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# ARTICLE III JUDGES AND THE INITIATIVE PROCESS: ARE ARTICLE III JUDGES HOPELESSLY ELITIST?

*Michael Vitiello\* and Andrew J. Glendon\*\**

## I. INTRODUCTION

The initiative process, a product of the Progressive and Populist reform efforts,<sup>1</sup> is so attractive in theory that it seems almost unholy to challenge its continuing vitality. Conceived as a way to circumvent a legislature under the control of monied interests and the railroads, the initiative process demonstrated the Progressive ideology that the people needed a vehicle to “directly battle against the corporations’ organized interests and influential lobbyists.”<sup>2</sup> While the theoretical underpinnings of the initiative process may be attractive, the reality of the initiative process, in its evolvment, is singularly unattractive.

A motivated group of concerned citizens can no longer rally around a cause and secure enough signatures to place it on the ballot.<sup>3</sup> The increase in population has led to professionals who collect the necessary signatures.<sup>4</sup> The cost of qualifying an initiative has made the process accessible primarily to monied interests.<sup>5</sup> At least since Proposition 13,<sup>6</sup> powerful political groups have been able to use the initiative process to advance a variety of political agenda that

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1. See discussion *infra* Part II.

2. Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 736 (1988).

3. See *infra* notes 47-63 and accompanying text.

4. See *infra* notes 49-52 and accompanying text.

5. See *infra* notes 52-63 and accompanying text.

6. Proposition 13, in CALIFORNIA VOTERS PAMPHLET, PRIMARY ELECTION 58 (June 6, 1978) (enacted as CAL. CONST. art. XIII).

often serve corporate and monied interests.<sup>7</sup> Advertising campaigns are often notoriously misleading, with ads playing on passions of the moment and masking serious concerns about the legislation.<sup>8</sup>

America has a long history of distrust in mob rule.<sup>9</sup> Majority rule raises legitimate concerns about insensitivity to the interests of those in the minority on any given political issue. Rather than reflecting consensus, legislation dictated by the majority is likely to result in winners and losers without compromise.<sup>10</sup> Our constitutional scheme reflects our concern about the unbridled majority rule in any number of its institutions, including Article III's creation of an independent judiciary.<sup>11</sup>

Some proponents of direct democracy analogize the initiative process to a town meeting in which the majority may accommodate minority interests through rational debate.<sup>12</sup> This Article examines that theory in light of recent experience in California with the initiative process, especially with regard to Proposition 209,<sup>13</sup> outlawing some affirmative action programs. Recent experience with direct democracy in California suggests that we use the initiative process in ways that exacerbate our differences and ignore legitimate interests of significant groups of California citizens.<sup>14</sup>

At the same time that California shifted legislative responsibility from the legislature to the electorate through the increased use of the initiative process, both the legislature and the courts have come under criticism. For example, initiatives like Proposition 140<sup>15</sup>—mandating term limits for state legislators—demonstrate many voters' hostility towards the legislature.<sup>16</sup> Even more troubling is a

7. See discussion *infra* Part IV.

8. See *infra* notes 53-63, 69-80 and accompanying text.

9. See discussion *infra* Part VI.

10. See *infra* notes 81-83, 111-17 and accompanying text.

11. See *infra* notes 125-31 and accompanying text.

12. See DAVID B. MAGLEBY, *DIRECT LEGISLATION* 22 (1984); see also *infra* notes 25-35 and accompanying text (expanding on the Progressive reform movement that spawned direct democracy).

13. Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 30-33 (Nov. 5, 1996) [hereinafter 1996 CALIFORNIA BALLOT PAMPHLET] (enacted as CAL. CONST. art. I, § 31).

14. See *infra* notes 176-81, 210-17 and accompanying text.

15. Proposition 140, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 68-71 (Nov. 6, 1990) (enacted as CAL. CONST. art. IV, §§ 1.5, 2, 4.5; art. V, §§ 2, 11; art. VII, § 11; art. IX, § 2; art. XIII, § 17; art. XX, § 7).

16. See Sherry B. Jeffe, *How Prop. 140 Could Feed the Public's Distrust of Government*, L.A. TIMES, Oct. 27, 1991, at M5 (stating that "Californians lashed out at their state's politicians by passing Proposition 140 last November [of

renewed attack on the independent Article III judiciary. Frustrated by judges who have impeded immediate implementation of controversial propositions, some, especially conservative, politicians have called for restraints on the federal judiciary.<sup>17</sup> The most draconian demand is the repeal of the lifetime tenure provisions of Article III.<sup>18</sup> This Article examines that attack.

Like so many attacks on the federal judiciary in the past, it is driven not by principle, but by current passions over a single decision by a federal court.<sup>19</sup> One can hope that as passions cool, so too will the call for the repeal of a remarkable institution that has served the nation well. Article III courts are well equipped to do justice because of their independence and because of their capacity for deliberative, dispassionate decision-making.<sup>20</sup> This Article argues that independent judges may do a better job than the initiative process in reflecting a broad consensus view on controversial social issues.<sup>21</sup>

Specifically, this Article argues that—despite the wide popular support for propositions like Proposition 209—recent Supreme Court decisions on affirmative action, not readily understood by the electorate, may well come closer to reflecting a consensus than the public understands.<sup>22</sup> The sad reality is that popular democracy remains the victim of the passions of the moment and compares poorly to the reflective and incremental process of constitutional adjudication.

## II. THE BIRTH OF CALIFORNIA'S INITIATIVE PROCESS

Adopted in 1911, the initiative process was created to limit the influence that the Southern Pacific Railroad had over the legislature, the judges, and the media.<sup>23</sup> The railroad's political domination

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1990].”).

17. See *infra* notes 152-60 and accompanying text.

18. See H.R.J. Res. 77, 105th Cong. (1997) (providing that an Article III judge may not hold office for more than 10 years without the consent of the Senate).

19. See *infra* notes 154-56 and accompanying text.

20. See *infra* notes 125-30 and accompanying text.

21. See discussion *infra* Part VII.

22. See *infra* notes 184-217 and accompanying text.

23. See LEAGUE OF WOMEN VOTERS IN CALIFORNIA, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? 7 (1984) [hereinafter LEAGUE OF WOMEN VOTERS] (noting that between 1895 and 1910 the California Supreme Court decided 57 of 79 cases in favor of Southern Pacific); Judy B. Rosener, *Take the Initiative to Reform the Process*, L.A. TIMES, Dec. 1, 1996, at D4.

allowed the railroad enormous control over local and state government, giving the railroad an unfair competitive advantage over rivals and the general citizenry.<sup>24</sup>

The Progressive movement proposed the initiative process as a means to overcome corporate control of the legislature "by allowing the people to directly battle against the corporations' organized interests and influential lobbyists."<sup>25</sup> The initiative process reflected a tenant of the Progressive's ideology: that the citizens can govern themselves.<sup>26</sup> Only by restoring power to the general citizenry could democracy be restored and corruption caused by big business and the political machine be purged from the system.<sup>27</sup>

Progressives assumed that citizens were educated and informed.<sup>28</sup> Unlike the legislature, where deals were consummated in private smoke-filled rooms, the initiative process would allow all voices to be heard. In the words of one prominent reform scholar, the initiative process was "merely an attempt to get back to the basic idea of the old town meeting."<sup>29</sup>

24. See LEAGUE OF WOMEN VOTERS, *supra* note 23, at 6. Los Angeles was forced to pay Southern Pacific \$600,000, to give them a franchise intended for a competing railroad, and to provide a site for the depot in order to keep the railroad from going around the city. See *id.* Five ranchers died in 1877 while trying to protect their land from the ever-expanding lines of the railroad. See *id.* at 7.

25. Fountaine, *supra* note 2, at 736.

26. See MAGLEBY, *supra* note 12, at 21. The Progressive movement assumed an educated and informed citizenry, and believed that direct democracy is preferable to a politician- or legislature-based government. See *id.* at 21-22. The Progressive's legislative distrust is evidenced by their writings:

If the Initiative and Referendum are given to the people of this state [California], the fraudulent claims bills that slide through our legislature will be vetoed by the people, and legislative extravagance will be checked.

The citizens of every state have seen legislature after legislature enact laws for the special advantage of a few and refuse to enact laws for the welfare of the many.

The constant, unremitting application of corrupt influence to control the action of legislative bodies comes to be expected, almost tolerated . . . . That politics should be a school of corruption is enough to make the angels weep. What can be more deadly to democracy than this? What plague can equal this plague of political leprosy?

*Id.* (internal citations omitted).

27. See *id.* at 21 (quoting a Progressive scholar who wrote, "if big business was the ultimate enemy of the Progressive, his proximate enemy was the political machine").

28. See *id.* at 22.

29. *Id.*

“Kick the Southern Pacific out of politics!” cried Hiram Johnson, then a candidate for the Republican nomination in the 1910 California gubernatorial election.<sup>30</sup> The Progressive-influenced Lincoln-Roosevelt League asked Johnson to enter the race in California’s first direct primary election.<sup>31</sup> Johnson made the challenge to the railroad’s power his central campaign issue.<sup>32</sup> After winning a five-way race for the nomination, he defeated another Progressive-minded candidate, Democrat Theodore Bell, in the general election.<sup>33</sup>

Once elected, Johnson implemented his campaign promises. In 1911 the legislature passed twenty-three constitutional amendments, including the initiative and referendum programs.<sup>34</sup> Those measures won voter approval by a three-to-one margin.<sup>35</sup> Thus, began the era of direct democracy aimed at taking the lawmaking power out of the hands of wealthy special interests and placing it in the hands of the general citizenry.

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30. LEAGUE OF WOMEN VOTERS, *supra* note 23, at 9.

31. *See id.* at 8. Two newspapermen, Chester Rowell of the *Fresno Republican* and Edward Dickerson of the *Los Angeles Express*, are credited with organizing the successful movement which finally freed the Republican party and then the State of California, from the power of the Southern Pacific Railroad. *See id.* This reform-minded Republican organization changed the political composition of the state and was responsible for “the most significant social, economic, and political revolution in its history.” *Id.* at 8-9. *See also Reform the Reforms*, S.F. EXAM., Oct. 28, 1996, at A16 (noting that Hiram Johnson was elected California’s governor in 1911 with the help of the Good Government Group, a reform movement of breakaway Republicans known as the “Goo Goos”).

32. *See* LEAGUE OF WOMEN VOTERS, *supra* note 23, at 9.

33. *See id.* The votes received by each candidate totaled as follows: Johnson with 177,191; Bell with 154,835; and the Socialist candidate receiving 47,819. *See id.* at 10.

34. *See id.* (noting that only one proposal, concerning railroad passes for public officials, failed to win approval); *see also Reform the Reforms*, *supra* note 31, at A16 (listing some of the political changes established by Johnson, the most noteworthy being: the vote for women, worker’s compensation, and minimum wage hours for women and children). Hiram Johnson may not have known what direct legislation was immediately prior to winning the gubernatorial election. Rather, some believe that the idea of the initiative process may have been given to him by a “friend” so that “the old political machine wouldn’t have the power over the people it once had” in the event Johnson lost the next election. *Id.*

35. *See* Sam Stanton, *Taking the Initiative: California Voters Lay Down the Law at the Ballot Box—Routinely*, SACRAMENTO BEE, Aug. 4, 1996, at A1 (finding that 168,744 voters approved the initiative process in the 1911 special election, whereas only 52,093 voted against it).

## III. SOME OF THE REALITIES OF THE INITIATIVE PROCESS

California uses the initiative process more than any other state or country in the world.<sup>36</sup> But the early promise of its founders has not been realized. Its failure is a result of several factors, some relating to the mechanics of qualifying an initiative and some to modern political campaigns generally.

The first step to qualify an initiative for the ballot is not onerous. It requires submission of the proposed measure to the Attorney General with a nominal fee.<sup>37</sup> The proponents must include a written request that a title and a summary of the proposed measure be prepared.<sup>38</sup> The Attorney General must submit the summary to the Secretary of State within fifteen days after receipt of the proposed initiative.<sup>39</sup> The Attorney General must also deliver the summary to the proponents of the measure, who have 150 days to collect the required number of signatures from the electorate.<sup>40</sup>

If the initiative is a statute, proponents must collect five percent of the number of voters in the previous gubernatorial election.<sup>41</sup> Eight percent is required for a constitutional amendment.<sup>42</sup> The signature requirement is intended to keep frivolous or unreasonably narrow initiatives off the ballot.<sup>43</sup> The signatures are gathered on

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36. See Pamela J. Podger, *The Big Ballot*, FRESNO BEE, Oct. 6, 1996, at A1; Stanton, *supra* note 35, at A1. Roughly 800 initiatives have been proposed over the years in California, with 238 making the ballot. See *id.* The most common result of these initiatives is voter disapproval. Only 77 of the 238 initiatives, a mere 32.4%, were approved by the voters. See *id.*

37. See CAL. ELEC. CODE § 9002 (West 1996 & Supp. 1998). Each proponent must submit a written statement, signed under penalty of perjury, which states that no part of the measure was included in exchange for a contribution for purposes of qualifying the measure for ballot. See *id.* (Supp. 1998). The \$200 submission fee is to be held in trust and returned to the proponents if the measure qualifies for ballot, or paid to the State's General Fund if the measure does not qualify for ballot. See *id.* § 9004.

38. See *id.* § 9002 (Supp. 1998).

39. See *id.* § 9004. During this 15-day period, the proponents may make amendments to the proposed initiative measure. See *id.* If the Attorney General is a proponent of the measure, then the summary shall be prepared by the Legislative Counsel. See *id.* § 9003.

40. See *id.* § 336.

41. See CAL. CONST. art. II, § 8; Stanton, *supra* note 35, at A1 (stating that to place an initiative statute on the November 1996 Ballot required about 433,000 signatures).

42. See CAL. CONST. art. II, § 8; Dan Bernstein, *Lottery Initiative Was One Consultant's Roll of the Dice*, SACRAMENTO BEE, Aug. 5, 1996, at A1 (finding that for a constitutional amendment to have reached the ballot by initiative, in the November 1996 election, required 693,000 signatures).

43. See MAGLEBY, *supra* note 12, at 41.

petitions which may be circulated by any qualified voter and are circulated on a county-by-county basis.<sup>44</sup> Signatures must be verified.<sup>45</sup> After verification the Secretary of State must place the measure on the ballot, if it qualifies at least 131 days before the next general election.<sup>46</sup>

In 1912—in the first election after the initiative process was adopted—proponents needed to collect only 53,484 signatures to qualify a measure for the ballot.<sup>47</sup> A group of concerned citizens could gather enough signatures to qualify the measure for the ballot in the allotted time period. Many early measures demonstrated that kind of citizen activism.<sup>48</sup>

By 1996, because of the increase in population and in the number of qualified voters, proponents had to collect at least 433,000 signatures to qualify a measure for the ballot.<sup>49</sup> It is no longer possible for a few dedicated people to collect the necessary signatures.

Enter the signature gatherers. As one journalist has commented, “[e]ven before World War II, a shrewd Californian named Joe Robinson spotted a flaw in old Hiram’s reform, and invented a new political profession.”<sup>50</sup> The new profession is that of the signature solicitor. A signature solicitor is paid a specified sum per signature. For example, in Robinson’s day, a solicitor might receive a nickel per signature.<sup>51</sup> Modern day solicitors command much greater fees.<sup>52</sup>

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44. See CAL. ELEC. CODE § 9021.

45. See *id.* § 9030(d); see generally CAL. CONST. art. II, § 8; CAL. ELEC. CODE §§ 9030-9031 (detailing the signature verification process).

46. See CAL. CONST. art. II, § 8(c).

47. See Stanton, *supra* note 35, at A1.

48. See Rebecca Boyd, *84 Years of Initiatives in California*, SACRAMENTO BEE, Aug. 4, 1996, at A11 (listing the initiatives qualifying for ballot over the 84-year history of the initiative process). In 1912 three initiative measures qualified for the ballot. See *id.* Proposition 7, the only initiative statute, proposed the creation of a horse racing commission prohibiting bookmaking. See *id.* Propositions 6 and 8 were constitutional amendments dealing with local governments. See *id.* The former authorized the merger of city and county governments, and the latter allowed local governments to raise funds by establishing a “single tax” system. See *id.* It seems that the 1912 election reflected the purpose of the initiative process: to allow a group of citizen activists to propose needed legislation, because the single tax system of Proposition 8 appeared in the five subsequent elections, all by initiative. See LEAGUE OF WOMEN VOTERS, *supra* note 23, at 23 (noting that this recurrent idea of the people was defeated each time).

49. See Stanton, *supra* note 35, at A1.

50. Gene Marine, *Take the Initiative—Please*, S.F. EXAM., Oct. 24, 1996, at A19.

51. See *id.*

52. See Stanton, *supra* note 35, at A1. For some issues holding widespread



The cost of gathering signatures is hardly the only cost. However, it is a significant deterrent to individuals or groups with limited resources. While the cost may be prohibitive to the general citizenry, the cost is not significant to well-financed special interest groups.

Advertising has become critical to the initiative process. Even more daunting than the cost of gathering signatures is the cost of an effective media campaign in support of or in opposition to a proposed initiative. For example, in 1994 tobacco lobbyists spent an estimated \$18 million in an effort to pass Proposition 188,<sup>53</sup> a measure designed to weaken local anti-smoking ordinances.<sup>54</sup> One tobacco company alone spent \$2 million just to qualify the proposition for the ballot.<sup>55</sup> Proponents of Proposition 211<sup>56</sup> collected millions of dollars from law firms in support of a measure that would have made it easier to file a securities fraud lawsuit in California.<sup>57</sup> Its opponents, Silicon Valley corporations and Wall Street securities dealers, raised over \$10 million "to keep those commercials about the lawyers in [their] limousines coming into California's living rooms."<sup>58</sup> In fact its opponents raised so much money that they had excess millions to campaign against Proposition 217,<sup>59</sup> which would have restored the top income tax bracket.<sup>60</sup> Proposition 209, the anti-affirmative action initiative, made it on the ballot only because its proponents received more than \$3 million from the Republican National Committee and the California Republican Party.<sup>61</sup>

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public interest, such as recidivist offender statutes and illegal aliens, petition companies do not have to pay as much per signature. However, "[o]n other issues like the open primary initiative that passed in March [of 1996], I think a lot of people weren't sure what it was and what it meant and its impact," thus requiring that signature solicitors be paid a lot more money. *Id.*

53. *See id.*

54. *See id.*

55. *See Big Bucks Used to Qualify Initiatives*, FRESNO BEE, Aug. 31, 1994, at A4.

56. Proposition 211, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 38-41.

57. *See Peter Schrag, No, No, a Dozen Times No*, SACRAMENTO BEE, Sept. 11, 1996, at B6.

58. *Id.*

59. Proposition 217, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 68-71.

60. *See Peter Schrag, Mammon Works the Voters*, SACRAMENTO BEE, Nov. 13, 1996, at B6.

61. *See Jerome Karabel, Why Prop. 209 Won't Spread to Other States*, S.F. EXAM., Nov. 25, 1996, at A17. Paid professionals, not volunteers, gathered more than 85% of the signatures required to qualify "this self-proclaimed Populist measure" for ballot. *Id.*

No one should be surprised that money talks in politics, whether in the legislative or initiative process. As developed in the following discussion, the initiative process is at risk of becoming the captive of special interest groups.<sup>62</sup> Through misleading advertising, not just well-financed campaigns, those groups have been able to skew election results.<sup>63</sup>

#### IV. THE MODERN ERA OF THE INITIATIVE PROCESS

Many commentators identify Proposition 13 as the turning point for the initiative process.<sup>64</sup> Prior to 1978 the process was used infrequently.<sup>65</sup> Prior to Proposition 13, for example, only 153 initiatives appeared on the ballot. Since then, the increase has been dramatic.<sup>66</sup>

Proposition 13 enacted strict limitations on future property-tax bills, giving property holders large tax breaks at the expense of newer arrivals.<sup>67</sup> The initiative forced major changes in the way state services are funded.<sup>68</sup> It represented far more than a tax revolt.

Howard Jarvis was the chief proponent of Proposition 13.<sup>69</sup> Jarvis portrayed himself as an angry taxpayer leading a revolt against the California property-tax system.<sup>70</sup> Aiming much of the advertising campaign towards senior citizens who had seen their property taxes skyrocket as the value of their homes escalated, Jarvis was able to recruit numerous volunteers into his Jarvis and Gann Tax Reform Association. However, the greatest beneficiaries of tax reform were not

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62. See *infra* text accompanying notes 69-83.

63. See discussion *infra* Part IV.

64. See Stanton, *supra* note 35, at A1 (finding that Proposition 13 passed in 1978 by a 65% to 35% margin).

65. See *id.* (noting that prior to 1978, the year that Proposition 13 passed, only 153 initiatives made the ballot in the initiative's 66-year history).

66. See *id.* Over an 18-year period, from 1978 to 1996, 84 initiatives have been placed on the ballot with no end in sight. See *id.* Since 1978 the average rate of initiatives has doubled from 2.3 per year to 4.6 per year.

67. Proposition 13 restricts the maximum property tax rate to 1% and limits increases in assessed valuation to 2% per year. See Jonathan M. Coupal, *Proposition 13 Has Made Everyone's Tax Reasonable*, L.A. TIMES, Aug. 29, 1989, at M7. This taxation system favors long-term property owners because the system uses the acquisition value of property as the basis of taxation. When property is sold, the value is reassessed at fair market value. See *id.* "Thus, recent purchasers derive no immediate benefit from the limitation on annual increases in taxable value." *Id.* Because Proposition 13 uses the purchase price as a basis for taxation, it is possible for similarly situated neighbors to have significantly different tax bills. See *id.*

68. See Stanton, *supra* note 35, at A1.

69. See Marine, *supra* note 50, at A19.

70. See *id.*

home owners; they were "really large landowners,—corporate farmers, utilities, [and] oil companies—[who] poured their money into [Jarvis's] campaign."<sup>71</sup> As one commentator has observed, "[t]o this day, there are Californians who still think that Howard Jarvis was just an angry old man, and that Proposition 13 was some sort of genuine 'grass-roots revolt' in the Hiram Johnson tradition."<sup>72</sup> Proposition 13 demonstrated the ability of special interest groups to raise large sums of money, using powerful Populist themes, while the true beneficiaries and the actual impact of the initiative remained undisclosed. Special interest groups, able to raise the money necessary to pay for signature gatherers and to fund successful and often misleading advertising campaigns, have recognized the initiative process as a bonanza.<sup>73</sup>

Proposition 13 was hardly unique both in the large amount of money that was raised by special interest groups and in the misleading campaigns that followed. One co-author of this Article has written extensively about the misleading campaign that led to passage of Proposition 184,<sup>74</sup> the "three strikes" initiative.<sup>75</sup> For example, the campaign literature relied on a methodologically flawed study prepared by Governor Pete Wilson's Chief Economist.<sup>76</sup> The study projected that "three strikes" would save billions of dollars, a claim that Governor Wilson, in the midst of a close gubernatorial election, repeated often.<sup>77</sup> Even more misleading were claims that the law targeted rapists, child molesters, and murderers.<sup>78</sup> Not revealed was the fact that "three strikes" predictably would lead to long prison sentences for aging felons convicted of non-violent "third strike"

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71. *Id.*

72. *Id.*

73. See J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 338-39 (1992).

74. Proposition 184, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 32-37 (Nov. 8, 1994) (codified at CAL. PENAL CODE § 1170.12 (West Supp. 1997)).

75. See generally Michael Vitiello, "Three Strikes" and the Romero Case: *The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1643 (1997) [hereinafter *Romero*]; Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. LAW & CRIMINOLOGY 395 (1997) [hereinafter *Return to Rationality*].

76. See *Romero*, *supra* note 75, at 1674-76, 1679-85 (discussing the methodological flaws in the report by PHILIP J. ROMERO, GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, HOW INCARCERATING MORE FELONS WILL BENEFIT CALIFORNIA'S ECONOMY (1994)).

77. See *id.* at 1674-76.

78. See *Return to Rationality*, *supra* note 75, at 451-52 & n.327.

felonies.<sup>79</sup> Contrary evidence simply did not get out to the public. In many cases, as was the case with Proposition 184, there is little organized opposition to the proposition and any opposition that exists is often poorly funded.<sup>80</sup>

Special interest groups have found the initiative process attractive because, among other things, those groups can raise the money necessary to fund a campaign. No doubt, if one judges by the kinds of advertising campaigns relied on, those groups know that adoption of powerful slogans can substitute for hard policy analysis. However, using the initiative process means that the winner takes all.<sup>81</sup>

The more extreme the special interest group, the less likely that the group wants to risk the give-and-take compromises that may be necessary to pass legislation. Proponents of a given legislative agenda are often frustrated with the legislative process because it tends to force compromise. In the legislature a bill may be subject to horse trading by various interest groups.<sup>82</sup> While dissenters may not be able to block legislation, they may be able to force accommodation in exchange for support.<sup>83</sup>

The initiative process poses unique advantages over the legislative process. Especially if armed with funds for a powerful media campaign, proponents of a given measure do not have to compromise. They may be able to simplify the issues, mislead the voters, and win without compromise.

## V. THE WILL OF THE PEOPLE

In theory, the initiative process is supposed to reflect the will of the people. Despite the misleading campaigns, proponents of the various ballot initiatives make extravagant claims once the measures have passed. For example, Governor Pete Wilson and Attorney General Dan Lungren were extremely critical of the California Supreme Court when it interpreted the "three strikes" law in a manner

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79. See *id.* at 437-41.

80. See, e.g., Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM (forthcoming Spring 1998) [hereinafter *De Facto Legalization*] (observing that opponents of Proposition 215 were not well organized and spent little to defeat the initiative).

81. See Kelso, *supra* note 73, at 336 n.44, 338-40.

82. See *id.* at 339.

83. See *id.*

that avoided conflict with the state constitution's separation of powers provision.<sup>84</sup> Both have spoken with almost religious fervor about the court's frustration of the will of the people.<sup>85</sup> But an objective examination of many of the recent initiative battles suggests that voters have been misled. Even the most devoted advocates of direct democracy must feel some hesitation in making unequivocal statements about just what the "people" have approved on a given occasion.<sup>86</sup>

Proposition 215<sup>87</sup> provides a case study on point. A significant majority of Californians favor use of marijuana for medical purposes for certain illnesses.<sup>88</sup> The California legislature passed two bills that would have authorized its use under certain circumstances,<sup>89</sup> twice, Pete Wilson vetoed that legislation.<sup>90</sup> In part out of desperation with the legislative process, Dennis Peron, long-time marijuana legalization activist, led the efforts to place Proposition 215, authorizing the use of marijuana for medicinal purposes, on the 1996 ballot.<sup>91</sup>

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84. See generally Maura Dolan & Tony Perry, *Justices Deal Blow to '3 Strikes': Lower Courts Allowed Discretion in Sentencing*, L.A. TIMES, June 21, 1996, at A1 (noting that state Republican leaders condemned the *Romero* ruling by the California Supreme Court); James F. Sweeney, *Foul Ball*, NAT'L REV., Aug. 12, 1996, at 1 (stating that Governor Pete Wilson and Attorney General Dan Lungren immediately joined a coalition to draft and introduce a legislative response to the *Romero* decision).

85. Perhaps not surprisingly, neither has shown similar zeal with regard to implementation of Proposition 215, which both opposed.

86. That may explain why, although the California Supreme Court has suggested that the courts must liberally construe an initiative "to promote the democratic process," the court's process of interpretation shows far more restraint. Kelso, *supra* note 73, at 347 (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978)).

87. Proposition 215, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 58-61 (codified at CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 1997)). Proposition 215 creates an immunity from prosecution for possession of marijuana for certain qualifying patients and their caregivers.

88. See Tracie Cone, *Reefer Madness*, SAN JOSE MERCURY NEWS, May 14, 1995, at 12, 14 (stating that 66% of those surveyed statewide supported a law allowing medicinal use of marijuana with a doctor's prescription).

89. See A.B. 1529, 1995-96 Reg. Sess. (Cal. 1995); S.B. 1364, 1993-94 Reg. Sess. (Cal. 1994).

90. See Letter from Pete Wilson, Governor of California, to the California Assembly (Oct. 15, 1995) reprinted in 1995-1996 ASSEMBLY JOURNAL 4135, 4157 (1995) (vetoing A.B. 1529); Letter from Pete Wilson, Governor of California, to the California Senate (Sept. 30, 1994) reprinted in 1993-1994 SENATE JOURNAL 7055, 7097 (1994) (vetoing S.B. 1364).

91. See Greg Lucas, *Bill Flow Slows as Senate, Assembly Fight over Funds*, S.F. CHRON., Sept. 13, 1995, at A16; Dennis Peron, *Yes on Prop. 215: A Mission of Mercy*, S.F. EXAM., Oct. 20, 1996, at C15.

The proposition's language was intentionally ambiguous.<sup>92</sup> At the same time, the campaign in support of its passage focused on seriously ill people, including AIDS and cancer patients and their families.<sup>93</sup> The campaign focused on "compassionate use" of marijuana;<sup>94</sup> the ballot literature stated that the initiative would allow "seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician."<sup>95</sup> Careful examination of the language of the initiative—the kind of examination in which typical voters are not likely to engage—would have demonstrated the threat that the initiative might lead to de facto legalization of marijuana for many Californians.<sup>96</sup> It would also have demonstrated that the limitations suggested in the campaign were not reflected in the statutory language of the proposition.<sup>97</sup>

One of the first appellate decisions interpreting Proposition 215 demonstrates some of the difficulties in divining the will of the people as reflected in the initiative process.<sup>98</sup> Proposition 215 grants a defense in a prosecution for certain marijuana offenses to a qualifying patient who possesses marijuana with the recommendation of a physician.<sup>99</sup> The defense extends to that patient's caregiver.<sup>100</sup> The proposition was silent on how caregivers and qualifying patients were to secure marijuana.<sup>101</sup> Some of the campaign literature suggested that the initiative allowed individuals to cultivate their own marijuana.<sup>102</sup> The most highly publicized sources of marijuana have been

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92. See Interview with Dennis Peron, President of Californians for Compassionate Use, in San Francisco, Cal. (March 5, 1997) (transcript on file with McGeorge School of Law).

93. See Proposition 215, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 60.

94. See CAL. HEALTH & SAFETY CODE § 11362.5(a) (West Supp. 1997) (explaining that this section, formerly Proposition 215, shall be known and cited as "The Compassionate Use Act of 1996"); CALIFORNIANS FOR COMPASSIONATE USE, BROCHURE (1996).

95. Proposition 215, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 60.

96. See *De Facto Legalization*, *supra* note 80, at 14-44 & nn.76-255.

97. See *id.*

98. See *Lungren v. Peron*, 59 Cal. App. 4th 1383, 1397-98, 70 Cal. Rptr. 2d 20, 30 (1997).

99. See *id.* at 1387, 70 Cal. Rptr. at 23.

100. See CAL. HEALTH & SAFETY CODE § 11362.5(d) (West Supp. 1997).

101. See *De Facto Legalization*, *supra* note 80, at 32-33.

102. See Proposition 215, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 60.

cannabis-buyers clubs that existed prior to the passage of the initiative and that have proliferated since that time.<sup>103</sup>

The issue before the First District Court of Appeal was whether a cannabis club can qualify as a "caregiver" within the meaning of the statute.<sup>104</sup> Given the statutory definition, the court's conclusion that a club does not qualify as a caregiver is hardly surprising.<sup>105</sup> However, the court of appeal had to ignore the context in which the initiative passed. Shortly before the election, Attorney General Lungren raided the Cannabis Buyers Club and busted Dennis Peron.<sup>106</sup> If only for that reason, many voters must have known that Proposition 215 was a referendum on Peron's club.<sup>107</sup> In addition, the court's decision leaves many qualifying patients without a legal source of marijuana.<sup>108</sup>

Similar problems of construction arise frequently when voters approve initiatives because the propositions are often drafted by laypeople who are not skilled in legislative drafting<sup>109</sup> or by those who intend to create ambiguity with the hope that courts will give broad meaning to the legislation.<sup>110</sup>

Other problems exist in determining the will of the people. In many elections voter turnout is low, and as a result the "will of the people," reflected in the passage of a given initiative, may in fact reflect the view of a minority of eligible voters.<sup>111</sup>

Even when substantial numbers of people vote in favor of an initiative and even if people have not been misled by extravagant advertising campaigns or by ambiguous language, the initiative process does not allow for modification or compromise.<sup>112</sup> Prior to the 1992 election, a majority of Californians stated that they favored physician-assisted suicide.<sup>113</sup> Nonetheless, Proposition 161<sup>114</sup> failed to

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103. See *De Facto Legalization*, *supra* note 80, at 13 (discussing how Attorney General Lungren's raid on Peron's club may have affected the vote in favor of Proposition 215).

104. See *Lungren*, 59 Cal. App. 4th at 1387, 70 Cal. Rptr. 2d at 23.

105. See *De Facto Legalization*, *supra* note 80, at 19-20 (arguing that cannabis clubs do not come within the statutory definition of "primary caregivers").

106. See *id.* at 13.

107. See *id.*

108. See *Lungren*, 59 Cal. App. 4th at 1401-02, 70 Cal. Rptr. 2d at 32 (Kline, J., concurring).

109. See *Kelso*, *supra* note 73, at 339-40.

110. See *id.* at 344-45.

111. See, e.g., Otto Friedrich, *To Reform the System*, TIME, Feb. 23, 1981, at 36 (citing turnout for then-recent election at 53% of the voters).

112. See *De Facto Legalization*, *supra* note 80, at 8-9.

113. See Eric Bailey, *Action on "Right to Die" Languishes in California*, L.A. TIMES, June 27, 1997, at A12 (noting that some pre-election polls showed 75%

secure a majority required for passage.<sup>115</sup> Its failure to pass may have resulted from concerns about the lack of safeguards built into the legislation. Hence, failure to pass the proposition did not mean that Californians disapproved of physician-assisted suicide. Divining the will of the people in such cases is difficult at best.

Many of us who voted for Proposition 215 did so with trepidation. We approved of the limited use of marijuana for medical purposes and were frustrated with the intransigence of Governor Wilson and the federal government in blocking compassionate use of marijuana for seriously ill patients, but we did not want our votes to be construed as approval of de facto legalization of pot or as approval of the use of marijuana for people suffering from migraine headaches.<sup>116</sup> However, voters were not given a choice. The initiative process has virtually no flexibility, unlike the legislative process where proponents of a bill may face numerous changes that bring the legislation closer to a true consensus of public sentiment.<sup>117</sup>

While the initiative process was supposed to guarantee direct democracy, leading to passage of legislation reflecting the will of the people, a dispassionate look at the process in recent years suggests that the initiative process is at best only a partial reflection of majority sentiment. Low voter turnout skews results. Confusing or intentionally ambiguous legislation passed by a misled public can hardly be a clear reflection of popular will. The initiative process is more likely than the legislative process to force voters to make choices between two positions, neither of which reflects the broadest view of the public. Absent compromise, the process increases the chances that an extremist position will prevail over a position favored by a broader majority of the population.

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approval of the physician-assisted suicide measure on the 1992 ballot).

114. Proposition 161, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 32-35 (Nov. 3, 1992).

115. See Dianne Gassman, *161's Lack of Safeguards*, FRESNO BEE, Oct. 7, 1992, at B7.

116. We base these observations on our own informal survey of colleagues with whom we have discussed Proposition 215, as well as our views on the subject. One author of this Article has conducted a non-scientific sampling of friends who voted in favor of the proposition. Most had, at best, an incomplete understanding of what the initiative accomplished.

117. See *De Facto Legalization*, *supra* note 80, at 8-9.



## VI. THE WILL OF THE PEOPLE OR MOB RULE

The Framers of the Constitution distrusted direct democracy.<sup>118</sup> That distrust is reflected in numerous institutions created by the Constitution, including the bi-cameral legislature,<sup>119</sup> veto power by the executive,<sup>120</sup> the legislature's power to overrule the president's veto only upon a super-majority,<sup>121</sup> and the power to amend the Constitution, again only through a super-majority.<sup>122</sup> Indeed, in some sense, constitutional government where the Constitution limits legislative action will often be undemocratic. As suggested by James Madison in *The Federalist Paper Number Ten*,<sup>123</sup> a republican form of government is more likely than direct democracy to produce sound policy.<sup>124</sup>

Article III's creation of an independent judiciary is another important instance in which the Constitution distanced federal authority from mob rule. Article III does not mandate the creation of federal courts other than the Supreme Court, but it does require that judges have certain protection: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."<sup>125</sup> That those provisions were to guarantee judicial independence is uncontroverted and produced no significant disagreement among the Framers.<sup>126</sup>

Judicial independence is not intended only as a protection for the individual judge. Instead it is intended to assure the quality of the court's decision-making consistent with requirements of justice and free from the concern about pleasing the political branches of government.<sup>127</sup> While commentators continue to debate whether there is parity between federal and state court judges in their ability

118. See, e.g., THE FEDERALIST NO. 10 (James Madison) (explaining that the republican form of government avoids the evils of factions and the tyranny of the majority).

119. See U.S. CONST. art. I, § 1.

120. See *id.* § 7, cl. 2.

121. See *id.*

122. See *id.* § 7, cl. 3.

123. See THE FEDERALIST NO. 10 (James Madison).

124. See *id.*

125. U.S. CONST. art. III, § 1.

126. See MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 8 (2d ed. 1990).

127. See THE FEDERALIST NO. 78 (Alexander Hamilton); see also REDISH, *supra* note 126, at 50-52 (discussing policy favoring Article III over legislative courts).

to protect federal rights holders,<sup>128</sup> those who argue that federal judges are superior to state court judges point to judicial independence as a primary explanation for why federal judges are better than state court judges.<sup>129</sup> As summarized by Professor Erwin Chemerinsky, "the federal judicial system has greater insulation from political pressure because federal judges have life tenure and salaries that cannot be decreased, whereas [most states have] some form of judicial election."<sup>130</sup>

That the Framers intended to insulate judges from political pressure has not saved federal judges from attack when they have used their independence to protect minority rights. From the inception of the United States, losing litigants and their supporters have excoriated decisions by federal courts when those courts have frustrated their goals.<sup>131</sup> At least since the liberal reforms effectuated by the Warren Court, predominately conservative critics have attacked federal courts, especially the Supreme Court, as undemocratic.

For example, part of former Judge Bork's criticism of the judiciary in *The Tempting of America*<sup>132</sup> was that Article III judges, under the sway of the liberal elite, were out of touch with majority sentiment.<sup>133</sup> For example, according to Bork, "Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment."<sup>134</sup> That elite is dominated by theorists who, Bork accuses, "wind up . . . prescribing a new constitutional law that is much more egalitarian and socially permissive than either the actual Constitution or the legislative opinion of the American public."<sup>135</sup> Activist judges confronted by the anger of the people, deflect the anger "by claiming merely to have been enforcing the

128. Compare Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), and Julie A. Davies, *Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1 (1986), with Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

129. See, e.g., Neuborne, *supra* note 128, at 1110-15.

130. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 34 (2d ed. 1994).

131. See, e.g., 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 514-25 (1926) (discussing negative reactions to the Supreme Court's decision in *McCulloch v. Maryland*).

132. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

133. See *id.* at 16-17.

134. *Id.* at 17.

135. *Id.* at 6.

Constitution.”<sup>136</sup> In Bork’s view, that “Constitution” is one that activist judges of all stripes have made up.<sup>137</sup>

At times the attack has come from within the Court. For example, Justice Scalia has argued that the Court must rely on the original understanding of the Constitution in order to prevent judges from imposing their own values in place of the will of the political branches of government.<sup>138</sup> Recently, for example, in his dissent in *Romer v. Evans*,<sup>139</sup> Justice Scalia accused the Court of imposing its will in place of that of the voters of Colorado with regard to “traditional sexual mores.”<sup>140</sup> In arguing an extremely narrow view of the Constitution, Justice Scalia argued that absent a specific constitutional protection relating to homosexuality, the subject “is left to be resolved by normal democratic means.”<sup>141</sup> The *Romer* majority, according to Justice Scalia, imposed “upon all Americans” the values of “the elite class from which the Members of this institution are selected . . . .”<sup>142</sup>

Like Judge Bork, Justice Scalia appears to see America engaged in a cultural war in which the Supreme Court is at odds with the majority of Americans. The will of the people in *Romer* was reflected in a ballot initiative amending its state’s constitution.<sup>143</sup>

Court critics profess faith that the democratic process reflects the will of the people and that federal courts are hopelessly out of touch with majoritarian sentiment.<sup>144</sup> One might dismiss the attack on the Court as the frustration of the losing party in any given dispute. In the past, attacks on the Court have subsided over time. For example, southern and western states openly defied the federal government because of those states’ hostility to the national bank.<sup>145</sup> Ohio not only imposed a tax on the bank, but then, in defiance of a federal court order, entered the bank and carried off approximately

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136. *Id.* at 17.

137. *See id.* at 15 *passim*.

138. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

139. 517 U.S. 620 (1996).

140. *Id.* at 636 (Scalia, J., dissenting).

141. *Id.* (Scalia, J., dissenting).

142. *Id.* (Scalia, J., dissenting).

143. *See id.* at 639 (Scalia, J., dissenting).

144. *See id.* at 645-46 (Scalia, J., dissenting). For example, then Justice Rehnquist commented that “[b]ecause the Supreme Court is so ‘thoroughly undemocratic’ . . . he believes its role should be circumscribed.” John A. Jenkins, *The Partisan: A Talk with Justice Rehnquist*, N.Y. TIMES MAG., Mar. 3, 1985, at 28, 34 (emphasis in original).

145. *See* WARREN, *supra* note 131, at 525-40 (describing southern and western states’ reaction to the Supreme Court’s decision in *McCulloch v. Maryland*).

\$120,000.<sup>146</sup> By the time the Supreme Court rendered its decision, the economic conditions that gave rise to the hostility towards the bank had improved. The Supreme Court's decision, reaffirming the right of the bank to exist and affirming the power of the federal court to issue the injunction against the state officials was announced without public reaction.<sup>147</sup>

Recent attacks by conservatives arguing that the federal courts are undemocratic is not without some irony. When popular legislation has frustrated their political agenda, they have been quick to use the federal courts and to raise federal constitutional challenges to overturn the will of the people. Challenges to gun control measures provide one example.<sup>148</sup> Challenges under the Takings Clause,<sup>149</sup> when, for example, popular environmental legislation diminishes an owner's property value, provide another example where conservatives ought to appreciate the value of access to an independent federal court and the value of constitutional rights that are inconsistent with majority sentiment.<sup>150</sup>

One might be inclined to dismiss conservative criticism of federal courts simply as distaste for particular results rendered by those courts. However, the anger towards federal courts seems to run deeper. Although conservatives have scored major victories in those courts, much of the public still seems to view federal courts with hostility.<sup>151</sup>

At various points in our history, critics of federal courts have proposed legislation aimed at undercutting the authority of those courts. President Roosevelt's court-packing scheme is a notable example of an attack by liberals.<sup>152</sup> More frequent have been bills that

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146. *See id.* at 529.

147. *See id.* at 538.

148. *See, e.g.,* *Printz v. United States*, 117 S. Ct. 2365 (1997).

149. U.S. CONST. amend. V.

150. *See, e.g.,* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (upholding the right of a property owner to economic compensation when state environmental legislation prevents him from using his property as he desired).

151. *See Another Bites the Dust: A Federal Judge Voids California Term Limits*, SAN DIEGO UNION-TRIB., Apr. 26, 1997, at B8 (arguing that California voters have a "jaundiced" view of the initiative process due to the regularity with which federal judges stay or strike down popularly approved initiatives); John Marelius, *Keep Proposition Process as Is, Voters Say: Poll Reveals Attitude Toward Initiatives*, SAN DIEGO UNION-TRIB., Nov. 3, 1997, at A3 (finding that the greatest negative response to the initiative process is that "so many ballot measures are not enforced or are overturned in court").

152. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 147-48 (3d ed. 1986). President Roosevelt's proposal was entitled "Reorganization of the Federal Ju-

would have deprived federal courts of jurisdiction over specific categories of cases. During the 1950s, bills were introduced that would have limited federal courts' jurisdiction over cases involving loyalty oaths, state bar admissions requirements, and other cases involving state subversive activities legislation.<sup>153</sup> Members of Congress sought to reverse statutorily decisions by the Warren Court, including cases like *Baker v. Carr*,<sup>154</sup> requiring legislative reapportionment, and the desegregation cases.<sup>155</sup> The strategy escalated during the early Reagan years. In 1981 and 1982 alone, thirty such bills were introduced in Congress that would have curtailed federal court jurisdiction over cases involving issues such as school prayer, abortion, and school busing.<sup>156</sup> In part because of serious questions about the constitutionality of those various bills,<sup>157</sup> Congress fortunately did not enact measures that would have undercut constitutional rights.<sup>158</sup>

The failure of earlier legislation should not result in complacency. Most recently, proponents of various initiatives, primarily enacting conservative legislation, have been frustrated by the ability of federal courts to slow the implementation of the initiatives or to overturn them entirely.<sup>159</sup> A movement is afoot to rewrite Article III, abandoning life tenure for judges.<sup>160</sup> The message would be clear for federal judges; judicial independence would be sacrificed in the name of direct democracy.

diciary." See S. 1392, 75th Cong. (1937).

153. See Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 159 (1960).

154. 369 U.S. 186 (1962).

155. See GERALD GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 58-59 (9th ed. 1975).

156. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895-96 (1984).

157. See generally *Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary United States Senate*, 97th Cong. (1981) (involving oversight hearings to define the scope of the Senate's authority under Article III of the Constitution to regulate the jurisdiction of the federal courts).

158. See PETER W. LOW & JOHN C. JEFFERIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 161-62 (2d ed. 1989).

159. See Nick Budnick, *Judge: Prop. 198 Is Constitutional*, RECORDER, Nov. 18, 1997, at 1 (stating that Secretary of State Bill Jones requested a decision by mid-November in order to have time to make a changeover to an open primary system and noting there was little chance of overturning the ruling in time to affect the upcoming primaries).

160. See H.R.J. Res. 77, 105th Cong. (1997) (proposing a constitutional amendment providing that an Article III judge may not hold office for more than 10 years without the consent of the Senate).

## VII. THE IMPERIAL JUDICIARY AND THE WILL OF THE PEOPLE: A COUNTERINTUITIVE DEFENSE OF THE COURTS

At least in the minds of some critics of federal courts, the initiative process reflects the popular will while federal courts, dominated by the liberal elite, frequently frustrate the will of the people.<sup>161</sup> This Article argues that the initiative process often fails to reflect the popular will because of low voter turnout, misleading ad campaigns, the absence of compromise measures that would receive greater support, and voter confusion about complex matters beyond the understanding of many voters.<sup>162</sup> This section examines the other part of the attack on federal courts, that they do not reflect the will of the people.

The traditional liberal defense of federal courts is that they are designed to protect minority rights.<sup>163</sup> If that frustrates the majority and the majority cannot amend the Constitution, so be it. There is much to be said for a judicial system that can dispense justice, because judges do not fear the wrath of the public or at least because they do not fear for their job security.<sup>164</sup> While defending rights of unpopular groups before the courts is an essential element of justice, federal courts are not nearly as far out of synch with the popular will as their critics claim.

This section first addresses some general reasons why federal courts do not stray far from majoritarian sentiment. It then addresses some of the specific claims made by proponents of Proposition 209 and concludes that careful examination of the Supreme Court's affirmative action jurisprudence was closer to popular preference than portrayed by critics of affirmative action.

Article III obviously creates the opportunity for judges to exert independent judgment. The Constitution includes numerous checks on judges; practical limitations on judicial power create additional checks on that power.

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161. See *supra* notes 132-47 and accompanying text.

162. See *supra* Parts III, IV.

163. See, e.g., Neuborne, *supra* note 128, at 1110-15.

164. For example, even otherwise conservative critics of the Court have justified the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Also, Robert Bork has argued that, although the analysis used by the Court was incorrect, the case can be justified in light of an original understanding of the Constitution. See BORK, *supra* note 132, at 74-84.

Despite the contention of some extremists,<sup>165</sup> federal judges represent a broad spectrum of political views. For example, the Supreme Court includes judges appointed by five different presidents.<sup>166</sup> While some of those judges have honored principles of *stare decisis* and have not affected a wholesale overruling of earlier precedent,<sup>167</sup> they have obviously affected a change in the Court's jurisprudence.<sup>168</sup> For some who want complete political victory, change may not come quickly enough. The political spectrum reflected on the Court undercuts the view of a Court hopelessly out of touch with majority sentiment.

As the nation learned during the Senate hearings on the nomination of Robert Bork, the Senate's advice and consent power<sup>169</sup> works an important constraint on a president's ability to appoint an extremist. Judge Bork was just that.<sup>170</sup>

Despite disingenuous claims by some members of Congress—either because President Clinton is a political moderate or because he learned from the bitter Bork confirmation battle—Clinton has appointed a string of political moderates to the federal court.<sup>171</sup> At least as long as we have an executive from a different party than the majority of the Senate, the opportunity to appoint political extremists is virtually non-existent.

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165. See BORK, *supra* note 132, at 101 (suggesting that the Rehnquist Court is "more liberal than the American people").

166. Chief Justice Rehnquist was appointed by President Nixon as a Justice of the Court and by President Reagan as Chief Justice; Justice Stevens, by President Ford; Justices O'Connor, Scalia, and Kennedy, by President Reagan; Justices Souter and Thomas, by President Bush; and Justices Ginsburg and Breyer, by President Clinton.

167. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992) (O'Connor, J., plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 996-1001 (1991) (Kennedy, J., concurring).

168. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991) (overruling four-year old and two-year old precedent).

169. See U.S. CONST. art. II, § 2, cl. 2.

170. That is demonstrated by even a casual reading of ROBERT H. BORK, *THE TEMPTING OF AMERICA*, *supra* note 132. There is considerable irony in recent claims by Senator Orrin Hatch, justifying his Senate Judiciary Committee's slow action on judicial nominees, that President Clinton is attempting to appoint activists to the bench. For example, one commentator observed that President Clinton has succeeded in fulfilling his 1992 campaign promise to "name intelligent judges who possess balanced judicial temperament and evince a commitment to protecting the individual rights enumerated in the Constitution." Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 23 HASTINGS CONST. L.Q. 741, 741 (1997).

171. See Tobias, *supra* note 170, at 742-47.

As Justice Frankfurter often warned, federal courts have limited enforcement capacity.<sup>172</sup> Issuing unpopular decrees that go unenforced undercuts the credibility of the Court. As demonstrated by President Eisenhower's hesitation to enforce the federal district court's order to desegregate Little Rock's Central High School,<sup>173</sup> the federal courts may be rendered powerless without support of the executive branch of government.

The initiative often fails to reflect the majority because of misleading campaigns and the uncompromising nature of the initiative process.<sup>174</sup> By contrast, the judicial process is deliberative. Even if counsel on one side is more capable than opposing counsel, judges' questions, additional research by their clerks, discussion among judges, and discussion between judges and their clerks all contribute to careful consideration of a given legal issue. The deliberative process may result in a position that reflects a realistic compromise of views. Over time, the Court may modify its position on a given social issue and take into account problems created by the original decision.<sup>175</sup> Even with its blemishes, judicial decision-making is rational, deliberative, and flexible.

The judicial process is not intended to produce majoritarian results. But the system is not without checks on the judiciary. What then of Proposition 209, often cited as a clear example of majoritarian sentiment?<sup>176</sup> Captioned the "California Civil Rights Initiative," it provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."<sup>177</sup>

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172. See, e.g., *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498-500 (1941) (seeking to avoid an equal protection claim, in part, because of sensitive issue of federal regulation of states).

173. See DAVID HALBERSTAM, *THE FIFTIES* 685-87 (1993).

174. See *supra* notes 53-63, 69-83 and accompanying text.

175. Although the Supreme Court's death penalty decisions have been subject to considerable criticism, those decisions reflect the kind of give-and-take that occurs over time as more subtle questions arise. See Michael Vitiello, *Payne v. Tennessee: A "Stunning Ipse Dixit,"* 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 231-36 (1994) (discussing underlying themes that have emerged in the Court's death penalty case law).

176. Proposition 209 was approved by 54% of Californians who voted in the November 5, 1996 election, arguably reflecting the majority sentiment. See Gale Holland, *Calif. Vote Pushes Affirmative Action onto National Agenda*, U.S.A. TODAY, Nov. 7, 1996, at A4.

177. CAL. CONST. art. I, § 31(a).



One might dwell on the obvious efforts to make the language ambiguous. While parading under the banner of "Civil Rights," its proponents were counting on the white male vote as primary support for its passage.<sup>178</sup> An appeal to the angry white male is not generally considered the stuff of civil rights. In addition the drafters also attempted to appear politically neutral by denouncing "discrimination against" enumerated groups.<sup>179</sup> However, the proposition adds nothing to legal protection for minority groups that the Equal Protection Clause does not already provide.<sup>180</sup> The proposition is a one-way street, despite the cosmetic appeal to neutrality; it only takes away protection from the enumerated groups.<sup>181</sup>

Apart from the language of the initiative that may have misled, the campaign rhetoric also misled. For example, Governor Pete Wilson was typical of many supporters of the measure when he stated that "[a] generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, the government imposed quotas, preferences, and set-asides."<sup>182</sup> Proposition 209 proponents overstated the preferences allowed by the Court.

To contend, as did many proponents of Proposition 209,<sup>183</sup> that quotas were lawful under Supreme Court precedent, is simply wrongheaded or intentionally misleading. The proponents of Proposition 209 acted as if almost a decade of Supreme Court case law did not exist.

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178. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 n.12 (N.D. Cal. 1996). "White voters were the only racial or ethnic group supporting [Proposition] 209," and the approval/disapproval breakdown of the voters was listed as follows: male 61%/39%; female 48%/52%; white 63%/37%; black 26%/74%; Latino 24%/76%; Asian 39%/61%. See *id.*

179. See Proposition 215, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 32.

180. See U.S. CONST. amend. XIV, § 1 (providing that no persons shall be denied equal protection of the law); CAL. CONST. art. I, § 7(a); see also 42 U.S.C. § 2000(d), (e) (1994) (prohibiting discrimination in any project or activity receiving federal financial assistance on the basis of race and in employment on the basis of sex).

181. See generally *Coalition for Econ. Equity*, 946 F. Supp. at 1495-98 (finding that the effect of Proposition 209 is to substantially reduce opportunities available for minorities and women in the areas of contracting, employment, and education maintained by California public entities).

182. See Proposition 215, in 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 13, at 32.

183. See *id.* at 32-33 (stating arguments for and against implementation of Proposition 209, with no mention by the proponents that the proposition was designed to end affirmative action programs in California).

Beginning at the end of the 1980s with the appointment of Justice Kennedy, the Court's affirmative action case law started to shift significantly.<sup>184</sup> In *City of Richmond v. J.A. Croson Co.*,<sup>185</sup> Richmond, Virginia, had in place an affirmative action program that guaranteed that thirty percent of the city's construction funds went to black-owned firms. Previous case law had required a federal court to examine with strict scrutiny legislation imposing a burden on minorities; unless that legislation served a compelling governmental interest and was narrowly tailored to serve that interest, it would be found to violate equal protection.<sup>186</sup> The standard was strict. As one Justice observed, it may have been "strict in theory, but fatal in fact."<sup>187</sup>

In *Croson*, the Court imposed the same level of scrutiny to local legislation—presumably favored by a majority of that governmental entity—favoring a group historically discriminated against.<sup>188</sup> Absent proof of prior discrimination on the part of the entity that now sought to favor the minority group, affirmative action efforts almost certainly violate equal protection.<sup>189</sup> Good motives, according to Justice O'Connor, often the swing vote in equal protection cases, do not justify discrimination.<sup>190</sup> Similarly, Justice Kennedy has insisted that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause."<sup>191</sup>

In *Adarand Constructors, Inc. v. Peña*,<sup>192</sup> the Supreme Court extended *Croson* to a case involving the federal government's "practice of giving general contractors on Government projects a financial

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184. That the Court would have cut back on affirmative action is not surprising in light of the fact that President Reagan ran on a platform to eliminate affirmative action. See Joan Biskupic, *The Supreme Court's Change of Heart*, WASH. POST NAT'L WKLY., Dec. 22-29, 1997, at 29.

185. 488 U.S. 469 (1989).

186. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986).

187. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). "[T]he failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact." See *id.* (citing Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

188. See *Croson*, 488 U.S. at 493-95.

189. See *id.* at 496-97.

190. See Biskupic, *supra* note 184, at 29.

191. *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in judgment).

192. 515 U.S. 200 (1995).

incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals.'<sup>193</sup> Five Justices agreed that *Crosson's* strict scrutiny test applied to racial classifications imposed by the federal government, as well as to those imposed by local and state governments.<sup>194</sup>

The Fifth Circuit has read the recent Supreme Court cases to disallow consideration of race in law school admissions.<sup>195</sup> A divided Court in *Regents of University of California v. Bakke*<sup>196</sup> suggested that, while quotas or rigid set-aside admissions programs violated federal law, a university could take race into consideration.<sup>197</sup> A number of justices have recognized that the state may have a legitimate interest in a diverse student body.<sup>198</sup> The Fifth Circuit found that the Supreme Court would in effect overrule that aspect of *Bakke*.<sup>199</sup> The Supreme Court denied certiorari in *Thurgood Marshall Legal Society v. Hopwood*,<sup>200</sup> thereby avoiding an opportunity to address the issue.

Proposition 209 was aimed, in part, at limiting California's voluntary race- and gender-conscious affirmative action programs in contracting, employment, and education.<sup>201</sup> As discussed, at least insofar as race-based classifications were based on general societal discrimination, those programs may have been vulnerable to an equal protection attack under the Supreme Court's recent case law.<sup>202</sup>

193. *Id.* at 204.

194. *See id.* at 222. While only part of Justice O'Connor's opinion secured five votes, Justice Scalia would have applied an even stricter strict scrutiny standard. *See id.* at 239 (Scalia, J., concurring in part and concurring in judgment).

195. *See Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir. 1996), *cert. denied sub nom. Thurgood Marshall Legal Society v. Hopwood*, 116 S. Ct. 2580 (1996).

196. 438 U.S. 265 (1978).

197. *See id.* at 318 (plurality opinion).

198. *See id.* at 311-12 (Powell, J., separate opinion). Numerous Justices have recognized that diversity may provide a sufficient constitutional purpose for race conscious admission decisions. *See Wygant*, 476 U.S. at 306 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.), 315 (Stevens, J., dissenting), 288 (O'Connor, J., concurring).

199. *See Hopwood*, 78 F.3d at 944-46.

200. 116 S. Ct. 2580 (1996).

201. *See Coalition for Econ. Equity*, 946 F. Supp. at 1495-98.

202. *See supra* notes 184-200 and accompanying text. While the Supreme Court has examined gender classification under intermediate scrutiny, as opposed to strict scrutiny, as of yet the Court has not resolved whether an entity may base gender classifications on a need to remedy general societal discrimination, as opposed to a need to remedy past discrimination by the specific entity that seeks to rely on the gender classification. *Compare Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), *with Michigan*

The area most directly affected by Proposition 209 is education. While the California Board of Regents forced the University of California system to implement race neutral admissions policies prior to passage of Proposition 209,<sup>203</sup> the initiative narrowed the consideration of race and gender allowed by Supreme Court precedent.<sup>204</sup>

The voters almost certainly misunderstood the state of the law when they voted for Proposition 209. Given the widely held perception that federal courts have created unfair opportunities for women and minorities, voters may have voted for Proposition 209 to express disapproval of federal courts. They also may have disfavored affirmative action in hiring, but not in education. As discussed, part of the problem with the initiative process is that it does not allow subtle decision-making.<sup>205</sup>

That California voters may have wanted to end some affirmative action programs but not others, finds support in at least one recent public opinion poll. A recent New York Times/CBS News Poll suggests that a majority of those polled oppose race- and gender-based preferences.<sup>206</sup> Depending on how the question was framed, significant majorities agreed that diversity in a university's student body is important and that "they favor 'special efforts' to help racial minorities compete."<sup>207</sup>

Polling results depend on subtle semantic changes. So too do election results. Houston voters defeated a measure similar to Proposition 209, but one which used less inflammatory language. Houston's mayor was able to shape the language to avoid framing the issue in terms of ending preferential treatment.<sup>208</sup>

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Rd. Builders Ass'n v. Milliken, 834 F.2d 583 (6th Cir. 1987).

203. Prior to Proposition 209, the University of California campuses selected 40%-60% of students based on their grades, test scores, and course work. The remaining selections were based on a combination of certain criteria including the following: residence, physical and learning disability, educational disadvantage, family income, ethnicity, public service, and special athletic, artistic, or musical ability. See *Coalition for Econ. Equity*, 946 F. Supp. at 1497.

204. See *supra* notes 184-202 and accompanying text.

205. See *supra* text accompanying notes 82-83.

206. See Sam Howe Verhovek, *Most Oppose Race-Based Hiring Criteria, Poll Finds*, SACRAMENTO BEE, Dec. 14, 1997, at A8.

207. *Id.*

208. See Peter Callaghan, *Ballot Issues Often Become Game of Twister with the Words*, MORNING NEWS TRIB., Jan. 25, 1998, at B5. The Houston initiative asked voters if they wished to end "affirmative action," as compared to California's Proposition 209, that asked voters if they wished to end "'preferential treatment' by canceling programs that 'discriminate.'" *Id.* This choice of words by initiative proponents was most likely the difference between passage by California voters and the initiative's failure in Houston.

A closer examination of Proposition 209 and the state of the law prior to the election suggests two things. First, one ought to be cautious about making definitive statements about the will of the people on the question of race-based programs. Second, the general notion that the federal courts were far out of line with majoritarian sentiment is overstated. California voters appeared to believe that Proposition 209 was about quotas and rigid set-aside programs and that those remedies were permissible under Supreme Court precedent.<sup>209</sup>

Commentators who regret passage of Proposition 209 may be willing to concede that it represents majority sentiment, but believe that a constitutional government should protect minority interests.<sup>210</sup> That position has strong moral appeal in light of historical discrimination against many of the minority groups now deprived some protection by the initiative. The proposition is also subject to criticism for its willingness to withdraw protection from groups historically discriminated against while allowing preferential treatment in favor of other groups, like veterans who have received the benefit of affirmative action in various settings.<sup>211</sup>

We are not as willing to concede the premise that Proposition 209 reflects majoritarian sentiment. This Article does not present empirical support but offers a working hypothesis that ought to be the subject of further research. First, even though the proposition received a clear majority of the electorate, many Californians did not vote in the election.<sup>212</sup> Those least likely to vote are members of minority groups who would almost certainly have opposed the measure.<sup>213</sup> Second, as discussed, the campaign in favor of the proposition was misleading. It portrayed the proposition as necessary to overturn

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209. See *supra* notes 182-83 and accompanying text.

210. See Peter Schrag, *Conflict Between the Courts and "the Will of the People,"* SACRAMENTO BEE, Aug. 6, 1997, at B7 (arguing that the courts are sometimes needed to overturn "the often impulsive and unexamined acts of the electorate" when they enact legislation that "effectively trump[s] the First Amendment, the rights of minorities and other constitutional protections").

211. See Interview with Brian K. Landsberg, Professor of Law at McGeorge School of Law, in Sacramento, Cal. (Jan. 22, 1998) (on file with McGeorge School of Law).

212. See *What Others Say*, SACRAMENTO BEE, Jan. 19, 1997, at F4 (noting that California voter turnout was less than 60% of those registered to vote, and that of those who took the time to vote, many avoided the numerous propositions on the ballot).

213. See generally MAGLEBY, *supra* note 12, at 100-22 (discussing "[t]he Representativeness of Voters who Decide Statewide Propositions," and finding underrepresentation in groups of lower socioeconomic status).

quotas and set-aside programs that ought to have been found improper under existing law.<sup>214</sup>

Third, it lumped together programs involving contracting, employment, and education.<sup>215</sup> If public opinion polls are an accurate reflection of public sentiment, many Californians may have favored discretion to allow university administrators to guarantee diversity in a student body but voted in favor of the measure because they disapproved of affirmative action in hiring decisions. Even if a majority favored the proposition on balance, a broader majority may have favored a more subtle provision, one that would have granted university admissions offices leeway to assure minority representation on university campuses.<sup>216</sup>

Fourth, at least early projections suggest that the primary effect of Proposition 209 will be a reallocation of admissions from Hispanic and African American to Asian students, with a slight negative effect on white admissions in the university system.<sup>217</sup> It may be cynical to speculate that some white voters, convinced that they were unfairly excluded from state-run programs, would have been less willing to back such an obvious divisive measure for no net gain in white admissions to the university system.

#### VIII. CONCLUSION

After the passage of Proposition 209, its proponents were angry with the federal district court which slowed its implementation. In response, they joined the movement of those who would limit the authority of the independent federal judiciary.<sup>218</sup> That is a bad choice.

This Article has argued that the initiative process has long since ceased being the panacea envisioned by its Progressive and Populist

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214. See *supra* notes 178-83 and accompanying text.

215. See *supra* note 177 and accompanying text.

216. See Verhovek, *supra* note 206, at A8.

217. See David Weinshilboum, *New Admissions Policies Will Cut Diversity at UCD*, DAVIS ENTERPRISE, Nov. 2, 1997, at A1. The racial composition of the 1994 fall freshman class was as follows: American Indian representation at .96%; African American representation at 4.35%; Latino representation at 14.87%; Filipino representation at 4.26%; Asian representation at 32.28%; and Caucasian/other representation at 43.28%. See *Coalition for Econ. Equity*, 946 F. Supp. at 1497. If the enactment of Proposition 209 forced discontinuing existing race- and gender-conscious selection criteria, African American and American Indian representation is projected to reduce by as much as 40-50%, with Filipino and Asian American representation increasing by 5% and 15-25%, respectively. See *id.*

218. See *supra* notes 152-60 and accompanying text.

parents. It has argued that money controls the process and skews the law in numerous ways. California often ends up with confusion both in understanding the language of the law and in measuring the will of the people.<sup>219</sup>

This Article also has argued that the judicial process, involving the deliberation of independent judges, produces better results than does the process of direct democracy.<sup>220</sup> This Article has rejected the widely voiced criticism that the federal judiciary is dominated by elitist judges out of touch with majoritarian sentiment. Instead, it argues that structural and practical pressures bring judicial decisions closer to majoritarian will than the courts' critics acknowledge.<sup>221</sup> Sadly, those courts remain the convenient targets of the disgruntled.

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219. See discussion *supra* Parts III, V.

220. See discussion *supra* Part VIII.

221. See discussion *supra* Part VII.