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Samir Junejo
Seattle University

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I. INTRODUCTION

It has been over a century since Washington approved the use of the ballot initiative process.[1] During that time, voters have seen 175 initiatives on their ballot and have approved almost half of them.[2] No question exists that voters have used the initiative process to make substantial changes in the law, including legalizing recreational marijuana, legalizing physician-assisted suicide, and making major changes in the administration of primary elections.[3] But the initiative process, which is democracy at its most pure, can be and has been used by society to impose its will upon minority populations who simply cannot bring together enough votes to have an impact.[4] The proof is in the numbers. One national study found that

* Samir Junejo, J.D. Candidate 2016, Seattle University School of Law. He would like to thank his incredible colleagues at SJSJ who edited this article, especially Breanne Schuster for her invaluable edits and advice.

1 *See Yearly Summary of Initiatives to the People*, Wash. Sec'y of State, http://www.sos.wa.gov/_assets/elections/initiatives/YearlySummaryIP32013.pdf (last visited Apr. 19, 2015); *Yearly Summary of Initiatives to the Legislature*, Wash. Sec'y of State, http://www.sos.wa.gov/_assets/elections/initiatives/Yearly-Summary-IL-2-14.pdf (last visited Apr. 19, 2015).

2 *Id.*

3 Initiative No. 502, WASH. LEGISLATURE, http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Initiatives/Initiatives/INITIATIVE%20502.pdf (last visited Mar. 29, 2016); Initiative No. 872, WASH. SEC'Y OF STATE, https://www.sos.wa.gov/elections/initiatives/text/i872.pdf (last visited Mar. 29, 2016); Initiative No 1000, WASH. LEGISLATURE, http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Initiatives/Initiatives/INITIATIVE%201000.SL.pdf (last visited Mar. 29, 2016).

4 Generally, the minority populations I refer to include racial minorities, religious minorities, and LGBT groups. *See, e.g.,* Washington State Initiative 677, OFFICE OF THE

initiatives that restrict the civil rights of minorities pass 78 percent of the time in comparison to the 33 percent success rate of all other initiatives.[5]

Some of the Founding Fathers of the United States talked openly about the tyranny of the majority; it was a significant factor as to why the US Constitution created a republic where voters choose legislators to engage in a legislative process rather than a direct democracy where voters directly vote on laws.[6] The rise of direct democracy in the twentieth century has seen the passage of various ballot initiatives across the United States that have negatively impacted African Americans, non-English speakers, members of the LGBT community, and other minority groups.

A great example of a Washington State ballot initiative that allowed the majority population to pass a measure unfavorable to a minority group was Initiative 200 (I-200). A quick study of I-200 can shed some light on how these types of initiative campaigns are run. I-200 was a 1998 initiative that sought to add this statement into state law: "The state shall not discriminate against, or grant preferential treatment to, any individual or groups on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."[7] While the language may at first seem uncontroversial, it would have had damaging

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SEC'Y OF STATE, https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/documents/voters%27pamphlets/1997_general_election_voters_pamphlet.pdf (last visited May 31, 2016) (a losing initiative that would have prohibited employment discrimination on the basis of sexual orientation); Washington State Initiative 200, WASH. LEGISLATURE, https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/documents/voters%27pamphlets/1998%20wa%20st.pdf (last visited May 31, 2016) (a successful initiative prohibiting affirmative action by state and local government).

[5] Barbara Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 254 (1997).

[6] *See* THE FEDERALIST NO. 10 (James Madison).

[7] Paul Guppy, *A Citizen's Guide to Initiative 200: The Washington State Civil Rights Act*, WASH. POLICY CTR. (Sept. 1, 1998), http://www.washingtonpolicy.org/publications/brief/citizens-guide-initiative-200-washington-state-civil-rights-initiative.

practical effects. Because there was no specific mention of affirmative action in the language of the initiative, the American Civil Liberties Union (ACLU) filed a lawsuit arguing that the ballot title and summary should include language that makes it clear that I-200 would effectively end all state affirmative action programs.[8] The ACLU lost the case, but the battle over the language was just the beginning of the contentious I-200 campaign.

The man who initiated the process was a republican state legislator named Scott Smith who claimed that he was a victim of reverse discrimination when he applied for a job at the King County Sheriff's Office.[9] Smith's wife received an offer while he did not, despite his test score being hundreds of slots above hers; other police officers told him that gender must have been the difference.[10] That inspired Smith to try to pass a bill in the legislature paralleling Proposition 209, a successful 1996 initiative in California that banned affirmative action programs.[11] Smith tried multiple times, but the bill never got out of committee.[12] The Republican Party, who later endorsed I-200,[13] controlled the state legislature at the time, yet the bill was still unable to find any success.[14] Republicans in the legislature were caught between multiple factions within the party and decided their best bet was to simply avoid a vote.[15] Smith had no success in convincing his own party that the bill was necessary; a staffer

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[8] *Id*.
[9] DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 173 (1st ed. 2000).
[10] Marsha King, *State, Local Preferential-Treatment Programs Targeted—Initiative 200 Campaign Travels Far And Wide For Signatures, Cash,* SEATTLE TIMES (Aug. 4, 1997), http://community.seattletimes.nwsource.com/archive/?date=19970804&slug=2553005.
[11] Howard Mintz, *California Supreme Court Upholds Prop. 209 Affirmative Action Ban,* SAN JOSE MERCURY NEWS (Aug. 2, 2010), http://www.mercurynews.com/rss/ci_15659364?source=rss.
[12] BRODER, *supra* note 9, at 173.
[13] *Id,* at 175.
[14] *Id*. at 173.
[15] *Id*. at 175.

at the ACLU stated that Smith "is not in the mainstream of Washington Republicans" and that even within the party, only a small group would agree with him.[16] It is important to note that it was only after his failures in the legislature that Smith turned to the initiative process.

Opponents of I-200 crossed traditional party boundaries; it was an issue with significant bipartisan opposition.[17] The most popular politician in the state at the time, Democratic Governor Gary Locke, actively spoke out against I-200 and frequently told the story of how he, as a son of Chinese immigrants, would not be where he is today without affirmative action.[18] Not only were prominent democrats speaking out against I-200, but prominent state republicans like Secretary of State Ralph Munro and former governor and former Senator Dan Evans also spoke out against it.[19] Large Washington businesses like Microsoft, Boeing, Starbucks, Costco, and Weyerhauser all made contributions to the campaign against I-200.[20] Nearly all of the major newspapers in Washington State wrote editorials against I-200, and the religious community came out against I-200 as well.[21] The campaign against I-200 also had support from national figures like Vice President Al Gore and Reverend Jesse L. Jackson Jr., who visited the state to raise money in opposition of the measure.[22] But despite the widespread opposition from businesses, educational institutions, government leaders, and religious organizations, polls showed that the campaign against I-200 would have an uphill climb.[23]

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[16] King, *supra* note 10.
[17] BRODER, *supra* note 9, at 176.
[18] *Id*.
[19] *Id*.
[20] *Id*. at 177.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 179.

The battle over I-200 showed the difficulty in getting a state that is 81.8 percent white to vote no on an initiative they believed would give them a better shot at jobs, contracts, and university admission.[24] Ads created by I-200 proponents did not shy away from the racial divide. Their first ad featured a white woman who battled through a troubled upbringing to get a college degree and then was denied admission to the University of Washington School of Law.[25] The law school attributed the rejection due to her omission of important information about her background, but the ad ignored that and stated, "The UW law school rejected her. Why? She was white. 90 percent of the blacks who enrolled had lower qualifications."[26] With I-200 proponents using ads that catered directly to the interests of a majority-white population, the opposition decided that their best strategy was to do the same. Rather than start a debate about how affirmative action helps racial minorities, the opposition attempted to make I-200 an issue about gender. They made ads using people like the president of the state chapter of the League of Women Voters to argue that I-200 would hurt women and that those women would be significantly impacted in hiring and contracting.[27]

The new strategy and the rabid opposition were not enough, as I-200 prevailed easily by a 58 percent to 42 percent margin.[28] Despite massive opposition from the most prominent politicians and biggest businesses in the state, the people of Washington voted to ban affirmative action programs designed to help the progress of people that come from marginalized backgrounds. A fringe politician used the initiative process to

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[24] *Population of Washington: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUS VIEWER, http://censusviewer.com/state/WA (last visited Mar. 28, 2016).
[25] BRODER, *supra* note 9, at 180.
[26] *Id*.
[27] *Id*.
[28] *Id*.

do what he could not do in the legislative process. In the legislature, members not only look out for themselves but for many other interests, while in the initiative process any voter can go into a voting booth and vote for what is in his or her own best interest, without any regard to minority groups. The strategy of the opposition to focus on women, creating a gender issue, is an implicit admission that minority populations have no power in the initiative process. The only hope the opponents had for success was to find a way to frame it as a majoritarian issue and find a majority to mobilize.

I highlight I-200 because it is a perfect example of how the initiative process is a purely majoritarian process while the legislative process is not. The initiative process sidesteps a legislature whose job it is to represent a diverse community including minorities. In an initiative process, no safeguards exist to ensure minority groups have their voices heard. These safeguards exist in the legislative process. If we want to avoid the tyranny of the majority, the initiative process must become more deliberative and more legislative. We must institute a set of reforms that increase the involvement of the legislature in the initiative process and ensure a process where the potential effects of an initiative on minorities will be discussed through a process that reflects deliberation, caution, and respect for minority communities.

In Part II of this article, I will discuss the origin of the initiative process and historical environment through which the process first became law. In Part III, I will discuss how the initiative process negatively affects minority groups, giving examples of various initiatives voted into law that were prejudicial to minorities. In Part IV, I will argue that the legislative process is more inclusive than the initiative process. Finally, in Part V, I will outline the reforms that will make the initiative process more inclusive and less prejudicial.

II. WHERE THE INITIATIVE PROCESS COMES FROM

A. The Historical Background of Direct Legislation in the United States

Of the 27 states that have adopted a form of the ballot initiative process, 23 of those states did so between 1898 and 1918.[29] The Progressive Movement of the late nineteenth century formed the specific historical context of the movement to adopt the initiative and referendum processes, popularly known at the time as direct legislation.[30]

The movement for direct legislation did not come out of thin air. As early as 1788, the state of Massachusetts held a referendum on its new state constitution,[31] and by 1850 it was accepted practice for states newly entering the Union to have their state constitutions approved by the people.[32] Over the course of the nineteenth century, local governments in Switzerland were the first to adopt direct legislation, and in 1891, Switzerland allowed its national constitution to be amended by initiative.[33] Americans who visited Switzerland would come back and distribute pamphlets about the process.[34] But watching the success of the process in other countries was not alone in spurring the movement.

Post-Civil War United States saw big economic changes that dramatically changed the dynamics of the economic structure and helped create two

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[29] Initiative & Referendum Institute, State-by-State List of Initiative and Referendum Provisions, UNIV. OF S. CAL., http://www.iandrinstitute.org/states.cfm (last visited June 1, 2016).

[30] BRODER, *supra* note 9, at 26; The referendum is a form of direct legislation and direct democracy. The referendum process in Washington State is different from the initiative process in that voters are voting on a law already passed by the legislature. *See* WASH. CONST. art. II, § I(a).

[31] BRODER, *supra* note 9, at 23.

[32] *Id*. at 24.

[33] Dale Oesterle & Richard B. Collins, *Structuring the Ballot Initiative: Procedures That Do and Don't Work,* 66 U. COLO. L. REV. 47, 54 (1994)

[34] BRODER, *supra* note 9, at 26.

similar movements that started the direct legislation movement.[35] During the Industrial Revolution, Americans saw the rise of megacompanies that were much bigger than what anyone had previously seen.[36] The role of farmers declined, factories replaced farms, and big businesses absorbed small businesses.[37] These developments were great for businessmen and bankers like Andrew Carnegie, J.P. Morgan, and John Rockefeller, but not so much for the working class.[38] As labor reformer and activist Anna Rochester wrote, "The flaunting extravagance of the new industrial rules and their Wall Street brothers covered depths of mass poverty and suffering. Both the crowded tenements and the scattered farms were cruelly exploited in this onward march of American capitalism."[39] It was in this environment the populist movement was born – a farm-worker movement challenging corporate power.[40] As American businesses grew, they also gained a foothold in the political world. Their growth demanded political influence and power, and many "capitalistic abuses" occurred.[41] The competition induced bribery, collusion, and corruption of politicians.[42]

The economic changes and the apparent political corruption gave rise to both the populist movement and the progressive movement. The populist movement was largely made up of members of the working class who challenged corporate power and corporate influence in politics, while the movement was a middle-class and intellectual movement that aimed to

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[35] *Id*. at 24.
[36] *Id*.
[37] Daniel M. Warner, *Direct Democracy: The Right of People to Make a Fool of Themselves; The Use and Abuse of Initiative and Referendum: A Local Government Perspective,* 19 SEATTLE U. L. REV. 47, 52 (1995).
[38] BRODER, *supra* note 9, at 25.
[39] *Id*.
[40] *Id*. at 26.
[41] Warner, *supra* note 37, at 52.
[42] *Id*.

clean up government corruption.[43] Populists believed the people had lost power and that the government had turned into a system where corporations had lawmakers performing at their will through bribes.[44] Progressives were offended by government corruption, even if they were not suffering from the corruption personally.[45] The progressive movement enlisted intellectuals and eventually gained a foothold in the politics of the day. In his manifesto, Woodrow Wilson wrote,

> We will no longer permit any system to go uncorrected which is based upon private understandings and expert testimony; we will not allow the few to continue to determine what the policy of the country is to be . . . it is our part to clear the air, to bring about common counsel, to set up a parliament of the people.[46]

The populist and progressive movements were movements promoting a government that better represented public opinion, and so direct legislation quickly emerged as a favored solution.[47] In 1900, Eltweed Pomeroy, the head of the Direct Legislation League, published a pamphlet advocating for the initiative and referendum process.[48] In the pamphlet titled "For the People," Pomeroy argues that, in the early days of the United States, representative government was effective because representatives were elected from a generally homogenous population and the problems the representatives had to deal with were much simpler.[49] But as the functions of representatives became more varied and wealth less concentrated, Pomeroy states, "The interests of the rulers after the election did not coincide with justice to all people."[50] He continues,

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[43] BRODER, *supra* note 9, at 26.
[44] *Id*. at 26–7.
[45] *Id*. at 27.
[46] *Id*. at 30.
[47] Warner, *supra* note 37, at 53.
[48] BRODER, *supra* note 9, at 31
[49] *Id*.
[50] *Id.*

> Representative government has been tested on these shores for over a century. In many cases it is better than the older forms. It has been acclaimed a finality. But it has borne its legitimate fruits, and they are the dead sea apples of corruption and insidious injustice. Representative government is a failure.[51]

Having made his argument for the pervasiveness of corruption in representative government, Pomeroy goes on to make his case for direct legislation, stating,

> Interest coincides with justice, not in government, but in self-government; not in any form of rule by others, but in pure democracy, where the people rule themselves. Where the people vote or are able to vote on every law by which they are to be governed, then interest coincides with justice… This can be attained through Direct Legislation, the initiative and referendum.[52]

All sorts of intellectuals, reformers, and populist politicians expressed their support for direct legislation, which led to the very speedy adoption of direct legislation in the early twentieth century.[53] Between 1898 and 1918, beginning with South Dakota, 23 states adopted some form of direct legislation.[54]

B. The Initiative Process in Washington State

In Washington State, the push for direct legislation came from a mix of farmers, trade unionists, and urban progressives.[55] The Washington State Grange fought vigorously for years to build support within the state

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[51] *Id*. at 32.
[52] *Id*.
[53] *See id*. at 33–34.
[54] *Id*. at 34.
[55] Warner, *supra* note 37, at 54.

legislature for an initiative and referendum process.[56] The state master of the grange displayed the importance of the matter when he declared, "I consider at the present time that the amending of our state constitution providing for the initiative and referendum is the most important matter that we have to consider in matter of legislation."[57] The Direct Legislation League of Washington came into existence around the same time in 1907.[58] In 1911, proponents were finally successful in convincing the legislature to pass a constitutional amendment putting the initiative, referendum, and recall process into the Washington State Constitution.[59] Voters ratified the amendment by a two-to-one margin a year later.[60]

Both the initiative and referendum process are a part of the state constitution.[61] The initiative allows voters to petition to get an issue on the ballot for the people to vote on directly.[62] The referendum is a process where the legislature passes a bill on its own through the normal legislative process, but, if petitioners gain enough signatures, the voters can put the law on the ballot for voter approval or rejection.[63] The referendum came from the same historical context as the initiative process, but its dynamics are quite different for the purposes of this article, which is why this article will only apply to the initiative process.[64]

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[56] Claudius O. Johnson, *The Adoption of the Initiative and Referendum Process in Washington*, PAC. NW. QUARTERLY (Oct. 1944), http://lib.law.washington.edu/waconst/Sources/Johnson.pdf.
[57] *Id*. at 296.
[58] Warner, *supra* note 37, at 54.
[59] *Id*.
[60] *Id*.
[61] WASH. CONST. art. II.
[62] WASH. CONST. art. II, § I.
[63] *Id*.
[64] The biggest difference, for purposes of this article, is that in a ballot initiative it is the people who bring forth the issue at hand. In a referendum, the legislature brings forth the issue and then the people vote on it. WASH. CONST. art. II, §I(a).

There are two types of initiatives: the direct initiative and the indirect initiative. To get either type of initiative on the ballot, the Washington State Constitution requires proponents to draft the proposed law, file it with the secretary of state, and then obtain a petition with valid signatures of legal voters equaling eight percent of the voter turnout in the last gubernatorial election.[65] This is where the process differs for the direct initiative and the indirect initiative. For a direct initiative, also known as an "initiative to the people," once the secretary of state approves the signatures on the petition, it is placed on the ballot and the measure is enacted if approved by a majority of voters.[66] For an indirect initiative, also known as an "initiative to the legislature," once the secretary of state approves the petition, the initiative goes to the legislature who have the choice to enact the measure as it is, reject or refuse to act on it, or approve an alternative.[67] If the legislature proposes an alternative, both the original measure and the legislature's alternative are placed on the ballot.[68] If the legislature fails to enact the law, the initiative goes onto the ballot where voters can approve or reject it.[69] State courts have placed a couple limitations on both types of initiatives, holding that initiatives cannot amend the state constitution and that the subject matter is limited in scope to that which is "legislative in nature."[70]

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[65] WASH. CONST. art. II, § I(a).
[66] *Id*.
[67] *General Information*, WASH. SEC'Y OF STATE. http://www.sos.wa.gov/elections/initiatives/statistics.aspx (last visited Apr. 19, 2015).
[68] WASH. CONST. art. II, § I(a).
[69] *Id.*
[70] Ford v. Logan, 483 P.2d 1247, 1251 (Wash. 1971).

III. HOW THE INITIATIVE PROCESS DISADVANTAGES MINORITY POPULATIONS

Many would likely agree that the initiative process came about for the right reasons. In a democracy, those governed have the right to demand more from their government. But as this section demonstrates, while the initiative process has, in many cases, been successful in appropriating power back to the people, there have also been an alarming number of cases where the majority population has abused the "majority wins" idea to the detriment of minorities. A study by Barbara S. Gamble in the American Journal of Political Science looked at 74 different civil rights initiatives on state and local levels between 1959 and 1993 and found that 68 of the initiatives attempted to restrict civil rights.[71] The study found that 78 percent of the restrictive measures passed, compared to the normal 33 percent passage rate of initiatives.[72] During this period, six initiatives that would have benefitted minorities reached the ballot, but only one of them passed.[73]

That particular study started around the Civil Rights Movement, but the abuse of the initiative process is a phenomenon that has roots as far back as the late nineteenth century, even before initiatives and referendums were commonplace. As mentioned earlier, the earliest form of direct democracy in the United States was voter-approved state constitutions, and in many states and territories, voters approved constitutions that included provisions that excluded blacks from the territory.[74] In 1857, for example, Oregon approved a provision in their constitution that excluded any free blacks from the Oregon territory, reflecting a belief that blacks would bring crime

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[71] Gamble, *supra* note 5, at 254.
[72] *Id*.
[73] *Id*.
[74] Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54. WASH. L. REV. 1, 16–17 (1978).

and would take away jobs from whites.[75] While not enforced often, voters approved similar anti-black constitutional provisions in Kansas, Indiana, and Illinois, reflecting the power of direct democracy when a minority is powerless.[76] In the early twentieth century, around the time the initiative process was gaining in popularity, many women attempted to gain the right to vote using the initiative process.[77] While women did gain the right to vote by initiative in Oregon and Arizona, many attempts failed because liquor and saloon interests feared women favored prohibition.[78] Abusing the initiative process is not a new phenomenon, but as the minority population increased, majority groups used more and more initiatives to the detriment of minorities.

A. Denying Fair Employment in the Pre-Civil Rights Era

In the pre-Civil Rights Movement era various opportunities existed for white majority voters to either approve initiatives that would help the black community or reject initiatives that would hurt the black community, but these did not come to pass. In 1946, a California ballot initiative known as Proposition 11 would have created a Fair Employment Practices Commission (FEPC) and formally ban discrimination by race, religion, color, or national origin by unions and employers.[79] A study at the time

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[75] *Id*.
[76] *Id*. at 17.
[77] DIRECT DEMOCRACY: THE INITIATIVE AND REFERENDUM PROCESS IN WASHINGTON STATE, LEAGUE OF WOMEN VOTERS 3 (2002), http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/WA%20LOWV%20-%202002%20I&R%20Report%20IRI.pdf.
[78] *Id*. While women are not technically a minority, they were a politically disenfranchised group at the time. *See generally The Women's Rights Movement, 1848–1920*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/No-Lady/Womens-Rights/ (last visited Mar. 28, 2015).
[79] DANIEL MARTINEZ HOSANG, RACIAL PROPOSITIONS: BALLOT INITIATIVES AND THE MAKING OF POSTWAR CALIFORNIA 24 (2010).

found that 95 percent of job openings advertised in the State Employment Service were subject to particular qualifications of race, creed, gender or national origin.[80] Proposition 11 was intended to promote fair employment and would have benefited minorities.[81] At the time, California was a fairly liberal state, evidenced by the number of registered democrats in the state increasing by more than 500 percent in only a decade, while registered republicans stayed at about the same number.[82] But despite California's liberal bent, the proposition lost by a wide margin, receiving less than 30 percent of the vote.[83] California eventually adopted the FEPC, but did so through the state legislature.[84]

Even in 1946, there was debate as to whether the ballot initiative was the proper method for a disenfranchised racial minority to obtain unavailable rights. C.L. Dellums was a labor official who supported the ideas in Proposition 11, however, he was opposed to the idea of placing such a question on the ballot, stating,

> The rights I have been fighting for all my life, they are now called civil rights, I call human rights, God-given rights. White people have been using their majority and their control of the law enforcing agencies and firearms to prevent us from exercising our God-given rights.[85]

Dellums seems to say that by putting a question about civil rights on the ballot, black people are essentially asking a white majority to give them their natural rights. The quotation by Dellums displays recognition of the fact that a majority population can use its power to prevent minorities from having full and complete equal rights.

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[80] *Id*. at 35.
[81] *Id*. at 37.
[82] *Id*. at 28.
[83] *Id*. at 45.
[84] *Id*. at 50.
[85] *Id*. at 39.

B. Initiative Process Was Used with Success to Deny Minorities from Residing in White Neighborhoods

One of the most common ways in the twentieth century for a white majority to discriminate against a black minority was to deny them fair housing.[86] Harvard Law School Professor Derrick Bell notes that direct democracy, especially in the form of referendums, has been a strong tool in barring minorities from suburban, residential communities.[87] Municipalities would often enact fair housing laws restricting housing discrimination, which the voters would strike down.[88] Between 1959 and 1968, 11 initiatives occurred around the nation dealing with fair housing—10 of them sought to restrict access to housing and were in response to local legislative bodies passing or considering fair housing legislation.[89]

A prominent example of voters using the initiative process in response to a legislative body was when the California legislature passed the Rumford Act in 1963, a law prohibiting racial discrimination by realtors and owners of apartment buildings built with public assistance.[90] Much of the real estate industry, especially the California Real Estate Association (CREA), who was a leader in sustaining racial segregation in California, fought against the Rumford Act.[91] CREA and other real estate groups helped place Proposition 14, which would repeal the Rumford Act, on the ballot.[92] Proposition 14 would not only repeal the Rumford Act but also work to prevent any entity within California from adopting fair housing

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[86] Gamble, *supra* note 5, at 255.
[87] Bell, *supra* note 74, at 7.
[88] *Id*.
[89] The one initiative that sought to expand housing was in Berkeley, California, and it failed, though the NAACP opposed it due to poor crafting of the language. Gamble, *supra* note 5, at 255.
[90] Raymond E. Wolfinger & Fred I. Greenstein, *Repeal of Fair Housing in California*, 62 AM. POL. SCI. REV. 753, 753 (1968).
[91] HOSANG, *supra* note 79, at 643.
[92] *Id*. at 64.

legislation.[93] Until 1951, CREA had a code of ethics for their realtors that included the rule that a "realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in the neighborhood."[94] CREA's proposition would have effectively codified a "right to discriminate" for housing sales and rentals, protecting segregated neighborhoods.

The same day the American people elected the pro-civil rights Lyndon B. Johnson President by a wide margin, California voters approved Proposition 14 by a two-to-one margin.[95] Although the United States Supreme Court eventually ruled that Proposition 14 violated the Fourteenth Amendment, the measure had a significant impact. As Professor Barbara S. Gamble points out, "the very act of putting civil rights to a popular vote increases the divisions that separate us as a people."[96] Many scholars called Proposition 14 a reaction, or even a "white backlash," against the ongoing Civil Rights Movement, but this "white backlash" was not in some southern conservative state, it was in liberal California.[97] While the segregation in California was not as severe as in states in the South or on the East Coast, the measure still passed by a wide margin, showing that prejudicial and racist ballot initiatives are not just limited to those states we usually identify with racial animus.[98] The fact that Proposition 14 passed in a liberal state highlights the importance of taking this issue seriously in Washington State, another state associated with left-leaning liberal politics. This example puts to rest the concept that minority groups in Washington are "safer" than those in states with a history of racism.

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[93] Wolfinger & Greenstein, *supra* note 90.
[94] HOSANG, *supra* note 79, at 55–56.
[95] *Id*. at 53.
[96] Gamble, *supra* note 5, at 262.
[97] HOSANG, *supra* note 79, at 54.
[98] *Id*. at 55.

C. Even Largely Symbolic Initiatives Like English-Only Laws Are Detrimental to Minorities

Until now, I have discussed ballot measures that mostly disadvantaged African Americans, but other minorities have also found themselves disadvantaged, particularly through "English-only" initiatives. These efforts attempt to "consider English [the] official language and to restrict the use of other languages . . . in government business."[99] These laws were especially common in the 1980s.[100] During this time, California, Colorado, Arizona, and Florida had statewide English-only initiatives, and many others existed on the local level.[101]

Again, California provides the best examples, as California passed two statewide English-only measures.[102] The first was Proposition 38 in 1984, which required the governor to write a letter to the president and Congress requesting "federal law be amended so that ballots, voters' pamphlets, and all other official voting material shall be printed in English only."[103] Two years later, voters approved California Proposition 63, which made English the official language of California.[104]

Both of these measures were largely symbolic, but, as noted earlier, the act of voting on an initiative can create divisions. One proponent of the California English-only initiatives said the initiatives were a platform to bring attention to the immigration issue and "to make immigration a subject

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[99] Gamble, *supra* note 5, at 260.
[100] *Id*.
[101] *Id*.
[102] *See California Proposition 38, Voting Materials in English Only (1984),* BALLOTPEDIA, https://ballotpedia.org/California_Proposition_38,_Voting_Materials_in_English_Only_(1984) (last visited Feb. 23, 2016); *California Proposition 63, English is the Official Language Amendment (1986)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_63,_English_is_the_Official_Language_Amendment_(1986) (last visited Feb. 23, 2016).
[103] HOSANG, *supra* note 79, at 131.
[104] *Id*.

of conversation among thinking people."[105] In the conversation surrounding these two measures, University of Oregon Professor Daniel HoSang points out that immigrants were characterized as a threat to the integrity of the democratic system because they engage in bloc voting and potentially engage in voter fraud.[106]

Prominent labor leaders and civil rights activists spoke out against the English-only ballot measures, arguing that proponents were attempting to infringe on the voting rights of farmworkers, so that their power to take action on the issues like racism and police treatment of minorities would be limited.[107] As the immigrant population in California and across the United States increased, anti-immigration policies found broader support, and the initiative process provided a relatively easy way for a white majority to make sure newcomers to America knew who was in charge. This episode highlights the evolution of the concept of the "other" by white America, and that even when the Civil Rights Movement faded, prejudicial initiative campaigns targeted other minority groups.

D. More Recent Examples of Ballot Initiatives Detrimental to Minorities

In addition to employment, housing, and English-only initiatives, we have seen various other prejudicial initiatives approved in recent years as well. Many of the past initiatives that have been highlighted took place in what might seem like a different era, an era where de facto and de jure discrimination against minorities, especially blacks, was seen as commonplace. It is true that society has changed for the better in many respects, but we only recognize that today with the benefit of hindsight. It is more difficult for a majority to recognize their own transgressions as they are committing them.

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[105] *Id*.
[106] *Id*. at 141–42.
[107] *Id*. at 143.

In 1994, California again approved a particularly anti-immigrant initiative by passing Proposition 187.[108] Unlike the English-only measures, Proposition 187 was unlikely to have a merely symbolic impact. Proposition 187 required the government to establish a system to track individuals' immigration status to prevent illegal immigrants from getting public benefits such as public education or health care.[109] Proposition 187 won by an 18-point landslide on election day, though ultimately, a federal court declared the measure unconstitutional and said it was preempted by federal immigration law.[110] Additionally, in recent years, anti-affirmative action initiatives have been popular. As mentioned earlier, there was an anti-affirmative action initiative in Washington State in 1998, but the early 2000s also saw anti-affirmative action initiatives in Nebraska, California, Michigan, and Colorado, with Colorado being the lone state where voters narrowly rejected the measure.[111]

In the last two decades, the initiative process has also been used as a weapon against LGBT groups. In the aforementioned study by Barbara S. Gamble, she found that 88 percent of the 43 LGBT related initiatives sought to restrict LGBT rights, and 79 percent of those restrictive initiatives passed.[112] In 1989, Tacoma City Council passed a LGBT rights law that

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[108] Am. Civil Liberties Union, *Ca's Anti-Immigration Proposition 187 Is Voided, Ending State's Five-Year Battle With ACLU*, ACLU (July 29, 1999), https://www.aclu.org/news/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-rights-groups?redirect=immigrants-rights/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-righ.

[109] *Id*.

[110] *California's Proposition 187: A Brief Overview,* CONGRESSIONALRESEARCH.COM, http://congressionalresearch.com/97-543/document.php?study=CALIFORNIA%26%23146%3BS+PROPOSITION+187+A+BRIEF+OVERVIEW (last visited Mar. 28, 2016).

[111] *Affirmative Action: State Action*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 2014), http://www.ncsl.org/research/education/affirmative-action-state-action.aspx. Additionally, Oklahoma and Arizona voters approved affirmative action bans; however, state legislators put the referendum on the ballot—not the state's citizens. *Id*.

[112] Gamble, *supra* note 5, at 258.

voters then subsequently repealed, and the next year when pro-gay rights advocates attempted to use the initiative process to get the law back on the books, they were defeated.[113] LGBT advocates also lost in Washington when the state failed to pass Initiative 677 (I-677) in 1997.[114] Although I-677 would have prohibited employers from discriminating based on sexual orientation, it lost by the large margin of 19 points.[115] Once again, it was the legislature that eventually prohibited employment discrimination based on sexual orientation.[116] Before the US Supreme Court declared it unconstitutional, banning same-sex marriage was common across the country.[117] Between 1998 and 2012, voters in 30 states approved amendments to their state constitutions prohibiting same-sex marriage.[118] Before the Court's ruling, some of the bans at issue were in place for many years, which once again shows how impactful prejudicial ballot initiatives have been on minority groups.

The initiatives mentioned thus far are the most blatantly prejudicial and discriminatory measures, but in many ballot measures, the effect on minorities still exists but in a less pronounced manner. One such example is the "three strikes law" that voters first passed by initiative in Washington with Initiative 593 (I-593) in 1993.[119] I-593 required criminals to be

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[113] *Id*. at 259.
[114] *Election Search Results November 1997 General*, WASH. SEC'Y OF STATE, http://www.sos.wa.gov/elections/results_report.aspx?e=6&c=&c2=&t=&t2=&p=&p2=&y= (last visited Feb. 23, 2016).
[115] *Id*.
[116] *2006 House Bill 2661: Discrimination Based on Sexual Orientation,* WASH. VOTES, http://www.washingtonvotes.org/2006-HB-2661 (last visited Feb. 23, 2016).
[117] Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015).
[118] Peter Sprigg, *How Many States have Banned Gay 'Marriage'?,* LIFESITE (May 24, 2012, 12:35 PM), https://www.lifesitenews.com/opinion/how-many-states-have-banned-gay-marriage.
[119] *Election Search Results November 1993 General*, WASH. SEC'Y OF STATE, http://www.sos.wa.gov/elections/results_report.aspx?e=22&c=&c2=&t=&t2=&p=&p2=&y= (last visited Feb. 23, 2016) [hereinafter *Election Results 1993*].

sentenced to life in prison without parole on the third time they are convicted of a "most serious offense."[120] The measure does not facially discriminate against minorities, but because the rate of incarceration for African Americans is nearly six times the rate of whites,[121] the law will affect African Americans at a much higher rate than whites. I-593 easily passed with more than 75 percent of the vote.[122] It was clear that the idea was immensely popular among voters, and it quickly spread to many other states, most notably California, which passed its own "three strikes law" in 1994.[123] A study found that two years after California implemented the law, African Americans made up 43 percent of the "third strike" defendants,[124] while African Americans made up only seven percent of the overall population.[125]

A more recent example is the increasing popularity of "banning" Islamic law, also known as sharia law. In 2010, Oklahoma voters overwhelmingly approved a ballot measure forbidding state courts from considering Islamic law in their rulings.[126] A federal court ruled the measure was unconstitutional because the state discriminated among religions, and the state failed to show a compelling interest.[127] In November 2014, 72 percent

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[120] *Id*.
[121] *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/pages/criminal-justice-fact-sheet (last visited Apr. 19, 2015).
[122] *Election Results 1993, supra* note 119.
[123] Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, ROLLING STONE (Mar. 27, 2013), http://www.rollingstone.com/politics/news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-20130327?page=2.
[124] Greg Krikorian, *More Blacks Imprisoned Under '3 Strikes,' Study Says*, L.A. TIMES (Mar. 5, 1996), http://articles.latimes.com/1996-03-05/news/mn-43270_1_african-american-men.
[125] JENNIFER CHENG ET AL., A PORTRAIT OF RACE AND ETHNICITY IN CALIFORNIA vii (Belinda I. Reyes ed., 2001), http://www.ppic.org/content/pubs/report/R_201BRR.pdf.
[126] Jacob Gershman, *Oklahoma Ban on Sharia Law Unconstitutional, US Judge Rules,* WALL ST. J. (Aug. 16, 2013, 6:17 PM), http://blogs.wsj.com/law/2013/08/16/oklahoma-ban-on-sharia-law-unconstitutional-us-judge-rules/.
[127] *Id*.

of Alabama voters amended their state constitution to ban "foreign law," which was a way of banning Islamic law without discriminating among religions.[128] Supporters of these measures concede that there is no epidemic of courts applying Islamic law in the United States;[129] instead, these bills can be seen as a way to instill fear and xenophobia among the public. One of the leading proponents of these laws, David Yerushalmi, seemingly admitted this when he said, "if this thing passed in every state without any friction, it would not have served its purpose."[130] In addition to creating unfounded anti-Muslim hysteria, bans on Islamic law can have a significant detrimental impact on Muslim Americans in matters of family law. Traditionally, Islamic law or any foreign law is usable as extrinsic evidence to add cultural context as long as there is no violation of the US Constitution.[131] One Kansas woman had an agreement with her husband that she would get $677,000 in the event of a death or a divorce, but despite the fact that similar premarital agreements are usually enforced, the jury refused to consider the contract because it was an Islamic marriage contract and Kansas had banned "foreign" law.[132]

It has been just over a year since voters approved the Alabama Islamic law ban. This is not an issue of the past. We have seen that from the 1800s to just last year, initiatives have been used against minorities. The victims

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[128] Jack Jenkins, *Fearing Shariah, Alabama Votes To Ban 'Foreign Laws'*, THINKPROGRESS (Nov. 5, 2014, 10:10 AM), http://thinkprogress.org/election/2014/11/05/3589225/alabama-votes-to-ban-foreign-laws/.
[129] Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&_r=0.
[130] *Id.*
[131] Rehel Gebreyes, *The Unfortunate Consequence of Banning Sharia Law*, HUFFINGTON POST (Mar. 3, 2015, 10:49 AM), http://www.huffingtonpost.com/2015/03/03/consequences-of-banning-sharia-law_n_6790436.html.
[132] *Id*.

have changed, but the tool has not. What has been consistent throughout the years is that a majority has abused the initiative process to harm minorities.

E. What Are the Reasons the Initiative Process Is So Often Used Against Minorities?

Many possible reasons exist as to why minorities are so often on the losing side when it comes to ballot measures dealing with civil rights or minority issues. Beyond the simple and obvious fact that the majority outnumbers the minority, demographic disparity is very skewed when it comes to the electorate.[133] Minorities are much less likely to turn out to vote than the white majority.[134] Even in 2000, when California became the first state where minorities collectively represented the majority of the population, the electorate was still 72 percent white.[135] As more states continue to become "majority-minority" states, it is clear that the electorate, those who actually vote, will not be representative of the broader community. In the face of a solidified white majority in the electorate, minority communities are still small and fragmented, and thus largely powerless at the voting booth when it comes to ballot initiatives.

As displayed in the anti-affirmative action I-200 campaign in Washington State, the campaigns themselves can also be emotionally charged. As Derrick Bell says, "Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns."[136] This means that voters are less likely to think about how their vote on a measure may affect society at large and are more likely to think about themselves. Bell states it best when he says that direct

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[133] Julian N. Eule, *Judical Review of Direct Democracy*, 99 YALE L.J. 1503, 1515 (1990).
[134] *Id*.
[135] HOSANG, *supra* note 79, at 10.
[136] Bell, *supra* note 74, at 19.

democracy "enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day."[137] For years, the initiative process has severely diminished the ability of minorities to fully participate and have their voice heard in an American democratic process that is supposed to value minority voices. The process needs reform. Throughout the study of these measures, it has been evident that the legislative process has been the arena in which minorities have been able to further their interests, and this gives us some hints as to what reform may look like.

IV. WHY THE LEGISLATIVE PROCESS IS BETTER FOR MINORITIES THAN THE INITIATIVE PROCESS

The initiative process essentially takes the power that the government delegated to the legislature and gives some of that power back to the people. As explained in Part II, the decision to take power from politicians and give it to the people was a conscious one. But as explained in Part III, that decision had some negative consequences in the form of a majority imposing its will on minorities. The other method we have for making laws is the legislative process. That process has some inherent characteristics that makes it less likely to be used against minorities and provides a lesson for why we must look towards the legislative process in reforming the initiative process.

A. An Analysis of Existing Studies on Whether Direct Democracy or Representative Democracy Is Better For Minorities

Definitive studies on whether the legislative process or initiative process is better for minorities would make this discussion much simpler, but the studies done on it have only proven that it is a difficult subject to study.

[137] *Id*. at 14–15.

Opponents of the argument that the legislative process is better for minorities than the initiative process will likely argue that the legislative process is no different and has enacted laws detrimental to minorities as well. The claim that legislatures are just as bad for minorities as direct democracy is a difficult one to evaluate because no reliable empirical studies exist.[138] Direct democracy experts Thomas Cronin and David Magleby have conducted extensive studies on the subject that provide contrasting views. Cronin found that voters are just as likely as legislatures to pass prejudicial laws, while Magleby found that legislatures are more sensitive to minority interests than voters.[139] Law professor Julian Eule points out that these two studies rely more on general observations and less on empirical data, which only lends credence to the studies that direct democracy's and representative democracy's effect on minorities cannot be precisely understood with studies.[140] Eule also points out that many of these studies fail to distinguish between initiatives and referendums, an important distinction because people only have the opportunity to vote on referendums after the legislature has passed it, so it is a less pure form of direct democracy.[141] Because of the uncertainty in the empirical studies on the subject, this article will rely on other arguments related to the differences between the initiative process and legislative process.

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[138] *See* Eule, *supra* note 133, at 1551–52.
[139] Eule, *supra* note 133, at 1552 n. 215 (citing THOMAS CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 92, 98 (1999); DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 184–85 (2001)).
[140] *Id*.
[141] *Id* at 1552; WASH. CONST. art. II, §1(a).

B. The American Legislative Process Was Created on the Principle of Fairness to Minorities.

Protecting minorities is an integral objective of the American political process created by the US Constitution. The Constitution created a republic—a government where the people elect representatives to represent them in legislative bodies.[142] This system acts as one of the many checks and balances that exist to ensure a majority does not impose their will upon an unwilling minority. Distinguished constitutional scholar and law school Dean Erwin Chemerinsky recently stated that protecting minorities is one of the main reasons we have a Constitution.[143] He states,

> Why have a Constitution? Why should a democracy be governed by a document that is difficult to change? It is not to protect the majority; they generally can protect themselves through the democratic process. It is minorities who cannot protect themselves through majoritarian democracy. I believe that the Constitution exists especially (though not exclusively) to protect the rights of minorities of all types.[144]

In analyzing the Constitution's view on direct democracy and protecting minorities, it can be helpful to go back to the words of the Founding Fathers. James Madison wrote about "pure democracy" as a concept that would not work to reign in the divisions in a society, which he referred to as "factions."[145] Madison says of "pure democracy" that "it is that such democracies have ever been found to be spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they

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[142] US CONST. art IV. § 4

[140] Dahlia Lithwick, *This Court Erred*, SLATE (Sept. 30, 2014, 2:36 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/the_case_against_the_supreme_court_erwin_chemerinsky_says_justices_side.html.

[144] *Id.*

[145] *See* THE FEDERALIST NO. 10, *supra* note 6.

have been violent in their deaths."[146] He then goes on to say, "A republic, by which I mean a government in which a scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking."[147] Madison believed that representative democracy was the answer to the problems of pure democracy. Madison and his fellow Founding Fathers, like Thomas Jefferson, were heavily influenced by the Greek philosopher Aristotle, who said that the greatest task for a republic is "the education of the citizens in the spirit of the polity," and "there are no more momentous duties than those of electing officers of State and holding them responsible."[148] The meaning of representative democracy is that representatives selected by the people do the lawmaking. As evidenced by the writings quoted above, Founding Fathers like James Madison were committed to this idea because it was another way to diminish the power of the majority. The initiative process undeniably impairs the lawmaking process they envisioned and is an example of "pure democracy" in action. As we have seen, many of the initiatives that have been detrimental to minorities have in fact resulted in the "turbulence and contention" that Madison described.

C. Compromise and Competing Interests

The legislative process is one where multiple representatives with a multitude of interests have to figure out how to achieve a goal. The deliberation involves negotiation, compromise, and consideration of multiple political perspectives.[149] In the initiative process, voters vote privately, and they may not necessarily have any interaction with those

[146] *Id*.
[147] *Id*.
[148] Brewster C. Denny, *Initiatives—Enemy of the Republic*, 24 SEATTLE U. L. REV. 1025, 1030 (2001) (quoting ARISTOTLE, THE POLITICS OF ARISTOTLE 132, 379 (J.E.C. Welldon, D.D., trans., 1905)).
[149] HOSANG, *supra* note 79, at 11.

individuals who are against it. In the legislative process, lawmakers who vote for a bill will have to interact and work with those who vote against that bill.[150] The next day, they may very well be on the same side on a different issue because every lawmaker has to vote on different issues and that can bring shifting alliances, therefore "[n]o one is always in the majority."[151] As Yale Law Professor Akhil Amar stated, "Perhaps we cannot force white voters to listen to blacks in their neighborhoods, but black legislators can interact with and influence their white colleagues."[152] Legislators do not vote their conscience and move on; the process is one of compromise, vote trading, and tactics.[153] Legislative reciprocity, which is the process of exchanging votes, is an essential part of the process. The process of reciprocal voting, also known as logrolling, provides a benefit to minorities. As Eule says, "Legislative logrolling over a broad agenda brings minorities into the process and allows resulting compromises to accommodate their interests."[154]

Eule highlights three particular facets of the legislative process that do not exist in the initiative process that make the former more likely to protect minority interests: (1) the committee system; (2) incorporation of political parties; and (3) the veto power.[155] He first addresses the committee system, which creates the legislative agenda; the complete legislative body may not vote upon a bill until it is passed out of a specialized committee comprised of a small amount of legislators.[156] Getting bills out of committee and onto the floor for a vote naturally takes negotiation and gives much more power

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[150] Eule, *supra* note 133, at 1527.
[151] *Id*.
[152] Akhil Reed Amar, *Choosing Representatives by Lottery Voting,* 93 YALE L.J. 1283, 1304 (1984).
[153] *See* Eule, *supra* note 133, at 1556.
[154] *Id*.
[155] *Id*. at 1557.
[156] *See Overview of the Legislative Process*, WASH. ST. LEGISLATURE, http://leg.wa.gov/legislature/Pages/Overview.aspx (last visited Feb. 23, 2016).

to minorities because, instead of needing a majority of the whole legislative body to block legislation, in the committee system you only need a majority of that particular committee to block legislation.[157]

Second, Eule notes that the legislative process also incorporates political parties, while political parties play a very small role in the initiative process.[158] Political parties do not always take a strong stand on ballot measures, but in the legislative process the parties are able to "enabl[e] the individually powerless to aggregate their voting power."[159]

Lastly, Eule talks about bicameralism and executive veto.[160] To become a law, a bill must pass both chambers of the legislature and then must be signed by the executive.[161] This multi-step process necessitates broad coalitions, sometimes across traditional political lines.[162] When it comes to the executive veto, if the governor refuses to sign a bill, a legislative override requires a two-thirds majority.[163] Bicameralism and the executive veto create a process that is far from a pure democracy. These mandated pinch points create an almost counter-majoritarian process that effectively requires a supermajority to pass a law, which greatly enhances the power of the minority vote. Those legislators representing minority interests cannot be ignored because, in many cases, their votes will be needed to pass legislation. The legislative process forces compromise amongst lawmakers with competing interests, and this type of compromise and deliberation is nonexistent in the initiative process.

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[157] *See id*.
[158] *Id*.
[159] *Id*.
[160] Eule, *supra* note 133, at 1557.
[161] *See Overview of the Legislative Process*, *supra* note 156.
[162] Eule, *supra* note 133, at 1557.
[163] WASH. CONST. art. III §12.

D. Accountability

At the end of Part III, I mentioned Derrick Bell's notion that direct democracy enables a voter's racial bias to be "recorded and tabulated" in its pure form.[164] When it comes to the legislature, votes are public and the lawmakers themselves are public figures.[165] Because public officials are in the public spotlight, they cannot justify their votes with prejudicial or bigoted beliefs, as opposed to a ballot measure where motivations for a vote do not have to be justified in public. Those lawmakers elected by constituents who would otherwise be in favor of prejudicial and racist legislation will not be able to vote against legislation because of the racist beliefs of their constituents.[166] Even if racist constituents elected a legislator because they believed the legislator's view aligned with their own, it is not so simple for that legislator to vote in favor of legislation that is harmful to minorities. If a legislator were to vote for legislation that had a negative impact on minorities due to his or her constituents, it is likely that in the next election cycle that legislator's opponent would get support, especially financial, from groups and individuals outside the district who do not agree with prejudicial or racist policies. Legislators may represent specific districts, but those districts do not exist in a bubble. Society has reached a point where it will not tolerate racist attitudes in the public sphere, and public condemnation can serve as a disincentive to spew racist and bigoted views in the public arena.[167] But these disincentives do not exist in the initiative process. An individual voter's prejudice will never receive public attention, instead, when the final results of the measure are revealed, voters

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[164] Bell, *supra* note 74, at 14–15.
[165] *See* WASH. CONST. art. II §§21–22.
[166] Bell, *supra* note 74, at 13–14.
[167] *See, e.g.*, *Mayor Who Made Racist Comments About Obamas Resigns*, KGW.COM (Aug. 18, 2015, 9:39 AM), http://legacy.kgw.com/story/news/politics/2015/08/18/mayor-who-made-racist-comments-obamas-resigns/31912741/.

may see that they are not the only one with these specific views, so instead of feeling ostracized for these views, they may actually feel validated.

E. Measuring Intensity

One of the fundamental aspects of the legislative process that makes it more amenable to minorities is the fact that legislators can measure intensity of support.[168] When considering how to vote on a bill, a legislator will not only consider how many in his constituency support the bill and how many oppose, he or she will also consider the intensity of those for and of those against.[169] In the initiative process, every vote is equally weighed; it is purely numerical. The legislative process responds to intensity because the representatives must find out how much a vote will cost them in their next election.[170] If a minority is organized and adamantly against proposed legislation, while a majority supports that legislation but is largely apathetic, then a legislator can expect that minority to be quite motivated to be vocal against that legislator in the next election cycle, while the majority will be silent.[171]

Without considering electoral concerns, the legislative process allows a legislator to listen to a minority's legitimate concerns about legislation.[172] A legislator "would rather respond to an intense minority than a more or less lukewarm majority, particularly if he thinks the minority's claim is legitimate."[173] If a particular bill will negatively impact a minority in a major way and positively affect the majority in small way, the legislator can justifiably choose to listen to the minority. Conversely, in an initiative process based on numerical support, the vocal minority will always lose to a

[168] Wolfinger & Greenstein, *supra* note 90, at 768.
[169] *Id*.
[170] *Id*.
[171] *Id*. at 768–69.
[172] *Id*. at 769.
[173] *Id*.

lukewarm majority. As previously mentioned, the fair housing initiative in California, Proposition 14, after voters passed the Rumford Act by the California State Legislature. The Rumford Act was immensely unpopular when it was polled, but the legislature passed the act anyway.[174] During the fight for the passage of the Rumford Act, a group of young civil rights activists chained themselves to a stairway in the state capitol building as part of a four-week sit-in that ended only when the act passed.[175] That type of action was a sign of the intensity of the minority population's feelings on this issue and likely was a large part of the legislature's calculations in determining whether to pass it. Experts have also found that the state legislators running for re-election did not appear to suffer as a result of their vote on the Rumford Act, so the legislators acted rationally, meaning they accurately voted based on their self-interest.[176]

The story of Proposition 14 is not the only one that demonstrates the differences in success for minorities in the initiative process and legislative process. Proposition 11, an initiative about creating a fair employment commission in California, failed to pass via initiative, but was later adopted by the legislature.[177] As stated in the introduction, Washington State Representative Scott Smith tried to pass anti-affirmative action legislation and only brought it to the ballot because he could not even present it for a vote in the republican-controlled legislature.[178] In 1969, the city of Akron, Ohio, passed fair housing legislation, after which the voters in the city passed a ballot measure that amended the city's charter to require any city ordinance that regulated discrimination in housing to pass by a majority of

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[174] *Id*. at 768.
[175] *Id*.
[176] *Id*.
[177] *See* HOSANG, *supra* note 79, at 24–25.
[178] *See* King, *supra* note 10.

voters.[179] Those voters against fair housing legislation in Akron understood the differences in the legislative and initiative processes. They took away the power of the legislature to regulate this issue and gave it to voters because they seemed to recognize they could trust voters more than their representatives when it came to maintaining racial segregation in their neighborhoods. Direct democracy scholar David Magleby summarizes the differences of the two processes; he says that direct democracy encourages conflict and competition, while the legislative process values stability, compromise, and consensus.[180]

V. PROPOSALS FOR REFORM

A. Why a Solution in Washington State Is Needed

Many of the examples in this article were from all over the United States, but there is a reason why reform in Washington State is desperately needed. This article's use of many California initiatives was a conscious one because California is not far from what Washington State may one day become. Like Washington State, California is politically and culturally known as a "blue" state that is fairly inclusive compared to southern states.[181] Considering this factor, it can be shocking to see the approved ballot initiatives in California that either ignored minority interests or were blatantly prejudicial against minorities.[182] States like Washington and California should be the forefront of progress in America, and they have

[179] Hunter v. Erickson, 393 U.S. 385, 386–87 (1969) (holding that the ordinance violated the Fourteenth Amendment because it placed a higher burden on minorities by making it more difficult for minorities to pass legislation).
[180] David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative And Referendum Process* 66. U. COLO. L. REV. 13, 43–44 (1995).
[181] *See* Walter Hickey, *Presenting: The Most Liberal States in America,* BUSINESS INSIDER (Feb. 3, 2013) http://www.businessinsider.com/most-liberal-states-2013-2?op=1
[182] *See generally* HOSANG, *supra* note 79 (discussing the ironies of California being a liberal state and passing all these initiatives against minorities).

been in many ways, but as we have seen with things like anti-fair housing initiatives, anti-gay rights initiatives, and anti-affirmative action initiatives, these "liberal" states are not so liberal when it comes to the ballot initiative process. One of the reasons California has seen more prejudicial ballot measures than Washington State is due to demographics: 39 percent of California was white, compared to 70 percent of Washington.[183] As demographics change, like they did in California, and minorities have a greater presence in Washington State, anti-immigration and anti-minority individuals and groups will be more active in their efforts to take away political power from minorities. Reforming the process now could ensure Washington State does not turn into California.

There is no single way to make the initiative process completely equitable, but implementing the suggested changes could improve the fairness of the initiative process. In examining the potential ways to solve the issue, one of the obvious solutions may be to abolish direct democracy altogether. But despite the fact that it would likely be difficult to convince voters to vote for reducing their power to decide for themselves, benefits exist to the initiative process and it is a necessary institution. The initiative process can be necessary to put pressure on legislators when business and economic interests take priority over the public good. As a society, we must be careful that in the process of solving one problem we do not create another problem. Instead of getting rid of the initiative process, structural changes could make sure minorities are not hurt by the whims of the majority. There are ways to reform the initiative process within the current structure. Here in Washington, I propose the abolishment of the direct

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[183] *Washington,* U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/53,00 (last visited June 1, 2016); *California,* U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06000.html (last visited June 1, 2016) (statistics are from 2014, which is when most recent census data was available).

initiative and strengthen the indirect initiative, allowing the legislature to have a greater say and to increase scrutiny on initiatives that have a negative effect on minorities.

1. Abolish the Direct Initiative

An essential step in making the initiative process more legislative is to amend the Washington State Constitution to abolish the direct initiative. Also known as the "initiative to the people," the direct initiative is the initiative that goes straight to the ballot, as opposed to the indirect initiative, which goes to the legislature before it goes on the ballot.[184] Abolishing the direct initiative would require a constitutional amendment, which takes a two-thirds vote of both houses of the state legislature and then approval by a majority of voters.[185] Without abolishing the direct initiative, any attempts to make the indirect initiative stronger and more deliberative would be pointless because proponents could just sidestep that process and go straight to the ballot via the direct initiative.

2. Strengthen the Indirect Initiative

Abolishing the direct initiative is only the first step; the next step is to make the indirect initiative less susceptible to abuse by a majority. Without limitations, the indirect initiative would be no different from the direct initiative. Currently, there is no requirement that the legislature must take any action or consider any initiatives submitted to them; as a result, it is rare for the legislature to vote on initiatives and easy for the legislature to the let the initiative go to the ballot without a meaningful discussion. The legislature has only enacted five indirect initiatives in the history of the

[184] WASH. CONST. art. II, § 1.
[185] WASH. CONST. art. XXIII, § 1.

Washington State's initiative process.[186] There is no mechanism inherent in the indirect initiative process to ensure initiatives go through the legislative process. It is important to strengthen the process to ensure the legislature has an active role in the indirect initiative. The subsequent proposals will also require a constitutional amendment because the state constitution has many quite details regarding the initiative process.[187]

3. Public Hearings

In order to strengthen the process, I first propose that a requirement for public hearings held for every certified initiative to the legislature and that the relevant committee takes action on whether, and how, the initiative should proceed to the next step. This way, those for and against the initiative will get together and make an effort to accomplish their goals during the legislative session. Proponents of the initiative will be motivated to lobby the legislature for passage of the initiative so they can avoid a lengthy and expensive ballot campaign. A public hearing will ensure a conversation takes place about the initiative during the legislative session. It will also put the issue in the news cycle, so if the legislature does reject the initiative and it goes on the ballot, awareness of the issue will already exist to a certain extent. Initiative campaigns generally run later in the year, mostly in September and October, but legislative action brings attention to the issues during the legislative session, which starts in January and ends in either March or April.[188] If an initiative is particularly egregious, this means more citizens will have more time to educate themselves about the issue and opposition will be able to mobilize earlier, which can lead to increased voter turnout for minorities.

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[186] *Yearly Summary of Initiatives to the Legislature*, WASH. SEC'Y OF STATE, http://www.sos.wa.gov/_assets/elections/initiatives/Yearly%20Summary%20IL%2012-14.pdf (last visited Apr. 19, 2015).
[187] *See* WASH. CONST. art. II, § 1.
[188] *See Overview of the Legislative Process*, *supra* note 156.

4. Legislative Amendments

Second, if the legislature amends an initiative during the legislative process, it should not continue onto the ballot. Currently, if the legislature passes a different or altered version of an indirect initiative, the legislature's version and the original initiative will both appear on the ballot and the public will choose between them.[189] The initiative process should recognize the difference between "regular amendments" and "substitute amendments." I define a regular amendment as an alteration of a proposed initiative, specifically striking and/or inserting new language for the purpose of altering or perfecting it.[190] A substitute amendment replaces a substantial part or entirety of the language.[191] The original initiative and legislative alternative should only appear on the same ballot when the legislature has made substitute amendments that resulted in a different version of the initiative. If the legislature adds amendments that alter or perfect language in the text of an initiative and then pass that bill, the initiative should pass and should not be placed on the ballot.[192]

This change enables the legislative process to work as it does. It is not common for bills in the legislature to go from introduction to passage without any changes; this will allow the initiatives to benefit from the legislative process. It will also motivate legislators to seriously consider and work on a proposed initiative because they will know that if they pass an initiative, it will be law, and there is no chance for a long, expensive public campaign.[193] Additionally, this will allow legislators to amend certain

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[189] WASH. CONST., art. II, § 1(a).
[190] *See* CHRISTOPHER DAVIS, THE AMENDING PROCESS IN THE SENATE 6 (2013), https://www.fas.org/sgp/crs/misc/98-853.pdf.
[191] *Id.* The author slightly altered the U.S. Senate's definition by adding "substantial part." *Id.*
[192] The courts would certainly have the authority to resolve any disputes as to whether an amendment is a regular amendment or substitute amendment.
[193] This change would not require a change to the referendum process. If an indirect initiative is passed by the legislature, voters could still ask for a referendum on the

provisions in initiatives that are not facially discriminatory, but may still have a discriminatory impact. The legislature can amend the specifics without the confusing situation of both the original text and the slightly amended text being on the ballot.

5. Minority Impact Statements

Lastly, the legislature should pass a bill allowing minority impact statements by request. A minority impact statement would be a report that shows the impact of a proposed initiative on minority groups.[194] Several states have versions of a minority impact statement, mostly in the form of racial impact statements that provide an analysis of proposed legislation on racial minorities.[195] A legislator should be able to request a minority impact statement when the initiative is sent to the legislature. Proposed legislation in the Washington State Senate provides a blueprint for how a minority impact statement should work in Washington.

A legislator should be able to request a minority impact statement, upon which the Caseload Forecast Council would work in cooperation with the appropriate legislative committee, legislative staff, and public agencies to come up with minority impact statements that outline any positive or negative impact of proposed legislation on minorities.[196] Some states only investigate impacts on racial and ethnic minorities, but I recommend that the minority impact statement analyze any positive or negative impact on

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matter. Reforming the referendum process is beyond the scope of this article, but an increase in the signature threshold for a referendum would help institute a higher standard that would differentiate the referendum process.

[194] Ideally, a legislator would be allowed to ask for a minority impact statement on bill in the legislature. Indirect initiatives sent to the legislature would still fall under that category.

[195] WASH. STATE S., SENATE BILL REPORT SB 5752 (2015), http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bill%20Reports/Senate/5752%20SBR%20WM%2015.pdf.

[196] *See, e.g., id*.

minorities on the basis of race, religion, color, national origin, sex, veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or registered service animal.[197] A minority impact statement would help make clear the impact of proposed initiatives on minority communities for legislators, initiative proponents, initiative opponents, and the general public.

If an initiative that received a minority impact statement is rejected by the legislature, both a full and condensed version of the minority impact statement should be published in the voter's pamphlet that accompanies the ballot initiative. That way, if an initiative is detrimental to minorities, the impact will be clear to voters as they make their decisions.

V. CONCLUSION

These reforms represent significant steps Washington State can take to decrease the negative effect of the initiative process. The ballot initiative came about for very valid reasons, but too often the majority has used the process to impose its will and self-interest upon an unwilling minority. The American political process is one that honors and places importance on minority power, and the initiative process must reflect that fundamental part of American democracy. By reforming the initiative process to make it more like the legislative process, potential exists for the initiative process to be used for the benefit of minorities. But more importantly, reforms will decrease the likelihood of the majority using the process against the minority. It has been more than a century since Washington first instituted the initiative process; it is now time to update our laws for the next century.

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[197] *See* WASH. REV. CODE § 49.60.030 (1995). The definition of minority was mostly crafted from Washington's law against discrimination, with "creed" changed to "religion" due to the vagueness of "creed." *Id*.