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"HUMANITY ON THE BALLOT": THE CITIZEN INITIATIVE AND OREGON’S WAR OVER GAY CIVIL RIGHTS

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Abstract: The citizen initiative, a form of “direct democracy” by which citizens both draft and enact their own law, is often described by its supporters as the truest and most representative form of democratic government. As Constitutional framers recognized by the creation of the Guarantee Clause, however, the pure expression of the people’s will must always be tempered by legislative compromise and judicial constraint. Unchecked, individual voters’ fears and private biases come to be memorialized as state code and as constitutional amendments. In this Note, the author highlights the discriminatory nature of the citizen initiative process both generally, and as it targets gay men and lesbians in cities and states across America. Particular attention is paid to the situation of gay men and lesbians in Oregon, where a series of failed citizen initiatives has nonetheless succeeded in creating a climate of hostility and intolerance. The author urges the Supreme Court to accept jurisdiction in cases where citizen initiatives target minority rights, upholding a constitutional scheme that explicitly favors representative state government.

In September of 1992, Lon Mabon, founder and chairman of the Oregon Citizen’s Alliance (OCA), walked among the aging trailers at his headquarters in an industrial park off of Oregon’s Interstate 5.1 “These are the first units of the cultural war meeting on a political battlefield,” he portended.2 “It’s about a lot of citizens concerned at the direction the culture’s going.”3

Since then, Mabon’s battle has been all that he foretold, and it continues to rage today.4 The “war” is over the political and social

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2 Id.
3 Id.
4 See Bill Graves, Measure 9 Defeated; New Battle Expected, Oregonian, Nov. 9, 2000, at C1.
status of lesbians and gay men in Oregon. The battlefield is made up of voting booths throughout the state, from urban Portland and Eugene to the rural farmland that surrounds the OCA headquarters in Brooks. In these booths, Oregon voters may curtail the civil rights of gay men and lesbians by amending their state laws and constitution through the use of citizen initiatives.6

Mabon has proposed three such initiatives in eight years, each more moderately tailored to the aim of “countering the gay rights movement.”7 In 1992, his proposed constitutional amendment branded homosexuality “unnatural, perverse,” and akin to pedophilia and sadism.8 The measure, which required a majority of votes to pass, failed by fourteen percent.9 In 1994, the OCA sponsored another constitutional amendment to forbid government “approval” of homosexuality as a protected class under the Oregon Constitution’s equal protection clause.10 This measure failed by the much slimmer margin of six percent.11 In November of 2000, Oregonians decided whether to approve a statutory amendment that would ban public school instruction that “promotes” homosexuality.12 On election night, the race was called a “cliffhanger,” but eventually urban vote tallies revealed that Measure 9 was again defeated by six percent.13

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5 The characterization “lesbians and gay men” is commonly used in academic literature regarding gay and lesbian issues. See William E. Adams, Is it Animus or a Difference of Opinion? The Problems Caused by Invidious Intent of Anti-Gay Ballot Measures, 34 WILAMETTE L. REV. 449, 450 (1998). These measures also pose threats to bisexual persons, but the measures themselves speak only of lesbians and gay men or “homosexuals.” Id. For this reason, references to gay men and lesbians in this Note also include bisexual persons, at least to the extent that their same-sex sexual behavior and affectional preferences are affected. Id.

6 Article IV, Section 1 of the Oregon Constitution enables registered voters to place proposed constitutional amendments or statutes on the ballot after submitting a signed petition, obtaining a ballot title, and securing valid signatures of registered voters equal to a specified percent of the votes cast for governor at the preceding general election. OR. CONST. art. IV, § 1.

7 See Graves, supra note 4.

8 See ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 165 (Stephanie L. Witt & Suzanne McCormle eds., 1997) [hereinafter ANTI-GAY RIGHTS].


10 See ANTI-GAY RIGHTS, supra note 8, at 165–66.

11 See By the Numbers, OREGONIAN, Nov. 11, 1994, at C1. Measure 13 received 457,822 “yes” votes and 515,660 “no” votes. Id.

12 See Oregon Voter’s Pamphlet (on file with author).

13 See Measure 9 Losing in Election Cliffhanger, OREGONIAN, Nov. 8, 2000, at C1; Meehan, supra note 9; CNN.com, Voter Results in Oregon, at http://www.cnn.com/ELECTION/2000/results/OR/ (last visited Nov. 30, 2001) [hereinafter Voter Results in Oregon].
ure received almost 700,000 votes, however, the most of any OCA initiative.\textsuperscript{14} The day after the election, Mabon reported, “I’m actually sitting here rewriting the measure . . . . It just comes down to a little bit more money and I think we would’ve won.”\textsuperscript{15}

The citizen initiative, a form of “direct democracy,” is a process by which citizens can draft a law or constitutional amendment and then collect a requisite number of signatures to add the measure to the ballot.\textsuperscript{16} To some, the process represents democratic government in its “purest and highest form.”\textsuperscript{17} These proponents of the citizen initiative see it as an opportunity to bypass legislative corruption and inefficiency.\textsuperscript{18} In the storied tradition of New England town meetings, voters are able to debate and decide the matters of greatest importance to them.\textsuperscript{19} Mabon appears to invoke this sentiment, in noting that, “a lot of citizens” stand behind OCA initiatives, and are “concerned at the direction the culture’s going.”\textsuperscript{20}

Critics of the initiative system, however, point to many of its practical flaws and are skeptical as to whether citizen-sponsored ballot measures truly represent issues of real concern to voters.\textsuperscript{21} Instead, some argue, many of the issues simply reflect the concerns of ideological or reform groups who have been unsuccessful in lobbying the legislature.\textsuperscript{22} These groups, critics claim, are able to play on voters’ fears and prejudices to target certain minority groups whose social status is otherwise unproblematic for the majority of citizens.\textsuperscript{23}

In a strictly representative mode of government, critics argue, legislators’ tendencies toward prejudice are chastened by legislative

\textsuperscript{14} See Voter Results in Oregon, supra note 13. The second Measure 9 received 688,572 “yes” votes and 771,205 “no” votes. Id.
\textsuperscript{15} See Graves, supra note 4.
\textsuperscript{17} See CITY CLUB OF PORTLAND, supra note 16, at 11.
\textsuperscript{20} See Yang, supra note 1.
\textsuperscript{21} See Derrick A. Bell, Jr., The Referendum: Democracy’s Barrier to Racial Equality, 54 WASH. L. REV. 1, 18–19 (1978–1979); Magleby, supra note 16, at 35–36. For practical flaws, see infra notes 204–255 and accompanying text.
\textsuperscript{22} See Magleby, supra note 16, at 35–36.
\textsuperscript{23} See id. at 41; Adams, supra note 5, at 458–59; Bell, supra note 21, at 14.
debate, public scrutiny and political compromise. But when the legislative process is turned back to the citizenry, few of these factors that counsel moderation for public officials are likely to affect individual voters’ private biases. Initiatives designed to curtail fair housing, gay civil rights, or to promote so-called “English-only” education are among the categories of ballot measures that are seen to exploit voter “passions” for the sake of discrimination.

The initiative’s propensity for stirring discriminatory sentiment is of particular danger to minority interests in states such as Oregon, California and Colorado, where state code and constitutions are amended relatively easily, and often. By 1992—the year of the first OCA-sponsored initiative—274 citizen initiatives had been submitted to Oregon voters, more than in any other state. And the trend toward citizen-sponsored initiatives is growing: Oregon’s voter’s pamphlet for the 2000 general election was “the size of a telephone book” with twenty-six different ballot initiatives, including the OCA’s latest near-miss amendment to curtail gay civil rights.

As many critics have noted, the sense that pure democratic voting leads to excesses of majority “passion” is not a recent phenomenon. As articulated in The Federalist Papers, James Madison presaged that in systems of direct democracy, minority interests would tend to be oppressed by tyrannical majority factions. His concerns led to the adoption of Article IV, Section 4 of the United States Constitution which assures that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” Known as the Guarantee Clause, it represents the framers’ intention that the gov-

24 Bell, supra note 21, at 29.
25 Id. at 14.
27 See Michael Gillette, The Legislative Function: Initiative and Referendum, 67 OR. L. REV. 55, 59 (1988). In Oregon, “[i]f fifty percent of the people vote in an election but only forty percent of those people vote on the constitutional amendment in question, and a bare majority of that forty percent votes in favor of the constitutional amendment, less than a majority of people eligible to vote in this state will have changed the law for everybody.” Id. at 61.
29 All Things Considered (NPR radio broadcast, Nov. 6, 2000).
32 U.S. CONST. art. IV, § 4; see Linde, supra note 30, at 22–24.
government's power must be "derived from" the people, but not exercised by the people en masse.33

This explicit constitutional provision, however, has been rendered ineffective by the Supreme Court's reluctance to decide on the politically risky subject of a state's governmental structure.34 This reticence, combined with the Court's limited Fourteenth Amendment protection of gay civil rights, has left lesbian and gay Americans with very little constitutional recourse against majority attack in the form of citizen initiatives.35

Part I of this Note highlights the OCA's damaging and divisive efforts to amend Oregon's laws and constitution and describes the national history of anti-gay civil rights initiatives. Part II provides an overview of the initiative process, including its history and proliferation throughout the western United States. Also, it provides a detailed evaluation of the citizen initiative, demonstrating how OCA-sponsored measures exemplify some of the larger practical problems with direct democracy. Part III describes the ideological concerns about direct democracy that were shared by the framers of the Constitution and that led to the inclusion of the Guarantee Clause. Also, it addresses how the Supreme Court's refusal to adjudicate Guarantee Clause claims, and its reluctance to extend Fourteenth Amendment protections, has rendered gay men and lesbians highly vulnerable in the face of discriminatory citizen initiatives. This Note concludes by urging the Supreme Court to accept jurisdiction in cases where citizen-initiated measures have targeted minority rights, and to uphold the constitutional scheme that explicitly favors representative state government.

I. OREGON AND THE BATTLE AGAINST GAY CIVIL RIGHTS

A. The Trumpet is Sounded: Measure 9 and the 1992 Election

MEASURE 9

Amends Oregon Constitution. All governments in Oregon may not use their monies or properties to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism. All levels of government, including public educational systems, must assist in setting a standard for Oregon’s youth which recognizes that these “behaviors” are “abnormal, wrong, unnatural, and perverse,” and that they are to be discouraged and avoided . . . .

Ballot Measure 9 was first introduced in 1991. With its highly inflammatory language, this measure was the first and most extreme of the three proposed initiatives. It grouped homosexuality together with pedophilia, sadism, and masochism, and it provided specific pejorative language with which to brand gay and lesbian Oregonians. Despite the eventual defeat of the OCA at this phase of the battle, Measure 9’s divisive language set the stage for a cultural war that is far from over.

By its terms, Measure 9 proposed to amend the Oregon Constitution in order to prohibit the state from establishing protections based on sexual orientation. It would ban the state from “encouraging homosexuality” and would require agencies and schools to set a standard that homosexuality was “abnormal and perverse.”

Beyond these explicit forms of discrimination and intolerance, however, opponents feared that the measure would have far-reaching consequences for education and employment. Many openly gay public employees worried that their jobs would be threatened by the

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36 See Anti-Gay Rights, supra note 8, at 165. The measure continues, “State may not recognize this conduct under sexual orientation or sexual preference levels, or through quotas, minority status, affirmative action, or similar concepts.” See id.
37 See id. at 18.
38 See id. at 165.
40 See Anti-Gay Rights, supra note 8, at 165.
41 See Alliance that Battled Measure 9 Looks to the Future, Oregonian, Nov. 22, 1992, at C1.
amendment's broad mandate that state agencies "discourage" homosexuality.\textsuperscript{43} Educators predicted that the measure would also threaten the jobs of lesbian and gay teachers, ban hundreds of books relating to homosexuality, and censor teacher's interpretations of literature.\textsuperscript{44} Mabon countered these concerns by noting that gay and lesbian teachers would not lose their jobs, as long as they remained in the closet.\textsuperscript{45} He also argued that teachers could still talk about gay and lesbian artists and their works, provided that they reminded students homosexuality is wrong.\textsuperscript{46}

On an ideological level, Measure 9 was highly divisive.\textsuperscript{47} Characterized as a "bitter struggle," lines were drawn through almost every imaginable demographic classification of Oregonians.\textsuperscript{48} Exit polls revealed a deep divide between Oregonians with varying levels of income and education, and through gender lines.\textsuperscript{49} In rural areas, Measure 9 was a war against the imposition of "urban values."\textsuperscript{50} To born-again Christians and the majority of regular church-goers, it was a war over fundamental notions of right and wrong.\textsuperscript{51} To some lesbian and gay Oregonians, however, it was also a threat to their very lives.\textsuperscript{52}

True to the nature of any "war," physical violence was also a component of the first battle over gay rights in Oregon.\textsuperscript{53} During 1992, "bias" crimes in Oregon increased sharply from the prior year, with eighty-seven reported crimes against gay men and lesbians within two months before the election.\textsuperscript{54} For example, in September, a black lesbian and a gay man in Salem, Oregon were killed when their home

\textsuperscript{43} See Graves, supra note 42.
\textsuperscript{44} See id.
\textsuperscript{45} See id.
\textsuperscript{46} See id.
\textsuperscript{47} See Meehan, supra note 39; Meehan, supra note 9.
\textsuperscript{48} See Meehan, supra note 9.
\textsuperscript{49} See id. As income and education rose, support for Measure 9 waned. Id. About 55% of high school graduates supported it, compared with 35% of college graduates and 22% of people with postgraduate degrees. Id. The initiative produced a gender gap of about ten percentage points. Id. 55% of "yes" voters were men; 45% were women. Id..
\textsuperscript{50} See All Things Considered, supra note 29. Of Oregon's thirty-six counties, nine urban counties surrounding Portland and Eugene rejected the measure, and twenty-seven of Oregon's smaller rural counties approved it. See Meehan, supra note 9.
\textsuperscript{51} See Meehan, supra note 9. Voters who described themselves as born-again fundamentalists or regular church-goers were the most loyal supporters of the measure. Id. More than seven of ten fundamentalists and six of ten regular church-goers voted for the measure. Id.
\textsuperscript{52} See Meehan, supra note 39.
\textsuperscript{53} See id.
\textsuperscript{54} See id.
was firebombed by suspected white supremacists.\textsuperscript{55} Calls to a hot line run by the Lesbian Community Project also increased dramatically, reporting as many as ninety-one incidents of intimidation or violence in one month.\textsuperscript{56}

In October, vandals spray-painted anti-gay and pro-Measure 9 graffiti on the exterior of a church whose leaders had spoken in opposition to Measure 9.\textsuperscript{57} Five nights later, the vandals returned, scrawling epithets aimed at gays and lesbians, minorities, Jews and Catholics in red paint all around the inside of the church.\textsuperscript{58} Thus, a month before the state-wide election, the OCA had already succeeded in changing the cultural climate as acts of intolerance flared up around the state.\textsuperscript{59}

The “No on 9” campaign attempted to capitalize on the lack of outspoken support for the measure by publicizing the opposition of influential public figures in Oregon life.\textsuperscript{60} According to Oregon’s largest newspaper, \textit{The Oregonian}, “every major civic and political figure in Oregon,” as well as “an array of business, religious, labor and cultural groups” stood publicly against the measure.\textsuperscript{61} These included the current governor and four past governors, the Republican and Democratic party leaders, the attorney general, senators, congressmen, and associations of Catholic, Jewish, Lutheran, and Presbyterian clergy.\textsuperscript{62} National figures such as Jesse Jackson, David Dinkins, and even William F. Buckley publicly denounced the initiative.\textsuperscript{63} “No on 9” raised over $2 million dollars for the purpose of amplifying these voices of dissent.\textsuperscript{64}

In contrast, few public figures outside the OCA and Christian fundamentalist groups came forward to support Measure 9.\textsuperscript{65} Instead, the “Yes on 9” campaign avoided traditional media in favor of a grass-


\textsuperscript{56} Meehan, supra note 39. During 1991, 483 incidents of intimidation or violence against gays and lesbians were reported for the entire year. \textit{Id}.

\textsuperscript{57} \textit{Id}.

\textsuperscript{58} \textit{Id}.

\textsuperscript{59} See \textit{id}.


\textsuperscript{61} \textit{Id}.

\textsuperscript{62} Anti-Gay Rights, supra note 8, at 19.

\textsuperscript{63} \textit{Id}.

\textsuperscript{64} See \textit{id}.

\textsuperscript{65} See \textit{id}.
roots "No Special Rights" campaign. Utilizing fliers, speeches, videotaped presentations, and mass mailings, the OCA used emotional appeals and often misrepresentation to gain support where mere ambivalence had stood.

One cable television advertisement featured a black American woman who "believe[s] in right and wrong." She said:

As a mother, I would never allow the public schools to teach my children that racism or drug abuse is good and normal. I do not want them to teach my children that homosexual behavior is good and normal either. Please—let's protect our children from what's wrong. It's not discrimination, it's just common sense.

This advertisement seemed to invoke a paranoid sense of parental obligation, providing the indignation that voting parents lacked from any personal experience with the "homosexual agenda." Particularly in conservative rural areas, classes were most often led by similarly conservative teachers who had no intention of promoting homosexuality. But even in urban areas where schools were more likely to demonstrate acceptance of homosexuality, parents seem to have expressed very few concerns of this nature. One active parent, who led a movement to improve school funding and dealt with "hundreds of parents" over five years reported, "I have never heard a parent share with me concerns about the presentation of homosexuality in public schools." A ten-year PTA member in Oregon's urban Clackamas County said, "I don't remember it coming up once."

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66 Id. As one commentator noted, the coded rhetoric of "special rights" enables opponents of gay rights to tap into deep and powerful reservoirs of social anxiety and anger about other anti-discrimination laws based on race, gender, and disability—particularly affirmative action measures—even as these opponents claim to champion existing civil rights protections. Adams, supra note 5, at 459.


68 Analyzing the Ads, supra note 67, at B4.

69 Id.

70 See Rubenstein, supra note 60; David Sarasohn, Lon Mabon Discovers the Schools, OREGONIAN, Nov. 3, 2000, at B9 [hereinafter Sarasohn, Lon Mabon Discovers]; David Sarasohn, Rural Oregon Ponders the Real Threat, OREGONIAN, Nov. 4, 1994, at C10 [hereinafter Sarasohn, Rural Oregon Ponders].

71 See Graves, supra note 42; Sarasohn, Lon Mabon Discovers, supra note 70; Sarasohn, Rural Oregon Ponders, supra note 70.

72 See Sarasohn, Lon Mabon Discovers, supra note 70.

73 Id.

74 Id.
OCA’s television advertisements featuring minority speakers also sought to portray the rejection of homosexuality as reasonable and socially moderate. They urged Oregon’s socially conservative voters that one could reject homosexuality without being racist or bigoted. Incidentally, the truth was that most black Oregonians opposed the measure, along with virtually all of the major political and social organizations in Oregon—including the NAACP and the Urban League. In this way, the OCA attempted to gain wider support by using less representative spokespeople to speak in favor of its cause.

Another example of misleading campaigning is provided by an OCA radio advertisement. Taking a more extreme tactic, the advertisement proclaimed that the “gay rights agenda” in Oregon was inclusive of an organization called the North American Man/Boy Love Association: “In a desire to legalize sex with children, NAMBLA has proposed first lowering the age of consent to 13, then eliminating the age of consent altogether. The gay rights agenda in Oregon does include pedophilia . . . .” Aside from the absurdity of promoting its cause in this fashion, the advertisement was premised on an utterly false assertion: there is no NAMBLA chapter in Oregon, and all mainstream gay and lesbian groups, both locally and nationally, have continued to condemn both NAMBLA and pedophilia. As a result of such inflammatory advertising, the OCA exploited voters’ prejudices and their geographic isolation from gay and lesbian Oregonians, thereby creating an atmosphere of hostility and gross misunderstanding throughout the state.

Despite the overwhelming and outspoken opposition to Measure 9, over 500,000 Oregonians—and forty-five percent of those at the polls—voted in favor of it. One OCA ally, who appeared on “The Phil Donahue Show” in support of Measure 9, claimed that, “[t]his battle was created by militant homosexuals and sympathizers who want to give civil rights protections to a group based on private behav-

75 See Analyzing the Ads, supra note 67.
76 See id.
77 See id; Anti-Gay Rights, supra note 8, at 19.
78 See Analyzing the Ads, supra note 67.
79 See id.
80 See id.
81 Id. Spokespeople for the Lavender Network newspaper, which ran a NAMBLA advertisement in only two editions, said that the advertisement was mistakenly accepted by a volunteer staff member. Id. The newspaper’s advertising guidelines prohibit accepting advertisements from NAMBLA. Id.
82 See Meehan, supra note 9.
ior in the bedroom.” But the actual experiences of Oregonians witness the fact that prior to 1991, bedroom “behaviors” were actually private and were no cause for battle at all.

B. The Battle Rages on: Measure 13 and the Next Measure 9

1. Measure 13 and the Election of 1994

Measure 13 was the next state-wide initiative in opposition to the “homosexual agenda.” Proposed in 1994, it was entitled the “Minority Status and Child Protection Act” and represented a scaled-down version of the 1992 election’s Measure 9, but its legal effects were the same in many significant ways. Like Measure 9, Measure 13 would have banned state and local governments from protecting lesbians and gay men from discrimination based on sexual orientation. This constitutional amendment would have overturned anti-discrimination laws in four Oregon cities, including Portland. Moreover, the measure threatened “personnel action” against public employees whose sexual behaviors “disrupt the workplace.”

Measure 13 differed from its predecessor in that it did not seek explicit moral denouncement of homosexuality in the state constitution. Rather than requiring state and local governments to actively “discourage” homosexuality, the measure provided that public money could not be used in a manner that would approve it. Also, the OCA attempted to diffuse the book-banning issue of the previous campaign by specifically allowing for adult-only library books addressing homosexuality.

Aside from these few changes, the OCA campaign strategy was largely unaltered, and the group continued to disseminate many of the same advertisements and videos. The campaign’s focus on “child protection” provoked a strong response from some child advocates.

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83 See Meehan, supra note 39.
84 See Anti-Gay Rights, supra note 8, at 17; Rubenstein, supra note 60; Sarasohn, Lon Mabon Discovers, supra note 70; Sarasohn, Rural Oregon Ponders, supra note 70.
85 See Anti-Gay Rights, supra note 8, at 20, 165.
86 See id. at 17; Sura Rubenstein, What is Measure 13?, OREGONIAN, Oct. 30, 1994, at A22.
87 Rubenstein, supra note 86.
88 Id.
89 Anti-Gay Rights, supra note 8, at 20.
90 Id. at 165–66; Rubenstein, supra note 86.
91 See Anti-Gay Rights, supra note 8, at 20.
92 See id.
and counselors who worried that the introduction of Measure 13 had heightened the sense of fear and alienation faced by gay and lesbian teenagers.\textsuperscript{93} One counselor reported that the pressure from the Measure 9 debate had already added to the school dropout and suicide rate of gay youth in Oregon.\textsuperscript{94} She urged that the social rejection embodied by the subsequent Measure 13 could be terrifying and even tragic for some of the children who were actually in need of "protection."\textsuperscript{95}

As before, many parents and community members also recognized that there had never been a need to protect their children from the homosexual agenda.\textsuperscript{96} In the rural community of Molalla, one voter articulated the unnecessary and wantonly divisive character of the OCA initiative.\textsuperscript{97} "The OCA came in, for its own ends, capitalizing on homophobia," he said. "We didn't have anybody going to Molalla City Council, asking it to legalize single-sex marriages."\textsuperscript{98} Despite this lack of pre-existing concern over homosexual activism, however, the OCA was prevailing upon formerly disinterested Oregon voters with increasing success: Measure 13 was defeated by the much smaller margin of fifty-three to forty-seven percent.\textsuperscript{99}

2. Measure 9 and the Election of 2000

In November 2000, the OCA launched its most recent and most moderate attack in the battle against gay rights. This initiative, again called Measure 9, or the "Student Protection Act," took the form of a statutory amendment.\textsuperscript{100} The measure was narrowly tailored to public school instruction only, prohibiting schools from instructing students about homosexuality in a manner that "encourages, promotes or sanctions such behaviors."\textsuperscript{101} It provided sanctions for any public ele-

\textsuperscript{93} See Osker Spicer, Journey Often Tough for Black Homosexuals, OREGONIAN, Nov. 10, 1994, (Portland Zoner Magazine), at 1.

\textsuperscript{94} See id.

\textsuperscript{95} See id.

\textsuperscript{96} See Sarasohn, Lon Mabon Discovers, supra note 70; Sarasohn, Rural Oregon Ponders, supra note 70.

\textsuperscript{97} See Sarasohn, Rural Oregon Ponders, supra note 70.

\textsuperscript{98} Id.

\textsuperscript{99} See By the Numbers, supra note 11.

\textsuperscript{100} Oregon Voter's Pamphlet, supra note 12. Interestingly, it appears that the OCA had borrowed some of the language used by its opposition in drafting the new measure. For example, one section of the measure provides that sexual orientation is a "divisive subject matter not necessary" to the instruction of students in public schools. Id.

\textsuperscript{101} Id.
mentary school, secondary school, or college should it fail to comply, threatening the loss of state funding.102

While this more moderate-seeming measure would be less politically entrenched than a constitutional amendment, Measure 9 was perhaps more dangerous to lesbian and gay Oregonians due to its increased likelihood of success.103 The measure’s form, language, and history made it appear more moderate, and some feared that voters with less extreme prejudices, who had rejected the previous acrimonious and more fervent campaigns, might take this opportunity to vote against gay civil rights.104 This time, the “No on 9” rallies were smaller and the campaign funds fewer, but the threats of social alienation and censorship remained equally as real as in previous elections.105

As with the OCA’s previous measures, many of the same objections were raised against this Measure 9.106 An organizer of a rural Oregon “No on 9” campaign said, “the OCA did a great job of writing a ballot measure that deceived folks into believing that there was a problem when there wasn’t.”107 Echoing opponents of the previously defended Measure 13, she continued, “If this measure passes, our school will no longer be safe for all students.”108 A further argument against Measure 9 in the Oregon Voter’s Pamphlet stated, “As parents, we know there is no curriculum in Oregon’s public schools that ‘encourages or promotes’ homosexuality or bisexuality.”109 Rather, “[t]he real problems our schools face are a lack of funding and class sizes that are too large.”110

102 Id.
103 As will be discussed in the next part of this note, statutory initiatives can be subject to legislative amendment and judicial review, whereas constitutional amendments negate any inconsistent portions of the Oregon constitution and can only be overturned by later amendments or by federal judicial review. Gillette, supra note 27, at 59.
105 Bill Graves, Prayer Vigil Takes Aim at Measure 9, OREGONIAN, Nov. 2, 2000, at D18; Tallmadge, supra note 104. One vigil in a downtown Portland park reported only three dozen people in attendance. Graves, supra. Also, whereas “No on 9” campaign funds surpassed $2 million in 1992, the campaign raised only $648,000 in 2000. Bill Graves & Tomoko Hosaka, Measure 9 Rips Open Cultural Division, OREGONIAN, Oct. 22, 2000, at A1.
106 See Measure 9 Losing in Cliffhanger Election, supra note 13; Tallmadge, supra note 104.
107 See Measure 9 Losing in Cliffhanger Election, supra note 13.
108 Id.
109 Oregon Voter’s Pamphlet, supra note 12.
110 Id.
While the tenor of the debate was generally more temperate, opponents continued to fear that Measure 9’s passage would add to the atmosphere of hostility for lesbian and gay Oregonians and stigmatize Oregon as an intolerant state. In the days prior to the election, local and national media reported that voters were evenly split on the issue.

Due perhaps in part to a close presidential race and higher voter turnout around the state, Measure 9 eventually failed by a margin of six percent. It received more “yes” votes than any other OCA initiative, however, garnering just under 700,000 votes in twenty-seven counties around the state. Mabon was disappointed with what he anticipated would be a “fifty percent plus one” victory, but announced that he was presently drafting a similar measure for 2002. Using “language that [the voters] simply cannot misinterpret,” he planned to dispel some voters’ misconceptions that the measure would have “stopped” AIDS education and sex education, or would have “got[ten] open homosexuals fired.”

Mabon declared that the battle against the homosexual agenda rests in the hands of the OCA. Deploring the Republicans in the Oregon legislature for not having the “courage of their convictions [to] take this on themselves,” he willfully overlooks the fact that the party’s leaders are publicly opposed to his brand of reform. Calling the civil status of lesbian and gay Oregonians the “last great battle,” Mabon vows that the cause is “too important” to let go, leaving many Oregonians to wonder, “important to whom?”

C. Mabon’s War in Context

A discussion of the history of anti-gay rights initiatives demonstrates that the OCA’s efforts are neither innovative nor isolated. In

111 See Measure 9 Losing in Election Cliffhanger, supra note 13; Tallmadge, supra note 104.
112 See All Things Considered, supra note 29.
113 See Voter Results in Oregon, supra note 13.
114 See id.
115 See Measure 9 Losing in Election Cliffhanger, supra note 13.
117 See id.
118 See id.
119 See id.; ANTI-GAY RIGHTS, supra note 8, at 17; Rubenstein, supra note 60; Sarasohn, Lon Mabon Discovers, supra note 70; Sarasohn, Rural Oregon Ponders, supra note 70; Tallmadge, supra note 104.
120 See Adams, supra note 5, at 458–67; Lazos Vargas, supra note 26, at 428–32.
fact, the first such initiative was successful under the slogan “Save Our Children” in Dade County, Florida in 1977, and utilized prejudice and religious rhetoric to repeal an ordinance that forbade discrimination on the basis of sexual orientation.\textsuperscript{121} Over the past twenty years, initiatives curtailing the civil rights of lesbians and gay men have proliferated and have become increasingly successful.\textsuperscript{122}

In the year following the victory over gay rights in Dade County, similar measures were used to repeal non-discrimination ordinances in a number of other cities throughout the country, including Eugene, Oregon.\textsuperscript{123} These efforts gained momentum in the late 1980s and early 1990s.\textsuperscript{124} Oregon led the way in 1988, when an OCA ballot measure repealed a gubernatorial executive order that banned discrimination based on sexual orientation.\textsuperscript{125} The Oregon Court of Appeals overturned the repeal as unconstitutional, but it set the stage for the OCA’s first Measure 9 and a similar measure in Colorado.\textsuperscript{126}

While the extreme language of the 1992 Measure 9 failed, the Colorado measure, which more closely resembled Oregon’s 1994 Measure 13, was approved fifty-four to forty-six percent by its citizens.\textsuperscript{127} As this measure was challenged in the state court, working its way ultimately to the Supreme Court, Florida and Maine passed state-wide initiatives to freeze existing categories of protected classes, thereby excluding lesbians and gay men.\textsuperscript{128} Additionally, in 1992 and 1993, anti-discrimination laws were repealed by cities in five states through the initiative process.\textsuperscript{129} Even San Francisco, thought to be one of the most accepting cities for gay men and lesbians, repealed a domestic partnership law in 1989.\textsuperscript{130}

Aside from Measure 9’s loss in Oregon, and two failed measures in St. Paul, Minnesota and Portland, Maine that would have repealed local anti-discrimination laws, these anti-gay rights initiatives met primarily with approval.\textsuperscript{131} The victories subsequently emboldened “citi-

\textsuperscript{121} See Barbara S. Gamble, \textit{Putting Civil Rights to a Popular Vote}, 41 AM. J. POL. SCI. 245, 258 (1997).

\textsuperscript{122} See Adams, \textit{supra} note 5, at 458; Lazos Vargas, \textit{supra} note 26, at 428–29.

\textsuperscript{123} See Adams, \textit{supra} note 5, at 458.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} See Tomoko Hosaka, \textit{The OCA’s Initiatives}, OREGONIAN, Sept. 10, 2000, at A17.


\textsuperscript{127} See Adams, \textit{supra} note 5, at 459 n.56.

\textsuperscript{128} See \textit{id.} at 460.

\textsuperscript{129} See Gamble, \textit{supra} note 121, at 259.

\textsuperscript{130} See \textit{id.}

\textsuperscript{131} See \textit{id.;} Adams, \textit{supra} note 5, at 460.
zens alliances" around the country, who attempted to place such initiatives on ballots in ten states in 1994. However, petitioners failed to collect sufficient signatures to place the measures on the ballots in seven of these states. Moreover, one measure was invalidated by the Florida Supreme Court for violating the state’s single subject requirement. The remaining measures, in Oregon and Idaho, were rejected by voters.

Additionally, with Romer v. Evans in 1996, the United States Supreme Court invalidated Colorado’s popularly elected “Amendment 2” that created a constitutional amendment to prohibit legislative, executive, or judicial actions designed to protect gay men and lesbians from discrimination. The Court held that the amendment had a “peculiar property of imposing a broad and undifferentiated disability on a single named group,” and that the amendment lacked “a rational relationship to legitimate state interests.” The Court noted that, “if constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”

132 See Adams, supra note 5, at 460–61.
133 See id. at 461.
134 See In re Advisory Opinion to the Attorney Gen.: Restricts Laws Related to Discrimination, 632 So.2d 1018, 1021 (Fla. 1994). State constitutions that include citizen initiative processes often also include a “single subject requirement.” See id.; City Club of Portland, supra note 16, at 15, 17. This provision requires that the initiative “shall embrace one subject only” in order to simplify the voter’s choice. See In re Advisory Opinion, 632 So.2d at 1019; City Club of Portland, supra note 16, at 15, 17.
135 See Gamble, supra note 121, at 262; By the Numbers, supra note 11.
137 See id. at 632. Under the Fourteenth Amendment law of substantive due process, when courts are confronted with an enactment that targets a “suspect class,” they employ “strict scrutiny” to ensure that the enactment is tied to some legitimate governmental interest. See id. at 629–30. For all other laws, courts must merely find a “rational relationship” between the enactment and a legitimate governmental interest. See id. at 632. In Romer, the Court avoided the issue of whether “homosexual persons” constituted a “suspect class” by stating that Amendment 2 failed the lower standard of finding a rational relationship between the amendment and a legitimate governmental interest. See id. at 631–32. The Court held that the “sheer breadth” of the prohibition in Amendment 2 was “so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” Romer, 517 U.S. at 632.
138 See Romer, 517 U.S. at 634–35 (emphasis added). The Court also noted that, “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” See id. at 633.
This particularly encouraging year for gay rights advocates was an exception to the overall pattern of approval for anti-gay rights initiatives. Including 1997 and 1998 initiatives in Washington and Hawaii, and many successful initiatives at the local level, thirty-four of forty-three (seventy-nine percent) ballot measures involving sexual orientation have resulted in the limitation of gay rights.

On a practical level, these anti-gay rights measures have the effect of further stigmatizing lesbians and gay men, as well as withholding fundamental rights, such as the freedom from discrimination and the ability to partake of a state-sanctioned marriage. On a symbolic level, however, the exclusion of gay men and lesbians from collective social processes stands as their effective erasure from mainstream political and social life. This "coerced invisibility" is a highly damaging aspect of citizen-sponsored anti-gay rights initiatives, regardless of their success or failure. Oregon's first openly gay legislator noted, "As a woman, as a lesbian, my humanity is on the ballot again." In the same vein, the editor for Just Out, a monthly newspaper for lesbians and gay men, said, "The rights of any human being should not be left up to debate." The citizen initiative process, in its purest sense, allows civic-minded voters to "decide" on the identity and status, as humans, of lesbians and gay men. For many, it is a process no more subtle than a firebomb, but farther-reaching.

II. THE INITIATIVE PROCESS: ENACTING THE WILL OF THE PEOPLE

A. The Birth and Proliferation of the Initiative Process

Debate over the merits and uses of the citizen initiative has been raging since the 1880s. Along with South Dakota and Utah, Oregon was one of the first states to seriously consider and adopt the initiative process. Responding to the corruption and inefficiency of Oregon

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139 See Adams, supra note 5, at 463; Gamble, supra note 121, at 258.
140 Adams, supra note 5, at 463; Gamble, supra note 121, at 258.
141 See Adams, supra note 5, at 458–63; Gamble, supra note 121, at 258–62.
142 See Adams, supra note 5, at 472–73; Graves & Hosaka, supra note 105; Meehan, supra note 39.
143 Adams, supra note 5, at 472–73.
144 Graves & Hosaka, supra note 105.
145 Meehan, supra note 39.
146 See Adams, supra note 5, at 472–73; Graves & Hosaka, supra note 105; Meehan, supra note 39.
147 See Schuman, supra note 19, at 948.
148 See id.; Lazos Vargas, supra note 26, at 411.
politics in the late 19th century, Oregon’s Progressive political organizations discovered Switzerland’s model of direct democracy, which allowed for constitutional, statutory, and even national constitutional initiatives. These radical notions of popular government appealed to the citizens at a time when the legislature consisted of “briefless lawyers, farmless farmers . . . and political thugs,” and, as such, they sought to bring direct democracy to Oregon.

In the 1890s, with the leadership of Seth Lewelling and William U’Ren, the “Milwaukie Alliance” developed the Populist Party in Oregon and began to infiltrate the state legislature. After ten years of legislative standoff, U’Ren eventually wore down state Democrats and Republicans to win virtually unified support for the citizen initiative amendment. In June of 1902, the initiative and referendum amendment passed by a vote of eleven-to-one. During this Progressive Era, many other Western states also adopted what came to be known as “The Oregon System.”

A total of twenty-three states and the District of Columbia currently provide voters with the option of popular voting through the initiative process. Most states adopted the process near the turn of the century. In accordance with what some political theorists describe as the individualistic and progressive spirit of the West, only six states west of the Mississippi River do not have some form of initiative or popular referendum. Of all the states that provide for the initiative process, citizens in Oregon and California have used it most often. Between 1898 and 1992, Oregonians proposed 274 initiatives and Californians proposed 236; conversely, eighteen other states proposed an average of forty-two initiatives.

149 See Schuman, supra note 19, at 948–49.
150 See id. at 949–50.
151 See id. at 950–51.
152 See id. at 951–56.
153 See Collins & Oesterle, supra note 18, at 54–55; Schuman, supra note 19, at 948.
154 See Lazos Vargas, supra note 26, at 411. The states that provide for initiatives, in the order that they adopted the initiative, are South Dakota, Utah, Oregon, Montana, Oklahoma, Maine, Missouri, Arkansas, Colorado, Arizona, California, Idaho, Nebraska, Nevada, Massachusetts, Alaska, Florida, Wyoming, Illinois, District of Columbia, and Mississippi. Id. at 411 n.34. Florida and Illinois allow only constitutional initiatives. Id. Utah, Maine, Idaho, Washington, Alaska, Wyoming, and the District of Columbia allow only for statutory initiatives. Id.
155 See id.
158 See id.
Additionally, the total number of all state-proposed initiatives has increased dramatically in the last two decades.\textsuperscript{160} In the 1980s, the number of initiatives and referendums proposed nation-wide was less than 200; in the 1990s, the number of proposals was projected to be over 350.\textsuperscript{161} In particular, constitutional and statutory initiatives are coming to dominate state government in Oregon, California, and Colorado.\textsuperscript{162} In California, the number of citizen initiatives on the 1990 ballot alone (eighteen) was only slightly lower than all of the initiatives proposed between 1970 and 1979 (twenty-two).\textsuperscript{163}

In Oregon, eighteen initiatives were proposed between 1970 and 1979, while thirty-two were proposed in the 1980s.\textsuperscript{164} By 1994, thirty-one initiatives had already been proposed since 1990, with eighteen measures on the 1994 ballot alone.\textsuperscript{165} The September 2000 ballot contained twenty-six ballot measures and required a "bulging" two-volume Voters' Pamphlet with 607 arguments for and against the proposals.\textsuperscript{166} The unanticipated size of the pamphlet forced the state Elections Division to meet with the Legislative Emergency Board and request over $1 million to cover printing and mailing costs.\textsuperscript{167}

B. An Overview of the Initiative Process

The citizen initiative is a form of "direct democracy" that, as distinct from "representative democracy," refers to a system where laws are enacted directly by enfranchised citizens rather than by representatives elected by the citizens.\textsuperscript{168} The citizen initiative process includes three distinct methods by which enfranchised citizens can make law.\textsuperscript{169} Two of these methods are classified as "direct," and the other is "indirect."\textsuperscript{170}

OCA Measures 9 and 13 are examples of the so-called direct initiative, where citizens can draft a proposed statute or constitutional amendment, obtain a certain percentage of voters' signatures (which

\textsuperscript{160} See id. at 27; Lazos Vargas, supra note 26, at 415.
\textsuperscript{161} See Magleby, supra note 16, at 27.
\textsuperscript{162} Collins & Oesterle, supra note 18, at 48.
\textsuperscript{163} Lazos Vargas, supra note 26, at 415 n.55.
\textsuperscript{164} See CITY CLUB OF PORTLAND, supra note 16, at 13.
\textsuperscript{165} See id.
\textsuperscript{166} Steve Mayes, Election Outlay Prompts Request for Money, OREGONIAN, Nov. 16, 2000, at B12.
\textsuperscript{167} Id.
\textsuperscript{168} CITY CLUB OF PORTLAND, supra note 16, at 4.
\textsuperscript{169} See Collins & Oesterle, supra note 18, at 50.
\textsuperscript{170} Id.
varies from five to fifteen percent), and add a measure to the ballot.\textsuperscript{171} Under the indirect initiative process, also known as the referendum, however, citizens are required to petition the legislature before proceeding to the signature stage.\textsuperscript{172} Only if the citizens are rebuffed by the legislature may they attempt to gather signatures and force a popular vote.\textsuperscript{173} Generally, the less cumbersome methods of direct initiative are preferred to the indirect initiative.\textsuperscript{174}

As the 1992 and 2000 versions of Measure 9 illustrate, citizens utilizing the direct initiative can choose from two methods to change state law: the measure can be drafted either as a statute or as a constitutional amendment.\textsuperscript{175} Successful statutory initiatives contribute to or revise state or local laws.\textsuperscript{176} These initiatives, once they are made law, can be altered in one of three ways.\textsuperscript{177} The state legislature can revise or nullify the law according to its ordinary processes; the state judiciary can invalidate the law if it is deemed not to conform with state or federal constitutional law; or, citizens can change the statute through another popular vote.\textsuperscript{178}

In contrast, a successful constitutional initiative adds an amendment to the state constitution that overrides other inconsistent laws or portions of the state constitution.\textsuperscript{179} Thus, courts must limit their review of such amendments to ensure consistency with respect to the United States Constitution, and state legislatures have no power to alter them whatsoever.\textsuperscript{180} Hence, a successful constitutional initiative becomes more deeply entrenched in state law than does a statutory initiative.\textsuperscript{181}

Given that constitutional amendments have more assured permanence, most state and local governments require a greater number of signatures to qualify constitutional initiatives for the ballot.\textsuperscript{182} In Oregon, for instance, adding a constitutional initiative to the ballot

\textsuperscript{171} See Lazos Vargas, \textit{supra} note 26, at 417.
\textsuperscript{172} Collins & Oesterle, \textit{supra} note 18, at 50.
\textsuperscript{173} Id.
\textsuperscript{174} See Magleby, \textit{supra} note 16, at 14.
\textsuperscript{175} See Collins & Oesterle, \textit{supra} note 18, at 50.
\textsuperscript{176} See \textit{id.} at 50–52.
\textsuperscript{177} See Collins & Oesterle, \textit{supra} note 18, at 51 n.11; Magleby, \textit{supra} note 16, at 13, 40–41.
\textsuperscript{178} See Collins & Oesterle, \textit{supra} note 18, at 51 n.11; Magleby, \textit{supra} note 16, at 13, 40–41.
\textsuperscript{179} Collins & Oesterle, \textit{supra} note 18, at 51.
\textsuperscript{180} See Collins & Oesterle, \textit{supra} note 18, at 51; Magleby, \textit{supra} note 16, at 13, 40–41.
\textsuperscript{181} See Magleby, \textit{supra} note 16, at 13.
\textsuperscript{182} See CITY CLUB OF PORTLAND, \textit{supra} note 16, at 29.
requires that the valid signatures of registered voters equal eight percent of the votes cast for governor in the preceding general election; in turn, only six percent is required to add a statutory initiative to the ballot.\textsuperscript{183} But despite the more burdensome signature requirement, many citizen petitioners nonetheless opt to draft initiatives in the form of constitutional amendments and do so, some argue, without great difficulty.\textsuperscript{184}

Many critics posit that the two procedurally distinct forms of the direct initiative are beginning to resemble one another in substance.\textsuperscript{185} As will be addressed in the next section, petition circulating and signature gathering have become profitable industries in some states.\textsuperscript{186} In these states, critics argue, a slightly higher amount of campaign funding is all that distinguishes constitutional initiatives from statutory initiatives.\textsuperscript{187} Moreover, some point out that state constitutions have begun to look like books of legislative code, with pension plans and complicated tax schematics added as amendments.\textsuperscript{188}

In Oregon, the only state-imposed content restriction for a proposed initiative is that it "shall embrace one subject only."\textsuperscript{189} Scholars, such as former Oregon Supreme Court Justice Hans Linde, have urged the state legislature to restrict the constitutional initiative further, confining its subject to matters that affect the structure, organization, or powers of the government only.\textsuperscript{190} Justice Linde argues that the constitutional initiative has been wrongly used to impose obligations and sanctions on private citizens, such as Oregon's lesbian and gay community.\textsuperscript{191}

\textsuperscript{183} See \textit{id.}
\textsuperscript{184} See Adams, \textit{supra} note 5, at 451; Lazos Vargas, \textit{supra} note 26, at 418–19; Magleby, \textit{supra} note 16, at 23–25, 36.
\textsuperscript{186} See \textit{City Club of Portland, supra} note 16, at 26–27; Lazos Vargas, \textit{supra} note 26, at 418–19; Magleby, \textit{supra} note 16, at 23–25, 36.
\textsuperscript{187} See \textit{City Club of Portland, supra} note 16, at 27; Lazos Vargas, \textit{supra} note 26, at 418–19; Magleby, \textit{supra} note 16, at 23–25, 36.
\textsuperscript{188} See \textit{City Club of Portland, supra} note 16, at 30; Frohnmayer & Linde, \textit{supra} note 185, at 753–59; Gillette, \textit{supra} note 27, at 61.
\textsuperscript{189} \textit{OR. CONST. art. IV, § 1 (2) (d).}
\textsuperscript{191} See Frohnmayer & Linde, \textit{supra} note 185, at 756. \textit{See generally Linde, supra} note 190.
C. Direct Democracy in Theory, and in Action

1. Proponents' Views

In a country whose democratic system is defined by drawing its power from the “consent of governed,” it is natural to assume that the purest manifestation of that consent—the initiative process—makes for the truest democracy. Proponents of the citizen initiative view direct democracy as an elaboration on the traditional town meeting, in which decisions about government flow directly from the “will of the people.” In true civic fashion, they posit, citizens are not merely permitted, but are in fact responsible for educating themselves about these decisions. This responsibility leads to increased citizen participation and to laws that most accurately reflect voters’ preferences.

During the Progressive Era, proponents of direct democracy saw the initiative process as a way to reduce the voter alienation that was due to legislative corruption and special interests. Modern proponents continue to view the process as a method of increasing voter turnout, empowering citizens to make more meaningful choices about the issues of greatest importance. Some also make the logically appealing argument that representative democracy is outmoded where technology and modern media make it possible for voters to represent themselves directly and with greater efficiency.

A 1996 study by the City Club of Portland shows that citizen initiative proponents in Oregon favor the process for many of these same reasons. It cites voter education, avoidance of special interests, and the preservation of an “integral part of [the] legislative process” as some primary factors in support of the initiative. Its interviews

192 See Collins & Oesterle, supra note 18, at 55.
193 See id. at 53; Magleby, supra note 16, at 19; Schuman, supra note 19, at 947.
194 See Collins & Oesterle, supra note 18, at 56--57.
195 See id.; Adams, supra note 5, at 452.
196 See Collins & Oesterle, supra note 18, at 56; Magleby, supra note 16, at 34.
197 See Collins & Oesterle, supra note 18, at 56--58; Magleby, supra note 16, at 34--35.
198 See Collins & Oesterle, supra note 18, at 61; Schuman, supra note 19, at 947. One of the most celebrated ideas to emerge from Ross Perot’s 1992 presidential campaign was the “electronic Town Hall,” a system of direct democracy using sophisticated video and data transmission technology to allow voters nationwide to debate and then vote on legislation. Schuman, supra note 19, at 947. However, concerns over how to limit the scope of such a device has limited the political progress of the national referendum. See Magleby, supra note 16, at 42--43.
199 See CITY CLUB OF PORTLAND, supra note 16, at 11.
200 Id.
revealed that proponents view direct democracy as "democratic government in its purest and highest form." As Mabon has repeatedly expressed, many also believe that "[t]he initiative is the only way the people can adopt constitutional amendments and statutory measures which the people favor and the legislature refuses to refer or enact." Critics of the initiative system, however, point to a number of reasons that deliberative legislative bodies might very sensibly refuse to enact some of the proposals that are drafted by citizen petitioners. For the purposes of this Note, these reasons are grouped into practical and ideological concerns. The practical concerns go to the question of how well the citizen initiative truly speaks for "the will of the people." These will be addressed by rebutting the proponents' arguments that the citizen initiative enhances citizen participation, that it represents the issues of most importance to voters, and that it loosens the grip of special interests and other corruptive forces. The ideological concerns go to the social dangers of expressing the "people's will" directly, and will be addressed in Part III of this note.

2. Rebutting the Civic Participation Argument

With regard to proponents' claims that the initiative enhances civic involvement and voter education, critics urge that in many cases full voter participation is actually hindered due to the difficulty in discerning the actual meaning of some ballot initiatives. Additionally, some critics argue that the absence of a mechanism to screen the language of proposed initiatives for clarity and efficacy leads to ballot measures whose consequences are uncertain even to their own sponsors.

The recent increase in the number of initiatives on the ballot creates a significant hurdle for an average voter seeking to educate herself about the measures. One study demonstrates that voters are less likely to vote for any ballot measure as the length of a state or lo-

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201 Id.
202 Id.
204 See Collins & Oesterle, supra note 18, at 57; Magleby, supra note 16, at 33–34.
205 See City Club of Portland, supra note 16, at 23; Collins & Oesterle, supra note 18, at 57; Magleby, supra note 16, at 33–34.
206 See Adams, supra note 5, at 455; Collins & Oesterle, supra note 18, at 57; Magleby, supra note 16, at 33.
cal ballot increases.\textsuperscript{207} Also, critics find that voters with lower incomes and less education tend to skip ballot measure questions at a higher rate.\textsuperscript{208} This is unsurprising in light of the fact that some voter's pamphlets are written at "a reading level equivalent to that of a third-year college student."\textsuperscript{209} As such, these factors can lead not only to lower voter turnout overall, but may serve to amplify social and class bias.\textsuperscript{210}

Given that voter's pamphlets are read by only a small fraction of those who receive them, a voter's primary source of information about a ballot measure is the media.\textsuperscript{211} Media coverage is generally divided between news reports and advertisements that are paid for by ballot measure campaigns.\textsuperscript{212} As one might predict, however, campaign-sponsored propaganda is likely to define a ballot measure in the light most favorable to its own position.\textsuperscript{213} As one critic noted, some campaigns employ strategies that purposely raise doubts and create confusion.\textsuperscript{214} On controversial issues, opponents and proponents may engage in open contention over the very meaning of a measure, its cost, and its consequences.\textsuperscript{215} Where the text of the measure is itself ambiguous, the news media can only serve to parrot these campaigns' alternative interpretations.\textsuperscript{216}

Widely varying debate over critical issues such as the cost and fundamental meaning of controversial ballot measures often evidences inadequate drafting and deliberation.\textsuperscript{217} Citizens with no particular legal or legislative expertise create proposals with highly complex fiscal and social consequences.\textsuperscript{218} A state's legislative counsel may provide drafting advice to petitioners, but this advice is not mandatory.\textsuperscript{219} Thus, a proposed measure may have consequences wholly un-

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\item \textsuperscript{207} Collins & Oesterle, \textit{supra} note 18, at 57.
\item \textsuperscript{208} Magleby, \textit{supra} note 16, at 35.
\item \textsuperscript{210} See Magleby, \textit{supra} note 16, at 33–34.
\item \textsuperscript{211} See id. at 40; CITY CLUB OF PORTLAND, \textit{supra} note 16, at 23.
\item \textsuperscript{212} See CITY CLUB OF PORTLAND, \textit{supra} note 16, at 23–24.
\item \textsuperscript{213} Magleby, \textit{supra} note 16, at 38.
\item \textsuperscript{214} See id. at 30.
\item \textsuperscript{215} See id. at 38. Conversely, on noncontroversial measures, most voters face an information vacuum. \textit{Id}.
\item \textsuperscript{216} See Graves, \textit{supra} note 42.
\item \textsuperscript{217} See CITY CLUB OF PORTLAND, \textit{supra} note 16, at 23; Magleby, \textit{supra} note 16, at 38.
\item \textsuperscript{219} CITY CLUB OF PORTLAND, \textit{supra} note 16, at 23.
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intended and unforeseen even by its own sponsors. 220 Once a measure has qualified for the ballot, however, it cannot be amended. 221

Some measures are poorly focused or overly broad, while others are simply unconstitutional. 222 These flaws render such initiatives very difficult, if not impossible, to enforce as law. 223 Critics note that one class of very problematic initiatives are those that create social programs or promise tax cuts without designating which portions of the state budget will be sacrificed as a result. 224 Citizen petitioners are not required to submit any form of fiscal statement alongside measures that drastically interfere with state budgeting. 225 These measures thus present voters with a desirable program but do not publicize the fiscal trade-offs. 226

Oregon's Measure 7 exemplifies this kind of ballot measure. 227 Approved in November of 2000, Measure 7 is a constitutional amendment that requires state and local governments to compensate a landowner any time a regulation, such as a zoning or environmental restriction, lowers the value of his or her property. 228 Under traditional property law, such "takings" are part of the social contract that ordinarily allows government intrusion on behalf of public welfare; yet, to the majority of Oregon voters, the compensation requirement seemed only fair. 229 As "the most far-reaching land use compensation measure in the nation," opponents of the measure have called it esti-

220 Id.
221 See id.
222 See Magleby, supra note 16, at 38; Tornquist, supra note 218, at 677.
224 See CITY CLUB OF PORTLAND, supra note 16, at 31–34; Tornquist, supra note 218, at 677; Hunsberger, supra note 223.
225 See CITY CLUB OF PORTLAND, supra note 16, at 25. In preparation for a measure's inclusion in the Oregon voter's pamphlet, the secretary of state is required to make a dollar estimate of the financial impact of the measure. Id. The statement does not point out the measure's effect on the functioning of government operations, nor does it state the dollar amount or its impact as a proportion of the total estimated general fund. Id. Moreover, a failure to file a fiscal impact statement does not prevent the measure from going on the ballot, and the amount of the estimate is not subject to judicial review. Id.
226 See id.; Tornquist, supra note 218, at 677.
227 See Richard Colby & David Anderson, Rules Greet Measure 7 Claims, OREGONIAN, Nov. 29, 2000, at D1; Hunsberger, supra note 223.
228 See Colby & Anderson, supra note 227.
229 See Stern v. Halligan, 158 F.3d 729, 735 (3rd Cir. 1998) (holding that township decree that landowners connect their property to municipal water supply was supported by the landowners' participation in the "broader social contract"); Hunsberger, supra note 223.
mated its cost at $5.4 billion per year. In addition, conservationists fear that Oregon will be resultantly unable to afford to comply with federal environmental regulations, or to continue land use planning. In February, a Marion County judge held that Measure 7 violated Oregon's constitutional single subject requirement, and that it altered other state constitutional provisions without adequately informing Oregon voters; the Oregon Supreme Court heard arguments on this issue November 6, 2001 but has yet to announce its decision.

As detailed in the discussion of the warring OCA and "No on 9" campaigns, Measures 9 and 13 also serve to exemplify the problems of vaguely worded and legally vulnerable ballot measures. The language of the first Measure 9 prohibited government "promotion" of homosexuality and required public schools to "recognize" it as wrong and perverse. While opponents feared that these mandates could result in book burning and the dismissal of openly gay teachers, the open-ended language of the measure enabled Mabon to label these concerns "misinterpretations": the manner, and indeed the bare feasibility, of enforcing the measure was up for debate. As noted, many critics also indicated that a measure requiring teachers to speak against the gay community might violate the First Amendment, as well as the Equal Protection Clause of the United States Constitution under cases such as Romer v. Evans. Mabon has responded to these vulnerabilities by attempting to narrow the scope and tighten the wording in the drafting of each successive measure. Thus, even though these OCA measures might very well have been found unconstitutional if enacted, they were nonetheless put to popular vote and

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231 See Hunsberger, supra note 223.


233 See Graves, supra note 42.

234 See Anti-Gay Rights, supra note 8, at 165.

235 See Alliance that Battled Measure 9 Looks to the Future, supra note 41; Graves, supra note 42; Hosaka, supra note 116.

236 See All Things Considered, supra note 29. The American Civil Liberties Union was poised to challenge Measure 9 in the 2000 general election on the grounds that it violated the free speech and equal protection clauses of the Constitution. See id. The groups believed that the similarities between the OCA initiative and Colorado's Amendment 2 were great enough that Measure 9 could not have survived federal constitutional review. See id.

237 See Hosaka, supra note 116.
allowed to threaten the social identity of gay and lesbian Oregonians.\textsuperscript{238}

3. Rebutting the Claim that Initiatives Represent the Most Important Issues to Voters

There is little evidence to support initiative proponents’ claims that direct democracy has enabled citizens to make laws that are most important to them.\textsuperscript{239} On the contrary, ballots tend to reflect the narrow goals of corporations or of ideological or reform groups who wish to elevate their causes through the media attention that comes from an initiative campaign.\textsuperscript{240} In 1992, voters indicated that the economy, unemployment, and the deficit were the most important political problems facing the nation.\textsuperscript{241} Meanwhile, the OCA went to war for the people of Oregon with the anti-sexual deviance platform of Measure 9.\textsuperscript{242} As such, proponents would have to argue that “deviant” sexual practices were at the forefront of voter consciousness.\textsuperscript{243} Can even Mabon himself plausibly assert that state-sanctioned sadism was keeping Oregonians awake at night?

Prior to the OCA’s involvement in the initiative process, the Oregon legislature had never addressed the status of lesbian and gay Oregonians.\textsuperscript{244} While Mabon may cite this inaction as evidence of representative neglect, many Oregonians have noted that few citizens gave much thought to the so-called “homosexual agenda” prior to its characterization by the OCA.\textsuperscript{245} According to the president of one Oregon community’s chamber of commerce, homosexuality “wasn’t an issue” before OCA legislation.\textsuperscript{246} In fact, a political scientist at Oregon State University is convinced that, “[I]f Martians carried [the three OCA leaders] off for their zoo, my sense is this issue would evaporate and disappear in a short time.”\textsuperscript{247} He argues that without the sort of public stimulus these ballot measures produce, “most people aren’t talking

\textsuperscript{238} See ANTI-GAY RIGHTS, \textit{supra} note 8, at 17-18.
\textsuperscript{239} See Magleby, \textit{supra} note 16, at 35.
\textsuperscript{240} \textit{Id}.
\textsuperscript{241} \textit{Id}.
\textsuperscript{242} See ANTI-GAY RIGHTS, \textit{supra} note 8, at 18.
\textsuperscript{243} See \textit{id}. at 18-21.
\textsuperscript{244} See Hosaka, \textit{supra} note 116.
\textsuperscript{245} See \textit{id}.; ANTI-GAY RIGHTS, \textit{supra} note 8, at 17; Rubenstein, \textit{supra} note 60; Sarasohn, \textit{Lon Mabon Discovers, supra note 70}; Sarasohn, \textit{Rural Oregon Ponders, supra note 70}.
\textsuperscript{246} ANTI-GAY RIGHTS, \textit{supra} note 8, at 17.
\textsuperscript{247} Rubenstein, \textit{supra} note 60.
about gay rights. Oregonians have other things they worry about a whole lot more than the homosexual agenda.  

4. Rebutting the Anti-Corruption Argument

Another set of criticisms center around proponents' claims that the citizen initiative is a method of bypassing legislatures that are corrupted by special interest money and that refuse to enact the laws that people really want. Indeed, the Progressive Era initiative process sought to save government and the underrepresented from corruptive corporate influences. But critics note that the modern initiative is, in fact, frequently used as a tool for corporations and wealthy organizations to target unfavorable government policy and minority interests.

The notion that the citizen initiative is an alternative to special interest-influenced lawmaking is seriously undermined by evidence that, in many states, direct democracy has become an industry with big corporate contributors. Professionals can help draft measures, circulate petitions, manage campaigns, provide polling, and produce media. To such ends, over $117.3 million dollars were spent on ballot measures in twenty-one states in 1992. Examples of heavy spending include $21 million to fight a tobacco tax increase in California and $6.8 million by the National Rifle Association to defeat a gun control referendum in Maryland in 1988.

Oregon is no exception to the trend among citizen initiative states that increased spending provides increased political power. Campaign spending has increased from $50,000 per measure in 1970 to more than $900,000 per measure in 1990. The combined expenditures for the 1992 Measure 9 campaign were well over $2 million.

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248 Id.
249 See Collins & Oesterle, supra note 18, at 56; Linde, supra note 190, at 395–98.
250 See Collins & Oesterle, supra note 18, at 56.
254 Id.
255 Id.
257 Id.
dollars. And, as Mabon reflected, "My belief is that if we would have had about $250,000 more, then we could have countered [the opponents'] litany of lies [and] ... we would have held that lead [in the polls] and maybe gained." For many, it is frightening to think that $250,000 might have been all that kept the OCA's "truth" about Measure 9 from deciding the legitimacy of their civil status as Oregonians.

III. BRIDLED PASSION: THE PEOPLE'S WILL CONSTRAINED

A. Representation and Discrimination

Certainly, one argument advanced by proponents of the citizen initiative is almost impossible to rebut. When a majority of voters approve or reject a particular citizen-proposed ballot measure, it is an expression of that majority's will. But is it the best way to make law? And, more importantly, is it even a constitutional one?

Within the traditional three-branch conception of the national and state governments, the legislative branch is thought to express the will of the people most directly. State legislators are selected by a small and distinct portion of a state's population; as such, they understand as their primary duty the representation of the narrowed interests of those citizens. Congressional lawmaking is intended to be a fairly efficient method of translating the people's will into law. As many scholars note, however, even this process contains purposeful inefficiencies that temper and inform that translation. Legislating involves more than a simple counting of hands, and this difference, many critics urge, functions as a safeguard against majoritarian animus and discrimination.

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258 See Rubenstein, supra note 60.
259 Hosaka, supra note 116.
260 See Graves & Hosaka, supra note 105.
261 See Collins & Oesterle, supra note 18, at 58.
262 See id.
263 See CITY CLUB OF PORTLAND, supra note 16, at 21.
264 See id.
265 See Bell, supra note 21, at 14, 29; Collins & Oesterle, supra note 18, at 59–60; Linde, supra note 30, at 34.
266 See Bell, supra note 21, at 14, 29; Collins & Oesterle, supra note 18, at 59–60; Linde, supra note 30, at 34.
Some scholars articulate this safeguard as the legislators' enhanced ability to respond to strong minority interests. Legislators are able to register the intensity—rather than simply the quantity—of citizens' preferences. This enables minority groups to persuade legislators to pass the bills that they most strongly desire, even if a majority of citizens would not have approved them. More importantly perhaps, minorities are able to persuade legislators to amend parts of majoritarian bills that they find most objectionable.

Others describe the representative safeguard as hindering legislators' ability to invoke and to fully register a majority's discriminatory tendencies. As has been discussed with respect to the first Measure 9, issues that are important only to a few social extremists are not given the opportunity to arouse majority prejudice. And even where members of Congress already hold certain socially extreme views, their impulses toward prejudice are chastened through debate and public scrutiny, and are ultimately diluted by political compromise. The deliberative process offers exposure to competing needs and opportunities to transform one's preferences, and thus filters out many of the socially extreme perspectives. In contrast, when the lawmaking process is given directly to the citizenry, "[n]o political factors counsel restraint on racial [or other prejudice-based] passions emanating from longheld and little considered beliefs and fears." Without such political restraints, few of the concerns that can transform the "conservative" politician into a "moderate" public official are likely to affect the individual voter's decision.

Oregon's early history with the initiative and referendum process underscores this observation. In 1857, voters in the Oregon territory overwhelmingly approved a referendum intended to exclude all free blacks. Despite its very small black population, residents of the

268 See Magleby, supra note 267, at 185; Collins & Oesterle, supra note 18, at 59–60.
269 See Collins & Oesterle, supra note 18, at 59; Eule, supra, note 209, at 1527.
270 See Magleby, supra note 267, at 186; Collins & Oesterle, supra note 18, at 59–60.
271 See Bell, supra note 21, at 29; Linde, supra note 30, at 34.
272 See Anti-Gay Rights, supra note 8, at 165; Rubenstein supra note 60; Sarasohn, Lon Mabon Discovers, supra note 70; Sarasohn, Rural Oregon Ponders, supra note 70.
273 Bell, supra note 21, at 29.
274 Eule, supra note 209, at 1527.
275 Bell, supra note 21, at 14.
276 Id.
277 See id. at 16–17.
278 Id. at 16.
territory had spent years urging the legislature to approve such measures, but each political party feared the other would exploit the issue.279 Another example of prejudice-based lawmaking came in 1922, when the Ku Klux Klan led a majority of Oregon voters to outlaw private schools in order to eliminate parochial school education for Catholic children.280 Although the United States Supreme Court invalidated the measure as a violation of the Due Process Clause, Oregon’s anti-Catholic animus had still been expressed through law.281 Thus, where the representative political process would have curbed citizens’ racist tendencies, direct democracy served as a vehicle for their codification.282

B. The Roots of Republican Government

To many scholars and critics of the citizen initiative, representative democracy is not merely ideologically preferable to the initiative process, it is also a constitutional mandate.283 Article IV, Section 4 of the United States Constitution provides that “the United States shall guarantee to every state in this Union a Republican Form of Government.”284 The inclusion of this so-called Guarantee Clause is historically linked to the political unrest of the 1780s and most notably Shay’s Rebellion, which dramatized the government’s inability to protect states from citizen uprising under the Articles of Confederation.285 The early drafters of the Guarantee Clause, James Madison and Edmund Randolph, sought to create a provision that would both insure citizen sovereignty through “republican” government and also suppress domestic conflicts and insurrections.286 In his Federalist Papers, Madison advanced the view that social division, through the development of “factions,” was a threat to each goal.287

Historians debate the exact significance of the term “republican government,” but the framers’ contemporary statements indicate that

279 Id. at 16–17.
280 Linde, supra note 30, at 38.
281 Id. See generally Pierce v. Soc. of Sisters, 286 U.S. 510 (1925).
282 See Bell, supra note 21, at 16–17.
284 U.S. CONST. art. IV, § 4
285 Salz, supra note 283, at 103.
286 Id.
287 See The Federalist, supra note 31, No. 51, at 333 (James Madison).
representation was a key component. Madison contrasted a “democracy” from a “republic” by noting that democracy consisted of a small number of citizens who assembled and administered the government in person. Within a republic, however, “the scheme of representation takes place.” Madison hoped that the representative nature of state government would enable the newly formed United States to succeed where earlier free societies had failed.

From their experience with English monarchy and confederate self-government, the framers had learned that factionalism was a serious threat to stable popular government. Madison defined a faction as a “number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” Where “passion” was allowed to reign, he noted, the stronger could readily unite to oppress the weaker, and the nation would return to an anarchical “state of nature.”

Madison felt that a representative legislature was critical to the maintenance of democratic order. When the people, “blinded by prejudice or corrupted by flattery,” called for a measure they will later “lament and condemn,” Madison looked to the Senate to provide “the cool and deliberate sense of community” that would thwart such measures. He spoke directly against popular voting with regard to constitutional questions, warning that the process would “interest[] too strongly the public passions.” Thus, the Guarantee Clause embodies the framers’ vision

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288 See Salz, supra note 283, at 103-04.
289 See THE FEDERALIST, supra note 31, No. 10, at 58-59 (James Madison).
290 Id. at 58.
291 See Eule, supra note 209, at 1539.
292 See THE FEDERALIST, supra note 31, No. 10, at 54 (James Madison).
293 Id.
294 See THE FEDERALIST, supra note 31, No. 51, at 334 (James Madison).
295 See THE FEDERALIST, supra note 31, No. 63, at 403-04 (James Madison). The passage also emphasizes the difference between a republic and an Athenian direct democracy: “What bitter anguish would not the people of Athens have often avoided if their government had contained so provident a safeguard against the tyranny of their own passions?” Id. at 404.
296 See id. at 403-04.
297 See THE FEDERALIST, supra note 31, No. 49, at 323 (James Madison).
that state governments should promote the people's will but also guard against the people's passion.298

C. Absent Guarantees: The Role of the Supreme Court

As part of the framers' conception of "mature democracy," the Guarantee Clause was meant to preserve the solely representative nature of state lawmaking.299 Given that direct democracy is rapidly coming to dominate the legislative process in many western states, however, the framers' "republican government" is not exactly guaranteed.300 One reason is the United States Supreme Court's consistent refusal to adjudicate Guarantee Clause claims on the ground that they are nonjusticiable political questions.301 Since 1849, the Court has held that determinations about the nature of state governments are better left to Congress, as a politically accountable branch of government.302 Calling reliance on the Guarantee Clause "futile," the Court has eliminated any constitutionally based argument for representative state democracy in order to avoid politically risky situations.303

The first Supreme Court case to address the citizen initiative on Guarantee Clause grounds originated in Oregon in 1912, when a corporation objected to a citizen-initiated law requiring it to pay special taxes.304 In Pacific States Telephone & Telegraph Co. v. Oregon, the Court held that the issue was "political and governmental, and embraced within the scope of powers conferred upon Congress, and not therefore within the reach of judicial power ...."305 This conclusion was reaffirmed in Baker v. Carr, where the Court held that even an equal protection claim, if cast as a denial of equal protection in the political process, and thus arguably a denial of a republican form of govern-

298 See The Federalist, supra note 31, No. 51, at 333, No. 63, at 403–04 (James Madison).
300 See Collins & Oesterle, supra note 18, at 48.
301 See Luther v. Borden, 48 U.S. 1, 42 (1849).
302 See id. This principle was established in Luther v. Borden, where the court held, "Under [the Guarantee Clause] of the constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." Id.
305 See id. at 151.
ment, was nonjusticiable.\textsuperscript{306} As such, federal courts have refused jurisdiction of Guarantee Clause claims per se, and state courts have been compelled to follow suit.\textsuperscript{307}

After \textit{Romer} \textit{v. Evans}, however, federal equal protection jurisprudence seemed to be a more promising constitutional approach to defeating anti-gay civil rights initiatives.\textsuperscript{308} But given that \textit{Romer} failed to designate “homosexuals” as a suspect class, initiatives that target lesbians and gay men are subject only to “rational basis” review, and are thus easily distinguished.\textsuperscript{309} In fact, of the cases that raise equal protection claims relating to gay civil rights since \textit{Romer}, five have been distinguished from the decision and none have followed it.\textsuperscript{310} \textit{Equality Foundation of Greater Cincinnati Inc. v. City of Cincinnati}—one of four circuit court decisions after \textit{Romer}—addressed an initiative that forbid the city of Cincinnati from enacting any law that provides homosexual, lesbian, or bisexual persons “the basis to have any claim of minority or protected status, quota preference or other preferential treatment.”\textsuperscript{311} After noting that \textit{Romer} required no form of heightened scrutiny, the Court held that the Cincinnati statute was rationally related to the public interest in preserving “community values and

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\item \textsuperscript{306} See 369 U.S. at 226–27.
\item \textsuperscript{307} Linde, \textit{supra} note 30, at 39–40. Judge Linde argues that the Guarantee Clause is “nevertheless law” and should be applied by state courts in spite of lacking federal jurisdiction. \textit{See id.} However, no state has invalidated an initiative on this basis. \textit{See id.}
\item \textsuperscript{308} See generally 517 U.S. 620 (1996) (holding that a citizen-initiated amendment that prohibited legislative, executive, or judicial action from protecting homosexual persons from discrimination was a violation of the equal protection clause).
\item \textsuperscript{309} \textit{See id.} at 631–32.
\item \textsuperscript{310} See generally Williams \textit{v. Pryor}, 240 F.3d 944, (11th Cir. 2001) (holding that an Alabama statute prohibiting the use of certain sexual devices did not involve the kind of anti-discrimination concerns addressed in \textit{Romer}); Zehner \textit{v. Trigg}, 133 F.3d 459, 464 (7th Cir. 1997) (finding no such “broad restriction” as in \textit{Romer} where inmates were denied specific remedial rights in asbestos suit); \textit{Equal. Found. of Greater Cincinnati Inc. v. City of Cincinnati}, 128 F.3d 289, 295 (6th Cir. 1997) (holding that a city amendment removing homosexual persons from antidiscrimination protection survived \textit{Romer} because it was narrower in scope and impact); \textit{Imprisoned Citizens Union \textit{v. Shapp}}, 11 F.Supp. 2d 586, 595 (E.D. Pa. 1998) (upholding prison officials’ consent decrees because \textit{Romer} only applies to facial challenges against statutes “in their entirety”); \textit{Bailey \textit{v. City of Austin}}, 972 S.W.2d 180, 190 (Tex. App. 1998) (holding that referendum amendment that eliminated employee benefits for domestic partners because it did not target a discrete group, but applied to all city employees).  
\item \textsuperscript{311} \textit{See 128 F.3d} at 291.
\end{itemize}
character.”\textsuperscript{512} The United States Supreme Court denied certiorari in 1998.\textsuperscript{513}

In the 1997 case \textit{Bailey v. City of Austin}, a Texas appellate court held that a referendum amendment to a city charter that eliminated employee benefits for domestic partners was rationally related to the legitimate state interest of “recognizing and favoring legally cognizable relationships, such as marriage,” and thus did not violate equal protection guarantees of the Texas Constitution.\textsuperscript{514} Although the court acknowledged that gay and lesbian employees could not enter into a legally cognizable marriages, it determined that the imposition of a disproportionate burden on gay and lesbian employees was not sufficient to trigger an equal protection violation as articulated in \textit{Romer}.\textsuperscript{515} Due to such decisions, some scholars urge that the Supreme Court in \textit{Romer} failed to adequately set out the basis for its decision, enabling circuit courts to reach contrary results on nearly identical facts.\textsuperscript{516}

In light of these decisions rendering the Guarantee Clause “futile” and limiting \textit{Romer’s} effect on equal protection jurisprudence, a successful OCA “No Special Rights” initiative could be very difficult to invalidate on constitutional grounds.\textsuperscript{517} For instance, a future federal court might point to Oregon’s legitimate state interest in “preserving community values and character.”\textsuperscript{518} As previously noted, before 1992, Oregonian’s private expressions of sexuality were rarely defined in the context of “community values.”\textsuperscript{519} These days, however, if what are now primarily rural “community values” prevail, the private sexual expressions of gay Oregonians may determine the extent to which they can participate in their primarily urban communities.\textsuperscript{520}

\textsuperscript{512} \textit{Id.} at 297.
\textsuperscript{514} See \textit{972 S.W.2d} at 189.
\textsuperscript{515} See \textit{id.} at 186.
\textsuperscript{516} Lazos Vargas, \textit{supra note} 26, at 505.
\textsuperscript{518} See \textit{Equal. Found.}, 128 F.3d at 291.
\textsuperscript{519} See \textit{ANTI-GAY RIGHTS}, \textit{supra} note 8, at 17; \textit{Rubenstein, supra note} 60; \textit{Sarasohn, Lon Mabon Discovers}, \textit{supra note} 70; \textit{Sarasohn, Rural Oregon Ponders, supra note} 70.
\textsuperscript{520} See \textit{id.}
CONCLUSION

Citizen initiatives that target gay civil rights are the result of a system that enables "the people" to translate anti-minority animus into public code and constitutional amendment. As addressed in Part II of this Note, it is a far from flawless translation at that. The nature of the initiative process puts practical limits on who may participate, promote, and even comprehend the often inappropriate or poorly articulated choices presented. Additionally, it allows social extremists to exploit voters' latent prejudices to turn misunderstanding into divisive and socially damaging campaigns. As Part III demonstrated, these are not historically novel concerns, and the framers of the Constitution explicitly intended for the "cool and deliberate sense of community" to prevail.

In response to these concerns, the Supreme Court has declared that reforming direct democracy is the political purview of our national and state legislatures. Indeed, some critics and scholars have urged Congress to take up the cause, but direct democracy is "popular" in more than one sense. Despite studies that demonstrate that people are confused and misled by the initiative process, twenty-four states authorize some form of state-wide initiative and its use is increasing rapidly. Curtailing direct democracy in order to protect minority interests would be a politically unfavorable and therefore highly unlikely course of action for Congress, which must ultimately represent the "will of the people." At the same time, with its restrictive view of both the Guarantee and Equal Protection Clauses, the Supreme Court has essentially tied the hands of state courts to accomplish any lasting reform.

Thus, the Supreme Court is the branch most capable and best suited to guard minority interests in this context, given its historic role

321 See Bell, supra note 21, at 29; Linde, supra note 30, at 31-34.
322 See supra notes 147-260 and accompanying text.
323 See supra notes 204-260 and accompanying text.
324 See Magleby, supra note 16, at 30, 38; Analyzing the Ads, supra note 67.
325 See supra notes 261-320 and accompanying text.
327 See Collins & Oesterle, supra note 18, at 49-50.
328 See id.
329 See id.
in the preservation of fundamental rights and enduring constitutional aims.\footnote{See generally Hustler v. Falwell, 485 U.S. 46 (1988) (free speech); Roe v. Wade, 410 U.S. 113 (1973) (reproductive rights); Miranda v. Arizona, 384 U.S. 436 (1966) (privilege against self-incrimination); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (civil rights).} As illustrated by its civil rights and substantive due process jurisprudence, the Court is at times compelled to make socially unpopular decisions where minority rights are at stake.\footnote{See generally Roe, 410 U.S. at 113; Loving v. Virginia, 388 U.S. 1 (1967); Brown, 347 U.S. at 483.} In the citizen initiative, the Court is faced with a process that is contrary to the constitutional scheme of state lawmaking because it directly empowers the stronger majority to oppress a socially unpopular group of individuals.\footnote{See The Federalist, supra note 31, No. 51, at 334 (James Madison).} It is a politically heated issue, but it is precisely because of the passion surrounding these issues that minorities' civil rights are being overrun.\footnote{See Baker, 369 U.S. at 227 (holding that any reliance on the Guarantee Clause "would be futile").} The Court must recognize its duty to examine Guarantee Clause claims in the case of initiatives that target minority interests.

Although the "minorities" of whom the framers spoke were typically creditors, property owners, and the wealthy, their political insight still endures in the face of expanding social consciousness.\footnote{See Eule, supra note 209, at 1542.} In 1992, with the birth of the first Measure 9, former Oregon Attorney General Dave Frohnmeyer noted "the reemergence of ... tribal politics" in Oregon and deplored "the growth of politics based upon narrow concerns, rooted in the exploitation of divisions of class, cash, gender, region, ethnicity, morality and ideology."\footnote{Linde, supra note 30, at 32.} He called it a "give-no-quarter and take-no-prisoners activism that demands satisfaction and accepts no compromise."\footnote{Id.}

This language speaks to the divisive potential of the citizen initiative in its most flagrant manifestation.\footnote{See The Federalist, supra note 31, No. 51, at 334, No. 63, at 403–04 (James Madison).} As discussed in Part I of this Note, the campaigns for Measures 9 and 13 created rifts in voter demographics along every imaginable classification, inciting religious, geographical and ideological conflict throughout the state.\footnote{See supra notes 36–119 and accompanying text.} These are precisely the battles that thinkers like Madison hoped would stay...
unfought. Like laws excluding free blacks or prohibiting Catholic education, a measure that limits the social status of gay Oregonians is an instance of citizen lawmaking that, as Madison portended, the people will later "lament and condemn."341

During a gentler time in Oregon's future, these efforts will likely come into political focus as attacks on the ideological and social status of gay and lesbian Oregonians. At this time, however, the Supreme Court must accept jurisdiction to invalidate such initiatives, if successfully enacted, before the proliferation of "tribal politics" does irreparable damage to what we hope is a mature democracy.342 In short, the Court must take gay and lesbian identity off the ballot, so that Oregon might once again be known as a state characterized by its celebration of difference and respect for all people's humanity.343


341 See The Federalist, supra note 31, No. 63, at 404 (James Madison); Bell, supra note 21, at 16–17; Linde, supra note 30, at 38.


343 See generally Salz, supra note 283.