

# CHALLENGING DIRECT DEMOCRACY

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## INTRODUCTION

The Civil Rights Initiative in Michigan was adopted the day before this symposium on direct democracy was held at Michigan State University College of Law.

Let there be no doubt of its effects: it's going to be a devastating event for individuals of color throughout Michigan. I can back this up by the experience of California, after a similar initiative, also championed by Ward Connerly, was passed there in 1996. Statistics are available about the effect on admissions at the University of California Law Schools in the five years immediately after the passage of what was called their Proposition 209. The

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percentage of minority students at state law schools, like UCLA and Boalt, is a fraction of what it was at comparable private schools like Stanford and U.S.C. The same effects have been seen in government contracting and employment.

What I want to argue this evening is that the effects of Proposition 209, or your Michigan Civil Rights Initiative, are not atypical with regard to initiatives, but are representative. Time and again, initiatives are used to disadvantage minorities: racial minorities, language minorities, sexual orientation minorities, political minorities. Though I agree with so much of what has been said by the other speakers today, each of them, to some extent, supported the use of the initiative process. Each of them, at least in some way, seemed to advocate direct democracy as a good thing, at least in some circumstances.

I want to take a very different position. I want to argue today that direct democracy is undesirable and unconstitutional. I want to argue to you that the Supreme Court should find that the Michigan Civil Rights Initiative is unconstitutional, and strike it down. So I want to make two points. First, I am going to argue that direct democracy is undesirable. This is a normative argument; it's not an argument about constitutional doctrine. Second, I want to argue that direct democracy is unconstitutional, and make a series of different arguments as to why.

## I. DIRECT DEMOCRACY IS UNDESIRABLE

So let me start out with the first, arguing that direct democracy is undesirable. Here I'm especially focusing on the initiative process, where citizens go out and get signatures on petitions, to qualify the things on the ballot. You heard earlier that about twenty-four states have such initiatives, and the criticisms of them apply also to the referendum process, or even to amending state constitutions, especially when it can be done by majority vote.

### A. Direct Democracy is Inconsistent with the Structure and Philosophy of the Constitution

First, I'd argue that direct democracy is inconsistent with the structure and philosophy of the Constitution. I'm not going to take this so far as to make the strong claim that that makes direct democracy unconstitutional, but if you think about what our Constitution is about in its commitments, direct democracy is very inconsistent with it. I think above all, the United States Constitution seeks to balance majority rule with the rights of the minority. This isn't a profound observation; go back and read the Federalist Papers, and you get a sense that those who are most responsible for drafting our Constitution did want a society based on majority rule, but they were

very concerned about minority rights. As many, most notably the late Julian Eule observed, there are three main ways in which our Constitution tries to balance majority rule with minority rights.

One way is that we have laws adopted by representatives, and not directly by the people. Second, we have a structure of government that includes separation of powers, and checks and balances, which serves to protect the rights of the minority. Third, we put our enduring values, our most cherished commitments, in a Constitution that is very difficult to change. I don't think any of those three propositions is controversial. Let me elaborate, and show you why as to each, direct democracy can't be reconciled with them.

The structure of the Constitution is very much based on distrust of majorities. The things we all learned in junior high school civics make that clear. Look at the institutions of the federal government. The President wasn't chosen by direct, popular vote. The President, as we all were reminded in 2000, is chosen through the Electoral College. The Senate, at the time the Constitution was ratified, was selected by state legislatures. It wasn't until the Constitution was amended in the nineteenth century that there were direct elections of senators. And of course, federal judges are picked by the President, and confirmed by the Senate. Voters play no role in that. Only the House of Representatives, out of all of the institutions of the federal government, can be said to be truly majoritarian. That's not accidental, of course. That's because the Framers deeply distrusted majorities.

One might speak of this in pejorative terms as elitism, but it was based on the Framers' study of history. They were worried about factions, mob rule, and they were very much concerned with protecting the rights of the minority. And so they structured a government where there's not a mechanism for a national plebiscite. This was pointed out in the last discussion by Professor Sherman Clark. From time to time, there have been proposals to create national plebiscites over national issues. They never got anywhere. And I think the Framers would have been strongly condemning of the idea of a national plebiscite. They wanted laws made by elected representatives. They didn't trust the people: that's why they structured the government the way that they did. And of course, the government they structured was all about trying to diffuse power, to prevent tyranny. That's why, for instance, the federal government, as we learned in junior high school civics, has three branches, with a separate executive, legislative, and judicial power. That's why James Madison said in the *Federalist Papers*, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>1</sup>

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1. THE FEDERALIST NO. 47, at 249 (James Madison) (Gideon ed., George W. Carey & James McClellan eds., 2001).

The Framers also, of course, diffused power at the federal level in the sense of federalism; dividing power between the federal government and the states. The Framers thought that the structure of government was the best way to protect individual rights, including the rights of minorities. We all learned, at least in first-year constitutional law, that the Framers didn't include a Bill of Rights in the original Constitution, partly because they thought it was unnecessary. They thought that the structure of the government that they created was sufficient to protect the rights of the minorities.

Now my view of separation of powers is a simple one. The Framers wanted to make sure that two branches of government were involved before government did anything important. Generally, adopting a law takes an action by both the legislature and the executive. Enforcing the law to put a person in prison requires prosecution by the executive and conviction by the courts. Going to war requires two branches of government in the Constitution. The same goes for approving a treaty, confirming a federal judge, and anything else of consequence. One of the things that's so troubling about direct democracy is that these structural protections fell to pieces. You don't need two separate bodies to be involved, only one. The voters are able to take an action. That's sufficient to adopt a law. The diffusion of power that comes from separation, from checks and balances, is completely absent.

Moreover, of course, direct democracy allows precious commitments, including those found in state constitutions, to be changed by the majority of the voters. When I teach constitutional law, I always begin the first class by asking my students to think about how the Constitution is different from any other law. And of course, the answer is that any other statute passed by Congress can be changed by that, or the next, Congress. It only takes a majority of two houses and agreement by the President to change any statute that Congress passes. That's of course generally true of state statutes or local ordinances. But changing the United States Constitution is vastly different. It takes approval of two-thirds of both houses of Congress and ratification by three-quarters of the states. That's not accidental.

The Framers wanted to make sure that our long-term commitments weren't sacrificed to our short-term actions. They created the Constitution as an elaborate edifice, to make sure that our short-term desires didn't cause us to lose sight of our long-term commitments. Direct democracy makes it so easy to compromise that a state constitution can be changed just by an initiative put before the voters.

The whole of this, perhaps theoretical, does still come down to the notion that the Framers were very concerned about protecting minorities. Now to be sure, as was pointed out earlier, the minorities that might have been of the greatest concern were wealthy, land-owning minorities. The Framers weren't concerned about racial minorities; if they were, they wouldn't have written the Constitution that they did that institutionalized

slavery. But with the adoption of the Fourteenth Amendment in 1868, there was obviously much more concern for racial minorities, and our concern for minorities of all sorts in the political process is on that ground.

The reality, as I've alluded to, as others have spoken to this afternoon, is that often the initiative process targets minorities of all sorts. There's no doubt that those who will suffer from the initiative passed yesterday here in Michigan are racial minorities. That was the effect of Proposition 209 in California. If you look at other initiatives passed, such as Proposition 187 in California, it's a no-benefits of any sort to go to undocumented immigrants; again you see a specific minority being targeted. The English-only initiatives again are targeting a minority language. The initiatives that have swept the country, now adopted in what is the majority of states, prohibiting same-sex marriage, are again trying to limit rights of the minority: gays and lesbians.

Lest you doubt what I am saying about this, ask yourself the following question: when was the last time that the voters passed an initiative to increase the rights of prisoners, or increase the rights of criminal defendants? It's hard to think of illustrations of that. The political process cannot be realistically used to protect the rights of minorities, at least not very often. So in this way, I believe that the initiative process, direct democracy, does come in conflict with our constitutional principles.

#### B. Direct Democracy Often Makes for Faulty Lawmaking

But I would make another very different normative argument, and that's that the initiative process often leads to lousy lawmaking; that the nature of the initiative process doesn't lend itself to laws that are well-crafted, well-drafted, or very desirable. There are many reasons for this. One is that the checks that exist in the drafting process are absent with regard to initiatives. Usually a bill is drafted by professional staff in a committee of the legislature. It's then forwarded to the committee to consider, then it goes to the entire body. All the while, changes can be made. In bicameral legislatures, like the United States Congress, it will then likely go to another committee, considered by the entire body. Differences, including language, are then reconciled by a conference committee. It may be vetoed by the President, or Governor, based on language, and then go back through the process. All of that does improve the quality of legislation.

Earlier it was asked, well, can you really show that legislation is better than initiatives? I think with regard to the quality of drafting, I can consistently show that legislation is better drafted than laws adopted via the initiative process. This isn't theoretical or hypothetical, and coming from where I live in California, I saw that when California re-instituted the death pen-

alty, they did so by voter initiative. This of course was after the Supreme Court, in *Furman v. Georgia*,<sup>2</sup> invalidated the death penalty; then in *Gregg v. Georgia*,<sup>3</sup> the Court said that the death penalty could come back under certain circumstances. There was an initiative in California to reinstate the death penalty. It was, by any measure, a terribly drafted initiative.

And of course, it's easy to understand why. What does it take to get an initiative on the ballot? Well, at least in California, it costs several million dollars to do so, and that's something we haven't talked about today. And that limits who can use the initiative process. But assuming you've got your several million dollars, you then can go out and hire people to gather signatures, you get enough signatures, and it's on the ballot. That's all that it takes. So if you have somebody who's wealthy enough, or who has access to enough resources, and they go out and get the signatures, it's on the ballot. They don't need to vet the language of the initiative with anybody.

As a result of this, in the first 60-some cases to come before the California Supreme Court, in the overwhelming majority of cases, the California Supreme Court unanimously overturned death sentences, based on the drafting of the language. It's interesting that when Chief Justice Rose Bird was being reconsidered for the California Supreme Court in a retention election in 1986, opponents said that it's because she never voted to uphold the death sentence. In reality, in almost all of those cases, which were 7-0 or 6-1 decisions to strike down death sentences, Rose Bird was virtually never even in a dissent. Why was that? Because the death penalty initiative was so poorly drafted.

That's not the only example of this, of course. I can give you one more. California voters, in 1994, passed a so-called "three strikes" initiative. The way that it's drafted, unlike every other three strikes law in the country, is that the third strike doesn't have to be a serious or a violent felony. Any felony can count under the California three strikes law. In California, if someone commits shoplifting but has a prior conviction for a property crime, the shoplifting can be charged as a felony. I argued a case in the Supreme Court a few years ago, *Lockyer v. Andrade*.<sup>4</sup> My client, Leandro Andrade, was sentenced to life in prison with no possibility of parole for fifty years, for stealing \$152 worth of video tapes from K-mart stores in California. He is one of 360 individuals who are serving a life sentence in California for petty theft with a prior offense, stealing less than \$400 in merchandise.

As part of representing Mr. Andrade, in both the Ninth Circuit, and at the United States Supreme Court, I exhaustively researched the history for this California ballot initiative. It was all about wanting to put dangerous,

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2. 408 U.S. 238 (1972).

3. 428 U.S. 153 (1976).

4. 538 U.S. 63 (2003).

violent felons in prison for life. The focus was on Richard Allen Davis, who had kidnapped and murdered Polly Klaas. There's nothing in the legislative history of the ballot initiative, or the media coverage, to indicate that there was ever a desire to put people in prison for petty theft, or possessing small amounts of any drugs. I think if the initiative had gone through the usual legislative processes, this mistake would have been corrected. But it wasn't. It was just an initiative that was drafted by a group that wanted tougher laws in regard to crime, and as a result, you do have people like Andrade serving life in prison with no possibility of parole for fifty years, for stealing a \$152 in video tapes.

Another aspect of the initiative process leads to lousy lawmaking: campaigns for initiatives are often deceptive. People often vote about initiatives without really understanding what they're about. How many people who voted yesterday for the Michigan Civil Rights Initiative thought they were voting to advance the rights of racial minorities, to advance their civil rights? We've heard two eminent professors from Michigan who said even they got a little bit twisted as they were trying to explain what the Civil Rights Initiative is about. The same thing happened in California.

### C. Direct Democracy Distorts Citizens' Policy Preferences

Now these were for high-profile initiatives. Often initiatives are of a lower-profile nature. There are also initiatives at the local government level. Sometimes as you read ballot pamphlets, to say nothing of the advertisements, you have no sense of what the initiative is going to do. California had an initiative on the ballot a few years ago that would restrict derivative suits against corporations and class action suits against corporations. I would criticize both the proponents and the opponents of this, because if you read all the ads, and all the literature, you'd have no sense about what it was about at all.

The deliberative process, which the legislative process has much more than the initiative process, is just absent when this is going on. Now I realize there are those who would defend the initiative process. There are those who would say, well, it's responsive government. The initiative process lets the voters speak. I think that Professor Sherman Clark, earlier, developed a powerful argument as to why it's false to see the initiative process as reflecting voter preferences.<sup>5</sup>

I would elaborate his work, and the work of others, and develop a slightly different point that hasn't been expressed, as to why the initiative process doesn't reflect the will of the voters, and that's because compromise

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5. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

positions that reflect the majority of the voters often aren't reflected in the initiative process, which is binary; you vote for it or against it; there's no chance for compromise.

Let me explain with a simple hypothetical. Imagine that there's an issue where the positions could be lined up from zero to ten; zero being most extreme in one direction, and ten being most extreme at the other. Usually those who are going to pay the money to have an initiative on the ballot are more towards the extremes than they are towards the middle. And what they're going to do is to try to put an initiative on the ballot that's as far to their extreme position as can be, that is likely to be adopted by a majority of the voters. And so, a simple hypothetical; those who support an initiative on a topic might want a ten initiative, but they think the best chance is to have an eight initiative, and there would be an eight initiative on the ballot. Imagine that most voters in the state are at six on that issue. They'd like to do something. They don't want to go as far as the initiative, but they do want to do something. Well, they would have a choice. Vote for the eight initiative on the ballot, or do absolutely nothing.

Now in the legislative process, a compromise could be reached. You could come to the six that reflects the majority of the legislature, and hopefully the majority of the people. But since voters don't have that option, they've got to vote for the eight. Now, it may very well be that the majority of voters believe in everything that was adopted yesterday in the Michigan Civil Rights Initiative. But it might very well be that if they had a range of options, they would have picked something that was less extreme, that was more nuanced, perhaps something more towards the six, but that wasn't an option. I could give countless examples of this. This, too, shows why you can't assume that initiatives reflect the preference of the majority.

A second criticism of my position may be that I'm not being sufficiently nuanced as to the types of initiatives. And you heard some discussion that we should separate initiatives for perfecting the processes of government versus initiatives that target minorities. Perhaps we should say, when it comes to initiatives that perfect the processes of government, we should be supportive of them, and we should only be critical of those that harm minorities. I'm always skeptical of distinctions based on process versus substance. I think one of the lessons we learned in our first-year civil procedure class is that process and substance are just labels, and you can really characterize almost anything as process or substance, if you try hard enough. I think this is true here.

Let me give you an example: Proposition 13 was adopted by California voters to limit property taxes. It limited property taxes to no more than one percent of assessed valuation, as determined at the time of purchase, and the increase in the value of the property doesn't play much role in increases in property taxes. Now, one would say, I think, that this is an initiative more about process than substance. It's all about the process of deter-

mining valuation of property for the purpose of a property tax. But this is an initiative that has had a devastating effect on racial minorities in the state of California, including by limiting the funding available for schools in California. Of course, for those who are wealthy enough to send their kids to private schools, Proposition 13 doesn't matter very much. For those who send their kids to public schools in wealthy areas, they can supplement the money that's gained through the property taxes because they are able to contribute for book funds, teacher funds, after-school funds, and all the rest. But for kids who go to public school in California, where education dollars are very much dependent on property taxes, Proposition 13 has had a terrible and devastating effect. Is it process, or is it substance? Clearly, it's some of both.

If you accept my arguments in terms of the initiative process, I don't need to convince you that every initiative is undesirable. Frankly, I like some of the initiatives that were passed yesterday, such as those that increase the minimum wage in many states. But nonetheless, I would take as an overall position that the initiative process is undesirable for the reasons that I've suggested.

## II. DIRECT DEMOCRACY IS UNCONSTITUTIONAL

Arguing that the initiative process is undesirable doesn't make a constitutional argument against it. In the second part of my remarks, I want to argue that the initiative process is unconstitutional. I'd like to make three levels of argument here, starting with the most general, and going to the most specific, or to put it another way, starting with the most dramatic and then going to the most specific.

### A. Direct Democracy Violates the Republican Form of Government Clause

My most dramatic argument is that the initiative process should be declared unconstitutional because it violates the Republican Form of Government Clause.<sup>6</sup> This little-known provision says, "the United States shall guarantee to each state a republican form of government."<sup>7</sup> Now, contrary to the wishes of the current occupants of the White House, this provision has nothing to do with political parties. If one goes back, and tries to ask what the Framers meant by a republican form of government, there's a strong indication that they thought that a republican form of government was one where people would elect representatives, and the representatives would then make the laws. They saw direct democracy as the antithesis of a republican form of government.

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6. U.S. CONST. art. IV, § 4.

7. *Id.*

The problem, though, with challenging initiatives under the Republican Form of Government Clause, is a case from the 1840s: *Luther v. Borden*.<sup>8</sup> *Luther* is one of the more extraordinary events in American constitutional history. It involved the State of Rhode Island, which didn't have a state constitution. It was still governed under a charter issued by King Charles in the seventeenth century, and there was terrible malapportionment. So the voters considered an initiative. A new constitution passed. The existing government then made it a crime for anybody to participate in the election under the new constitution.

Nonetheless, an election was held. A man by the name of Doar was chosen as Governor. He tried to govern for a few days. Ultimately he and his supporters were arrested. And a sheriff from the existing government broke into the house of somebody and said he was involved in the illegal election. The person whose house was broken into sued for trespassing. The sheriff defended and said, "but I'm the government! I'm not trespassing, I'm engaging in a search." The person whose house was broken into said, "you're not the legitimate government of Rhode Island, because you fail the Republican Form of Government Clause." To which the Supreme Court, seeing this mess said, "we want no part of it." The Supreme Court said cases under the Republican Form of Government Clause are a non-justiciable political question.

Now, as with any case, the Court's holding was limited to these acts. It doesn't need to be seen as saying that for all circumstances the Republican Form of Government Clause is non-justiciable. You might be surprised to know that in *Plessy v. Ferguson*,<sup>9</sup> in Justice Harlan's famous eloquent dissent, he invoked the Republican Form of Government Clause explicitly. He was trying to argue why "separate but equal" could never be constitutional.<sup>10</sup> However, in 1914, in *Pacific States Telephone & Telegraph Co. v. Oregon*,<sup>11</sup> the United States Supreme Court considered whether a challenge to the initiative process violated the Republican Form of Government Clause. The Supreme Court, relying on *Luther v. Borden*, said challenges to the initiative process through the Republican Form of Government Clause are non-justiciable political questions.

The effect of *Luther v. Borden* has been to render the Republican Form of Government Clause a nullity. It's never been used by any federal

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8. 48 U.S. (7 How.) 1 (1849).

9. 163 U.S. 537 (1896).

10. *Id.* at 564. (Harlan, J., dissenting) ("Such a system is inconsistent with the guaranty given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.")

11. 223 U.S. 118 (1912).

court, let alone the Supreme Court. I can't think of any other Supreme Court case that completely buried an entire clause. The closest I can think of would be the Slaughter-House Cases,<sup>12</sup> and the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>13</sup> There are at least a couple of cases, including one in 1999, that used that provision.<sup>14</sup>

I see no reason why the clause should always be regarded as a non-justiciable political question. In *Baker v. Carr*<sup>15</sup> in 1962, the Supreme Court announced the criteria for determining if something is a political question. The Court said that one reason that something might be a political question is if there's a lack of judicially discoverable or manageable standards. But the Court could formulate judicially discoverable or manageable standards here. If you accept my position, the Court could take the position that the initiative process is unconstitutional because the Republican Form of Government Clause doesn't allow direct democracy.

Another thing *Baker v. Carr* said was that things are political questions where there is a textual commitment to a specific branch of government, such as if the Constitution says something is left to Congress. But the language of Article IV, Section 4, is "*the United States shall guarantee each state a republican form of government.*"<sup>16</sup> That includes the federal courts, a branch of the United States government.

In 1992, in a case called *New York v. United States*,<sup>17</sup> the Supreme Court returned to the Republican Form of Government Clause. The federal government required that every state clean up its nuclear waste by 1996. Any state that failed to do so by that date maintained title to the nuclear waste, and was liable for any harms it caused. One of the arguments made to the Supreme Court was that it violated the Republican Form of Government Clause for Congress to commandeer the states in this way. Justice O'Connor, at the beginning of her majority opinion, said that the Court should reconsider whether challenges to the Republican Form of Government Clause are justiciable. She said that there's no reason to believe that they are always non-justiciable. She then said that the Court needn't do that in this case because the law violates the Tenth Amendment.<sup>18</sup> I think this is an open invitation to bring challenges under the Republican Form of Government Clause, to convince courts that cases are not necessarily non-justiciable. If a court is willing to find such a case justiciable, then you get to my argument, that direct democracy is inherently inconsistent with the

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12. 83 U.S. (16 Wall.) 36 (1873).

13. U.S. CONST. amend. XIV, § 1, cl. 2.

14. See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999).

15. 369 U.S. 186 (1962).

16. U.S. CONST. art. IV, § 4 (emphasis added).

17. 505 U.S. 144 (1992).

18. *Id.* at 183-86.

Republican Form of Government Clause, the same argument that was made in *Pacific States Telephone & Telegraph* over ninety years ago. I think it's an argument that should be revived today. Indeed, I would say especially as to initiatives that target and harm minorities, the Republican Form of Government Clause argument should be revived.

I'm very skeptical of Framers' intent arguments in any context, but I think I can make a strong Framers' intent argument that the Framers were very concerned about protecting minorities, and for that reason they disavowed direct democracy and saw the Republican Form of Government Clause as the embodiment of that.

#### B. Direct Democracy Measures Disadvantaging Minorities Violate the Equal Protection Clause

Well, that's my broadest argument as to why direct democracy is unconstitutional. Let me move to a slightly more specific argument. And that would be, initiatives that disadvantage minorities from using the political process should be regarded as unconstitutional. And for this reason, regardless of the Republican Form of Government Clause argument, the Michigan Civil Rights Initiative should be declared unconstitutional.

Here I think I have strong support from Supreme Court decisions. The most notable of these is *Romer v. Evans*,<sup>19</sup> from 1996. It involved a Colorado initiative that repealed all laws protecting gays and lesbians from discrimination and prohibited any new laws in the state from protecting gays and lesbians from discrimination. The United States Supreme Court, in a 6-3 decision, declared this initiative unconstitutional. Justice Kennedy wrote the opinion for the Court. He stressed that the Colorado initiative kept gays and lesbians from using the political process, noting that all other groups could do so. If a lot of investors wanted to go to the Colorado legislature and seek some form of preferential treatment, they could do so. If journalists wanted to go to the Colorado legislature, and seek some form of preferential treatment, they could do so. If law professors wanted to ask the Colorado legislature to adopt a law that prohibited discrimination against them, if journalists wanted that, or any other group, they could.

But one group was kept from using the political process: gays and lesbians. They were not allowed to go to the political process and get any laws protecting themselves from discrimination, or any laws giving them preference. The United States Supreme Court declared this unconstitutional. Strikingly, Justice Kennedy's opinion used rational basis review, and said that keeping a group from using the political process would not serve any legitimate purpose and denies equal protection.

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19. 517 U.S. 620 (1996).

This isn't the only time the Supreme Court has said this. You might think back to the Seattle school case,<sup>20</sup> where voters passed an initiative to prohibit busing from being used. The United States Supreme Court said to prohibit a remedy for segregation, and to prohibit busing in this way, keeps minorities from using the political process, and that inherently denies equal protection.

One might go back to an even earlier case, *Hunter v. Erickson*,<sup>21</sup> that limited the ability of the government to adopt open housing laws. I think what these cases stand for is, if an initiative keeps a minority from using the political process in the way that all others can use the political process, that inherently denies equal protection. Isn't that exactly what the Michigan Civil Rights Initiative passed yesterday does? The Supreme Court, in *Grutter v. Bollinger*,<sup>22</sup> said that colleges and universities have a compelling interest in having a diverse student body. The Michigan Civil Rights Initiative says that minorities in Michigan cannot use the political process, even to pursue what the Supreme Court has expressly labeled a "compelling government interest." Isn't that disadvantaging minorities in a way that no other group is disadvantaged from using the political process? In that way, aren't *Romer v. Evans* and the *Seattle School District* case very much on point?

### C. Direct Democracy Measures Disadvantaging Minorities Should Be Subject to Strict Scrutiny

But if neither of these arguments have persuaded you, let me make even a more limited argument. I would say that at the very least, strict scrutiny should be used for initiatives that disadvantage minorities from exercising their rights. This is an argument that the late UCLA law professor Julian Eule advanced in a wonderful Yale Law Journal article, *Judicial Review of Direct Democracy*.<sup>23</sup> The underlying philosophy of this approach, in Professor Eule's argument, was that the level of scrutiny used reflects the degree of suspicion about the legislative process.

Generally there's trust in the legislative process. So there's great deference to the legislative process; that's why rational basis is generally used. But in those instances where we're very distrustful of the legislature, well that's where strict scrutiny gets used. And if we're somewhat distrustful, but not as much, it's intermediate scrutiny. But we all learned in first-year constitutional law that the levels of scrutiny track the degree of distrust of the legislative process. Professor Eule argues, I think persuasively, that

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20. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

21. 393 U.S. 385 (1969).

22. 539 U.S. 306 (2003).

23. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

there's great reason to be distrustful of the initiative process, especially if it bears upon the rights and interests of minorities, upon fundamental rights. Then the question would be whether an initiative like the Michigan Civil Rights Initiative would meet strict scrutiny.

#### CONCLUSION

My preference would be to see the initiative process declared unconstitutional in all circumstances and for all uses. At the very least I think initiatives that keep minorities from using the political process should be declared unconstitutional. But if that's not possible, then strict scrutiny should be used.

I have to admit to you I come to this position having lived in California for twenty-one years. I grew up in Chicago, and initiatives rarely are used in the State of Illinois. I've got to admit that for all the years growing up, going to college, teaching law, I don't remember any initiatives on the ballot. And then I remember when I moved to California in 1983, for the very first election, November 1984, getting in the mail a telephone-sized pamphlet that listed all the ballot initiatives and statements for and against them.

Now what hasn't been mentioned is, you don't get these only for state elections. There are also ballot initiatives at the local level; for example, amendments to the city charter come by virtue of ballot initiatives. In 1999, the voters of Los Angeles considered whether to adopt a new city charter. It was 168 pages long, single-spaced, and came to the voters as a pamphlet that they had to vote up or down on.

Having lived through that system for twenty-one years, having watched it, I really came to the conclusion that the Framers of our Constitution were right here. That direct democracy isn't the way to adopt laws. And so that's why when asked to present this keynote to you, I decided to present the strongest argument, that it is lousy lawmaking, and that it should be found to be unconstitutional.