the people* themselves.⁹⁴

4) Any decision-making process used by a group to decide among three or more options may be manipulated by strategic voters.

Id. (citations omitted).

86. Vitiello & Glendon, *supra* note 6, at 1277.

87. Charlow, *supra* note 6, at 533–41; ELLIS, *supra* note 8, at 122–23; Eule, *supra* note 65, at 784.

88. These elements include bicameral legislatures, legislative committees, the presidential veto, and the “[s]upermajorities [that] are sprinkled throughout the Constitution.” ELLIS, *supra* note 8, at 122; *see also* Vitiello & Glendon, *supra* note 6, at 1290.

89. THE FEDERALIST NO. 63, at 390 (James Madison) (Willmoore Kendall & George W. Carey eds., 1966).

90. *Id.* at 384.

91. Charlow, *supra* note 6, at 560–61.

92. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 89, at 469.

93. Eule, *supra* note 32, at 1523 (citation omitted).

94. *See id.*

It is idle . . . to speculate how the delegates [to the Constitutional Convention] might have responded to a proposal that the Constitution contain provisions for initiatives or referenda. . . . But everything about the tone of the Convention suggests that they would have looked upon such a scheme ‘with a feeling akin to horror.

(citation omitted). Of course, as a philosophical and a practical matter, “[i]t is one thing for a court to undertake the task of protecting the people from their government and quite another to protect

The fact that courts serve as the primary check on citizen lawmaking is evident in the ubiquity of lawsuits over initiatives and referenda.⁹⁵ In the 1990s, more than half of all initiatives in three of the five most active direct democracy states were challenged in state or federal court.⁹⁶ The courts struck down 55 percent of the challenged laws in whole or in part,⁹⁷ most often because they *violated individual rights* protected by the U.S. and/or state constitutions.⁹⁸ The abrogated rights included those of free speech, freedom from cruel and unusual punishment, equal protection, and procedural and substantive due process.⁹⁹

III. JUDICIAL INDEPENDENCE ENDANGERED

The expansion of citizen lawmaking generally and its use to decide minority rights questions in particular further threaten the precarious position American courts have occupied since the Supreme Court decided *Marbury v. Madison*.¹⁰⁰ To the delight of some and the dismay of others, it is a

the people from themselves.” *Id.* at 1585. One of the most widely debated questions vis-à-vis judicial review of direct democracy is the appropriate standard of review courts should apply. Whether the proper standard is stricter than, equal to, or more deferential than that applied to legislative enactments is beyond the scope of this comment.

95. See Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards* 1, 11 (Am. Pol. Sci. Ass’n, Sep. 1999), available at <http://www.iandrinstitute.org/Studies.htm> (arguing that courts have “become the meta-check on the initiative process” and describing the 1990s as “the Golden Age of initiative litigation”); see also Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 *LOY. L.A. L. REV.* 1239, 1256–58 (1998) (“Federal litigation is . . . fast becoming another step in an opposition campaign strategy. If opponents fail to defeat an initiative at the ballot box, a portion of the campaign budget is routinely set aside to contest the initiative in federal court.”); John Jacobs, *Poll: Voters Like Initiative Process, But Want It Fixed*, *SACRAMENTO BEE*, Dec. 9, 1997, at B7 (quoting University of California Berkeley Political Scientist Gene Lee’s characterization of the overloaded judiciary as an “extraordinary cost” of the initiative explosion).

96. Miller, *supra* note 95, at 2 (analyzing litigation over initiatives in California, Oregon, and Colorado). State courts adjudicated roughly two times more initiative challenges than federal courts did, but the latter were “somewhat more likely” to invalidate the challenged law. *Id.* at 3. The prevailing explanation for why federal courts are more likely to strike down initiatives stems from the relative security and therefore independence of federal judges (who have lifetime tenure) compared to their elected state counterparts. *Id.* at 13 (citing Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 *NOTRE DAME L. REV.* 1133 (1977) and Vitiello & Glendon, *supra* note 6); see Holman & Stern, *supra* note 95, at 1240–41; but see Richard L. Hasen, *Judging the Judges of Initiatives: A Comment on Holman and Stern*, 31 *LOY. L.A. L. REV.* 1267, 1267–70 (1998) (questioning the empirical basis for the conclusion that federal judges are less deferential to initiatives than are California state judges).

97. Miller, *supra* note 95, at 2.

98. *Id.* at 3.

99. *Id.* at 22. Undoubtedly some of the violations of “individual rights” included in Miller’s analysis are not violations of “minority” rights per se. Notwithstanding the distinction, the fact remains that in an era when social policy is increasingly shaped by direct democracy, the courts “stand virtually alone” in countering majoritarian excess. *Id.* at 29. Attempts to curtail the courts’ checking power, therefore, endanger unpopular minorities most.

100. 5 U.S. 137 (1803). *Marbury* established that among the three branches of government, the Supreme Court decides whether legislative acts comply with the Constitution. In cases con-

position that may soon be untenable. The more diligently the judiciary meets its obligation to safeguard minorities' constitutionally protected rights, the more vulnerable it is to backlash from outraged majorities. The backlash in turn threatens judicial independence,¹⁰¹ thereby undermining courts' capacity to check abuses of raw majority power. Rage against the courts is evident in incendiary criticism that foments hostility toward "activist" judges¹⁰² and erodes public confidence in the state and federal judiciaries. It is also evident in the so-called "reforms" that some radical activists, officials, and interest groups propose to curtail the power and autonomy of the courts.

The gathering threat to judicial independence has numerous causes apart from the outrage generated by invalidated initiatives. In fact, the growing popularity of direct democracy is a product of many of the same economic, social, and technological developments that have placed the courts at the center of local and national politics.¹⁰³ But shared origins are only one dimension of the relationship between the rise of the initiative and the decline of judicial independence. In a 1994 article, Professor Julian Eule identified a causal dimension between these two trends, stating:

[J]udicial protection is most needed in the face of voter measures motivated by popular passion or prejudice. Yet it is precisely when electorally accountable judges stand up to such efforts that

cerning constitutionally suspect acts, Chief Justice John Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. According to historian Joel B. Grossman, *Marbury* is "the poster child of the American legal system." Martha Neil, *Cases and Controversies: Some Decisions Are All the Rage—Literally*, ABAJournal.com, <http://www.abanet.org/journal/redesign/10fmad.html> (Sep. 29, 2005) (last visited Jan. 27, 2007).

101. For the purposes of this comment, "judicial independence" denotes *decisional* and *institutional* independence as elucidated in the following definition from the American Judicature Society (AJS):

Judicial independence is a concept that expresses the ideal state of the judicial branch of government. The concept encompasses the idea that individual judges and the judicial branch as a whole should work free of ideological influence. Scholars have broken down the general idea of judicial independence into two distinct concepts: decisional independence and institutional, or branch, independence. Decisional independence refers to a judge's ability to render decisions free from political or popular influence based solely on the individual facts and applicable law. Institutional independence describes the separation of the judicial branch from the executive and legislative branches of government.

AJS, What is Judicial Independence?, http://www.ajs.org/cji/cji_whatjsi.asp (last visited Jan. 27, 2007).

102. Though the phrase "judicial activist" has lately been associated primarily with critics from the political right, when either Republicans *or* Democrats "seek to criticize judges or judicial nominees, they often resort to the same language. . . the word 'activist' is rarely defined. Often it simply means that the judge makes decisions with which the critic disagrees." Paul Gewirtz & Chad Golder, Editorial, *So Who Are the Activists?*, N.Y. TIMES, Jul. 6, 2005, at A19.

103. These developments include, *inter alia*, the "tabloidization" of American media and the ascension of the "sound bite" as a replacement for thoughtful analysis and reporting of complex issues, the increasingly partisan nature of the political sphere, and an increasingly active and well funded cadre of special interest groups and single-issue activists. Uelman, *supra* note 96, at 1134-35.

they are most at risk. A judiciary that is directly accountable to the identical forces which shaped the judgment under review may find it difficult to provide sustained enforcement of more deliberative constitutional norms.¹⁰⁴

In the eleven years since Professor Eule's article, it has become abundantly clear that both electorally accountable state judges *and* life-tenured federal judges are vulnerable to an increasingly destructive backlash from organized interests that see the courts as an impediment to their policy agendas.

A. *The Targeting of Individual Judges*

To varying degrees, judges in both the federal and state judiciaries are vulnerable to political pressures. Federal judges are appointed by the president with "advice and consent" from the Senate and enjoy lifetime tenure "during good behaviour,"¹⁰⁵ while judges in thirty-nine states are in some way accountable to the electorate.¹⁰⁶ Elected judges face well-funded and increasingly successful campaigns to prevent their reelection, often on the basis of one unpopular opinion.¹⁰⁷ But appointed judges—both federal and state—are also under siege from impeachment campaigns and other forms of reprisal.¹⁰⁸ Although calls for impeachment have met with relatively little success,¹⁰⁹ they have chilling effects of their own. Regardless of what form they take, attacks on individual judges influence judicial decisionmak-

104. Eule, *supra* note 55, at 739; *see also* Miller, *supra* note 16, at 1055 (discussing voter frustration with courts that overturn initiatives and stating that "the same Populist impulse that drives initiative lawmaking can further politicize the judiciary and threaten its independence").

105. U.S. CONST. art. II, § 2, cl. 2.; U.S. CONST. art. III, § 1. As previously discussed, the Framers viewed lifetime tenure as a way to insulate the federal judiciary from encroachment by the other branches of government and to thwart "mob rule." Vitiello & Glendon, *supra* note 6, at 1290.

106. Rachel Paine Caufield, *The Foreboding National Trends in Judicial Elections*, Presentation to the Iowa Judges Conference 1 (June 24, 2005), *available at* http://www.ajs.org/selection/docs/caufield_ia_judges_conference.pdf (last visited Apr. 27, 2006). Among the thirty-nine states are those with partisan elections, nonpartisan elections, and "hybrid" systems. *Id.* Judges sitting on the highest courts of all but two direct initiative states (Maine and Massachusetts) are ultimately accountable to voters. Eule, *supra* note 55, at 735.

107. Caufield, *supra* note 106, at 4; George Hodak ed., *Judges in the Culture Wars Crossfire*, A.B.A. J., Oct. 5, 2005, <http://www.abanet.org/journal/redesign/10fround.html> (last visited Feb. 10, 2006).

108. Death threats and acts of physical violence against American judges are also on the rise. Julian Borger, *Former Top Judge says U.S. Risks Edging Near to Dictatorship*, THE GUARDIAN (London), Mar. 13, 2006, at 19 (reporting on a speech by former Supreme Court Justice Sandra Day O'Connor, in which the latter "noted [that] death threats against judges were on the rise"); Judge Damon Keith, Editorial, *Court Critics Out of Order? Yes: Recent Attacks on Independence of Judges Endanger Democracy*, DETROIT FREE PRESS, Apr. 16, 2006, at 1E (describing specific threats made against Supreme Court justices Ruth Bader Ginsburg and Sandra Day O'Connor).

109. Impeachment of federal judges by the House of Representatives has taken place only thirteen times since 1789. Butch Mabin, *Ginsburg speaks at UNL*, LINCOLN STAR J. (Lincoln, Neb.), Apr. 8, 2006, *available at* <http://journalstar.com/articles/2006/04/07/local/doc4436adb57e62e783323426.txt> (citing Justice Ruth Bader Ginsburg).

ing by increasing the personal and professional risks for judges who interpret the law in ways at odds with the majority's preferences. Such attacks also erode public confidence in the judiciary itself.

Attacks on numerous judges over the past twenty years illuminate the increasing politicization of the judiciary and its implications for judicial independence. For example, retention elections for California Supreme Court justices passed without much attention until the mid-1980s.¹¹⁰ Then in 1986, Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso lost their seats in the wake of what many insiders considered a purely political campaign.¹¹¹ Especially rankled by the justices' rulings in death penalty cases,¹¹² conservative activists spent more than seven million dollars to oust them¹¹³ by funding campaign ads equating "no votes" against the justices with "yes votes" for the death penalty.¹¹⁴ Voters defeated Bird by a two-to-one margin, apparently convinced by conservatives' portrayal of her as a "left-wing zealot who arrogantly refused to implement laws the people wanted."¹¹⁵

Similarly, in 1990, Mississippi voters ousted Supreme Court Justice Joel Blass in favor of an opponent who portrayed him as "soft on crime."¹¹⁶ Unsurprisingly, the winning candidate—a self-described "tough judge for tough times"—had secured the endorsement of the Mississippi Prosecutors Association.¹¹⁷ Also that year, anti-abortion interest groups in Florida attempted to oust then Chief Justice Leander Shaw, Jr.¹¹⁸ Their effort was unsuccessful, but it required Shaw to raise and spend \$300,000 to retain his seat.¹¹⁹ The same forces organized in 1992 against Florida Supreme Court Associate Justice Rosemary Barkett, this time joined by prosecutors and police who decried a single dissenting opinion from Barkett in a death penalty case.¹²⁰ Barkett held on to her seat after receiving nearly 61 percent of the vote, but the single death penalty decision cost her an appointment to the Court of Appeals for the Eleventh Circuit.¹²¹ Also in 1992, pro-death

110. Maura Dolan, *Rose Bird's Quest for Obscurity; Voted out in 1986 after a Firestorm of Controversy, the Former Chief Justice of California is Portrayed by Some as a Struggling Recluse*, L.A. TIMES, Nov. 15, 1995, at A1.

111. Anthony Murray, Editorial, *Once is Enough, Don't Settle Judicial Scores*, L.A. TIMES, Mar. 24, 1987, at Metro 5.

112. Uelman, *supra* note 96, at 1136.

113. Murray, *supra* note 111.

114. Uelman, *supra* note 96, at 1136.

115. Dolan, *supra* note 110.

116. Uelman, *supra* note 96, at 1137.

117. *Id.*

118. *Id.* at 1140 (footnote omitted).

119. *Id.*

120. *Id.* The police and prosecutors were apparently unmoved by Barkett's overall record in death penalty cases; in her previous nine years on the bench, she had voted to affirm more than two hundred death sentences. *Id.*

121. *Id.*

penalty interests succeeded in removing Mississippi Supreme Court Associate Justice James Robertson on the basis of two dissenting opinions.¹²²

Four years later, activists orchestrated the defeat of Tennessee Supreme Court Justice Penny White—the first judge ever removed by voters in the state’s twenty-two year history of retention elections for appellate courts.¹²³ After taking advantage of free media coverage to position the contest as “a referendum on the death penalty,” conservatives celebrated White’s defeat, deeming it “the first blow in their battle ‘to take back the courts.’”¹²⁴ The hostility against White stemmed from a single death penalty decision.¹²⁵ Nebraska Supreme Court Justice David Lanhier also fell prey to voter backlash in 1996, his defeat attributable to the same well-financed interests that sponsored the successful term limits initiative he voted to overturn.¹²⁶

More recently, Nevada Supreme Court Justice Deborah Agosti survived a recall campaign that anti-tax activists mounted in 2003, only to decide not to participate in a subsequent retention election.¹²⁷ The recall campaign stemmed from a single Supreme Court decision holding that the legislature was required to fund public education, notwithstanding a constitutional provision requiring a two-thirds majority to pass tax bills.¹²⁸ In 2004, Iowa Senator Kenneth Veenstra urged voters to unseat four state supreme court justices in retaliation for a single decision in which the justices voted to invalidate a law regulating tax rates for different types of casinos.¹²⁹

As the foregoing incidents demonstrate, campaigns to oust incumbent state judges on the basis of one or two controversial decisions have become a regular feature of American political life. The trend toward increasingly issue-oriented judicial elections shows no signs of abating and indeed, most commentators expect it to accelerate.¹³⁰ At the same time, incidents of re-

122. *Id.* at 1137.

123. Jeff Woods, *Public Outrage Nails a Judge*, NASHVILLE BANNER (Nashville, Tenn.), Aug. 2, 1996, at A1.

124. *Id.* Commenting on White’s removal, Tennessee Conservative Union President John Davies said, “This is a historic decision where the people have started to take back the courts from soft-on-crime judges.” *Id.*

125. *Id.*; Gerald F. Uelman, *Judges Hear the Crocodiles Snapping; Justice: Nationwide, the Trend is to Stifle Correct but Politically Unpopular Rulings*, L. A. TIMES, Feb. 19, 1997, at Metro B9.

126. *Id.*

127. Am. Judicature Soc’y, *Judges under Fire*, http://www.ajs.org/cji/cji_fire.asp (last visited Feb. 10, 2006) (citations omitted).

128. *Id.*

129. *Id.*

130. In the wake of *Republican Party of Minn. v. White*, 536 U.S. 765, 765 (2002) (holding that candidates for judicial office have a First Amendment right to announce their views on disputed legal and political issues), many commentators have asserted that judicial elections will become increasingly partisan, bitter, and expensive. See, e.g., Caufield, *supra* note 106, at 4 (noting that “more money and more organized interests equal more politically motivated attacks

prisal against state judges who are *not* subject to elections¹³¹ and even life-tenured federal judges have also become quite unremarkable.¹³²

The targeting of judges based on single issues clearly undermines decisional independence within the judiciary. As former California Supreme Court Justice Otto Kaus explained, a judge is acutely aware of the possible consequences of his decision in a controversial case.¹³³ This awareness, Kaus writes, is akin to “finding a crocodile in [the] bathtub when you go in to shave in the morning. You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”¹³⁴ Kaus’s view comports with survey results from 1991—a time when the judiciary was arguably *less* politicized than it is today—showing that just over 60 percent of 369 electorally accountable judges then believed that retention elections affect judicial behavior.¹³⁵ Approximately 28 percent of the respondents felt that elections made them “more sensitive to public opinion,”

on judges and judicial candidates,” and that *White* will “further exacerbat[e] . . . these trends”); Hon. Joseph M. Hood, *Judicial Independence*, 23 NAT’L ASS’N ADMIN. L. JUDGES J. 137, 139–40 (2003) (discussing the implications of the *White* decision for judicial independence vis-à-vis the role of “money and special interest groups”).

Even before *White* was decided, the spectacular amount of money pouring into judicial elections nationwide both caused and reflected an increasingly politicized judiciary. Caufield, *supra* note 106, at 5. Spending on elections for state supreme court justices, for example, reached a new record in 2004, with \$9.3 million spent to fill a single seat on the Illinois Supreme Court. Tim Jones, *Voters, Activists Put Heat on Judges; Interest Groups, Playing to Voter Resentment, Mount TV Attack Ads*, CHI. TRIBUNE, Dec. 5, 2005, at 1. Much of the money is spent on deceptive ads that oversimplify judges’ records. *Id.* In an archetypical example, one TV spot vilified a (soon-to-be-defeated) justice in West Virginia as “too dangerous for our kids.” *Id.* The total tab for television advertising promoting and disparaging judicial candidates in fifteen states reached \$21 million in 2004. Caufield, *supra* note 106, at 3.

131. Examples include a Massachusetts judge who was targeted by a state representative for removal in 2000, based on a single instance of unacceptably “lenient” sentencing involving a convicted child molester. Editorial, *Lopez Not Issue, Independence Is*, BOSTON HERALD, Apr. 13, 2001, at 24. A Massachusetts state representative proposed removing all four justices who comprised the majority in *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 941 (Mass. 2003), which legalized same-sex marriage in the state. Am. Judicature Soc’y, *supra* note 127. Chief Justice Margaret Marshall was specifically targeted for removal by the Article 8 Alliance, an anti-gay marriage group. *Id.* In 2004, a Colorado state representative, backed by the Christian advocacy group Focus on the Family, introduced a resolution to impeach a Denver district judge for allegedly violating the constitutional rights of a mother in a custody battle with her former lesbian partner. Chris Frates, *GOP Criticizes Group’s Push to Impeach Judge*, DENVER POST, Apr. 18, 2004, at B2. The mother had “embraced Christianity and renounced homosexuality,” prompting the judge to order her not to expose the child to religious doctrines or other teaching of a homophobic nature. *Id.*

132. The American Judicature Society has documented fourteen incidents of reprisal, including calls for impeachment, against federal judges at all levels since 2001. Am. Judicature Soc’y, *supra* note 127.

133. Uelman, *supra* note 96, at 1133.

134. *Id.* (footnote omitted). Kaus himself confessed that when he voted to uphold the constitutionality of a ballot initiative in 1982, his position might have been subconsciously influenced by thoughts of his upcoming retention election. Eule, *supra* note 55, at 738 (footnote omitted).

135. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994).

and approximately 15 percent thought that “judges avoid[ed] controversial cases or rulings before elections.”¹³⁶ While the survey’s designers did not speculate about the role of respondent bias in their survey, it is logical to assume that some underreporting occurred, given that judges would likely *prefer* to believe that their decisional independence is unaffected by political pressure.

Professor Gerald Uelman tested Kaus’s “crocodile theory” by analyzing the actual effect of single-issue attacks against elected judges, and the results are sobering. Describing the well documented backlash over anti-death penalty rulings as “the fattest crocodile,” Uelman concluded that political pressure is partly responsible for a remarkable and relatively recent increase in the number of death sentences affirmed by six state supreme courts.¹³⁷ In 1985, these six courts affirmed 63 percent of death sentences appealed.¹³⁸ By 1995, that rate had jumped to 90 percent.¹³⁹ According to Uelman’s analysis, the rate at which judges affirm death sentences appears to correlate with methods of judicial selection: the less secure a judge’s position, the more likely she is to affirm.¹⁴⁰

In addition to creating a climate in which judges’ decisionmaking is increasingly subject to political influence, the targeting of individual judges—and the corresponding portrayal of them as activists in black robes—has contributed to a troubling lack of public confidence in the judiciary.¹⁴¹ More than six years ago, a study sponsored by the National Center for State Courts found that 81 percent of people surveyed believed politics influences judicial decisions.¹⁴² A 2005 poll by the *ABA Journal* revealed equally concerning results. Among its findings: 56 percent of respondents strongly agreed or somewhat agreed with the statement, “Judicial activism . . . seems to have reached a crisis. Judges routinely overrule the will of the people, invent new rights and ignore traditional morality.”¹⁴³

136. *Id.* at 312–13.

137. Uelman, *supra* note 96, at 1136 (analyzing affirmance rates in California, Illinois, Indiana, Ohio, Texas, and Virginia).

138. *Id.*

139. *Id.*

140. *Id.* at 1137 (For example, judges subjected to partisan contested elections affirm at a rate of 62.5 percent; judges appointed by executives without retention elections affirm only 26.3 percent of the sentences.).

141. See Editorial, *Injudicious Intimidation: Objections over Courts Cross Line from Healthy Criticism to Dangerous Threat*, DETROIT FREE PRESS, Apr. 16, 2006, at 2 (asserting that while “speaking out” on judicial decisions” is good for democracy, “venom[ous]” remarks “can erode public faith in justice”).

142. Lauren Stiller Rikleen, *Courting Change, Independently Watchful Eyes Still See Us as World Model*, BOSTON GLOBE, Oct. 15, 2000, at C3.

143. Martha Neil, Half of U.S. Sees ‘Judicial Activism Crisis’, Sept. 30, 2005, <http://www.aba.net/org/journal/redesign/s30survey.html>.

B. Attacks on the Judicial Branch

The low level of confidence the judiciary enjoys among members of the public undoubtedly enables numerous anti-court “reforms” to advance further than they otherwise would. Indeed, proposals that would have seemed unnecessary and even radical in bygone eras are now quite common. Many of them seek to undermine the structural integrity of federal and state judiciaries in profound ways, revealing a deep contempt not only for unpopular decisions, but for the very principle of judicial independence.¹⁴⁴

Contempt for the institution of the judiciary and widespread ignorance of its counter-majoritarian role¹⁴⁵ are manifest in the remarks of political actors nationwide. Former U.S. Representative Tom Delay once opined that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history,”¹⁴⁶ and at the zenith of the Terri Schiavo controversy, he railed against “the ‘arrogant, out-of-control, unaccountable’ judiciary.”¹⁴⁷ More dramatically, evangelist Pat Robertson characterized the federal judiciary as more threatening to America than were Nazi Germany, Japan, and the Civil War,¹⁴⁸ and a Focus on the Family spokesperson described “judicial tyranny” as “one of the biggest threats to our civil and religious liberties.”¹⁴⁹ State legislators have also joined in the verbal assault. For example, Alaska senator Loren Leman remarked that “The [Alaska Supreme Court] needs to be a reflection of Alaskan society and our values . . . [a]nd if it isn’t, then we need to get hold of

144. On the important distinction between criticizing specific decisions and disparaging the judiciary as a whole, see Hodak, *supra* note 107, at 3 (quoting Professor Michael Tigar’s concerns over “attacks by majoritarian institutions on the right of judges to make [countermajoritarian] decisions”); Herman Schwartz, Editorial, *The Nation: The Law; The War against Judicial Independence*, L.A. TIMES, May 11, 1997, at M2 (distinguishing “justified and indeed necessary” criticism of courts’ performances from “[p]artisan attacks that undermine their independence”).

145. See Neil, *supra* note 143 (referencing Professor Charles G. Geyh’s observation that [t]he idea that judges should ‘somehow follow the voters’ views . . . reflects a fundamental misunderstanding of what judges are supposed to do’” and describing ABA President Michael S. Greco’s appointment of a nonpartisan Commission on Civic Education and the Separation of Powers to “educate Americans about the role of an independent judiciary in U.S. government.

146. Schwartz, *supra* note 144 (quoting Rep. DeLay). DeLay was one of seventy-four co-sponsors of the Reaffirmation of American Independence Resolution, H.R. Res. 568, 108th Cong. (2004). The resolution “express[ed] the sense of the House of Representatives” that federal courts should cease using foreign legal sources to interpret U.S. law. Representative Tom Feeney, sponsor of the Resolution, threatened that “judges who based decisions on foreign precedents would risk the ‘ultimate remedy’ of impeachment.” Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10. Commenting on Representative Feeney’s remarks, Chief Justice William Rehnquist asserted that “it ha[s] been clear since early in the country’s history that ‘a judge’s judicial acts may not serve as a basis for impeachment.’” *Id.*

147. Jones, *supra* note 130 (quoting Rep. DeLay).

148. Derek Rose, *Robertson: Judges Worse Than Al Qaeda*, N.Y. DAILY NEWS, May 2, 2005, at 10.

149. Frates, *supra* note 131 (quoting Peter Brandt).

it.”¹⁵⁰ And Florida representative Victor Crist identified “judges who do not listen to the will of the people” as a problem the Florida legislature must address.¹⁵¹

While the foregoing remarks illuminate the intensity of the backlash against the American judiciary, the “remedies” some have proposed are better indicators of its potential implications.¹⁵² In the U.S. Congress, bills introduced since 1997 would subject federal judges to Senate reconfirmation after 10 years;¹⁵³ limit federal judges’ power to overturn state initiatives;¹⁵⁴ prohibit federal courts from relying on foreign or international law in interpreting the U.S. Constitution;¹⁵⁵ and strip federal courts’ jurisdiction over suits challenging the Defense of Marriage Act,¹⁵⁶ governmental displays of the Ten Commandments,¹⁵⁷ and the recitation of the Pledge of Allegiance.¹⁵⁸ Former Federal Judge Robert Bork has advocated for a constitutional amendment that would empower *Congress*—with only a simple

150. Liz Ruskin, *A Question of Balance: Court Rulings Ignite Conservative Backlash, Debate over Judge Selection*, ANCHORAGE DAILY NEWS, Mar. 29, 1998, at A1 (quoting Sen. Leman).

151. Tampa Tribune Editorial Board, *Crist’s Assault on the High Court*, TAMPA TRIB., May 15, 2000, at 8 (quoting Rep. Crist).

152. Speaking before a Georgetown University audience in March 2006, former Supreme Court Justice Sandra Day O’Connor cited the records of autocracies and former Communist countries and warned that politically-motivated interference with the American judiciary is placing the U.S. “in danger of edging towards dictatorship.” Borger, *supra* note 108.

153. H.R.J. Res. 77, 105th Cong. (1997).

154. H.R. 1170, 104th Cong. (1995); Judicial Reform Act of 1998, H.R. 1252, 105th Cong. (1997). Both bills would prohibit individual federal judges from enjoining any voter-enacted initiative on grounds of unconstitutionality and would require that any applications for injunction be heard by three-judge panels.

155. Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (1995). Forty-six representatives cosponsored this bill.

156. Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005). Seventy-five representatives co-sponsored the bill. (The Defense of Marriage Act, 28 U.S.C.A. § 1738C (2000), allows states to refuse to recognize same-sex marriages granted by other states.)

157. Safeguarding Our Religious Liberties Act, H.R. 4576, 109th Cong. (2005). Seven representatives co-sponsored the bill.

158. *Id.* In a typical example of the ubiquitous political grandstanding that occurs when unpopular court decisions are announced, numerous officials rushed to condemn the Ninth Circuit decision that undoubtedly motivated H.R. 4576. President Bush called “ridiculous” the outcome of *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002) (holding that a California school district’s policy of teacher-led recitation of the Pledge of Allegiance including the words “under God” violated the Establishment Clause). Andrew Cohen, Editorial, *The Dangers of Holding Courts in Contempt*, THE WASHINGTON POST, July 7, 2002, at B2. Senator Tom Daschle deemed the decision “just nuts,” while Senator Robert Byrd described the authoring judges as “stupid” and Representative Joseph Pitts presciently opined that “it was time ‘for Congress and the president to stand up to the courts that have arrogated so much power to themselves.’” *Id.*

It must be noted that Congress has threatened to strip the courts’ jurisdiction in the past, as in the 1950s when outrage over desegregation was mounting. Mabin, *supra* note 109; *see also* Vitello & Glendon, *supra* note 6, at 1294 (noting that in 1981 and 1982, members of Congress introduced thirty bills attempting to strip federal courts’ jurisdiction over challenges involving school prayer, abortion, and busing). The fact that these efforts are nothing new provides little comfort when one considers the larger context—social, political, economic, and technological—fueling the current backlash against the judiciary. *See supra* note 103 and accompanying text.

majority in both houses—to overrule the decisions of federal and state judges.¹⁵⁹ In Florida, where the backlash against the state judiciary seems especially virulent, state legislators have entertained a bill that would require incumbent appellate judges to win two-thirds majorities in retention elections and restrict judicial oversight of lawyers' conduct to that which occurs in court.¹⁶⁰ Florida politicians have also advocated a constitutional amendment to remove death penalty cases from the state supreme court's jurisdiction and make such cases the exclusive province of an autonomous "death court," whose every member would be appointed by the governor.¹⁶¹

Interest groups nationwide are gaining attention with their own anti-judiciary proposals. One of the most noteworthy is a proposed amendment to South Dakota's constitution that appeared on statewide ballots in November 2006. Sponsored by a "single-issue grassroots organization," J.A.I.L. 4 Judges (the Judicial Accountability Initiative Law) would have ensured judicial accountability to "the People in mass" by empowering citizen grand juries to assess whether judges' decisions reflect "lawful conclusions."¹⁶² Another ambitious interest group, PeopleNotJudges.com, has dedicated itself exclusively to "reining in runaway judges."¹⁶³ Among other proposals, the group calls on Congress and the states to

pass a "Judicial Reform Amendment" to the U.S. Constitution that would: (a) place a maximum ten year term limit on all federal and state judges; and (b) provide that the "good behavior" standard of Article III, Section I shall be determined by the President with the advice and consent of the Senate.¹⁶⁴

159. Bob Herbert, Editorial, *A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 4, 2000, at A29 (citing ROBERT BORK, *SLOUCHING TOWARD GOMMORAH: MODERN LIBERALISM AND AMERICAN DECLINE* (HarperCollins 1996)). Apparently unaware that such a draconian change would require a constitutional amendment, Kentucky Representative Ron Lewis tried to accomplish the same outcome by sponsoring The Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920. Dahlia Lithwick, *Not-So Supreme: The Dumb New Proposal to Veto the Supreme Court*, SLATE, Mar. 17, 2004, <http://www.slate.com/id/2097306>. On the subject of judges disparaging their peers and the judiciary generally, see Andrew Cohen, Editorial, *The Dangers of Holding Judges in Contempt*, WASH. POST, Jul. 7, 2002, at B2.

160. Editorial, *Vandals after Our Judiciary*, ST. PETERSBURG TIMES (St. Petersburg, Fla.), Mar. 2, 2001, at 14A (citing H.R.J. Res. 627 (2001)).

161. Editorial, *Death of High Court Not in State's Interest*, PALM BEACH POST (Palm Beach, Fla.), Aug. 19, 2000, at A14.

162. J.A.I.L. 4 Judges, J.A.I.L., <http://www.jail4judges.org> (last visited Apr. 2, 2007); Am. Judicature Soc'y, Editorial, *An Earthquake in South Dakota?*, http://www.ajs.org/ajs/ajs_editorial-template.asp?content_id=472 (last visited Apr. 26, 2006). Approximately 47,000 South Dakotans signed the petition required to qualify J.A.I.L. for the statewide ballot. Jones, *supra* note 130. Thankfully, the amendment was soundly defeated, with approximately 89 percent of voters opposed. Rebecca Fater, *Marshall: Fight to Protest Courts*, THE SUN (Lowell, Mass.) Dec. 1, 2006, at 1.

163. PeopleNotJudges.com, The Team, <http://www.peoplenotjudges.com/about/team.php> (last visited Apr. 25, 2006).

164. PeopleNotJudges.com, The Plan, <http://www.peoplenotjudges.com/about/plan.php> (last visited Apr. 25, 2006).

Activists at the ideological fringe are taking a multifaceted approach to eliminate judicial independence. Aside from the ill-conceived legislative “reforms” emerging at the state and federal levels, calls to cut funding for the operation of the courts ring out from editorial pages and statehouses alike.¹⁶⁵ Another tactic that has actually succeeded in thwarting the work of the judiciary is legislative inaction on judicial nominations.¹⁶⁶

IV. CONCLUSION

Are the attacks on judges and the judiciary a temporary reflection of our anxiety at the beginning of a new century, or a sign that the American system of government is changing in profound and permanent ways? In contemplating this question, it is instructive to consider (1) the expanding use of direct democracy to decide controversial matters of public policy; and (2) the particularly virulent emotions courts arouse when they invalidate voter-approved initiatives. If current trends in the use of the initiative and referendum continue—and especially if the federal government or additional states adopt direct democracy as a vehicle for lawmaking—outraged majorities may ultimately succeed in transforming our historically independent judiciary into a bureau of “rubber-stampers” who are powerless to protect minority rights.

Advocates of judicial “reform” can easily exploit invalidated initiatives and referenda to generate support for their cause because judicial review of citizen lawmaking offends many Americans’ core beliefs about what our democracy is *and should be*. Notwithstanding the vision of this country’s founders, the idea that a desirable society is one where minorities are protected in spite of majority preferences is counterintuitive and perhaps even radical to many citizens. Given our collective belief in majority rule as a good unto itself, Americans’ growing outrage over judicial review in the direct democracy context is not at all surprising.¹⁶⁷ Significantly, the out-

165. Robert Bauer, Editorial, *A Court Too Supreme for Our Good*, WASH. POST, Aug. 7, 2005, at B3 (arguing that Congress should cut the Supreme Court’s budget until the latter allows cameras in the courtroom); Editorial, *Contempt of Courts*, BOSTON GLOBE, May 9, 2002, at A18 (criticizing legislature’s \$40 million in budget cuts to the state judiciary in 2001 and proposing cuts of \$60 million from a \$500 million budget in 2002); PeopleNotJudges.com, *supra* note 164 (calling on Congress to freeze federal judges’ salaries and cut the judicial budget by five percent with the exception of salaries); Frank Phillips, *Judges Wary of Challenging Beacon Hill*, BOSTON GLOBE, Dec. 12, 2001, at B1 (discussing the legislatures’ use of the budget as a tool to infringe state courts’ autonomy).

166. Schwartz, *supra* note 144 (describing “stalling the judicial selection process itself” as part of “the strategy for going after the federal bench”). After securing approval from the Senate Judiciary Committee for a federal judgeship in 1996, one nominee was asked to state her “views in support or in opposition to [all 160] California initiatives in the last decade.” *Id.*

167. Americans’ relative ignorance about the three branches of government generally and the role our framers envisioned for each one undoubtedly exacerbates the aspect of human nature to equate majority rule with ideals such as fairness, justice, etc. In a recent poll sponsored by the American Bar Association, 40 percent of those surveyed could not identify the three branches of government. Neil, *supra* note 143. Fifty-six percent strongly agreed or somewhat agreed with the

rage stems not from differences of opinion about *whether* minority rights are violated by given ballot propositions, but from deeply-rooted convictions that it is nobler (or at least “fairer”) to effectuate the will of the majority than to protect the rights of the minority.

When coupled with a growing certainty among interest groups and individuals about the ultimate righteousness of their preferred social policies, the belief that majority rule is itself a moral good is deeply troubling. As Judge Learned Hand so powerfully stated at a 1944 ceremony in honor of “I Am an American Day”:

The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the mind of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias. . . .¹⁶⁸

It appears that direct democracy, at least in the twenty-six states that currently practice it, is here to stay. And allowing citizens to act as lawmakers is not necessarily or always undesirable—with one essential qualification: the exercise of raw majority power must be subject to the scrutiny of a robust and independent judiciary. To the extent that citizens reject *on principle* the need for a counter-majoritarian force, the continued expansion of direct democracy poses a clear threat to those outside the American mainstream.

statement, “[C]ourt opinions should be in line with voters’ values, and judges who repeatedly ignore those values should be impeached.” *Id.*

168. Judge Learned Hand, Address at “I Am an American Day” Ceremony, N.Y., N.Y. (May 21, 1944), available at <http://www.criminaljustice.org/public.nsf/ENews/2002e67?opendocument> (last visited Apr. 26, 2006).