Courts as Watchdogs of the Washington State Initiative Process

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I. INTRODUCTION

In November 1999, Washington state voters enacted Initiative Number 695 (I-695), the high-profile ballot measure designed to reduce vehicle license fees and to require voter approval for future tax and fee increases.¹ Shortly thereafter, Washington Superior Court Judge Robert Alsdorf invalidated the initiative.² Tim Eyman, I-695's sponsor, was enraged. "[O]ne guy with a robe on, but he might as well be wearing a crown if he's going to act like a king."³ In fact, Judge Alsdorf wielded a powerful scepter and committed a sweeping counter-majoritarian act. One solitary judge, and after him, eight justices of the Washington Supreme Court,⁴ overturned the will of nearly a million Washington voters.⁵

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⁴ See Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 11 P.3d 762 (2000). Eight Washington Supreme Court Justices voted to affirm the district court’s ruling; one dissented. Id. at 189, 11 P.3d at 763. The majority held that the initiative violated four state constitutional requirements for initiative lawmaking, including the constitution’s requirement that a bill contain only one subject. Id. at 256-57, 11 P.3d at 806. See also WASH. CONST. art.
The next year, Washington voters approved I-722, another Eyman-sponsored tax-cutting initiative known as “Son of I-695.” In a ruling from the bench, Thurston County Superior Court Judge Christine Pomeroy promptly struck down that initiative.

These rulings followed closely on the heels of the state supreme court’s decision to invalidate I-573, Washington’s 1992 term limit initiative. The two dissenters in that case, Justices Richard B. Sanders and Gerry L. Alexander, made the point directly: “Today, 6 votes on this court are the undoing of the 1,119,985 votes that Washingtonians cast at the polls in favor of term limits.”

Invalidation of a citizen initiative is indeed different from our usual understanding of judicial review, wherein a court overturns the judgment of a coordinate branch of representative government. Here, Washington courts nullified the decisions of the people themselves. While this outcome is remarkable, it is not particularly rare. Initiatives adopted by Washington voters, like initiatives in other states, are frequently challenged in court and are often invalidated, either in part or in their entirety.

This Article describes the high rate at which courts have invalidated Washington initiatives and then explores why this is so.
Article suggests that it is initiative lawmaking's Populist orientation—with respect to both its unfiltered majoritarian processes and its often-constitutionally suspect substance—that makes initiatives vulnerable to legal attack.

For their part, judges, who wield the sole institutional check on the initiative process, have to decide how strongly they are going to exercise that check. They can be what I call "juris-populists" and accommodate initiative lawmaking, or they can play the role of "initiative watchdogs" and look for ways to strike down initiatives and constrain the process. As initiative lawmaking has gathered force in recent years, legal scholars have debated whether courts should apply a different level of scrutiny to initiatives than to ordinary legislation, some arguing that initiatives should be scrutinized more aggressively.13

Very recently, courts in several states seem to have shifted discernibly from granting deference to initiatives toward applying tougher scrutiny. Specifically, several courts are more strictly applying technical state constitutional restrictions on initiative lawmaking, such as single subject rules and ballot title requirements, invalidating numerous initiatives on these grounds.14 The Article suggests that the Washington state courts' invalidation of I-695 is consistent with this trend.

If the courts are going to play "watchdog" over the initiative process, however, they do so at some risk. Many voters are frustrated when courts overturn popular initiatives and are inclined to agree with Mr. Eyman's anticourt sentiments.15 Especially where, as in Washington, judges are selected in competitive elections, the same Populist impulse that drives initiative lawmaking can further politicize the judiciary and threaten its independence.

II. JUDICIAL REVIEW OF WASHINGTON INITIATIVES

To understand the nature and magnitude of the courts' role in Washington’s initiative process, it is helpful to look at some numbers. First, Washington is a high-use initiative state.16 Since the state instituted the initiative process in 1912,17 Washingtonians have adopted

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13. See infra Section IV.
14. See infra Section V.
16. This Article focuses exclusively on the statewide initiative process. Local initiatives are an important lawmaking mechanism in many cities and counties, but they fall outside the scope of this discussion.
17. Adopted in 1889, the Washington State Constitution did not initially contain provisions for initiative or referendum. Article II, section 1 instead provided that "[t]he legislative
sixty-four statewide initiatives. Voters in only four states have adopted more. Oregon and California have used the initiative process most actively; the second tier of initiative states includes Colorado, North Dakota, Washington and Arizona. By contrast, voters in Utah, a "low-use" initiative state, have adopted only five initiatives in their state's history. Unlike other high-use initiative states, Washington has not seen a major surge in initiative lawmaking over the past few decades. In Oregon, for example, voter-approved initiatives jumped from zero in the 1960s to twenty-two in the 1990s, and in California they surged from only three in the 1960s to twenty-four in the 1990s. By contrast, Washington voters have adopted initiatives at a near-constant rate over the past four decades: nine in the 1960s, nine in the 1970s, seven in the 1980s, and eleven in the 1990s.

Second, as in other high-use initiative states, Washington's voter-approved initiatives have frequently faced court challenges. As of 1999, fifteen of the thirty-six initiatives Washingtonians approved between 1960 and 1999 (42%) had been challenged in state or federal

powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington." WASH. CONST. art. II, § 1. In 1911, however, the Washington legislature proposed Amendment 7, amending Article II, section 1 to state,

The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and a house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature. WASH. CONST. art. II, § 1. The following year, Washington voters approved Amendment 7 and gained, or "reserved," the power of initiative and referendum. See Jeffrey T. Even, Direct Democracy in Washington: A Discourse on the People's Powers of Initiative and Referendum, 32 GONZ. L. REV. 247, 251-52 (1997).


19. Here, "use" is defined as "adoption" rather than as qualification for the ballot or other activities, such as pre-petition filing.

20. The numbers of voter-approved initiatives in the highest-use initiative states are as follows: Oregon (115), California (95), Colorado (77), North Dakota (75), Washington (64), Arizona (64). Initiative and Referendum Institute Historical Database, supra note 18.

21. Other low-use initiative states include Mississippi (no voter-approved initiatives), Illinois (one), Wyoming (three), and Florida (ten). Initiative and Referendum Institute Historical Database, supra note 18.


23. Miller, supra at note 12, at 9, Table 2.
court—sometimes in both.24 This challenge rate is similar to Oregon's (44%, nineteen of forty-three)25 and Colorado's (48%, fourteen of twenty-nine)26 during the same period. California, the busiest initiative state over the past four decades, also had by far the highest rate of initiative challenges (65%, thirty-six of fifty-five).27 In all of these high-use initiative states, including Washington, the sheer number of challenges and the crucial policy significance of many of the cases have now fully established courts as an important component of the initiative process.

Third, the outcomes of cases suggest that courts have played an important countering and filtering role in Washington's initiative process. Courts struck down, either in part or in their entirety, 53% (eight of fifteen) of Washington initiatives challenged in court over the past four decades.28 The nullified initiatives included major proposals to impose a mandatory death penalty for first-degree murder;29 restrict pornography;30 prohibit forced busing for racial integration of schools;31 ban storage of out-of-state radioactive waste;32 impose term limits on state elected officials and members of Congress;33 and reduce vehicle license fees and require voter approval for future tax and fee increases.34

24. Id.
25. Miller, supra note 22, at 12, Table 5. Note that this percentage will increase as lawyers file new challenges to long-standing voter-approved constitutional initiatives in the wake of the Oregon Supreme Court's decision in Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998). See notes 147-49, infra, and accompanying text. New challenges to long-standing, voter-approved initiatives could increase litigation percentages in other states as well.
26. Id. at 12, Table 6.
27. Id. at 12, Table 4.
III. Why Do So Many Initiatives Have Trouble in Court?

We now turn to the question of why? Why are so many voter-approved initiatives challenged in court, and why are so many invalidated? I contend that the primary explanation for the courts’ high level of involvement in initiative lawmaking in Washington (and elsewhere) lies in the nature of the initiative process itself. Specifically, the Populist conception of initiative lawmaking, which manifests itself both in the process of enacting initiatives and in the substance of laws enacted thereby, makes ballot measures vulnerable to legal challenge and invalidation.

I should explain what I mean by the “Populist conception” of initiative lawmaking, distinguishing it from the competing “Progressive conception.” The initiative process is often characterized as a Progressive reform because it was introduced in Washington and most other initiative states during the “Progressive era” (approximately 1900—1918). However, Populists were agitating for adoption of direct democracy during the last decades of the 19th century, before the advent of the Progressive era. More importantly for this discussion, Populists and Progressives had different conceptions of the initiative process.

Progressives respected the representative system and envisioned the initiative (as well as the referendum and recall) as a way to improve representative government. For example, Woodrow Wilson, who came to support the initiative process, maintained that Progressive advocates of initiative lawmaking had no intention of undermining representative or legislative processes, but rather wanted to redeem them. By contrast, Populists made no secret of the fact that they

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38. See CRONIN, supra note 36, at 54. In coordination with their other reforms, the Progressives sought to use the initiative to enhance the responsiveness, professionalism, competence, and expertise of government. See also DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 21-25 (1984).
distrusted representative government and saw the initiative as a way to bypass, constrain, and undermine it.\textsuperscript{39}

Populists and Progressives from that earlier period have successors today, and the two conceptions of initiative lawmakers continue to compete. In short, neo-Progressives still seek to use the initiative to enhance the responsiveness, professionalism, and expertise of government, whereas neo-Populists seek to substitute the wisdom of the people for the deliberations of elected officials.

The Populist position today supports both the increased use of direct democracy and little or no reform of the initiative process. Term limit advocates (such as Sherry Bockwinkel)\textsuperscript{40} and tax cutters (such as Tim Eyman and his counterparts Bill Sizemore in Oregon\textsuperscript{41} and Doug Bruce in Colorado\textsuperscript{42}) are good examples of contemporary Populists. They support not only term limits and tax cuts, but also unconstrained initiative lawmakers, in part because all of these mechanisms weaken and constrain legislatures, and they believe that legislatures tend to enact unwanted laws and create wasteful expenses.\textsuperscript{43} Moreover, Populists tend to oppose initiative reforms that would give the legislature the ability to amend or respond to initiatives in circulation, and they favor the direct over the indirect initiative. As the initiative process has become more Populist-oriented, modern Progressives (including "good government" groups like Common Cause and the League of Women Voters) have become increasingly ambivalent about initiative lawmakers, seeking reforms to the process.\textsuperscript{44} Progressives are right to be concerned, because the Populist

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  \item \textsuperscript{39} See CRONIN, supra note 36, at 59.
  \item \textsuperscript{40} Bockwinkel sponsored two term limits initiatives in Washington, and has played an important role in other initiative campaigns. See Joni Balter & Lance Dickey, \textit{Initiatives: Governing by Microwave Populism: The Rise of Instant Gratification Politics, and We're Next}, SEATTLE TIMES, Mar. 5, 2000, at B5.
  \item \textsuperscript{41} Sizemore, the executive director of Oregon Taxpayers United, has sponsored numerous initiatives in Oregon over the past decade, including six that appeared on the November 2000 ballot. See Brad Knickerbocker, \textit{A Man Who Rules by Referendum}, CHRISTIAN SCIENCE MONITOR, Oct. 20, 2000, at 1.
  \item \textsuperscript{42} Bruce was the proponent of Colorado Amendment 1 of 1992, the taxpayer's Bill of Rights (TABOR), and several other initiatives. See, e.g., Steve Lipsher, \textit{Bruce Graves Respect but Taxes His Critics}, DENVER POST, Oct. 26, 1997, at A-25. Eyman, Sizemore, and Bruce are heirs to the tradition of Howard Jarvis, the California Populist who co-authored California's landmark 1978 property tax limitation initiative, Proposition 13. Jarvis died in 1986, but his impact is still strongly felt. \textit{See generally} PETER SCHRAG, \textit{PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE} 188-99 (1998).
  \item \textsuperscript{43} For a discussion of the imposition of term limits and tax expenditure limits in several states, see Caroline J. Tolbert, \textit{Changing Rules for State Legislatures: Direct Democracy and Governance Policies, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES} 171 (Shaun Bowler et al. eds., 1998).
  \item \textsuperscript{44} See, e.g., LEAGUE OF WOMEN VOTERS OF CALIFORNIA, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? A STUDY UPDATE OF DIRECT LEGISLATION IN
conception of initiative lawmaking has largely prevailed, at least in most high-use initiative states.45

Is this the case in Washington? Although the initiative process in Washington is not as Populist-oriented as in some states and has some important Progressive-oriented structural features, it has nevertheless increasingly been dominated by Populist forces.

It should be emphasized that Washington’s initiative process has three important features that orient initiative lawmaking in a Progressive rather than a Populist direction. First, Washington does not allow initiatives to amend the state’s constitution.46 This restriction makes it more difficult for Populist-minded initiative sponsors to bind and undermine representative government. Washington voters’ inability to impose term limits on elected officials without amending the state constitution is an example of how this rule places limits on Populist action.47

In addition, Washington permits the legislature to amend voter-approved initiatives.48 Specifically, for two years after the initiative’s enactment, legislative amendments require a two-thirds vote of both houses.49 After two years, like any other law, an initiative can be amended or repealed by a simple majority vote in the legislature and the executive’s signature. This feature prevents Populists from using

CALIFORNIA FROM PROGRESSIVE HOPES TO PRESENT REALITY (1998).

45. See Cain & Miller, supra note 35, at 39-42.

46. The Washington Constitution, Article II, section 41 reads in pertinent part as follows: “The legislative authority of the state of Washington shall be vested in the legislature, . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . . .” WASH. CONST. art II, § 41 No provision is made for constitutional amendment by initiative. Obviously, this is an important restriction, and initiative advocates have argued that the constitution can be amended by initiative. See, e.g., Postman, supra note 3, at B1. The Washington Supreme Court, however, has consistently rejected this view. See, e.g., Gerberding v. Munro, 134 Wash. 2d 188, 210, 949 P.2d 1366, 1377 (1998) (“We have often stated that the initiative process, as a means by which the people can exercise directly the legislative authority to enact bills and laws, is limited in scope to subject matter which is legislative in nature.”) (citations omitted). See also Even, supra note 17, at 268, 270.

47. See Gerberding, 134 Wash. 29 at 211, 949 P.2d at 1377.

48. See WASH. CONST. art II, § 1(c).

49. The Washington Constitution, Article II, section 1(c) reads as follows: No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: Provided, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.
initiatives to place permanent restrictions on legislative action. It contrasts with the super-populist California rule, under which statutory initiatives can be cast in stone, i.e., the legislature can never amend or repeal them without voter approval.  

Third, unlike other high-use initiative states, Washington provides the option of the indirect initiative. In theory, this mechanism, known in Washington as "initiative to the legislature," engages, rather than bypasses, the legislature, and thus is more consistent with the Progressive than the Populist conception of government. In practice, the indirect initiative has been disfavored in Washington in part because it has been

50. See CAL. CONST. art. II, § 10(c). California initiatives sometimes contain provisions allowing for subsequent amendment by the legislature (usually by a supermajority vote), but such provisions are optional. A recent example is California Proposition 36 (2000), a measure that promotes treatment rather than criminal penalties for drug offenders. Section 9 of that initiative provided, "This act may be amended only by a roll call vote of two thirds of the membership of both houses of the Legislature. All amendments to this act shall be to further the act and shall be consistent with its purposes." CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE, 2000 CALIFORNIA GENERAL ELECTION 69 (Nov. 7, 2000) available in <http://www.VOTE2000.ss.ca.gov/VoterGuide/pdf/ballotpamphlet.pdf>.

51. The Washington Constitution, Article II, section 1(a), provides the following procedure.

Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

WASH. CONST. art II, § 1(a).

52. In Washington between 1914 and 2000, 113 initiatives were submitted directly to the people, but only twenty-seven to the legislature. Office of the Secretary of State, State of
because few incentives favor the indirect initiative (e.g., the signature requirements are the same as for direct initiatives), and also because many initiative sponsors distrust the legislature and would rather take their proposals directly to the people than bother with elected officials. Nevertheless, providing the option of sending an initiative to the legislature affirms the Progressives’ vision of initiative lawmaking.

Taken together, these three Progressive-oriented procedural characteristics have helped to make Washington’s initiative process less of a Populist free-for-all than it otherwise might be. But, within these boundaries, there still is room for Populists to operate.

With respect to substance, Washington has a history of Progressive-oriented initiatives, such as I-207 (1960), which established the state’s civil service system, and I-276 (1972), a wide-ranging political reform act that established open meeting requirements, lobbyist regulations, and campaign finance rules. However, these Progressive-oriented initiatives, designed to improve and “redeem” representative government, increasingly have been overshadowed by Populist-oriented measures such as those seeking to limit representatives’ terms and to constrain their ability to make policy choices. The recent successes of Eyman, founder of Permanent Offense, and


53. Proponents of both initiatives to the people and initiatives to the legislature must submit signatures equaling eight percent of the vote in the most recent gubernatorial election. WASH. CONST. art. II, § 1(a).


57. Many examples of initiatives seek to constrain legislative flexibility, including I-601 (1993), establishing limits on state spending; I-200 (1998), prohibiting state-sponsored affirmative action; and I-695 (1999) and I-722 (2000), requiring voter approval for tax increases. See id. Importantly, however, not all “legislative-constraining” initiatives are associated with the political right. For example, an initiative like I-732 (2000), which requires salary increases for public school teachers, was supported by the political left, yet it undermines the legislature’s authority and flexibility on budget issues. For a discussion of the implications of using the initiative process to constrain legislative choices, see Elizabeth G. Hill, Ballot Box Budgeting. EDSOURCE PUBLICATIONS, Dec. 1990, at 1 (noting that approximately three-fourths of California’s state budget is not subject to legislative control through the budget process, and that more than half of this restriction is due to initiatives).

Bockwinkel, "queen of signature gatherers in Washington," 59 suggest that the Populist conception of initiative lawmaking is prevailing in Washington as elsewhere.

More specifically, what is it about the process and substance of Populist-oriented initiative lawmaking that makes initiatives vulnerable to legal attack? Let us look at each in turn.

A. Process

In contrast to the often slow, careful, and compromise-oriented nature of most legislative action, the Populist-oriented direct initiative process is what V.O. Key, Jr. and Winston Crouch called a "battering ram." 60 It is a heavy, blunt instrument that can break through the inertia of a checks-and-balances system and produce major policy breakthroughs in an expedited way. However, this expediency often comes at a cost. In avoiding careful vetting (i.e., in bypassing the processes of informed deliberation, refinement, compromise, and consensus-building that exist in any passably functional legislature), an initiative emerges from the process more vulnerable to court challenges.

More specifically, the initiative process has two primary features that make the end product (voter-approved initiatives) vulnerable to attack: proponents have absolute control of the framing and drafting of the measure; and measures are fixed and unamendable at an early stage of the process. Unlike in the legislative process, where a bill's language is drafted (or at least reviewed) by staff attorneys, there are no formalized drafting procedures in the initiative process. As a formal matter, when the proponent files the measure with the Wash-

59. Balter & Dickey, supra note 40, at B5. In 1994, Bockwinkel said, "Government's not doing the job ... so the vacuum's been taken up by people willing to stand up and speak out. . . . We're taking government into our own hands." Barbara A. Serrano, Citizens Are Taking Initiative: Proposals Reflect Loss of Faith in Legislators, SEATTLE TIMES, Mar. 27, 1994, at A1.

60. V.O. Key, Jr. & WINSTON W. CROUCH, THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA 458 (1939). In this section, I focus on initiatives to the people rather than on initiatives to the legislature, because the latter, at least in theory, receive some of the benefits of legislative procedures. Initiatives to the people bypass the legislature altogether.

ington Secretary of State, the Secretary submits a copy to the Code Reviser for review.\textsuperscript{62} That official reviews the initiative "for matters of form and style, and such matters of substantive import as may be agreeable to the petitioner, and shall recommend to the petitioner such revision or alteration of the measure as may be deemed necessary and appropriate."\textsuperscript{63} However, the recommendations are purely advisory, and have no binding effect.\textsuperscript{64} The Secretary of State then refers the initiative to the Attorney General.\textsuperscript{65} Although he or she prepares a title and summary,\textsuperscript{66} the Attorney General has no affirmative duty to review the measure's legal validity or to require the proponent to revise the measure if it is legally flawed. In fact, the Attorney General may not refuse to prepare a title and summary based on a conclusion that the measure, if enacted, would be unconstitutional.\textsuperscript{67} After this minimal review, proponents circulate the measure to gather sufficient signatures to place it on the ballot.\textsuperscript{68} Once it goes out for signature, a measure cannot be amended again, even by the proponents, even if it becomes apparent that the measure contains a flaw that should be corrected.\textsuperscript{69}

These characteristics of the initiative process have negative implications for deliberation and refinement. The closed process limits input from interested parties and consideration of other, perhaps more optimal, alternatives. In addition, the restriction on amendment after circulation forecloses opportunities to address flaws and refine the measure. As a result, the nature of initiative lawmaking makes it more likely that the product will contain flaws that will expose the measure to subsequent court challenge.

Moreover, by limiting the opportunities for opponents and other interested parties to participate in the process, the initiative system makes compromise and consensus-building less imperative to success. In the initiative process, opponents have no leverage to force amendments or compromise. If the proponents are confident that their

\textsuperscript{63} Id.
\textsuperscript{64} See Even, supra note 17, at 257-58.
\textsuperscript{66} See id.
\textsuperscript{68} In Washington, the required number of valid signatures of legal voters is equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing with the Secretary of State of the initiative measure text. See Wash. Const. art. II, § 1(a).
\textsuperscript{69} See Even, supra note 17, at 256-67, for a detailed discussion of procedures for initiative lawmaking in Washington.
proposal can win the support of the initiative electorate, they can ignore their opponents' interests and maximize their own. Unlike in the legislature, initiative proponents have no need to build a larger consensus in order to win approval of an initiative—a simple majority of the electorate will do, even if the majority is relatively apathetic and the minority intense. In allowing proponents to eschew compromise and accommodation of competing interests, the initiative system polarizes. Again, opponents have few options: if they cannot defeat the measure outright at the polls, their only recourse is to litigate. In fact, initiative opponents who lose at the polls very often challenge the initiative in the courts.70

B. Substance

If the Populist-oriented, battering-ram process of initiative law-making contributes to the large number of initiative challenges and invalidations, so does the Populist substance of initiatives. Initiatives in Washington (as elsewhere) often manifest a Populist impulse—many seek to constrain or undermine representative government or reinforce majority values at the expense of minority interests and individual rights. Why does the Populist substance of initiatives fuel litigation? Simply put, it is because the content of Populist-oriented initiatives often conflicts with constitutional norms, and courts have the responsibility to defend these norms against attack. Federal and state constitutions (1) establish institutions of government and (2) prohibit laws that unduly infringe on individual and minority rights. By attacking the institutions of representative government or by imposing majority values at the expense of minority rights, Populist-oriented initiatives often run counter to these constitutional norms. It is natural for this conflict to produce litigation.

1. Initiatives to Constrain Representative Government

A common initiative is one designed to control or constrain representative government. Examples from Washington state include voter-approved initiatives to limit state officials' salaries,71 limit state revenues,72 impose term limits on elected officials,73 limit state spend-

70. See supra notes 24-27, and accompanying text.
72. See id. (citing I-62, Shall State Tax Revenues Be Limited So That Increases Do Not Exceed the Growth Rate of Total State Personal Income? (1979)).
73. See id. (citing I-573, Shall Candidates for Certain Offices, Who Have Already Served
ing, and limit taxes and require voter approval for future tax increases. It is understandable that these proposals have been pursued through the initiative process, because representatives have a vested interest in maintaining their institutional powers. The normal inertia built into the checks and balances system is magnified when it comes to measures that adversely affect legislators, and it is extremely rare for legislatures to adopt such reforms.

The most striking example of this dynamic is term limits. Over the past decade, polls have shown that a majority of Americans favor term limits for elected officials. When members of Congress and state legislatures refused to approve proposals to impose term limits on themselves, voters invoked the initiative process. However, term limit measures and other attempts to use initiatives to constrain or control representative government often conflict with constitutional provisions that establish these institutions. In Washington, for example, I-573, the 1992 voter-approved term limits initiative, came into conflict with state constitutional provisions establishing qualifications for state elected officials. The Washington Supreme Court held that imposition of term limits could only be effected through a constitutional amendment. Similarly, the United States Supreme Court held that efforts by states (including Washington) to impose term limits on members of Congress violated the United States Constitution’s provisions establishing qualifications for election to Congress.

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74. See id. (citing I-601, Shall State Expenditures Be Limited by Inflation Rates and Population Growth, and Taxes Exceeding the Limit Be Subject to Referendum? (1993)).
75. See id. (citing I-695, Shall Voter Approval Be Required for Any Tax Increase, License Tab Fees Be $30 Per Year for Motor Vehicles, and Existing Vehicle Taxes Be Repealed? (1999); 1-722, Shall Certain 1999 Tax and Fee Increases Be Nullified, Vehicles Exempted from Property Taxes, and Property Tax Increases (Except New Construction) Limited to 2% Annually? (2000)).
76. For example, an April 1996 Gallup Poll showed that 74% of Americans favored congressional term limits. At the time, Paul Jacob, executive director of U.S. Term Limits, Inc., said, “I thought we had reached a peak in 1992, but I was wrong.” Bill Varner, Voters in 14 States to Decide on Limiting Congressional Terms, USA TODAY, Oct. 17, 1996, at 4A.
77. Nationwide, with the exception of North Dakota, Illinois and Mississippi, every state where citizens have the opportunity to place initiatives on the ballot (i.e., in twenty-one of the twenty-four states with the initiative process), term limits have been adopted. By contrast, with the exception of Louisiana, none of the twenty-six states that lack provisions for initiative law-making have adopted term limits through the legislative process. The New Hampshire legislature attempted to impose term limits on the state’s representatives in Congress, but not on itself. Similarly, despite strong pressure for congressional term limits, members of Congress have declined to adopt proposals to limit their own terms. Telephone Interview with Paul Jacob, National Director, U.S. Term Limits, Inc. (Feb. 25, 2000).
The Court did not allow states to undermine those provisions on a piecemeal basis—only the arduous process of amending the federal Constitution would do. In short, the job of defining how far an initiative can go in altering representative institutions falls to the courts, and the work of resolving these conflicts significantly fuels the high rate of initiative challenges.

2. Initiatives Affecting Racial and Other Minorities

In recent decades, at both the federal and state level, representative government has made numerous efforts to improve conditions for historically disadvantaged groups, including racial minorities, women, immigrants, language minorities, and homosexuals. These efforts have promoted voting rights for various minority groups, racial desegregation of the public schools, bilingual education programs, affirmative action programs to benefit racial minorities and women, and legal protections for persons who face discrimination on the basis of their race, gender, national origin, or sexual orientation.

At times, government efforts to assist minorities have stirred resentment, which in turn has fueled counter-efforts to reestablish and reinforce majoritarian interests. At the state level, the initiative process has provided a convenient vehicle for repealing or preempting representative government’s efforts to assist minorities. In some states, such as California and Colorado, voters have approved a steady stream of such initiatives in recent decades, nearly all of which have been challenged in court. Washington voters have largely refrained from such measures, but two examples are I-350 (1978), which sought to prohibit school districts from using mandatory busing to desegregate public schools, and I-200 (1998), which dismantled the state’s

80. Id.
82. Office of the Secretary of State, State of Washington, Initiatives to the People: 1914–
system of affirmative action for racial minorities and women. I-350 was challenged for conflicting with the 14th Amendment’s Equal Protection Clause, and was invalidated in Washington v. Seattle School District No. 1. I-200 has not yet been challenged, perhaps in part because a similar initiative, California’s Proposition 209, was upheld by the Ninth Circuit in 1997.

These types of initiatives present hard legal questions: How far can the electorate go in restricting representative government’s efforts to protect minority interests? At what point do these majoritarian counter-measures infringe on minority rights? In the American system, courts have long assumed responsibility for protecting racial and certain other “discrete and insular” minorities, especially when prejudice against them “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” When an initiative affects a minority thus protected, it is predictable that after the election the measure’s opponents will petition the courts to strike it down. This conflict between the initiative system’s tendency to produce measures directed at protected minorities, and the courts’ commitment to strictly scrutinize such measures, naturally generates litigation.

3. Criminal Justice Initiatives

Those accused and convicted of crimes, especially violent crimes, are a highly unpopular minority group. In recent decades, large segments of the public have viewed legislatures and courts as being too soft on criminals. Thus, conditions have been ripe for initiatives that restrict the rights of the accused and increase the penalties for those convicted. When “tough-on-crime” measures appear on the ballot, they almost always win, and often by large margins.

2000 (last modified Feb. 26, 2001) <http://www.secstate.wa.gov/inits/iphist.htm> (citing I-350, Shall Public Educational Authorities Be Prohibited from Assigning Students to Other Than the Nearest or Next-Nearest School with Limited Exceptions? (1978)). I-350 was a response to the “Seattle Plan” in which Seattle schools attempted to achieve racial balance by imposing racial busing. The initiative sought to prohibit school districts from “requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence.” Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 462 (quoting I-350). It received 66% of the vote. Id.

83. See id. (citing I-200, Shall Government Be Prohibited from Discriminating or Granting Preferential Treatment Based on Race, Sex, Color, Ethnicity or National Origin in Public Employment, Education, and Contracting (1998)).

84. 458 U.S. 457 (1982).

85. See Californians for Economic Equity, 122 F.3d at 692.


87. In the history of the California initiative, for example, six “tough-on-crime” initiatives have appeared on the ballot, and voters have approved all of them. These include Proposition 17
Washington voters have approved fewer of these measures than have voters in some other high-use initiative states, but two examples are I-316, 88 which sought to require a mandatory death penalty for first degree murder, and I-593, 89 which required life sentences for certain repeat offenders. Federal and state constitutions, however, expressly protect the rights of the criminally accused and prohibit the imposition of "cruel and unusual" punishment, and courts have taken seriously their responsibility to protect these rights. The clash between the public’s impulse to crack down on crime and the courts’ role in ensuring that criminal justice procedures protect the rights of the accused is another way in which the Populist subject matter of initiatives contributes to the high rate of initiative litigation. In fact, both of Washington’s voter-approved “tough on crime” initiatives were challenged on federal constitutional grounds. 90 The Washington Supreme Court invalidated the mandatory death penalty initiative, 91 but upheld “three-strikes-and-you’re-out.” 92

Overall, in Washington, as in other high-use initiative states, the Populist-oriented process of initiative lawmaking, with its limitations on deliberation, refinement, compromise, and consensus-building, and the Populist-oriented substance of many initiatives, which pushes constitutional limits in their restrictions on representative government and individual and minority rights, expose initiatives to legal challenge. These two factors go a long way toward explaining why so

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89. Id. (citing I-593, Shall Criminals Who Are Convicted of “Most Serious Offenses” on Three Occasions Be Sentenced to Life in Prison Without Parole? (1993)).


91. See Green, 91 Wash. 2d at 446, 558 P.2d at 1379 (finding that the statute qualified by I-316, requiring mandatory death penalty for aggravated murder, violated the Eighth and Fourteenth Amendments).

92. See Manussier, 129 Wash. 2d at 672-84, 921 P.2d at 482-88 (finding that I-593, the “three strikes law,” did not violate the Fifth, Eighth, or Fourteenth Amendments).
many initiatives are challenged in court and why so many initiatives are invalidated.

IV. COURTS’ ATTITUDE TOWARD INITIATIVES: JURIS-POLITICIANS V. INITIATIVE WATCHDOGS

Through the initiative process, Populists have found an effective way to bypass legislatures and enact laws directly. They have not, however, found a way to bypass the courts.93 By virtue of their power of judicial review, courts are the institutional filter through which all laws potentially must pass.94 As we have seen, for a number of reasons, initiatives frequently end up being tested in court. When this occurs, the court’s attitude toward initiative lawmaking becomes crucial. How do judges view initiatives? Are judges tough on initiatives, or do they give them the benefit of the doubt?

In addressing this question, one must begin by noting that courts have refused to question the constitutional validity of the initiative process itself. Early critics of initiative lawmaking argued that the process is per se incompatible with Madisonian principles of republican government and violates Article IV, Section 4 of the United States Constitution, which states, “The United States shall guarantee to every State in this Union a Republican Form of Government.”95 Courts were unwilling to embrace this argument and thereby pull the

93. State constitutions in two states, Colorado (COLO. CONST. art. VI, § 1 (1914)) and Nevada (NEV. CONST. art. XIX, § 2 (1904)), were amended to prohibit judicial invalidation of initiatives. However, the Colorado provision is no longer in force and the present Nevada provision (NEV. CONST. art. XIX, § 1, cl. 2) is unlikely to bar judicial review. See Eule, supra note 11, at 1546 n.184.

94. Since its inception, judicial review has sparked controversy regarding its proper role in the American political system. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 15-18 (1990); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 4 (1980); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893). Most analysis of judicial review focuses on its operation within the context of representative government. Thus, what Bickel calls “the counter-majoritarian difficulty” is generally understood as the nullification by unelected judges of laws enacted by elected representatives. Judicial review of direct democracy, however, is a more acute counter-majoritarian act. When a court strikes down a voter-approved initiative, it is not checking a coordinate branch of representative government; it is checking the people themselves. As one former California Supreme Court Justice noted, “It is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another.” JOSEPH GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 105 (1989). Overturning a direct vote of the people thus has its own dynamic, different from judicial review of “ordinary” legislation. See Eule, supra note 11, at 1504-08; Cain & Miller, supra note 35, at 54-57.

95. U.S. CONST. art. IV, § 4, cl. 1.
plug on direct democracy. In 1912, the United States Supreme Court held in Pacific States Telephone and Telegraph Co. v. Oregon that the question of whether the initiative process violates the Constitution's guarantee of a republican form of government is a nonjusticiable political question.96 Two years before that, the Washington Supreme Court also rejected a Guarantee Clause challenge to initiative lawmaking in Hartig v. City of Seattle.97

In recent years, some parties seeking to invalidate initiatives (including I-593 of 1993, Washington's "Three Strikes" law) have included Guarantee Clause challenges in their petitions. In State v. Manussier,98 the Washington Supreme Court rejected the Guarantee Clause claim, noting that "Pacific still represents good law, and earlier cases decided by this court have been in accord with its holding."99 Although some other state courts have recently expressed interest in the Guarantee Clause's relationship to initiative lawmaking, none has yet invalidated an initiative for violating the guarantee of republican government.100 Jeffrey T. Even, a Washington Assistant Attorney

96. 223 U.S. 118, 150-51 (1912).
97. 53 Wash. 432, 102 P. 408 (1909). See also Kadderly v. City of Portland, 74 P. 710, 719-20 (Or. 1903) (upholding the Oregon initiative system against Guarantee Clause challenge in part because the system allowed the legislature to amend voter-approved initiatives). Some commentators, most notably law professor and former Oregon Supreme Court Justice Hans A. Linde, hold a more nuanced view of the relationship between the Guarantee Clause and direct democracy. Linde argues that while initiative lawmaking is not inherently nonrepublican, certain types of initiatives are inconsistent with republican government, and courts, including state courts, can and should invoke the Guarantee Clause to invalidate them. Linde is concerned in part with initiatives that violate republican principles by structurally eliminating the lawmaking authority of elected representatives. See David B. Frohnmayner & Hans A. Linde, Initiating "Laws" as "Constitutional Amendments": An Amicus Brief, 34 WILAMETTE L. REV. 749 (1998).
100. Id. at 671, 921 P.2d 482 (citations omitted).
General, recently surmised, "At this juncture in constitutional history, it would be astonishing if the courts were suddenly to announce that the Guarantee Clause prohibited or severely restricted the ability of the people to exercise a legislative function they have utilized for nearly a century." 101

A second issue for courts is whether to apply a different level of scrutiny to individual initiatives than they do to "ordinary legislation." The United States Supreme Court has held that courts should apply the same standard of review to initiatives as to laws enacted by representative government. 102

While initiative lawmaking has increased in recent decades, a growing number of judges and legal scholars have questioned this "equal treatment" principle. The debate can be summarized as follows. One view, which I call the "juris-populist" position, maintains that courts should accommodate initiative lawmaking and should give greater deference to initiatives than to ordinary legislation. The rationale for this view is that initiatives represent the "pure" will of the people, and popular sovereignty is entitled to great respect. One proponent of this view was United States Supreme Court Justice Hugo Black. Justice Black asserted that the initiative process is "as near to a democracy as you can get" and that a legal challenge to a law should have less force if the law was enacted by the people directly than if it were enacted by the legislature. 103 Black extolled direct democracy in three high-profile cases: Reitman v. Mulkey, 104 Hunter v. Erickson, 105 and James v. Valtierra. 106 More recently, on the Ninth Circuit Court

101. Even, supra note 17, at 256. For another practitioner's view, see Hardy Myers, The Guarantee Clause and Direct Democracy, 34 WILLAMETTE L. REV. 659, 662 (1998) (noting that "the relationship between the Guarantee Clause and the initiative process ... may be the greatest undefined relationship between the U.S. Constitution and state lawmaking.").

102. See Citizens for Rent Control Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981). In reviewing a local initiative, the Court declared, "It is irrelevant that the voters rather than the legislative body enacted [the challenged law]." Id. Generally, a law, whether enacted by representative government or by the people directly, is merely required to satisfy a rationality test; that is, it must be rationally related to a legitimate state interest. The law faces heightened scrutiny only if it creates a suspect classification, usually involving race, or infringes on a fundamental right protected by the Constitution, such as freedom of speech. See generally LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769 (2d Ed. 1988).


106. 402 U.S. 137 (1971) (upholding Article XXXIX of the California Constitution, which requires prior voter approval before a public body can develop a federally-financed, low-income
of Appeals, Justice Diarmuid O'Scannlain seemed to give special deference to a state constitutional provision because it was approved directly by voters. In an opinion reversing the district court's invalidation of California's Proposition 209, Justice O'Scannlain wrote, "A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy."\(^{107}\)

Of the current justices on the Washington Supreme Court, Justice Richard Sanders most clearly presents himself as a juris-populist. He submitted sharply-worded dissents in two recent cases invalidating the state's Populist-oriented term limits initiative\(^{108}\) and I-695.\(^{109}\) In his dissent in the term limits case, Sanders defended the initiative, claiming,

Term limits, which ensure our legislators remain citizen legislators, not career state employees, are generally consistent with [the state's] constitutional framework and specifically consistent with our citizens' historically Populist mistrust of the legislature. That this legacy remains in the minds of our citizens perhaps explains the popular adoption of the act before us today.\(^{110}\)

As noted above, Justice Sanders made it a point to mention in his *Gerberding* dissent that "[t]oday, six votes on this court are the undoing of 1,119,985 votes that Washingtonians cast at the polls in favor of term limits."\(^{111}\) When a judge cites those kinds of figures, it is likely that he or she is a juris-populist, and Justice Sanders clearly belongs to the category of judges seeking to give deference to Populist-oriented initiative lawmaking.

The competing view, which I call the "initiative watchdog" perspective, maintains that the initiative process is seriously deficient compared to representative government, and that courts should give less deference to initiatives than to "ordinary" legislation. The

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\(^{107}\) Coalition for Economic Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1992). California's Proposition 209, Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (1996), dismantled the state's affirmative action programs for state contracting, hiring, and university admissions. The "Yes" vote for Proposition 209 was 5,268,462; the No vote was 4,388,733. California Secretary of State Bill Jones, *Statement of Vote: November 5, 1996*, at xiii. See California Secretary of State Bill Jones, 2001 *Initiative Update* (visited June 1, 2001) <http://www.ss.ca.gov/elections/elections_j.htm>.

\(^{108}\) See *Gerberding* v. Munro, 134 Wash. 2d 188, 211, 949 P.2d 1366, 1378 (1998) (Sanders, J., dissenting).


\(^{110}\) *Gerberding*, 134 Wash. 2d at 229, 949 P.2d at 1386.

\(^{111}\) Id. at 230, 949 P.2d at 1388.
rationale for this view is that judicial review is designed to act as a filter to protect constitutional principles and minority rights against majoritarian attack, and thus, courts need to be more vigilant, not less, when reviewing laws enacted through the initiative’s unfiltered majoritarian process. In recent years, several legal commentators, including Derrick Bell112 and the late Julian Eule,113 have advanced this view. This approach faces two challenges: determining which kinds of initiatives warrant increased scrutiny, and, for those that do, deciding how strict the scrutiny should be.

With respect to the first problem, Eule argued that certain initiatives (e.g., those that impact individual rights and equal application of the laws, as well as those that restructure government or limit taxes or expenditures) should receive heightened judicial scrutiny, whereas other initiatives (e.g., those that improve the processes of representative government, including measures that impose ethical rules on public officials, regulate lobbyists, or restrict campaign contributions) should not.114 (In my terms, he would have had courts apply heightened scrutiny to Populist-oriented initiatives, and ordinary review to Progressive-oriented ones.)

The second problem facing this approach is how to define a heightened level of scrutiny for initiatives. Eule suggested,

I do not perceive the concept of a hard judicial look to be a rigid one. Unlike “strict scrutiny”—a standard which on paper at least can be reduced to precise formulation—it is not intended to take on a unitary form. What I have in mind is more a general notion that courts should be willing to examine the realities of substantive plebiscites—that the unspoken assumptions about the legislative process that so often induce judicial restraint deserve less play in a setting where they are more fanciful. Sometimes a hard judicial look will take the form—as it did in the Seattle busing case)—of a candid “We know what’s going on here and we won’t allow any of it.” In other situations... recognition that the burden of plebiscitary action falls on polit-

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113. See Eule, supra note 11.
114. Id. at 1559-60. Eule argued that in addition to applying strict scrutiny to measures that create suspect classifications or infringe on fundamental rights, courts should apply heightened scrutiny to any initiative that could have the effect of disadvantaging minorities. Initiatives that alter government structure or reapportion legislative districts, he argued, are often a façade for disenfranchising minorities. Id. at 1560 & n.255. Taxation and spending limitations, he argued, principally benefit upper- and upper-middle class white citizens, while burdening underrepresented racial minorities and the poor. Id. Because the initiative process does not adequately protect the interests of these groups, he argued, courts should aggressively review initiatives that disadvantage them. Id. at 1560.
ical actors able to defend their interests in the popular arena, combined with the need to conserve limited judicial capital, will appropriately lead to a more modest form of review.115

More recently, a commentator boldly suggested that all challenged initiatives be subjected to strict scrutiny.116 If this standard were universally applied, however, the effect on the initiative process would be lethal.117 But, perhaps that is precisely the unspoken objective. For those who are convinced that initiative lawmaking is dangerous, using judicial review to strangle the process would indeed be a good thing.

Although they do not expressly say so, some judges seem to apply a higher level of scrutiny to initiatives.118 Two examples are judges Stephen Reinhardt and Betty B. Fletcher of the Ninth Circuit Court of Appeals. In Jones v. Bates,119 judges Reinhardt and Fletcher held that a term limit initiative120 was unconstitutional essentially because when voting on the initiative, voters were ignorant or confused about whether or not the initiative imposed a lifetime ban.121 If “voter ignorance” were the controlling standard, however, most initiatives would be suspect.122 Nevertheless, the two Ninth Circuit initiative watchdogs concluded that part of the process of enacting the initiative (i.e., informing voters of the initiative’s impact) was so inadequate that the enactment was invalid.123

115. Id. at 1572-73 (citations omitted).
117. Justice Thurgood Marshall suggested that strict scrutiny is “strict in theory, but fatal in fact.” Fullilove v. Klutznik, 448 U.S. 448, 519 (1980) (Marshall, J., concurring), overruled by Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that because federal racial classifications must serve a compelling governmental interest and be narrowly tailored to further that interest, to the extent that Fullilove held federal racial classifications subject to a less rigorous standard, it is no longer controlling). Justice Sandra Day O’Connor disagrees with Justice Marshall, pointing out that all Justices of the Court agreed that the discriminatory conduct of a state department justified a narrowly tailored race-based remedy. See Adarand, 515 U.S. at 237 (citing United States v. Paradise, 480 U.S. 149, 167 (1987)).
118. Pak, supra note 116, at 251.
120. See Jones, 127 F.3d at 843 (California Proposition 140 was adopted by voters in 1990).
121. Id. at 863.
122. See Bates, 131 F.3d at 853 (O’Scannlain, J., concurring) (“Searching the Constitution . . . I am unable to locate an ‘ignorant voter clause’ that vests federal courts with the power to review voter-enacted legislation to ensure that enough people were capable of understanding what they voted for at the ballot.”).
123. See Jones, 127 F.3d at 858-63.
ruling, however, the Ninth Circuit rejected this watchdog view and upheld California's term limits amendment. 124

Judges Reinhardt and Fletcher seem to have staked out an extreme initiative watchdog position. I will argue, however, that they may be trendsetters, because supreme courts in several initiative states—including Washington—seem to be gravitating in their direction.

V. CONSTRAINING POPULIST-ORIENTED INITIATIVE LAWMAKING THROUGH THE SINGLE-SUBJECT RULE

The foregoing discussion demonstrates that in Washington and elsewhere (1) courts are unlikely to prohibit or severely restrict initiative lawmaking as violative of the Guarantee Clause; and (2) judges officially apply the same standards of review to the substance of initiatives as they do to the substance of ordinary legislation; but that (3) judges vary in their attitudes about Populist-oriented initiative lawmaking, and the degree of deference it deserves. In this section, I will continue to focus on that last point, and I will offer evidence for the argument that in several state courts, judicial attitudes toward initiative lawmaking are discernibly shifting toward what I call the "watchdog" position. Specifically, this shift is evidenced by stricter judicial enforcement of state constitutional limitations on initiative lawmaking, especially so-called "single-subject rules." I contend that the recent I-695 case signals that the Washington Supreme Court is moving in the watchdog direction as well.

The Washington Constitution, like constitutions in other initiative states, includes several limitations on initiative lawmaking. 125 One of those limitations is that an initiative must contain only one subject. 126 It is actually more accurate to say that Washington’s single-subject rule applies by implication to initiatives. The Washington Supreme Court (like courts in Idaho, Illinois, Montana, Nevada, and Oklahoma) has determined that the state constitution’s single-subject restriction on “bills” applies not only to acts of the legislature, but to initiatives as well. 127

124. See Bates, 131 F.3d at 843.
125. Examples include the single-subject rule and subject-in-title rule of Article II, section 19: “No bill shall embrace more than one subject, and that shall be expressed in the title.” WASH. CONST. art. II, § 19. See also WASH. CONST. art. II, § 37 (an act revised or amended must set forth at full length and may not be amended or revised by mere reference to its title); Gerberding v. Munro, 134 Wash. 2d 188, 211, & n.11, 949 P.2d 1366, 1377, & n.11 (1998) (initiatives address only legislative matters and not amendments to the constitution).
126. WASH. CONST. art. II, § 19.
127. It has been argued that Washington’s single-subject rule should not apply to initiatives, but only to legislative bills. See, e.g., Amalgamated Transit Union Local v. State, 142
The generally stated purposes for imposing a single subject requirement for legislation are to prevent "log-rolling" and to prevent confusion.\textsuperscript{128} Courts in several states have discovered, however, that single subject rules potentially play another, larger role—that is, if they are strictly enforced, they can be a powerful constraint on initiative lawmaking. Professor Daniel H. Lowenstein notes that single-subject rules allow for a wide range of interpretation because the concept of subject is "infinitely malleable."\textsuperscript{129} Lowenstein observes,

If we examine only the words of the single-subject rule, two extreme interpretations are possible. On the one hand, we might plausibly conclude that no initiative could possibly violate the rule. Consider the most bizarre assortment of unrelated provisions you can imagine. The mere fact that the provisions have been put together in one measure makes them constitute a "single subject," if only for purposes of discussion and study. On the other hand, the language of the single-subject rule also permits an interpretation that would abolish the initiative proc-

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\textsuperscript{128} The Washington Supreme Court defined "logrolling" as "pushing legislation through by attaching it to other legislation." \textit{Amalgamated Transit}, 142 Wash. 2d at 207, 11 P.3d at 781 (citing Power, Inc. v. Huntley, 39 Wash. 2d. 191, 198, 235 P.2d 173 (1951)). \textit{See also} State v. Waggoner, 80 Wash. 2d 7, 9, 490 P.2d 1308, 1309 (stating that the "prevention of logrolling is one of the purposes of art. 2, s 19, of our constitution").

\textsuperscript{129} Lowenstein, \textit{supra} note 128, at 967.
ess altogether. That is, it is impossible to conceive of a measure that could not be broken down into parts, which could in turn be regarded as separate subjects. 130

This malleability provides courts the opportunity to either accommodate or restrict initiative lawmaking. If courts interpret single-subject rules generously, sponsors can merge together in one initiative a wide array of proposals, thereby magnifying the measure's impact. By contrast, a strict interpretation of the single-subject rule limits an initiative sponsor's freedom of action and the initiative's potential power.

State courts have taken various approaches to enforcing the single-subject rule, with California and Florida staking out opposite ends of the spectrum. California adopted a single-subject rule for initiatives in 1948, 131 but the California Supreme Court applied a liberal standard for enforcing it, requiring only that the various elements of an initiative be "reasonably germane" and rejecting the stricter standard that they be "functionally related." 132 At least until

130. Id. at 942.
131. California's single-subject rule for initiatives is now contained in California Constitution, Article II, section 8(d). The rule was enacted in 1948 as Article IV, section 1(c), and was twice renumbered and rewritten. See Lowenstein, supra note 128, at 949-53 & n.69.
132. In 1949, the year after California adopted a single-subject rule for initiatives, the California Supreme Court held that the rule would be interpreted identically to the existing single-subject rule for legislative acts. Under this interpretation, the single-subject rule was to be "construed liberally to uphold proper legislation, all parts of which are reasonably germane." Perry v. Jordan, 207 P.2d 47, 50 (Cal. 1949) (quoting Evans v. Superior Court, 8 P.2d 467 (Cal. 1932)). Three decades later, California Supreme Court Justice Wiley Manuel advocated a stricter construction of the rule, arguing it should require that all provisions of an initiative be "functionally related in furtherance of a common underlying purpose." Schmitz v. Younger, 577 P.2d 652, 656 (Cal. 1978) (Manuel, J., dissenting). However, in that case, which occurred before the election, the court refused to rule on the single-subject issue and declined to embrace Justice Wiley's proposed test. See id. at 653. Shortly thereafter, in Fair Political Practices Comm'n v. Superior Court, 599 P.2d 46, 47-51 (Cal. 1979), the court elaborated on its liberal interpretation of the single-subject rule. In that case, the court upheld Proposition 9 of 1974, a complex political reform initiative, against single-subject attack. The initiative was invalidated in part on other grounds. See id. at 55. Noting that it is the duty of the courts to "jealously guard" the people's right of initiative, the court reasoned that voters may not be limited to brief general statements but may deal comprehensively and in detail with an area of law.

Although the initiative measure before us is wordy and complex, there is little reason to expect that claimed voter confusion could be eliminated or substantially reduced by dividing the measure into four or ten separate propositions. Our society being complex, the rules governing the initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne.

Id. at 50. In Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982), the court (by a 4-3 margin) upheld a multipart criminal justice initiative against single subject attack and rejected the "functional relationship" test. Three judges dissented and Chief Justice Bird charged that the majority had "obliterate[d] one section of the state Constitution by effectively repealing the single subject rule." Id. at 306 (Bird, C.J., dissenting).
last year, the California Supreme Court consistently upheld initiatives against single-subject challenges.\textsuperscript{133}

The Florida Constitution contains a similar single-subject requirement for initiatives,\textsuperscript{134} but the Florida Supreme Court has enforced it much more strictly. In Florida, initiatives are permitted only for constitutional amendments, not for statutory matters.\textsuperscript{135} Partly for that reason, the Florida Supreme Court has held that initiatives require “strict compliance” with the single-subject rule because “our constitution is the basic document that controls our governmental functions,”\textsuperscript{136} and thus it should not be easily amended. In searching for a violation of the single-subject rule, the court looks to see whether an initiative affects multiple “functions of government.”\textsuperscript{137} This standard, according to one member of the court, is “practically insurmountable,”\textsuperscript{138} and the court has excluded many initiatives from the ballot for failure to satisfy its demanding single-subject test.\textsuperscript{139}

The consequences of different approaches to single-subject rule interpretation are revealed by the fate of proposals in the respective states to end affirmative action in state hiring, contracting, and university admissions. In California, opponents of the proposal (Proposition

\textsuperscript{133} Prior to 2000, the California Supreme Court had never overturned an initiative on single-subject grounds. The court had denied review in two cases in which initiatives had been invalidated by lower courts for single-subject rule violations. See Chemical Specialties Mfrs. Ass'n, Inc. v. Deukmejian, 278 Cal. Rptr. 128 (Cal. Ct. App. 1991) (invalidating California Proposition 105 (1988), The Public's Right To Know Act, for violating the single-subject rule); California Trial Lawyers Ass'n v. Eu, 245 Cal. Rptr. 916 (Cal. Ct. App. 1988) (striking down prior to the election a tort reform initiative for violation of the single-subject rule), abrogated on other grounds, Lewis v. Superior Court, 970 P.2d 872 (Cal. 1999). For a discussion of the California Supreme Court’s stricter approach toward enforcement of the single-subject rule, and toward initiative lawmaking, see Gerald F. Uelmen, Taming the Initiative, CALIFORNIA LAWYER, Aug. 2000, at 46.

\textsuperscript{134} See FLA. CONST. art. XI, § 3 (“The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith.”).

\textsuperscript{135} See id.

\textsuperscript{136} Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984).

\textsuperscript{137} Id. at 990.

\textsuperscript{138} Justice Leander Shaw criticized the strictness of the “function of government” test in a concurring opinion in Evans v. Firestone, 457 So. 2d 1351, 1360 (Shaw, J., concurring) (1984).

\textsuperscript{139} See, e.g., Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998); Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Comm'n: Unifies Marine Fisheries and Game and Fresh Water Fish Comm'ns, 705 So. 2d 1351 (Fla. 1998); Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding, 703 So. 2d 446 (Fla. 1997); Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, and Advisory Opinion to the Attorney General re Voter Approval Required for New Taxes, and Advisory Opinion to the Attorney General re Property Rights, 699 So. 2d 1304 (Fla. 1997).
209 of 1996) never challenged the measure in state court on single-subject grounds. They likely assumed that it easily satisfied the state supreme court's liberal interpretation of the single-subject rule. In Florida, however, pro-affirmative action forces capitalized on the state supreme court's strict reading of the single-subject rule to kill a Proposition 209 clone. Even after sponsor Ward Connerly divided his anti-affirmative action proposal into four separate initiatives,¹⁴⁰ the Florida Supreme Court held that each violated the stringent "function of government" test for enforcing the state's single subject rule.¹⁴¹ The court thus blocked the initiatives from reaching the ballot.

The way a court interprets a state's single-subject rule has tremendous substantive impact. It is clear, for example, that if the Washington Supreme Court were to apply rigorous, Florida-style single-subject review to I-200 of 1998 (Washington's anti-affirmative action initiative), the initiative would not survive because I-200, like its Florida counterparts, affects "multiple functions of government." Strict judicial enforcement of a state single-subject rule can indeed create a "practically insurmountable" barrier to initiative lawmaking.

In the past, Florida's approach was anomalous. Courts in most initiative states sought to give deference to initiative lawmaking, and interpreted single-subject rules and other formal requirements liberally in order to protect the initiative process. In recent years, however, a discernible shift away from this approach has occurred; several state supreme courts have signaled that they want to put teeth into their state's single-subject rule or related limitations on initiative lawmaking. Consider the following examples.

¹⁴⁰ In an attempt to satisfy the Florida Supreme Court's strict reading of the state's single-subject rule, Connerly divided his proposal to end affirmative action based on race into four initiatives. One was directed at public education, a second at public employment, and a third at public contracting. The fourth initiative targeted affirmative action based on gender as well as race in public education, employment, and construction. See William Yardley, Drive to Alter Race Rules Advances, ST. PETERSBURG TIMES, Oct. 27, 1999, at 1B.

¹⁴¹ See Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 25 FLA. L. WEEKLY 546, 2000 Fla. LEXIS 1460, *1, *27-29 (Fla. 2000); Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Employment, id.; Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Contracting, id.; Advisory Opinion to the Attorney General re End Governmental Discrimination and Preferences Amendment, id.
A. Changing Interpretations of Single Subject and "Separate Vote" Rules in Other States

In 1994, Colorado enacted a single subject rule for initiatives. Since then, when reviewing initiatives, the state supreme court has aggressively enforced the rule, much more rigorously than it has enforced the rule for legislative acts, and much to the dismay of initiative advocates. Many Colorado initiatives have faced pre-election single-subject challenges in the past six years, and in the vast majority of the cases, the court has held they violate the single-subject rule.

In 1998, the Oregon Supreme Court dusted off a never-before invoked constitutional requirement that each amendment to the constitution requires a separate vote, using it to invalidate Measure 40, a crime victim's rights initiative. The court indicated that it would enforce the separate vote requirement for initiated constitutional amendments by analyzing the extent to which the measure would modify the constitution. The effect of this new approach is

142. See COLO. REV. STAT. § 1-40-106.5 (2000).
143. See Campbell, supra note 127.
144. See Campbell v. Buckley, 203 F.3d 738, 746-47 (10th Cir. 2000) (rejecting petitioners' claim that the state applies the single-subject requirement in a manner that discriminates against certain proponents on the basis of the content of their initiatives).
145. Id. See, e.g., In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 41, 975 P.2d 180 (Colo. 1999); In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 86, 962 P.2d 245 (Colo. 1998); In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 4, 961 P.2d 456 (Colo. 1998); In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 30, 959 P.2d 822 (Colo. 1998); In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 95, 960 P.2d 1204 (Colo. 1998); Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 64, 960 P.2d 1192 (Colo. 1998); In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by the Title Board Pertaining to a Proposed Initiative "Public Rights in Waters II," 898 P.2d 1076 (Colo. 1995).
146. See OR. CONST. art. XVII, § 1 ("When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.").
147. See Armatta v. Kitzhaber, 959 P.2d 49, 63 (Or. 1998). The court established a new three-prong test for enforcing the separate vote requirement: "the proper inquiry is to determine whether, [1] if adopted, the proposal would make two or more changes to the constitution that [2] are substantive and that [3] are not closely related." Id. at 64. The court noted, "In some instances, it will be clear from the test of the proposed initiative whether it runs afoul of Article XVII, section 1. In other instances, it will be necessary to examine the implications of the proposal before determining whether it contains two or more amendments." Id. Here, although the initiative purported to amend only Article 1 of the constitution, the court said it changed five existing sections of the constitution that encompassed six, separate individual rights. Id. at 67. In addition, the court concluded (without articulating a test) that the changes were "substantive." Id. Finally, the court held that the changes were not closely related. Id.
148. Id. at 60.
that in Oregon, it will now be more difficult to use the initiative process to amend the constitution than to enact statutes.\footnote{149}

Shortly thereafter, the Montana Supreme Court invalidated CI-75, an initiative that sought to require voter approval for tax increases, on the basis that the measure violated the state constitution’s separate vote requirement.\footnote{150} The court’s ruling expressly departed from the old rule set forth in 1914 in \textit{State ex rel. Hay v. Alderson}\footnote{151} that constitutional amendments need only have a “unity of subject,” and instead adopted the more stringent standard that the Oregon Supreme Court set forth the year before in \textit{Armatta v. Kitzhaber}.\footnote{152}

In California, which has a long history of liberal single-subject rule interpretation,\footnote{153} the supreme court last year signaled a significant change in approach. In \textit{Senate of California v. Jones},\footnote{154} prior to the election, the court invalidated Proposition 24 (a measure to reduce legislators’ salaries and strip the legislature of power over redistricting)\footnote{155} for violating the single-subject rule. Although the court retained the “reasonably germane” standard, it applied the standard more strictly than in the past.\footnote{156} In dissent, Justice Kennard noted that “[n]ever before has this court invalidated an initiative measure for violation of the single-subject rule”\footnote{157} and argued that the court was

\footnotesize
\begin{itemize}
\item \footnote{149} \textit{Id.} Note that Oregon constitutional initiatives passed prior to \textit{Armatta v. Kitzhaber} are vulnerable to this attack. On July 20, 2001, a circuit judge in Marion County, Oregon invalidated Oregon’s 1992 term limits initiative (Measure 3) on the basis that it violated the state constitution’s separate vote requirement. Lawyers in Oregon are planning to file similar challenges to several other long-standing voter-approved constitutional initiatives. See Ashbel S. Green & Lisa Grace Lednicer, \textit{Judge Overturns Term Limits, THE OREGONIAN}, July 21, 2001, at A-1. See also Philip Bentley, Note, \textit{Armatta v. Kitzhaber: A New Test Safeguarding the Oregon Constitution from Amendment by Initiative}, 78 OR. L. REV. 1139 (1999).
\item \footnote{150} Marshall v. State \textit{ex rel. Cooney}, 975 P.2d 325, 331 (Mont. 1999) (holding that the initiative amended three parts of the constitution and was therefore invalid). The Montana separate vote requirement is contained in Article XIV, section 11 of the Montana Constitution.
\item \footnote{151} 142 P. 210, 213 (Mont. 1914).
\item \footnote{152} 959 P.2d 49 (Or. 1998). In rejecting Montana’s former, more liberal standard, the \textit{Marshall} court held that the unity of subject rule that the court applied in \textit{Hay} and \textit{Cooney} is unworkable. Under the Court’s rationale in \textit{Hay}, for example, a constitutional initiative to “improve Montana’s government” could amend virtually every part of Montana’s constitution but have one single subject. The unity of subject rule set forth in \textit{Hay} and \textit{Cooney} is so elastic that it could swallow Montana’s entire Constitution. We decline to affirm such a rule.
\item \footnote{153} See supra notes 132, 133 and accompanying text.
\item \footnote{154} 988 P.2d 1089, 1105 (Cal. 1999).
\item \footnote{155} \textit{Id.} at 1091-92.
\item \footnote{156} \textit{Id.} at 1100-05.
\item \footnote{157} \textit{Id.} at 1106 (Kennard, J., dissenting).
\end{itemize}
abandoning judicial restraint and making a precipitous shift away from the former, more liberal approach.\textsuperscript{158}

These examples all point in the same direction: Courts in several initiative states are moving in the "initiative watchdog" direction by more strictly enforcing single-subject rules and related requirements.

B. Washington's Enforcement of the Single Subject Rule

Last year, in Amalgamated Transit Union Local 587\textsuperscript{11} v. State, the Washington Supreme Court invalidated I-695, in part because it violated the state's single-subject rule as set forth in Article II, section 19.\textsuperscript{159} In its opinion, the court did not suggest that it was establishing a new, more stringent standard for single-subject review. Like the California Supreme Court, the Washington Supreme Court applied its old, "liberal" standard in a new, more aggressive way. The Washington Supreme Court applies a two-tiered standard of single-subject review, depending on whether the initiative's title is "general" or "restrictive."\textsuperscript{160} For general titles, the court applies a "rational unity test" in which all that is required is a rational unity between the general subject and the incidental subjects.\textsuperscript{161} Restrictive titles are not regarded as liberally as a general title for purposes of single-subject review.\textsuperscript{162} In Amalgamated Transit, the court held that I-695 had a general title,\textsuperscript{163} and therefore was entitled to the less strict "rational unity" test. Nevertheless, the court held that I-695 failed to meet the test in that no rational unity existed between the subjects of the initiative.\textsuperscript{164}

I-695 sought to reduce vehicle license fees to $30 and to require voter approval for future increases in taxes and fees.\textsuperscript{165} Attorneys for Mr. Eyman and the State argued that the single subject of the measure was "limiting taxation," and argued that all the provisions of I-695 are rationally related to the general subject of limiting taxation.\textsuperscript{166} The court rejected that argument and struck down the initiative.

\textsuperscript{158} Id. at 1111 (Kennard, J., dissenting).
\textsuperscript{159} 142 Wash. 2d 183, 11 P.3d 762 (2000).
\textsuperscript{160} See Amalgamated Transit, 142 Wash. 2d at 206-12, 11 P.3d at 780-83.
\textsuperscript{161} Id. at 209, 11 P.3d at 782.
\textsuperscript{162} Id. at 210, 11 P.3d at 782. A "restrictive title" is defined as "one where a particular part or branch of a subject is carved out and selected as the subject of the legislation." Id. (quoting State v. Broadway, 133 Wash. 2d 118, 129, 942 P.2d 363 (1997)).
\textsuperscript{163} Id. at 216, 11 P.3d at 786.
\textsuperscript{164} Id. at 217, 11 P.3d at 786.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 212, 11 P.3d at 783.
Justice Sanders, in dissent, objected to the court's strict application of the single subject rule to this initiative. 167 He noted that in Fritz v. Gorton, 168 the court held that Initiative 276 of 1972 satisfied the single-subject rule. 169 This was so, even though the challengers to I-276 maintained and the dissent agreed that the initiative contained a "multiplicity of subjects," including: (1) disclosure of campaign financing; (2) limitations on campaign spending; (3) regulation of lobbying activities; (4) regulation of grass-roots educational activities; (5) disclosure of financial affairs of elected officials; and (6) public inspection of public records." 170 In Fritz, the court went out of its way to hold that the six components of the initiative were unified by the "generic subject" of "openness in government." 171

Justice Sanders could justifiably argue that the tax-limiting provisions of I-695 were at least as unified in a common "subject" as were the political reform provisions of I-276. Placing Fritz side-by-side with Amalgamated Transit, it is apparent that the Washington Supreme Court enforced the single-subject rule more strictly in the latter case.

The differing outcomes suggest two possibilities. The court may be applying the single-subject rule in an uneven manner, using it to strike down only those initiatives it dislikes (i.e., Populist-oriented measures like I-695), but not the Progressive-oriented initiatives it favors. 172 Alternatively, it could signal that the court is seeking to constrain initiative lawmaking generally, by more strictly interpreting the single-subject rule and other related constitutional limitations on the initiative process. Either way, the court in Amalgamated Transit was playing the watchdog, baring its teeth, and signaling to Populists like Tim Eyman that it will resist their battering rams.

VI. POTENTIAL RISKS FOR THE COURT

The same Populist impulse that delights in initiative lawmaking is repulsed by judicial review. In the Populist mind, judicial review raises the specter of arrogant, elitist, insular judges usurping power from popularly elected legislators, or, even worse, from the people

167. Id. at 264-65, 11 P.3d at 810 (Sanders, J., dissenting).
169. See Amalgamated Transit, 142 Wash. 2d at 264-65, 11 P.3d at 810 (Sanders, J., dissenting).
171. See Amalgamated Transit, 142 Wash. 2d at 264-65, 11 P.3d at 810 (citing Fritz, 83 Wash. 2d at 290, 317 P.2d 911 (Sanders, J., dissenting)).
172. Professor Julian Eule advocated this very sort of differential treatment. See Eule, supra note 11, at 1558-73.
themselves. Pressure on the courts grows when judges overturn "the will of the people" as directly expressed through the initiative process, and the risk of backlash is most acute for state court judges, especially in states like Washington where judges have to face voters in contested elections.173

If the Washington initiative process is in fact becoming dominated by Populist entrepreneurs who seek to undermine representative government, and if state courts are in fact increasingly assuming an "initiative watchdog" role, aggressively invalidating Populist-oriented initiatives, it does not take much imagination to see how the conflict could turn ugly. The same Populist impulse (and campaign industry) that drives initiative campaigns can be enlisted to defeat watchdog judges. If the court becomes more politicized, its legitimacy, independence, and capacity to protect representative government, minority interests, and individual rights may erode. At that point, the Populist ideal of the unmediated power of the people will have moved a step closer to realization. Populism will have undermined not only the legislature, but the courts as well.