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# *Putting Civil Rights to a Popular Vote\**

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*Theory:* Democratic theory and theories of public policy frame the concern for the rights of minorities in the face of majority opposition.

*Hypotheses:* Without the filtering mechanisms of the representative system, direct democracy promotes majority tyranny as the scope of civil rights conflicts expands and citizens vote on civil rights laws.

*Methods:* The paper analyzes over three decades of initiatives and popular referenda from five major civil rights areas: housing and public accommodations for racial minorities, school desegregation, gay rights, English language laws, and AIDS policies.

*Results:* Citizen initiatives that restrict civil rights experience extraordinary electoral success: voters have approved over three-quarters of these, while endorsing only a third of *all* initiatives and popular referenda.

America's political landscape is littered with legislation that citizens have written, petitioned to put on the ballot, campaigned for and against, and voted on. Frustrated with politics and disenchanted with their elected officials, ordinary people increasingly sidestep the representative system by putting their own laws to a popular vote (Magleby 1984; Ranney 1978). Recently, ballot initiatives that seek to bar governments from passing laws that prohibit discrimination on the basis of sexual orientation have occupied a prominent place among the issues that have reached the ballot. But lesbians and gay men are not the first to see their civil rights put to a popular vote. Many minority groups have watched voters decide their fate at the polls.

One question persistently haunts the use of direct democracy: when citizens have the power to legislate issues directly, will the majority tyrannize the minority? In other words, are the rights of political minorities—rights central to our conception of a Madisonian democracy (Dahl 1956)—less secure when citizens vote on civil rights laws than when those laws filter through the representative system? Surprisingly, even though political observers have frequently asked these questions, they have done little more than collect anecdotal evidence to find the answers.

This paper uses a more systematic approach to determine whether direct democracy lends itself to majority tyranny in the area of civil rights. By examining over three decades of civil rights laws that have appeared

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on state and local ballots across the nation, I find strong evidence that the majority has indeed used its direct legislative powers to deprive political minorities of their civil rights. In five issue areas—housing and public accommodations for racial minorities, school desegregation, gay rights, English language laws, and AIDS policies—the majority has been extraordinarily successful at using the ballot box to repeal existing legislative protections and to pass laws that block elected representatives from creating new laws. Furthermore, the judicial system, with its deference to the direct democratic process, provides only partial protection to the minorities whose rights have been taken away by popular vote.

I begin by briefly reviewing the background of direct democracy and the associated concerns about tyranny of the majority. I also suggest that theories of public policy predict that civil rights opponents who have access to the initiative process will use direct democracy to thwart civil rights. After describing my methods for cataloging civil rights initiatives and referenda, I provide an overview of the data and discuss each issue area in greater depth. I conclude by examining the normative implications of my findings.

### **Direct Democracy and the Tyranny of the Majority**

At the turn of the century, the Progressives successfully promoted the initiative and referendum as a way for citizens to circumvent legislatures that they felt were captive to monied interests. Currently, 24 states give their citizens the power to initiate referenda on legislatively-enacted statutes, 21 allow citizens to propose their own statutes, and 17 permit citizens to place constitutional amendments on the ballot (Council of State Governments 1993). A far greater number of localities enact and review laws through the initiative and referendum process. Estimates of the number of state and local initiatives and referenda since the turn of the century run from the tens of thousands (Magleby 1984, 70) to the hundreds of thousands (Hamilton 1970, 125).

Julian Eule (1990) identifies two types of direct democracy: complementary and substitutive. Complementary direct democracy consists of legislative referenda. With these measures, “the voters and the legislature must act in concert before a law may take effect. Legislative passage is prerequisite but inadequate. Without voter endorsement the legislative effort fails; without legislative passage the electorate has nothing to vote on” (1990, 1512). Because of the legislative involvement, complementary measures fall within the framework of a representative system of government. Substitutive measures, on the other hand, include ballot initiatives (proposed statutes and constitutional amendments) and popular referenda (measures that seek to repeal existing laws or executive orders). Under

substitutive direct democracy, “the states and municipalities . . . have a primary representational form of governance but afford voters the opportunity to substitute plebiscites for the ordinary process of lawmaking. In order to exercise this option the voters neither need legislative permission nor legislative assistance” (Eule 1990, 1510). Substitutive measures “displace completely the representational framework for lawmaking and substitute a direct one” (1990, 1511). Substitutive and complementary direct legislation suffer quite different fates at the ballot box. Between 1898 and 1978, voters approved 60% of state legislative referenda, meanwhile, they passed only 33% of the substitutive measures on their state ballots (Magleby 1984, 71–3).

The framers of the United States Constitution adopted a representative system of government to filter the majority will. In *The Federalist No. 10*, James Madison warned, “When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.” In *The Federalist No. 51*, Madison cautioned, “It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.” A central tenet of Madisonian democracy is that government should not make decisions by majority rule (Dahl 1956, chap. 1). Thus, the cure for the “mischiefs of faction” was not direct legislation, it was representative government. The framers institutionalized their suspicions of direct democracy through constitutional features such as the electoral college, the indirect election of senators, and the absence of a national initiative process.<sup>1</sup>

Legislators need not be more fair or less prejudiced than other citizens in order for the filter to work. As Carey (1978) has pointed out, Madison worried as much about governmental tyranny as majority tyranny, so he proposed the separation of powers to control the legislature. In addition to the external constraints that the separation of powers provides (e.g., bicameralism, judicial review, and executive veto power), legislatures have internal checks that may derail laws that disadvantage political minorities. While

<sup>1</sup>Many legal scholars would add Article IV of the Constitution to this list. “Article IV explicitly imposes an obligation on the United States—a term that ordinarily includes the judiciary—to ‘guarantee to every State in this Union a Republican Form of Government’ ” (Eule 1990, 1539).

committee hearings, legislative coalitions, public recorded votes, and the need to explain voting records help constrain the behavior of representatives, none of these filtering mechanisms exist when the public votes directly on laws (Eule 1990, Gillette 1988).<sup>2</sup>

Clayton Gillette (1988, 954) argues that direct democracy can overcome its potential for majoritarianism, “if the motivations that lure voters to the voting booth simultaneously and systematically induce other-regarding behavior.”<sup>3</sup> But he concedes that, “if individuals have substantial incentives to vote that do not emanate from concern for the welfare of others, they likely will turn out to record their narrowly self-interested preferences. If that is the case, minorities are vulnerable to repressive measures proposed through the plebiscitary process” (1988, 954). Typically, civil rights laws seek to shift political power from the majority to the minority, creating a conflict steeped in self-interest. Thus, where the civil rights of a political minority are at stake, the absence of the representative filter opens the door to the tyranny.

Because of the importance of the filtering system as a check on majority tyranny, my analysis focuses on substitutive direct democracy.<sup>4</sup> As I will show, the low rate of passage for substitutive measures (33%) does not hold where civil rights initiatives and popular referenda are concerned. In those cases, voters overwhelmingly favor direct legislation that repeals existing civil rights laws or precludes elected officials from making new ones.<sup>5</sup>

<sup>2</sup>The argument is not that the representative system is perfect, but that it is less flawed than substitutive direct democracy. Our history shows that governmental checks and balances provide no ironclad guarantee against laws that trample the rights of political minorities (e.g., Jim Crow laws, the World War II internment of American citizens of Japanese descent, etc.).

<sup>3</sup>As examples, he uses laws regarding the subdivision of land in residential areas and road paving schemes to show that the structure of a plebiscite can circumvent the prisoners’ dilemma nature of some local issues and turn them into coordination games. These issues bear little resemblance to the civil rights initiatives that I consider here (e.g., in the language of game theory, minorities and majorities face different sets of payoffs due to their unequal political power).

<sup>4</sup>This decision removes “ballot-box zoning” from my analysis. Many jurisdictions require local legislatures to submit zoning decisions to a vote of the people (Bell 1978; Slonim and Lowe 1979). Important zoning referenda, especially those that deal with public housing, have involved minority rights and produced legal precedent (e.g., *James v. Valtierra* where Justice Black proclaimed that “provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice” [1971, 141]). While public housing decisions can enforce racial segregation (Hirsch 1983), confounding factors such as antitax attitudes that engender resistance to public housing muddy the analysis. For this reason, I also do not consider antitax measures, like California’s Proposition 13, even though they may disproportionately harm racial and language minorities.

<sup>5</sup>Hereafter, when I use terms like “direct legislation” or “initiative,” my words apply to substitutive measures. I also drop the cumbersome phrase “initiatives and popular referenda” even though my remarks refer to both unless otherwise specified.

Theories of public policy suggest that civil rights issues should be exceptionally vulnerable to the initiative process. E. E. Schattschneider (1960, 3) observes that “At the nub of politics are, first, the way in which the public participates in the spread of conflict and, second, the processes by which the unstable relation of the public to the conflict is controlled.” The nature of an issue helps determine whether the scope of the conflict expands or contracts. According to Cobb and Elder (1972, 112–24), the issues most likely to expand to the widest possible political audience are those that can be defined broadly, have long-term implications, have social significance, can be quickly converted into emotional issues, and are nontechnical. Civil rights issues fit the bill. First, the language of civil rights conflicts is the politically compelling but ambiguous language of liberty and equality. Also, civil rights laws touch upon some of the most persistent divisions and deeply rooted values in our society. Finally, citizens do not need experts to tell them how they feel about issues like race and homosexuality.

But at what point does the scope of a civil rights conflict expand? As long as civil rights issues are not on the political agenda, those who oppose the laws need not actively campaign against them. Once the legislative and executive branches begin to pass or even consider new laws, however, opponents will likely seek to spread the conflict to the general public in order to appeal to spectators who will favor their cause in disproportionate numbers (Schattschneider 1960, chap. 1).<sup>6</sup>

Direct democracy serves as a powerful vehicle for the expansion of civil rights conflicts.<sup>7</sup> While holding a public vote may be a quintessential act of issue expansion, media exposure can help civil rights opponents frame the issue and put it on a broader political agenda regardless of the outcome (Gamson and Modigliani 1987).<sup>8</sup> The initiative process provides a structured series of events around which the news media can organize their coverage (Gans 1979, 168–9); the deadline by which all organizations must file their measures; the date on which they submit their signed petitions; the official announcement of which measures qualified for the ballot;

<sup>6</sup>To even get to this point, civil rights supporters have enlarged the conflict by seeking public intervention in what has previously been defined as a private conflict (Schattschneider 1960, chap. 1).

<sup>7</sup>Of course, political activists must be aware that direct democracy exists as a venue for their activities. The civil rights initiatives tend to cluster in time indicating that activists learn from the experiences of other communities.

<sup>8</sup>Although I have no data on initiatives that failed to make the ballot because petitioners did not gather enough signatures, this analysis suggests that the mere existence of direct democracy may encourage majority tyranny if elected officials interpret signature-gathering campaigns as indicators of public opinion that they must heed to stay in office. Even politicians in states that do not permit substitutive measures may believe that they cannot afford to ignore the point of view expressed by direct democratic efforts in other states (Van Horn, Baumer, and Gormley 1989, 248).

the campaign season preceding the election; and the announcement of actual election results. Even if a measure fails at any point along the way, merely participating in the process provides an organization with routinized access to the media, and to the general public, that they may lack in the legislative arena.

Scholars who have looked at single elections or single civil rights issues have expressed varying degrees of alarm about citizen legislation. After analyzing the 1964 vote in California to revoke the state legislature's new fair housing statute, Raymond Wolfinger and Fred Greenstein (1968, 769) argued for the compromise and weighing of different interests and intensities embodied, if imperfectly, in a representative system: "If, as seems likely, the next several years of civil rights politics in the North are characterized by confrontations between angry, demanding Negroes and intransigent whites, . . . then the referendum will become an increasingly inappropriate political tool and processes leaving room for calculation and compromise will be more necessary than ever."

A decade later, Derrick Bell (1978, 15) worried that "direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process. Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day." In 1990, Eule echoed Bell's words: "Unless, however, we are willing to abandon our commitment to the principles upon which our government is founded, we must be willing to confront the danger to minority rights and individual liberty posed by a device that aggregates without filtering" (1586).

The rights of minorities appear much more secure to those who have conducted more general studies of direct democracy. The most forceful statement comes from Joseph Zimmerman. "An associated objection in the 'tyranny of the majority' argument—the initiative may be employed to deprive minorities of some of their basic rights. The record to date proves this argument to be invalid" (1986, 95, italics omitted). According to Magleby's (1984, 196) more measured assessment, "Direct legislation has been neither as positive in its effect as proponents have frequently asserted nor as dire in its consequences as opponents have predicted. The courts have been active in protecting minority and individual rights." Thomas Cronin (1989, 92) lands somewhere in-between. "Yet the initiative and referendum record suggests that those direct democracy devices can only rarely be faulted for impairing the rights of the powerless." He later concludes that "the overall record suggests that American voters have in most cases approved measures protecting or promoting minority rights, almost as often

as institutions of representative government, with which they must be compared'' (1989, 98).

What does the record *really* show? Without looking at the entire record on civil rights initiatives, researchers who have examined only single issue initiatives may inaccurately generalize from an unrepresentative sample. The arguments of authors who provide overviews of direct democracy suffer from a different defect. Their claims rest on anecdotal evidence (Cronin 1989, chap 5; Magleby 1984, chap 10; Ranney 1978).<sup>9</sup> They list a few initiatives that have encroached on minority rights along with some where those rights have been upheld and declare a draw.

To explore the relationship between civil rights and citizen legislation, I examine three aspects of civil rights initiatives. First, which citizen groups have petitioned to put civil rights initiatives on the ballot? If the majority most often uses the ballot to attempt to deprive minorities of their rights, to nullify legislatively-enacted protections, or to bar elected officials from passing future civil rights laws, majority tyranny would seem a real and present threat. Second, what relationship do the outcomes of civil rights initiatives bear to legislative and executive decisions on the subject? Majority tyranny may exist if minority groups have secured their rights through the representative system only to see them taken away at the ballot box. Citizen-initiated laws that forbid elected officials from passing civil rights laws pose a similar danger. Finally, how have civil rights decisions made at the ballot box fared over time? If the majority tyrannizes the minority through direct legislation, but the courts or other levels of government overturn those decisions, our system of checks and balances may render this type of tyranny a paper tiger. As Bell (1978) notes, though, even the process of recording and tabulating prejudice takes a toll on a society made up of diverse groups of people.

### Cataloguing Civil Rights Initiatives and Referenda

To answer the questions I have posed, I collected information on civil rights initiatives that have appeared on state and local ballots between 1959 and 1993.<sup>10</sup> To build a catalogue of cases, I read extensively in the political science and legal literature on initiatives and referenda to find those that

<sup>9</sup>Zimmerman (1986) provides no evidence of the record that he finds so conclusive.

<sup>10</sup>Civil rights issues appear to make up less than 10% of all *state* ballot initiatives (Bone and Benedict 1975; Lee 1978; Ranney 1978). Lee (1978) uses a "civil liberties and civil rights" classification and finds that 5% of the state ballot initiatives in California between 1912 and 1976 fell into this category. Bone and Benedict, in their analysis of direct legislation in Washington state, found that 8.5% of state initiatives between 1914–1973 involved the fuzzy, and somewhat inappropriately named, category of "individual lifestyles" (1975, 334). Their category includes civil rights, regulation of alcoholic beverage sales, etc.



dealt with civil rights issues. I also scoured the postelection issues of *The Washington Post*. By consulting academic articles, legal opinions, nonprofit publications, and newspapers, I gathered as many details as possible about each case I found. I did not include an initiative in my analysis if I could not find at least the following information: the year it was on the ballot, where it appeared, the issue it addressed, and whether it passed or failed. Refer to the appendices for a list of sources that I have used for each initiative; each of the five issue areas has its own appendix of sources.<sup>11</sup>

The weaknesses in my method of cataloguing cases should be obvious. First, I do not claim to have found all the civil rights initiatives that have made their way onto the ballot. My sources are more likely to focus on statewide initiatives and referenda and to give less attention to local measures. I am also more likely to have found initiatives that have appeared in general elections than those that have been on primary or special election ballots. Second, when civil rights initiatives and referenda do make it into print, they are conceivably the most controversial and, therefore, the least representative of their class. The controversial nature of civil rights issues in general, however, may work to my advantage. Because civil rights initiatives usually generate a great deal of interest, they stand a better chance of receiving national attention than other local ballot measures such as school bond referenda.

The civil rights initiatives that I have collected involve the right of racial, ethnic, and language minorities, gay men and lesbians, and people with AIDS to the equal protection of the laws and their right to live free from discrimination in employment, housing, education, and public accommodations.<sup>12</sup> These groups form a minority of the population and generally hold less political power than the majorities that may be arrayed against them. While this list does not stray far from how the courts have perceived political minorities, some civil rights areas are still in flux. The courts have only inconsistently considered sexual orientation as a protected category under the 14th Amendment (W. Rubenstein 1993). However, the rise of the gay rights movement as one of the most active social movements of the 1990s warrants the inclusion of gay rights initiatives in this analysis.

The most notable omission from my analysis is women's rights issues. Women are an unusual political minority in that they form a potential electoral majority. While sheer numbers at the voting booth do not guarantee

<sup>11</sup>Only where I use a direct quote do I put the name of the source in the text of this paper.

<sup>12</sup>Ranney (1989) seems to follow a similar scheme in his review of the 1988 initiatives and referenda. He includes English language, AIDS, and gay rights laws in his categorization of "civil liberties/civil rights" issues.

**Table 1. Overview of Civil Rights Initiatives and Referenda, 1959–93**

Issue (years on ballot)	On the Ballot	Anti-minority Result	Majority Group Put Measure on Ballot	“Tyrannical” Outcomes
Housing and accommodations (1959–68)	11	9 (82)	10	8 (80)
School desegregation <sup>a</sup> (1960–89)	7	5 (71)	7	5 (71)
Gay rights (1977–93)	43	34 (79)	38	30 (79)
English language laws (1980–89)	8	8 (100)	8	8 (100)
AIDS policies (1986–89)	5	2 (40)	5	2 (40)
Total	74	58 (78)	68	53 (78)

*Note:* Percentages in parentheses.

<sup>a</sup>California voters approved two antibusing measures, one in 1972 and the other in 1979. The second antibusing measure does not appear here because the legislature referred the measure to the voters. The Supreme Court ruled the second law constitutional (*Crawford v. L.A. Board of Education* 1982).

success, women’s rights advocates have a marked advantage over other, less numerous, and more insular minority groups in pursuing their agenda through direct legislation. The decision to exclude women’s rights initiatives from my analysis has important consequences because those who find little evidence of tyranny of the majority, e.g., Cronin (1989), generally bolster their case by pointing to women’s rights issues—women’s suffrage, Equal Rights Amendments, and abortion access and funding—that have succeeded at the polls. However, even if a systematic look at women’s rights initiatives were to show that their success rate mirrors that of citizen initiatives in general, the question would remain as to why the group of initiatives that I look at here differs so dramatically.

### **Tyranny at the Ballot Box**

While I take a more detailed look at the five issue areas below, a brief overview provides discouraging evidence that political minorities do not fare well at the polls. Table 1 shows how civil rights initiatives break down in the areas of housing and public accommodations, school desegregation, gay rights, English language laws, and AIDS policies. The table lists the issue areas in the approximate chronological order in which they arose.

Between 1959 and 1993, 74 civil rights initiatives found their way onto state and local ballots across the nation. Note that because of court injunctions, the number of initiatives that made it through the petition phase exceeds the number that actually appeared on the ballot.

Of the 74 civil rights initiatives that citizens have voted on, 78% resulted in outcomes that constituted a defeat of minority interests. These defeats include the repeal of existing civil rights laws, the enactment of laws that prohibited legislative bodies from passing new civil rights laws, and the defeat of measures that sought to extend civil rights protections. The table also shows that citizens in the majority have used the initiative process far more often than minority groups. All but six of the 74 initiatives, or 92%, actively sought to restrict the rights of minorities. Although not shown, only one of the six initiatives that specifically tried to extend civil rights protection has passed since 1959. Finally, the last column in Table 1 shows the frequency of tyrannical outcomes, those instances where the majority voted to repeal existing civil rights legislation, pass new restrictive laws, or prohibit the passage of new legislative protections. The 68 restrictive measures that citizens voted on had a pass rate of 78%, as opposed to the pass rate of 33% for all substitutive measures. Either the famous “when in doubt, voters vote no” axiom of the initiative literature does not apply, or voters know exactly how they feel about the civil rights issues that appear on their ballots.

The aggregate figures tell only part of the story. A close look at each issue area reveals that civil rights initiatives often arise in response to legislative and executive action that seeks to protect minority rights. Furthermore, the judicial system has provided only partial relief to minority groups whose rights have been stripped away at the polls. Legal precedent in this area comes from fair housing and school desegregation initiatives. While the United States Supreme Court has repeatedly indicated that the Constitution does not prohibit citizens from repealing civil rights laws through the initiative process, they have generally struck down initiatives that restrict the rights of political minorities to participate in the political process (e.g., *Hunter v. Erickson* 1968; *Reitman v. Mulkey* 1967; *Washington v. Seattle School District No 1* 1981). Whether this precedent applies beyond cases involving racial minorities—e.g., to cases pertaining to gay rights—remains to be seen as the Supreme Court decides whether the citizens of Colorado can prohibit state and local governments from passing nondiscrimination laws based on sexual orientation (see below.)<sup>13</sup>

<sup>13</sup>For a thorough look at the issue of judicial review, see Eule (1990).

*Housing and Public Accommodations*<sup>14</sup>

Between 1959 and 1968, African-Americans experienced a wave of ballot box assaults in the area of fair housing and public accommodation laws. Fifteen percent of all civil rights initiatives have occurred in this issue area. Ten of the 11 initiatives sought to restrict access to housing and public accommodations and the voters approved 80% of the majoritarian measures. Only once have voters had the opportunity, prior to a legislative enactment, to expand the rights of racial minorities seeking housing access. A group named United Socialist Action put a fair housing ordinance on the ballot in Berkeley, California in 1959. The NAACP opposed the proposal because they felt it was poorly crafted and the proposal went down to defeat.

The remaining housing and public accommodation initiatives sought to repeal existing laws or to bar legislatures from passing new ones. In each of these cases, the initiatives arose in response to legislative bodies that were considering housing or accommodation laws or had already passed them.

The only initiative regarding public accommodations appeared on Maryland's ballot in 1964. In the wake of demonstrations against restaurants that refused to serve African-Americans, the Maryland General Assembly passed two laws in 1963 to prohibit public establishments from denying service to customers on the basis of race and to set up the framework for processing grievances. In July 1964, segregationist groups turned in two petitions to qualify referenda on both statutes for the November ballot. Unlike the outcomes for other initiatives in this issue area, the citizens of Maryland voted to uphold the new statutes. By the time of the election, however, President Johnson had signed the 1964 Civil Rights Law. The federal law contained stronger public accommodations provisions, effectively making the new state law moot.

State and local fair housing laws suffered repeated defeats at the polls during the 1960s. In April 1963, Berkeley citizens repealed a fair housing ordinance that the city council had passed three months earlier. The Berkeley vote foreshadowed events at the state level. In 1963, the California legislature passed the Rumford Fair Housing Act. The following year, Californians voted to nullify the Rumford Act by voting in favor of Proposition 14. This measure amended the state constitution to establish the right of property owners to rent, lease, or sell their property to anyone they pleased. Later, the California Supreme Court declared the initiative unconstitutional

<sup>14</sup>Tables that present summary details of the initiatives for each issue area are available upon request.

and the United States Supreme Court agreed in *Reitman v. Mulkey* (1967). Detroit voters also passed a property owner's rights ordinance in 1964, which was later struck down as unconstitutional, and the courts enjoined a similar ordinance from appearing on the ballot in Milwaukee in 1967 (*Otey v. Common Council of City of Milwaukee* 1968). In both of these jurisdictions, the city councils had already rejected fair housing ordinances.

In 1964, voters in Akron, Ohio amended their city charter to require a popular vote on fair housing legislation. By making the amendment retroactive, the initiative repealed a fair housing ordinance that the city council had passed a few months earlier. The United States Supreme Court, in *Hunter v. Erickson* (1968, 393) struck down the new amendment, ruling that the city could not "disadvantage any particular group by making it more difficult [for them than for others] to enact legislation."

By the end of 1967, citizens in three more cities—Toledo and Springfield, Ohio, and Jackson, Michigan—had used the initiative process to repeal their fair housing ordinances. Voters in Maryland followed suit the next year. Also in 1968, voters in Washington state upheld a fair housing law that the legislature had passed the previous year. The legislation prohibited discrimination by real estate brokers and provided weak sanctions for violations of the law. While real estate firms collected the petition signatures, they did not actively campaign after they qualified the referendum for the ballot. With the passage of the federal Fair Housing Act of 1968, direct democratic action in this area subsided.

### *School Desegregation*

One-tenth of the civil rights initiatives in the last three decades have dealt with school desegregation. Voters approved five of the seven initiatives that sought to stall school desegregation plans. The first ballot initiative response to desegregation efforts in the public schools occurred in 1960 in Arkansas and Mississippi. Citizens in those states voted on proposals that would have made it easier "to close down public schools threatened with desegregation" ("Many Local Proposals are Decided by Voters" 1960, A8). Arkansas rejected the initiative, Mississippians voted in favor.

The next direct democratic skirmishes around desegregation came in the 1970s as mandatory busing plans began to proliferate in the Northeast and the West. In 1972, California voters passed Proposition 21. That measure provided that "No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school" (*Santa Barbara School District v. Superior Court* 1975, 611). The proposition also repealed two sections of the State Education Code that declared a state policy of eliminating racial imbalance in public schools. The Supe-

rior Court of California found the first half of the proposition unconstitutional because it contributed to de jure and de facto segregation. The court left the second half intact, stating that citizens have a right to determine state educational policy.

The next volley came in Colorado in 1974 when voters passed an initiative that sought to outlaw forced busing to achieve desegregation. In 1978, Massachusetts voters approved a measure that prohibited school districts from using race to assign students to a school, although the measure specified that it did not apply to the court-ordered busing in Boston. That same year, Washington state voters passed an initiative that effectively repealed desegregation plans in Seattle, Tacoma, and Pasco. Those who drafted Washington's Initiative 350 were reacting to the Seattle School District's plan to begin mandatory busing in order to end segregation in its schools. Initiative 350 prohibited school districts from assigning pupils to schools other than those near their homes. The measure allowed several broad exceptions to the local assignment rule, but school districts could not violate the local assignment rule in order to advance racial integration.

In *Washington v. Seattle School District No 1* (1981, 471) the United States Supreme Court ruled that the Washington initiative violated the Equal Protection Clause of the Constitution because "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes." The Court declared that the new law placed a special burden on racial minorities to achieve legislation in their interest; they would have to lobby a remote state legislature, rather than their local school districts, to achieve racial integration in public education.

The last school busing initiative to reach the ballot was Initiative 34 in Seattle. In the 1989 general election, a slim majority of Seattle voters rejected a measure that would have ended mandatory busing in favor of allowing parents to enroll their children in the public school of their choice. The initiative would also have forced increased local funding of public schools and the enhancement of magnet school programs to promote integration.

### *Gay Rights*

Gay men and lesbians have seen their civil rights put to a popular vote more often than any other group. Almost 60% of the civil rights initiatives have involved gay rights issues. The measures have included efforts to repeal gay rights ordinances, to remove sexual orientation as a protected category in housing and employment laws, to enact and repeal domestic partnership laws, to prohibit lesbians and gay men from teaching in public schools, to declare homosexuality "abnormal, wrong, unnatural, and per-

verse,” and to prohibit jurisdictions from passing new gay rights laws.<sup>15</sup> Of the 43 gay rights initiatives that have reached the ballot, 88% have sought to restrict the rights of gay men and lesbians by repealing existing gay rights laws or forbidding legislatures to pass new ones. Voters approved 79% of these restrictive measures.

The first round of gay rights initiatives occurred between 1977 and 1980. In 1977, Anita Bryant made national headlines when her organization, Save Our Children, used the initiative process to repeal Dade County, Florida’s four month old gay rights ordinance. The next year citizens in St. Paul, Minnesota, Wichita, Kansas, and Eugene, Oregon also voted to repeal gay rights ordinances. In 1980, San Jose and Santa Clara County, California added their names to the list of jurisdictions that used the initiative process to repeal existing legislation that protected gay rights.

Two initiatives during this first round sought to expand the rights of lesbians and gay men. In 1978, pro-gay rights advocates in Dade County unsuccessfully tried to restore the gay rights ordinance that had been repealed by popular referendum the year before. Two years later, voters in Davis, California rejected an initiative that would have instructed the city council to adopt a gay rights ordinance.

Only twice during the period 1977 to 1980 did citizens cast a majority of their ballots to uphold the rights of lesbians and gay men. In 1978, California voters rejected Proposition 6, a measure that would have banned lesbians and gay men from teaching in public schools. California State Senator John Briggs, leader of the campaign to pass Proposition 6, turned to the initiative process after the state legislature did not pass a similar law. Also in 1978, Seattle voters refused to remove sexual orientation from city housing and employment ordinances. The city council had expanded the ordinances to include gay men and lesbians several years earlier.

The current barrage of initiatives that deal with gay rights issues began in 1988 with Oregon’s Measure 8. That year, voters approved an initiative sponsored by the Oregon Citizens Alliance (OCA), a Christian Right organization, that repealed a state executive order forbidding discrimination on the basis of sexual orientation in state employment. The measure also prohibited state officials from preventing any personnel actions taken on the basis of a state employee’s sexual orientation. In *Merrick v. Board of Higher Education* (1992), the Oregon Court of Appeals overturned the initiative result on the basis that it restricted state employees’ freedom of speech.

<sup>15</sup>I use the phrase “gay rights laws” as a general term for laws that prohibit discrimination on the basis of sexual orientation. These laws can pertain to housing, employment, credit practices, public accommodations, union practices, domestic partnership, etc.

In May 1992, the OCA proposed two local initiatives to amend the city charters of Corvallis and Springfield to prohibit the government from recognizing or promoting homosexuality. The Springfield initiative passed, while the Corvallis measure went down to defeat. Six months later, Oregon voters rejected Measure 9, a statewide initiative to amend the state constitution to declare homosexuality “abnormal, wrong, unnatural, and perverse” (Boxall 1992, sec. A). The measure also sought to prohibit state and local governments and agencies from taking actions which would promote or condone homosexuality.

Within a few months of Measure 9’s defeat, the OCA announced its new strategy of passing more moderate antigay initiatives in jurisdictions that had voted for Measure 9. By the end of 1993, residents of 11 cities and five counties had voted to amend their charters to bar legislation that would prohibit sexual orientation discrimination.<sup>16</sup> In August 1993, Oregon Governor Barbara Roberts signed a law that prohibited cities and counties from implementing the antigay rights initiatives.

California has also been a hot spot for recent gay rights initiatives. A domestic partnership law that included benefits for unmarried city employees and that had been unanimously approved by the San Francisco Board of Supervisors went down to defeat in a 1989 referendum. Two years later, San Francisco voters approved a weaker domestic partnership law that allowed unmarried partners to register at city hall but included no benefits. Voters refused to repeal the new law the following year. In 1989, the residents of Irvine, California used their initiative powers to remove sexual orientation from the city’s human rights ordinance. The city council had unanimously approved the inclusion of sexual orientation the previous year.

In Washington state, three gay rights initiatives have been on local ballots since 1989. In that year, voters in Tacoma repealed a gay rights law that the city council had passed a few months earlier. When pro-gay rights advocates used the initiative process to try to reinstall the gay rights law in 1990, their effort suffered a resounding electoral defeat. Also in 1990, Seattle voters rejected an attempt to repeal two ordinances that provided family leave and medical benefits to city employees and their unmarried partners. The city council had passed the ordinances in 1989 when they discovered that the city was in violation of its antidiscrimination ordinance. In other local ballot initiatives, voters in St. Paul refused to repeal their gay rights ordinance in 1991 as did voters in Portland, Maine in 1992. Repeal efforts were successful, however, in Tampa, Florida in 1992 and in Cincinnati, Ohio and Lewiston, Maine in 1993. Cincinnati’s Issue 3 also

<sup>16</sup>A judge overturned the result in one city because illegal ballots had been cast in favor of the initiative. That election was rescheduled to March 1994 and the initiative passed again.



prohibited the city council from passing new gay rights legislation. The United States Court of Appeals for the Sixth Circuit has upheld the constitutionality of the measure.

Perhaps the most famous of the ballot initiatives to consider the issue of gay rights is Colorado's Amendment 2. That measure, approved by voters in 1992, sought to amend the state constitution to bar state and local governments and agencies from passing laws or regulations that prohibit sexual orientation discrimination. The state courts enjoined the measure from taking effect in order to determine its constitutionality. The State Supreme Court ruled in 1994 that Amendment 2 was in violation of the Equal Protection Clause of the 14th Amendment, and the United States Supreme Court has agreed to hear the case.

### *English Language*

During the 1980s, several states and localities voted on whether to consider English their official language and to restrict the use of other languages in the course of government business. This issue area comprises just over 10% of the civil rights initiatives. Two statewide initiatives have appeared in California while Arizona, Florida, and Colorado each put one English-only initiative on their ballots. At the local level, citizens in Dade County, Florida; San Francisco, California; and Lowell, Massachusetts also cast ballots on the issue. In every case, voters approved the measures, usually by wide margins.

The first ballot initiative that sought to restrict the rights of language minorities appeared in 1980 in Dade County, Florida. There, voters passed an ordinance that prohibited the county from funding projects that used any language other than English. The Dade County Commission modified and weakened the ordinance four years later. In 1983, voters in San Francisco approved a nonbinding initiative that urged the federal government to print election ballots only in English. Californians passed a similar statewide initiative the following year. In 1986, California voters again went to the polls and passed Proposition 63, an amendment to the state constitution that declared English the state's official language. Two years later, the citizens of Florida and Colorado amended their constitutions with similar laws. In 1989, the people of Lowell, Massachusetts voted to make English their city's official language.

When the citizens of Arizona approved Proposition 106 in 1988, they enacted the most restrictive English language initiative to date. Not only did the proposition mandate that the state and all its subdivisions work "to preserve, protect and enhance the role of the English language as the official language" (*Yniguez v. Mofford* 1990, 317), it also required, with few exceptions, all government entities and employees to use English when conduct-

ing government business. In 1994, the United States District Court of Appeals for the Ninth Circuit upheld a lower court ruling that the law was unconstitutionally vague and violated the First Amendment right to free speech.

### *AIDS*

During the latter part of the 1980s, Californians had five opportunities to vote on the issue of AIDS. The AIDS initiatives, which comprise almost 7% of the civil rights initiatives, were hostile to the rights of people with AIDS and people suspected of having AIDS. These measures stand out because of their low rate of passage relative to other civil rights initiatives. Only two of the five that appeared on the ballot passed.

Lyndon LaRouche's followers put the first AIDS measure on California's state ballot in November 1986. Voters rejected this initiative, which would have barred people with AIDS from teaching or from working in food-related jobs. Californians voted on the issue of AIDS again in June 1988. This time they cast their ballots against a proposal to declare AIDS a communicable disease and make people with AIDS subject to quarantine. In the November election that year, voters also struck down Proposition 102, an initiative that sought to end the rule of confidentiality for AIDS testing.

The 1988 general election also saw the first of two successful AIDS initiatives. State voters approved Proposition 96, a law requiring AIDS testing for sex offenders and people who assault law enforcement or medical personnel. The following year voters in Concord, California repealed an ordinance that prohibited discrimination against people with AIDS. The city council had passed the law six months earlier. The unusual lack of success of AIDS initiatives, compared to other civil rights measures, may be the result of the voters' reliance on expert opinion. In other words, voters may be willing to defer to public health officials as the proper policy makers for a public health issue like AIDS.

### **Conclusion**

I began this inquiry with one question: when citizens have the power to legislate civil rights issues directly, will the majority tyrannize the minority? After reviewing over three decades worth of civil rights initiatives and referenda, the answer is quite clear. Citizens in the political majority have repeatedly used direct democracy to put the rights of political minorities to a popular vote. Not only that, anti-civil rights initiatives have an extraordinary record of success: voters have approved over three-quarters of these, while endorsing only a third of all substitutive measures. This pattern holds across all three decades and across all but one of the issue areas that I have investigated.

Cronin (1989) rightly asserts that direct democracy must be compared with the representative system it replaces. His conclusion, however, that “the overall record suggests that American voters have in most cases approved measures protecting or promoting minority rights, almost as often as institutions of representative government” (1989, 98) could hardly be more wrong. On the contrary, the record shows that American voters readily repeal existing civil rights protections and enthusiastically enact laws that bar their elected representatives from passing new ones. By repeatedly striking down the latter, the judicial system has vigilantly protected the rights of minorities to participate in the political process. But the protection stops there: the courts have left standing the initiatives that repeal existing laws.

Because the initiative process marks the expansion of civil rights conflicts to a broader public, it serves as a barometer of the political stock of minorities even before citizens cast their votes. With nativist sentiments rising, a 1994 initiative to restrict the access of illegal immigrants to public services appeared, and passed, in California (Pear 1994). The suggestion of a state initiative to abolish California’s affirmative action programs has greatly enhanced that issue’s political visibility. Gay rights occupied a prominent place on the political agenda in 1994 as nine states saw petition drives for antigay initiatives and voters rejected the measures in the two states, Idaho and Oregon, where the initiatives eventually appeared on the ballot (“Anti-Gay Push in Nevada” 1994; Holmes 1994; Pear 1994). All of these measures chronicle the embattled political fortunes of immigrants, people of color, lesbians, and gay men.

How we treat political minorities is one of the most volatile issues a society can face. As groups that have been excluded from participating fully in the social, economic, and political life of the nation fight for their civil rights, their confrontations with those who have already secured their place threaten to rend the very fabric of the communities in which we live. Our representative government, with its admittedly imperfect filtering mechanisms, seeks to protect the rights of minorities against the will of majorities. Minorities suffer when direct democracy circumvents that system. Not only do they lose at the polls, the very act of putting civil rights to a popular vote increases the divisions that separate us as a people. Instead of fortifying our nation, direct legislation only weakens us.

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**APPENDIX A**  
**Sources for Fair Housing and Public Accommodations Initiatives and Referenda**

Year	Location	Sources
1959	Berkeley, CA	Casstevens (1968b); School Bonds Lose in Berkeley (1959).
1963	Berkeley, CA	Casstevens (1968b); Hamilton (1970).
1964	Detroit, MI	Bell (1978); Hamilton (1970); Walker (1968).
	California	Bell (1978); Casstevens (1968a); Lee (1978); <i>Reitman v. Mulkey</i> (1967); Wolfinger and Greenstein (1968).
	Maryland	Franklin (1963); Md. Backs Question on Accommodations (1964).
	Akron, OH	Bell (1978); <i>Hunter v. Erikson</i> (1968); Backlash Plays Part in Vote on Local Laws in 2 States (1964).
1967	Toledo, OH	Bell (1978); Hamilton (1970).
	Springfield, OH	Eley (1968).
	Jackson, MI	Walker (1968).
1968	Maryland	Bell (1978); Gunn (1981); <i>Spaulding vs. Blair</i> (1968); Open-Occupancy Law is Defeated in Maryland (1968).
	Washington	Real-Estate Firms Target of Bias Vote (1968); Unofficial Vote on Ballot Propositions (1968).

**APPENDIX B**  
**Sources for School Desegregation Initiatives and Referenda**

Year	Location	Sources
1960	Arkansas	Many Local Proposals are Decided by Voters (1960).
	Mississippi	Many Local Proposals are Decided by Voters (1960).
1972	California	Lee (1978); Magleby (1984); <i>Santa Barbara School District v. Superior Court</i> (1975).
1974	Colorado	Ranney (1978); New Jersey Rejects Casino Gambling (1974).
1978	Massachusetts	Dewar (1978).
	Washington	Schmidt (1983); <i>Washington v. Seattle School Dist. No. 1</i> (1981); Angelos (1978).
1989	Seattle, WA	Haberstroh (1989).

**APPENDIX C**  
**Sources for Gay Rights Initiatives and Referenda**

Year	Location	Sources
1977	Dade County, FL	Ayres (1977); Shilts (1982).
1978	California	Schmidt (1983); Shilts (1982).
	Dade County, FL	Dewar (1978).
	Wichita, KS	Wichita Repeals Homosexual Law (1978); Shilts (1982).
	St. Paul, MN	Sheppard (1978); Shilts (1982).
	Eugene, OR	Lichtenstein (1978); Turner (1978).
	Seattle, WA	Williams (1979); Shilts (1982).
1980	Davis, CA	Hager (1980).
	San Jose, CA	Hager (1980).
	Santa Clara County, CA	Hager (1980).
1988	Oregon	<i>Merrick v. Board of Higher Education</i> (1992); Rubenstein (1992).
1989	Irvine, CA	Zonana (1989); Schwartz (1989).
	San Francisco, CA	Zonana (1989); Schwartz (1989).
	Tacoma, WA	Tacoma Repeals Gay-Rights Measure (1989).
1990	San Francisco, CA	Roderick and Zonana (1990); Sandalow (1990).
	Seattle, WA	Nelson (1990).
	Tacoma, WA	Nelson (1990).
1991	San Francisco, CA	Chung (1991); National Results at a Glance (1991).
	St. Paul, MN	National Results at a Glance (1991).
1992	Colorado	<i>Evans v. Romer</i> (1993); Reinhold (1992); Johnson (1994).
	Tampa, FL	Reinhold (1992).
	Portland, ME	Reinhold (1992).
	Oregon	Boxall (1992); Reinhold (1992).
	Corvallis, OR	Monje (1992).
	Springfield, OR	Monje (1992).
1993	Lewiston, ME	Egan (1993); Cincinnati, Two Northeast Cities Rebuff Gay Rights (1993).
	Cincinnati, OH	Egan, 1993; Cincinnati, Two Northeast Cities Rebuff Gay Rights (1993); Dunlap (1993).
	Canby, OR	How They Voted (1993); Beggs (1993).
	Cornelius, OR	Beggs (1993).
	Creswell, OR	S. Rubenstein (1993); McCall (1993).
	Douglas County, OR	How They Voted (1993); Beggs (1993).
	Estacada, OR	S. Rubenstein (1993); McCall (1993).
	Jackson County, OR	S. Rubenstein (1993); McCall (1993).
	Josephine County, OR	How They Voted (1993); Beggs (1993).
	Junction City, OR	Monje (1993); Beggs (1993); Anti-Gay Rights Vote Illegal (1993); Rubenstein (1994).
	Keizer, OR	Oregon Cities Adopt Anti-Gay Rights Measures (1993).
	Klamath County, OR	How They Voted (1993); Beggs (1993).
	Lebanon, OR	S. Rubenstein (1993); McCall (1993).
1993	Linn County, OR	How They Voted (1993); Beggs (1993).
	Medford, OR	S. Rubenstein (1993); McCall (1993).
	Molalla, OR	S. Rubenstein (1993); McCall (1993).
	Oregon City, OR	Oregon Cities Adopt Anti-Gay Rights Measures (1993).
	Sweet Home, OR	S. Rubenstein (1993); McCall (1993).

**APPENDIX D**  
**Sources for English Language Initiatives and Referenda**

Year	Location	Sources
1980	Dade County, FL	Arlington (1991); Omang and Hilts (1980).
1983	San Francisco, CA	Two Governors Win Referendum Fights (1983).
1984	California	Cronin (1989); Harris (1984).
1986	California	Arlington (1991); Note (1987); Peterson (1986a, 1986b).
1988	Arizona	Arlington (1991); Peterson (1988a, 1988b); <i>Yniguez v. Mofford</i> (1990); Court Overturns Law Restricting Workers to English on the Job (1994).
	Colorado	Schmidt (1983); Peterson (1988a, 1988b).
	Florida	Arlington (1991); Schmidt (1983); Peterson (1988a, 1988b).
1989	Lowell, MA	Arlington (1991).

**APPENDIX E**  
**Sources for AIDS Initiatives and Referenda**

Year	Location	Sources
1986	California	McGuigan (1986); Peterson (1986b).
1988	California (Proposition 69)	Schmidt (1983); Wiegand (1988).
	California (Proposition 96)	Schmidt (1983); Peterson (1988a, 1988b).
	California (Proposition 102)	Schmidt (1983); Peterson (1988a, 1988b).
1989	Concord, CA	Zonana (1989); Congbalay (1989); Schwartz (1989).

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