

Proposition 8 and the Need for California Constitutional Amendment Initiative Reform: Tolerance Requires Time and Deliberation

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Introduction

Proposition 8, a California ballot proposition entitled, “Eliminates Right of Same-Sex Couples to Marry,” passed on November 4, 2008 and amended the California Constitution to read: “only marriage between a man and a woman is valid or recognized in California.”¹ Previous attempts to prohibit same-sex marriage were statutory in form: In 1977, the legislature defined marriage between a man and a woman in California Family Code section 300² and in 2000, the electorate passed Proposition 22 with sixty-one percent of the vote and added section 308.5 to the California Family Code to ensure

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1. California General Election Guide, Official Voter Information Guide (Nov. 4, 2008), available at <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm> (last visited Mar. 3, 2009); California General Election Guide, Text of Proposed Laws (Nov. 4, 2008), available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8> (last visited Mar. 3, 2009).

2. CAL. FAM. CODE §§ 300–310 (West 2004).

there were no loopholes for same-sex marriage.³ Proposition 8 overruled the California Supreme Court's decision in *In re Marriage Cases*, which stated:

[T]he right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.⁴

In that case, the court declared that the ability to marry one's choice of life partner is a fundamental right under the California Constitution and thus protected the rights of a minority of the population and overruled the majority who had voted for Proposition 22.⁵ The ACLU filed a suit claiming Proposition 8 was a constitutional revision and not an amendment and should be deemed invalid by the California Supreme Court.⁶ But the California Supreme Court deferred to the electorate and upheld Proposition 8 in *Strauss v. Horton*.⁷ The legality of same-sex marriage became a game of tug of war between the court and the electorate and the electorate prevailed.

Procedurally, initiatives, like Proposition 8, amend the California State Constitution without deliberation or compromise.⁸ The California courts are the only institutional check and protector of minority rights in California's direct democracy scheme. The courts' indispensable role as protector of individual and minority rights places the court in a precarious position. Many view judicial review of direct democracy as a more acute counter-majoritarian act because

3. California Primary Election Guide, Limit on Marriages, Initiative Statute, Proposition 22 (Mar. 7, 2000), available at <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22text.htm> (last visited Mar. 3, 2009).

4. *In re Marriage Cases*, 43 Cal. 4th 757, 829 (Cal. 2008).

5. *Id.*

6. *Legal Groups File Lawsuit Challenging Proposition 8, Should it Pass*, AMERICAN CIVIL LIBERTIES UNION, Nov. 5, 2008, <http://www.aclu.org/lgbt/relationships/37706prs20081105.html>.

7. *Strauss v. Horton*, 46 Cal. 4th 364, 474-75 (Cal. 2009).

8. LARRY J. SABATO ET AL., DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 53 (Rowman & Littlefield Publishers, Inc. 2001).

it does not overrule another branch of government, but the people themselves.⁹

The tension between the electorate and the court created by the initiative system may leave justices facing increased public resentment, possible campaigns to oust them from office, and “the courts’ legitimacy, independence, and capacity to protect minority rights may erode.”¹⁰ In state courts where judges are elected rather than appointed, the electorate can express its disfavor of a judge’s decision and essentially vote him or her out of office.¹¹ Although a judge should focus on interpreting the law and not his or her retention on the bench, he or she is human. As former California Supreme Court Justice Grodin explains, “the potential that the pendency or threat of a judicial election is likely to have for distorting the proper exercise of the judicial function is substantial, and palpable.”¹² If the courts lose their ability to review initiatives without fear of backlash from the public, then initiatives will essentially become unchecked vehicles of the majority will.¹³ I will argue that under the current California initiative system: 1) Proposition 8 is an example of the initiative system placing the California Supreme Court in a vulnerable position via the electorate; 2) the initiative system, which was instituted during the Progressive Era at the turn of the twentieth century, has not fulfilled its intended purpose of promoting democracy and confounding special interest, but rather the initial fears of some of the progressives have materialized; 3) the structure of the initiative process, which only allows for judicial review, should be reformed to avoid both the pressure on the courts and negative effects on minority groups; 4) reform is more critical for constitutional amendment initiatives than for statutory initiatives; 5) the State Constitution should be amended through a more deliberative process involving the State Legislature and take into

9. *Id.* at 54.

10. *Id.* at 59.

11. *Id.* at 58; *see also* ERIN ADRIAN, WOMEN’S LEGAL HISTORY STANFORD, ROSE ELIZABETH BIRD: CHOOSING TO BE JUST 26 (2002), <http://womenslegalhistory.stanford.edu/papers/BirdR-Adrian02.pdf> (In 1986, Rose Bird, Cruz Reynoso, and Joseph Grodin were voted off the bench due to their opposition to the death penalty. Their “defeat changed law, politics, and the judiciary in California forever. ‘The defeat of Rose Bird was significant because it created a new danger in this state, the danger of politicizing a judicial branch that had not previously been subject to political pressures,’ said Court of Appeal Justice J. Anthony Kline, who served with Bird in Gov. Brown’s administration.”).

12. SABATO, *supra* note 8, at 58–59.

13. *See id.* at 59.

account more than a simple majority of the electorate; 6) reformers should look at other systems, like Switzerland and Massachusetts, to incorporate institutional review of potential initiatives.

I. Case Study: Proposition 8

The California Supreme Court is often a leading voice in the country for individual rights and freedom: “As California goes, so goes the rest of the nation.”¹⁴ Marriage rights are no exception. In 1948, the California Supreme Court was the first court in the nation to strike down a state law prohibiting interracial marriage.¹⁵ In *Perez v. Sharp*, the Court noted that marriage “is a fundamental right of free men,” and held “the right to marry is the right to join in marriage with the person of one’s choice.”¹⁶ The *In re Marriage Cases* Court expanded on *Perez*’s notion that the right to marry is a fundamental constitutional right embedded in the California Constitution:

[T]he constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process.¹⁷

Therefore, the *In re Marriage Cases* court determined that the right to marry, as embodied in the California Constitution article 1, sections 1 and 7, guaranteed same-sex couples the same substantive constitutional rights as heterosexual couples, including the right to choose one’s life partner.¹⁸ The emphasis on choice is similar to the language of *Perez*. The *In re Marriage Cases* court held that the statutes (enacted by Proposition 22 and the Legislature in 1977) violated California’s Equal Protection clause, and that “a more exacting and rigorous standard of review—‘strict scrutiny’—is applied when the distinction drawn by a statute rests upon a so-called ‘suspect

14. *News Bites: “As California Goes, So Does the Rest of the Nation,”* QUEERCENTS, May 16, 2008, <http://www.queercents.com/wordpress/2008/05/16/newsbites%e2%80%9ccas-california-goes-so-does-the-nation%e2%80%9d/>.

15. *See Perez v. Sharp*, 32 Cal. 2d 711 (Cal. 1948).

16. *Id.* at 714–15.

17. *In re Marriage Cases*, 43 Cal. 4th at 781 (emphasis added).

18. *Id.* at 781–82.

classification' or impinges upon a fundamental right."¹⁹ Therefore, both *Perez* and *In re Marriage Cases* held that restricting the ability of people to choose who they marry violates "a basic civil or human right of all people."²⁰

Proposition 8 essentially overruled the California Supreme Court by changing the language of the California Constitution, passing with 52.46% of the vote to 47.54% in opposition.²¹ A four percent difference in support stripped a right from a minority group deemed fundamental by the California Supreme Court less than six months prior to the election. The ACLU claimed that Proposition 8 should be invalid because it was a revision of the Constitution and not just an amendment: "A major purpose of the constitution is to protect minorities from majorities. Because changing that principle is a fundamental change to the organizing principles of the constitution itself, only the legislature can initiate such revisions to the constitution."²² Proposition 8 placed a measure the court already held invalid as a statute and presented the same text as a constitutional amendment. Proponents of Proposition 8 were able to bypass judicial review by amending the state constitution with a simple majority of the electorate.

The passage of Proposition 8 ignited a series of protests across California from members of the gay community and supporters of same-sex marriage.²³ Democratic state legislators filed amicus curiae brief in support of the challenge to the passage of Proposition 8.²⁴ Governor Schwarzenegger did not join the democratic legislators in challenging Proposition 8, but he suggested the court ruled appropriately in *In re Marriage Cases* by comparing the decision with *Perez*, and stating that the court should resolve the issue in favor of legalizing same-sex marriages.²⁵ Proponents of Proposition 8 claimed

19. *Id.* at 783.

20. *Id.* at 819, n.41.

21. Maloy Moore & Megan Garvey, *Gay Marriage Ban: A Tale of Two Votes*, L.A. TIMES, Nov. 6, 2008, available at <http://www.latimes.com/news/local/politics/cal/la2008-electionprop8prop22,0,6153805.htmlstory>.

22. AMERICAN CIVIL LIBERTIES UNION, *supra* note 6.

23. Jessica Garrison & Corina Knoll, *Prop. 8 Opponents Rally Across California to Protest Gay-Marriage Ban*, L.A. TIMES, Nov. 16, 2008, available at <http://www.latimes.com/news/printedition/california/la-meprop8162008nov16,0,913064.story>.

24. Kevin Yamamura, *Schwarzenegger Suggests Court Should Block Prop. 8*, SACRAMENTO BEE, Nov. 17, 2008, at 3A, available at <http://www.sacbee.com/capitoland-california/story/1403231.html>.

25. *Id.*

that the challenge would subvert the will of the people and render the ability of initiatives to amend the constitution moot.²⁶ Proponents argued that Proposition 8 is a single subject initiative that restores the definition of marriage to what it was and always had been prior to *In re Marriages Cases*.²⁷ The initiative system placed the court in the center of a public controversy.²⁸

The California Supreme Court deemed Proposition 8 a permissible constitutional amendment and not a constitutional revision in *Strauss v. Horton*.²⁹ Although the California Supreme Court in *In re Marriages Cases* deemed that the same-sex marriage ban violated the state constitution's equal protection clause, in *Strauss* the court held Proposition 8 "carves out a narrow and limited exception to these state constitutional rights, reserving the official *designation* of the term 'marriage' for the union of opposite-sex couples" but leaves "undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws."³⁰

In *Strauss*, the California Supreme Court stated, "the principal issue before us concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution."³¹ Recognizing that the California constitutional amendment process is less demanding and differs greatly from the federal constitutional amendment process, the court noted "a difference dramatically demonstrated by the circumstance that only 27 amendments to the United States Constitution have been adopted since the federal Constitution was ratified in 1788, whereas more than 500 amendments to the California Constitution have been adopted since

26. Mike McKee, *Supreme Court Wants More Briefs on Prop. 8*, LEGAL PAD, Nov. 12, 2008, http://legalpad.typepad.com/my_weblog/2008/11/looks-like-supremes-will-hear-prop-8-cases.html.

27. *Why Proposition 8*, Protect Marriage.com, <http://www.protectmarriage.com/about/why> (last visited Mar. 3, 2009).

28. Bob Egelko, *Prop 8 Hinges on Who Decides: Judges or Voters*, S.F. CHRONICLE, Nov. 19, 2008, at B-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/19/BAAV147103.DTL>.

29. *Strauss*, 46 Cal. 4th at 474–75.

30. *Id.* at 388.

31. *Id.* at 385 (emphasis in original).

ratification of California's current Constitution in 1879."³² The California amendment process is subject to majoritarian whims and as a result, the California Constitution is amended frequently.

David Boies and Theodore B. Olson have filed a federal suit on behalf of two gay couples arguing, among other things, that Proposition 8 violates federal constitutional guarantees of equal protection and due process.³³ The timing of the federal suit is controversial because of the conservative nature of the current Supreme Court; however, Boies and Olson are confident that "that the makeup of the Supreme Court [is] right because of the presence of Justice Anthony M. Kennedy" and they "point[] to two cases in which gay rights groups prevailed—a sodomy case in Texas and a constitutional ban on local antidiscrimination laws in Colorado—in which Justice Kennedy wrote the majority opinion."³⁴ Critics of the federal suit counter, among other things, that the suit is premature because the United States Supreme Court usually reflects public opinion and/or the law in the majority of the states.³⁵ Although the Court issued a strong gay-rights decision with *Lawrence v. Texas*, which struck down laws against intimacy for gay couples, it explicitly noted that it was not ruling on the formal legal recognition of same-sex relationships.³⁶ Therefore, critics of filing a federal suit believe there is more proponents can do at the state level, such as educate the public about same-sex marriage rights, win some initiative campaigns, or simply let some of the victories settle in so people witness that same-sex marriage does not impact other groups except same-sex couples.³⁷

Same-sex marriage proponents face a difficult road if they seek to place another initiative on the ballot. After the *Strauss* decision, "one of [California's] largest gay rights groups, Equality California, sent an e-mail message to supporters pleading for contributions to raise \$500,000 toward 'a massive campaign to put an initiative on the

32. *Id.* at 386.

33. Jesse McKinley, *Bush v. Gore Foes Join to Fight Marriage Ban*, N.Y. TIMES, May 27, 2009, at A1, available at <http://www.nytimes.com/2009/05/28/us/28marriage.html?ref=politics>.

34. *Id.*

35. *Id.*; see also Joe Garafoli, *Gay Rights Advocates Rip to Undo Prop. 8*, S.F. CHRONICLE, May 28, 2009, at A-10, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/05/27/MNDC17SB47.DTL&type=politics&tsp=1>.

36. *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

37. *Id.*

ballot and win.”³⁸ In addition to the expense of another initiative campaign, same-sex proponents must run a campaign to heighten awareness for the plight of same-sex couples to all socio-economic groups in California if they want to win the electorate.³⁹

II. California History of the Initiative and the Progressive Movement

At the turn of the twentieth century, the Southern Pacific Railroad was entrenched in all levels of California government.⁴⁰ The company’s influence and power was described in Frank Norris’ novel *The Octopus*: “They own us . . . they own our homes; they own our legislatures We are told we can defeat them at the ballot box. They own the ballot box. We are told we must look to the courts for redress; they own our courts.”⁴¹ The purpose of the initiative was to provide the public with a way to overcome special interest like the Southern Pacific Railroad by directly intervening in the legislative process when the state legislature was unresponsive to public concerns.⁴²

The development and adoption of direct democracy in California was largely due to the progressive movement led by John Randolph

38. John Schwartz, *California High Court Upholds Gay Marriage Ban*; N.Y. TIMES, May 26, 2009, <http://www.nytimes.com/2009/05/27/us/27marriage.html>. *see also* Richard Kim, *California Supreme Court Upholds Prop. 8*, THE NATION, May 26, 2009, <http://www.thenation.com/blogs/notion/438620> (“But the decision on whether or not to sink massive dollars and resources into an initiative to reverse Prop 8 in 2010 (remember, Prop 8 was the second most expensive election in the country in 2008; only the presidency cost more), should take this relative equality into account. There are dozens of states where same-sex couples have no partnership rights whatsoever; states where it is still legal to fire someone because they are gay; a federal Employment Non-Discrimination Act is still stalled in Congress.”).

39. Ben Ehrenreich, *Anatomy of a Failed Campaign*, THE ADVOCATE, November 19, 2008, http://www.advocate.com/print_article_ektid66063.asp (“[E]xit polls indicated that Latinos voted in favor of Prop. 8 by 53% to 47%, and an exit poll stated 70% of African-Americans voted for it. (Whites split right down the middle.)”).

40. RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 187 (Univ. Press of Kan. 2002); *see also* CENTER FOR GOVERNMENTAL STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT 36 (2d ed. 2008) (The Southern Pacific Railroad “and its followers not only monopolized the economy of California but also heavily entrenched themselves at all levels of government. Towns and cities found themselves obligated to railway lines for survival and hence to the Southern Pacific. It was no secret that the Southern Pacific virtually owned California’s state government.”).

41. ELLIS, *supra* note 40, at 187.

42. JOHN M. ALLSWANG, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 1 (Stanford Univ. Press 2000).

Haynes, a wealthy Los Angeles doctor and businessman who was very active in local politics.⁴³ Middle-and upper-class citizens who believed that the strengthening of the people and weakening of politicians would result in better government advocated for direct legislation, which became popular at both the city and state level.⁴⁴ Haynes took up the direct legislation cause. Haynes described direct democracy:

Let me confess it gentlemen, democracy is part of my religion We find that happiness, enlightenment [sic] and prosperty [sic] among the people increase in precisely the same ration as do their power, influence, and participation in government. Responsibility tends to develop the best that is in us.⁴⁵

To progressives, and Haynes particularly, direct legislation was a structural improvement on representative government, which expanded democracy by allocating more power to the people.⁴⁶ With this new power and responsibility, the people would fight and confound special interest.⁴⁷ In addition, it was a moral improvement based on “the assumption that the rule of ‘the people’ was the noblest aim of democracy, and that these political devices [the initiative and referendum] were a path to fulfilling that ideal.”⁴⁸ After the successful implementation of initiatives and referendums at the local Los Angeles city level and with Haynes’ political and monetary support, Hiram Johnson promised Haynes it would be part of his platform as governor.⁴⁹

In the 1910 election, the Progressives won the governorship with Hiram Johnson and also won control of both the state senate and assembly.⁵⁰ Johnson stated he would enact the direct democracy measures in his inaugural address.⁵¹ In 1911, the legislature passed twenty-three constitutional amendments, which included direct democracy, women’s suffrage, railroad regulation, and workmen’s

43. *Id.* at 8.

44. *Id.*

45. *Id.* at 9.

46. *Id.* at 30.

47. *Id.*

48. *Id.* at 30–31.

49. *Id.* at 15.

50. CENTER FOR GOVERNMENTAL STUDIES, *supra* note 40, at 40.

51. See ALLSWANG, *supra* note 42, at 15.

compensation, that were then collectively referred to the electorate for a vote.⁵² Ironically, “[a]lmost at a single stroke the legislature had reshaped the contours of California politics without any assistance from the statewide initiative.”⁵³ The legislature continued to adopt progressive reform throughout the 1910s. For example, the legislature reformed labor law by passing a series of acts that created an eight-hour work day for women, restricted child labor, required employers not to withhold wages for longer than fifteen days, and established an Industrial Accident Board.⁵⁴ Unlike the legislature, initiatives had little success reforming labor relations. Initiatives to create an eight-hour day and forty-hour work week for all failed and no initiatives passed dealing with the Southern Pacific Railroad or any other corporate power.⁵⁵

From the start, initiatives with some social or cultural characteristic tended to draw the largest number of voters.⁵⁶ In 1914, ninety-one percent of the electorate voted on Prohibition measure 2, and seventy-seven percent “voted on prize fights and on the anti-prostitution referendum.”⁵⁷ Moreover, voter agreement and ideological consistency on many of these social issues was strong and persistent over time.⁵⁸ Thus, groups of voters who supported conservative social agendas tended to represent a consistent voting block, giving them the power to target offensive social behavior.

Although the California’s Progressive Era is often deemed by many as the golden era of direct democracy reform, many of these reforms were simply acts passed by the legislature and not by the people.⁵⁹ Despite the lofty goals of fighting the Southern Pacific, expanding democracy to the people, and checking an unresponsive legislature, in practice California’s direct democracy focused more on social and moral issues rather than combating entrenched interest groups.⁶⁰ In fact, there were many early critics from the Progressive

52. *Id.* at 17; *see also* ELLIS, *supra* note 40, at 187.

53. ELLIS, *supra* note 40, at 187.

54. *Id.* at 188.

55. *Id.*

56. ALLSWANG, *supra* note 42, at 19.

57. *Id.* at 20.

58. *Id.*

59. *See* ELLIS, *supra* note 40, at 187.

60. *See* ALLSWANG, *supra* note 42, at 20; *see also* CENTER FOR GOVERNMENTAL STUDIES, *supra* note 40, at 42–43 (“Instead, early initiatives focused on taxation, prohibition, gambling, bond measures and similar concerns.”).

movement who were worried about the potential effects of direct democracy and who foreshadowed some of the problems California faces today.⁶¹ Chester Rowell, who felt the initiatives had been abused at the local level and the reality would be worse at the state level, stated that the initiative is “‘the worst possible way’ to deal with complex questions.”⁶² Harris Weinstock believed in expanding democracy but worried that the initiative would “promote radical legislation.”⁶³ Edward Dickson feared that interest groups would become too influential and was especially concerned that these groups would recall judges who did not favor their policies.⁶⁴ Should the progressives have listened more to these critics? These critics highlight that progressives were concerned about the majority of the electorate enacting policies without deliberation and with the ability to pressure the judiciary if it was not compliant with the electorate’s policies.

From the perspective of same-sex marriage supporters, California experienced some of the progressives’ foreshadowed fears of the structure of the initiative process with Proposition 8: a well organized interest group, focused on a social issue, passed a constitutional amendment without deliberation or time to reflect, and stripped a minority group of a right deemed fundamental by California Supreme Court.

III. California Constitution: Structure of the Initiative Process

Article 2, section 8 of the California Constitution provides the electorate, through the vehicle of the initiative, with the power to both propose statutes and constitutional amendments and to adopt or reject them.⁶⁵ In order for an initiative to make it to the ballot, the measure is presented to the Secretary of State in the form of a petition which states the text of the proposed statute or amendment.⁶⁶ The measure must be signed by five percent of electors for a statute and eight percent of electors for an amendment to the Constitution of the votes for all candidates for Governor at the last gubernatorial election. Currently, the approximate number of signatures needed

61. See ALLSWANG, *supra* note 42, at 14.

62. *Id.*

63. *Id.*

64. *Id.*

65. CAL. CONST. art. II, § 8(a).

66. CAL. CONST. art. II, § 8(b).

for a statute is around 375,000 and the approximate number for an amendment is 600,000.⁶⁷

Once the signatures are gathered, the Secretary of State is required to wait 131 days before placing the proposition on the ballot.⁶⁸ The state constitution imposes three limitations on initiatives: an initiative must be a single subject or it has no effect, an initiative cannot exclude any political subdivision of the state from the application or effect of its provisions, and an initiative cannot contain alternative or cumulative provisions.⁶⁹ If a measure passes with a simple majority vote of the electorate, the legislature can amend or repeal an initiative statute only if the electorate approves the legislature's proposed alternative statute, unless the initiative explicitly permits the legislature to amend or repeal the statute without the electorate's approval.⁷⁰ Moreover, the governor may not veto an initiative unless explicitly allowed in the language of the proposition.⁷¹ Therefore, the electorate can pass statutes or amend the constitution with little interference from elected officials; the only branch of government that has the ability to check the initiative process is the judicial branch.

IV. Lack of Checks and Balances in the Initiative Process: The Role of the Courts

Should laws enacted by the people with a simple majority vote through the initiative process be treated the same or differently than laws enacted through the legislative process? A person's response depends on whether they inherently trust or distrust the representative government system.⁷² Does he or she feel like politicians represent the public needs, or are politicians motivated more by personal ambition? In general, Americans are skeptical of government and often believe "[t]he checks and balances, so necessary to control the avarice and ambition of politicians, are not needed when the will of the people can be directly expressed. And if the people do error on occasion, the courts are there to prevent them

67. E. DOTSON WILSON & BRIAN S. EBBERT, CALIFORNIA LEGISLATURE 39 (Office of the Chief Clerk of the Assembly 2006) (calculating from the 2002 state-wide election results).

68. CAL. CONST. art. II, § 8(c).

69. CAL. CONST. art. II, § 8(d)–(f).

70. CAL. CONST. art. II, § 10(c).

71. CAL. CONST. art. II, § 10.

72. See ELLIS, *supra* note 40, at 125–26.

from doing away with fundamental rights.”⁷³ While no state court is required to give greater deference to an initiative than a statute passed by the legislature, often judges, particularly those who are subject to recall, tend to treat voter approved initiatives with greater deference.⁷⁴ Thus, there is an inherent conflict within the initiative structure: courts are relied upon to prevent the majority from infringing on individual rights, yet judges tend to give greater deference to initiatives passed by the people.

There are contrasting theories as to how judges should handle their potentially counter-majoritarian task of ruling on initiatives. Judges, who adopt the Populist view, “that in exercising their judicial review, courts should give extraordinary deference to initiatives, because initiatives represent the ‘pure’ will of the people, and the will of the people is entitled to great respect,” are called Juris-Populists.⁷⁵ United States Supreme Court Justice Black, a Juris-Populist, “asserted that the initiative process was ‘as near to a democracy as you can get’ and that a challenge to a law has less force if the law is enacted by the people directly than if it were enacted by the legislature.”⁷⁶ Justice Scalia, a current United States Supreme Court Justice, also promotes juris-populist notions.⁷⁷ Scalia dissented in *Romer v. Evans*, which overturned a Colorado voter-approved state-wide initiative prohibiting homosexuals from claiming rights as a protected class, and stated:

[The initiative] put directly to all the citizens of the state, the question: Should homosexuality be given special protection? They answered no. The court today asserts that this most democratic of procedures is unconstitutional. . . . Striking [the initiative] down is an act, not of judicial judgment, but of political will.⁷⁸

Some justices on the Supreme Court of California, such as Justice Richardson and Justice Bird, have similar inclinations and views; they wrote that initiatives are entitled to “*very special and very*

73. *Id.* at 125.

74. *Id.* at 126.

75. SABATO, *supra* note 8, at 54.

76. *Id.* at 54 (quoting Black, J., in oral argument in *Reitman v. Malkey*, 387 U.S. 369 (1967)).

77. *Id.* at 55.

78. *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J. dissenting); *see also* SABATO, *supra* note 8, at 55.

avored treatment” when reviewed and that “it is our solemn duty to jealously guard the initiative process, it being ‘one of our most precious rights’”⁷⁹ Both United States and California Supreme Court justices present compelling arguments in favor of letting the people have the ultimate decision on policy measures; however, in practice initiatives amount to unfiltered majority rule.

The critics of Juris-Populists and direct democracy argue that the initiative process runs counter to the representative and republican system laid out in the United States Constitution.⁸⁰ In *Federalist No. 10*, James Madison worried about the interest of factions.⁸¹ Madison claimed if factions were under a popular government they would lead to instability and injustice; unchecked majority rule may become majority tyranny.⁸² In a representative system, there are many checks on majority rule and points in the process for deliberation, such as the principle of separation of powers, supermajority votes within the legislature, bicameralism, and the President’s veto; whereas, the courts in California are the initiatives’ first and last check.⁸³

Moreover, under a system of separation of powers courts tend to defer to the policy making judgments of the legislature.⁸⁴ Legislatures are better equipped to deal with intricacies of national policies: They have better investigative powers and can deliberate the various merits

79. *Legislature v. Deukmejian*, 669 P.2d 17, 33 (Cal. 1983) (Richardson, J., dissenting); *Amador Valley Joint High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1302 (Cal. 1978) (Bird, C.J., concurring and dissenting) (quoting *Associated Home Builders of Greater Eastbay, Inc., v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976); see also *SABATO*, *supra* note 8, at 55.

80. Catherine A. Rogers & David L. Faigman, “*And to the Republic for Which It Stands*”: *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1059 (1996) (discussing that the idea that state initiatives violate the Guarantee clause stems from Madison’s *Federalist No. 10*); see also THE FEDERALIST NO. 10 (James Madison).

81. See ELLIS, *supra* note 40, at 123; see also Rogers & Faigman, *supra* note 80, at 1059–60.

82. ELLIS, *supra* note 40, at 123.

83. Rogers & Faigman, *supra* note 80, at 1060 (“Madison proposed the republican form as a check on the passions of a potentially factious majority. Representative decision making offered a mechanism by which public views could be refined and enlarged. In a republic, Madison believed, ‘the superior force of an interested and overbearing majority’ could be tempered by the reasoned judgment of representatives acting for the common good.”) (quoting THE FEDERALIST NO. 10).

84. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1534 (1990) (“When a Federal court declares an act of the Congress unconstitutional, it encroaches on the authority of a coordinate and equal branch of government to make law, a power that Article I explicitly confers upon the legislative branch. This disturbs the constitutional division of powers, and courts are urged to do so sparingly.”).

of policy positions.⁸⁵ Essentially, legislatures have institutional advantages over courts in making policy; however, initiatives do not go through the same process as laws enacted by the legislature.⁸⁶ This difference in procedure and process tilts in favor of stricter judicial review of initiatives than of laws passed through the legislature.⁸⁷

Judges who are more skeptical of initiatives tend to believe in the above criticisms and are called Progressive-Oriented “Initiative Watchdogs.”⁸⁸ They argue that judges should not give initiatives special deference.⁸⁹ In *Brosnahan v. Brown*, Justice Bird dissented and articulated the flaws of initiatives, arguing that initiatives are “drafted only by their proponents . . . [and] there is no opportunity for compromise or negotiation. ‘The result of this inflexibility is that more often than not a proposed initiative represents the most extreme form of the law that is considered politically expedient.’”⁹⁰ Judges who are more skeptical of initiatives run the risk of public backlash. Justice Bird, Justice Grodin, and Justice Reynoso were all voted out of their positions on the California Supreme Court when a public campaign was launched against them for their decisions against capital punishment.⁹¹

The debate surrounding judicial review continues to become more intense. In 1992, the California Commission on Campaign Financing argued in its report on the California initiative industry “that there had been a shift of power between the state legislature and the electorate and that increasingly, most important policy decisions are made in initiative elections.”⁹² In addition, since 1960 about two-thirds of successful initiatives have been challenged in court and in more than half of these challenges, the initiative was

85. See Rogers & Faigman, *supra* note 80, at 1063 (“No one could seriously contend that complex problems are better solved in the absence of discussion and debate. And no matter how creative the suggestions from defenders of pure democracy, the simple truth is that representative lawmaking includes, as part of its process, formal deliberation and debate. The state initiative process does not.”).

86. See *id.*

87. See SABATO, *supra* note 8, at 55.

88. *Id.* at 56.

89. *Id.*

90. *Brosnahan v. Brown*, 651 P.2d 274, 292 (Cal. 1982) (Bird, C.J. dissenting); see also SABATO, *supra* note 8, at 56.

91. Robert Lindsey, *Deukmejian and Cranston Win As 3 Judges Are Ousted*, N.Y. TIMES, Nov. 6, 1986, at A30.

92. SHAUN BOWLER ET AL., *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 109 (Ohio State Univ. Press 1998).

struck down completely or in part.⁹³ With no other check on initiatives, courts face resolving contentious issues, like same-sex marriage. The controversy surrounding Proposition 8 supports the conclusion that the initiative process is contentious and places the court in an insecure position vis-à-vis the electorate. For example, the title of an article in the *San Francisco Chronicle* read, “Proposition 8 Hinges on who decides: Judges or Voters.”⁹⁴ Therefore, the initiative structure requires courts to invalidate initiatives in the eyes of the public, creating tension between courts and the electorate.⁹⁵ This structure raises the concern that when the court experiences pressure from the electorate, it may not be able or willing to function in its traditional role of protector of minority rights.

V. The Initiative Process and Minority Rights

A direct initiative is a form of lawmaking by majority rule.⁹⁶ A majority interest can propose, qualify, and pass legislation without regard to the interest, preferences, or demands of others.⁹⁷ The initiative process, in theory, “allows even a fleeting majority of citizens, in the secrecy and anonymity of the voting booth, to enact a law that adversely affects an unpopular minority.”⁹⁸ Initiatives, like Proposition 8, that amend state constitutions with a simple majority are particularly troublesome when compared with the requirements to amend the United States Constitution: a two-thirds vote of both houses of Congress and ratification by three-fourths of the states.⁹⁹ These additional hurdles reflect a belief that constitutions should have widespread public support and, unlike statutes, should not be amended hastily.¹⁰⁰ “Each of these departures from majority rule reflects the nation’s historical commitment to safeguarding minority rights and interests, as well as promoting democratic deliberation and

93. ELLIS, *supra* note 40, at 148.

94. Egelko, *supra* note 28, at B-1.

95. See SABATO, *supra* note 8, at 60.

96. Eule, *supra* note 84, at 1510 (“In order to exercise this option the voters neither need legislative permission nor legislative assistance. A measure may be placed on the ballot by securing a specified number of signatures—usually set at some percentage of the votes cast in the preceding general election—and the measure is enacted if a majority of the voters signify their approval.”).

97. *Id.*

98. SABATO, *supra* note 8, at 50.

99. See ELLIS, *supra* note 40, at 123.

100. *Id.*

good public policy.”¹⁰¹ Contrary to our national philosophy, Proposition 8, and constitutional amendment initiatives in general, contradict the idea that an amendment to a constitution should have deep public support and be subjected to a deliberative process; rather, Proposition 8 passed with a small majority of the vote and took away rights of an unpopular minority.

Proposition 8 is an example of the majority taking away rights established by the judiciary; however, initiatives also can overrule the legislature. Kenneth Miller’s recent study of California, Colorado, and Oregon over the last forty years discovered that voters in these states “approved eleven initiatives that overturned or preempted efforts by representative government to promote the rights or interest of racial or other minorities.”¹⁰² These successful initiatives included efforts to prevent busing to desegregate public schools, restrict illegal immigration, ban state affirmative action, restrict efforts to protect the rights of homosexuals, restrict bilingual education, and establish English as the state’s official language.¹⁰³ “By contrast, no voter-approved initiatives in those states during that period expressly expanded the rights of minorities.”¹⁰⁴ Moreover, the composition of the electorate versus the composition of the legislature may affect the types of laws that are passed by each body. For example, the California electorate is two-thirds white and middle class despite the state containing fifty percent minorities, whereas the legislature’s large number of minority-controlled legislative districts is more reflective of the actual population.¹⁰⁵

Initiative campaigns bring the question of minority rights and public services into the forefront of media and public view.¹⁰⁶ Prior to such campaigns, the public at large often has not taken much time to think about the particular minority group or the benefits it may receive from the state.¹⁰⁷ “When an initiative is proposed that would restrict or rescind rights and benefits granted . . . to the group, the campaigns in favor of and opposed to the initiative expose members of the public to stimuli designed to sway their opinions.”¹⁰⁸ During

101. *Id.*

102. SABATO, *supra* note 8, at 52.

103. *Id.*

104. *Id.*

105. *Id.* at 51.

106. *See* BOWLER, *supra* note 92, at 230.

107. *Id.*

108. *Id.*

the Proposition 8 campaign, the proponents of the measure ran an advertisement depicting a little girl coming home from school where she had learned how a prince could marry a prince and therefore she could marry a princess.¹⁰⁹ The proponents of Proposition 8 used education as a tactic and ploy to sway voters in favor of the proposition and potentially altered their views of the homosexual community. Initiative campaigns like Proposition 8 that focus on social issues and employ propaganda, cause visceral reactions in the electorate, happen in a short period of time, and hinder the electorate's ability to view the issue in a more tolerant way.

Democracy is better achieved when the electorate can reach a tolerant response; however, that requires people to ignore their initial impulses of self-preservation and extend rights to those whom they view as threatening and potentially destructive.¹¹⁰

Thus, people who are on the fence about a particular issue need time to overcome their initial impulses and fear of a particular group in order to make a more reasoned and informed decision. Proposition 8 was on the ballot less than six months after the California Supreme Court rendered its decision; the electorate did not have the luxury to have a "sober second thought" that could potentially generate a more tolerant outcome.¹¹¹

Although the effects of Proposition 8's passage on California's gay community are still unfolding, anti-gay initiatives have often proven to be detrimental to relationships between the gay community and majority groups.¹¹² Whether an initiative is successful or not the "mere existence of initiatives targeting minorities can stigmatize the group—particularly if visible elites of at least one party or ideological group promote the intolerant position—evidence of 'learning' or attitude change might be reflected in opinions shifting toward less acceptance of the target group."¹¹³ A study, designed to gauge opinion change of minority groups targeted by initiatives, determined that GOP respondents living in states where anti-gay initiatives circulated "were significantly less likely [than other political affiliations] to respond favorably about tolerating different lifestyles

109. Yes on 8 in California – It Already Happened, http://www.youtube.com/watch?v=cOWjhqT_me8 (last visited Feb. 2, 2009).

110. BOWLER, *supra* note 92, at 230.

111. *Id.* at 229.

112. *Id.* at 234.

113. *Id.*

and moral standards.”¹¹⁴ Moreover, when members of the GOP nationally shifted to opinions less tolerant of these lifestyles during the same time period, the effect was more substantial among voters in states where anti-gay initiatives were filed.¹¹⁵ Further, “these results are particularly interesting (and disturbing) given that some opponents of anti-gay initiatives claim that hate crimes against gays increased when some anti-gay initiatives appeared on state ballots.”¹¹⁶ Therefore, the Proposition 8 campaign and its approval by voters may cause conservatives’ attitudes to become less tolerant toward alternative lifestyles in California.

While no branch of government is completely innocent of imposing laws that restrict rights of minorities, the structure of the initiative process remains more troublesome than other constitutional amendment processes because: 1) the proposal process does not involve deliberation or negotiation, only a collection of signatures; 2) once the signatures are collected, a simple majority vote can amend the state constitution whereas the state legislature requires a two-thirds vote plus electorate approval, and the federal constitution requires a two-thirds vote of Congress and three-fourths vote by the states; 3) the only institutional check on the initiative process is the judiciary, which leaves the judiciary in a precarious position via the electorate; and 4) initiatives tend to stigmatize the minority group targeted by the initiative. Although the judiciary serves an important function of protecting the rights of minorities, it is still vulnerable to both public pressure and the public overruling the court, as was the case with Proposition 8. The tension already present between the electorate and the courts suggests that expanding the role of judicial review over initiatives would not be the best way to ensure a more deliberative process or protection of minority rights. I propose that California reform its initiative process to provide more institutional checks and reflection or time for a “sober second thought.”

114. *Id.* at 243.

115. *Id.*

116. *Id.* at 245.

VI. Alternatives to the California System

A. Switzerland

Switzerland is the birth place of initiatives.¹¹⁷ The Swiss initiative and referendum process influenced many western states and progressives.¹¹⁸ Although many proponents of direct democracy in the United States point to the Swiss process as an exemplar system, they fail to recognize the distinctions that developed between states like California and the Swiss system.¹¹⁹ “[T]he U.S. initiative system is distinguished by its lack of checks on majorities, checks that are commonplace in the Swiss initiative system, particularly at the federal level, where the initiative power is limited to constitutional amendments.”¹²⁰

The Swiss initiative system is indirect at both the federal and cantonal (similar to a state in the United States) levels, and must pass through several institutional checks before the proposed constitutional amendment reaches the ballot.¹²¹ These checks include: seven Swiss citizens have 18 months to gather 100,000 signatures (a greater hurdle than in California) for an initiative;¹²² a draft of the initiative is submitted to the Federal Assembly; the Federal Assembly determines whether the initiative is valid or if it violates any rules or pre-existing laws; if it is valid, then the Assembly determines whether it supports the initiative or not; if the Federal Assembly supports the initiative, it appears on the ballot and must pass the electorate with a double majority vote (majority of the population and majority of the cantons must vote in favor of it); and if the Federal Assembly does not support the valid initiative, it will place the initiative and a counter-draft on the ballot and the electorate will vote on both measures; the voters may approve both drafts but they must indicate which they prefer, and the measure to receive a double-majority will

117. See ALLSWANG, *supra* note 42, at 3.

118. *Id.*

119. See ELLIS, *supra* note 40, at 139.

120. *Id.*

121. *Id.*

122. Switzerland has a population of 7,604,467. See <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html>. In contrast, California has a population of around 34 million and requires around 600,000 signatures. See <http://censtats.census.gov/data/CA/04006.pdf>.

be enacted into law.¹²³ This complicated system, along with the requirement of a double-majority vote, in theory provides a safeguard against the tyranny of the majority.¹²⁴

Apart from the institutional procedures of passing an initiative, the Federal Assembly can also be strategic about the wording of its voting recommendations, its choice of the Election Day, and it can slow down the process by taking several years to consider proposals.¹²⁵ "In other words, delay is sometimes used as an intentional strategy to break an initiative's momentum" or provide the public with the above mentioned "sober second thought."¹²⁶ The ability of the Federal Assembly to manipulate and slow down the initiative process contrasts greatly with the system in California. The California legislature has no power to intervene in the initiative process and no part of the process allows for deliberation or debate between opponents and proponents of a measure. "Furthermore, [the] fear of the dysfunctions of what [is called] the unmediated popular vote do not materialise [sic] in the case of Swiss popular initiatives . . . due to all mediating stages they are not as 'unmediated' as assumed, and extreme proposals will have difficulties at the parliamentary stages."¹²⁷ All of these safeguards and intervention on the part of the Federal Assembly mean that the number of initiatives actually passed in Switzerland is far smaller than the number passed in California.¹²⁸

The negative aspect of the Swiss system is that the political elite can inhibit the majority's will.¹²⁹ Only about one out of every ten initiatives that even make it to the ballot are accepted by both the people and the cantons.¹³⁰ Although the Swiss initiatives are generally less successful than in California, the dialogue established between the Swiss electorate and the Federal Assembly produce important indirect effects.¹³¹ "[T]he existence of direct-democratic institutions change the nature of the interaction and the power relationship

123. See MICHAEL GALLAGHER & PIER VINCENZO ULERI, *THE REFERENDUM EXPERIENCE IN EUROPE* 188 (Macmillan 1996).

124. *Id.*

125. MAIJA SETALA, *REFERENDUMS AND DEMOCRATIC GOVERNMENT: NORMATIVE THEORY AND THE ANALYSIS OF INSTITUTIONS* 149 (St. Martin's Press, Inc. 1999).

126. *Id.*; BOWLER, *supra* note 92, at 229.

127. SETALA, *supra* note 125, at 150.

128. *Id.* at 149-50.

129. GALLAGHER, *supra* note 123, at 188.

130. *Id.* at 192.

131. *Id.* at 193.

between political actors even in cases when they are not actively used . . . the case for raising the referendum option on the political agenda may be as important as actual referendums.”¹³² In Switzerland, bargaining procedures between initiative sponsors and the government were legally established in 1952.¹³³ Generally, initiative sponsors look more at making compromises with the government in order to translate their measures into law through the federal assembly rather than trying to garner the majority of the vote.¹³⁴ This process leads to more deliberation and compromise than the California process. Even when an initiative is not successful, the Federal Assembly will often make concessions regarding issues raised; for example, an initiative to disband the army barely failed in the 1960s, but afterward the Federal Assembly did enact army reforms.¹³⁵

Is the Swiss system an appropriate system to inspire reform for California? There are big differences between the two entities: One is a state and one is a country; although California is a state, its population is much larger than Switzerland; Switzerland is less diverse than California; and Switzerland does not have a system of judicial review like California. Judicial review is the only institutional check on the California initiative system, but the Swiss system has legislative checks along with a requirement of a double majority vote. Moreover, the Swiss Judiciary has no power to declare federal laws void, less than eighty percent of judges are attorneys, justices are approved and nominated by the legislature, and they serve a term of six years.¹³⁶ For the Swiss, the framers of the constitution are the people, “[t]o understand why the federal courts have almost no authority to void federal law and only limited authority to void cantonal statutes, it is helpful to remember who may: the people. The right to review laws, and change the constitution itself, is in use continuously throughout Switzerland.”¹³⁷ To the Swiss people, judicial review is perceived as undemocratic.¹³⁸

132. SETALA, *supra* note 125, at 148.

133. *Id.*

134. *Id.*

135. GALLAGHER, *supra* note 123, at 193.

136. GREGORY A. FOSSEDAL, *DIRECT DEMOCRACY IN SWITZERLAND* 71 (Transaction Publishers 2005).

137. *Id.* at 74.

138. *See id.*

Although the Swiss do not have judicial review, minority rights are protected by other institutional safeguards. The need for judicial review is diminished when the initiative process is tempered by legislative review and a higher threshold of voter support through the Swiss double majority. These two mechanisms ensure that the initiative process involves deliberation, broad public support, and time for the electorate to reflect on the policies that would amend the Swiss constitution. Overall, the Swiss model represents a system where there is an open dialogue between the electorate and the Federal Assembly ensuring that the public is heard, but where a simple majority cannot directly amend the constitution.

B. Massachusetts

Similar to Switzerland, Massachusetts employs an indirect initiative process for constitutional amendments. Massachusetts' legislature also acts as a filter for the initiative proposals; however, unlike in Switzerland, if the initiative does not receive the support of the legislature, the proposal will never appear on the ballot.¹³⁹ In order to amend the state constitution, it is necessary for an amendment to receive the support of a quarter of the legislature (50 out of 200) at two state constitutional conventions (a joint meeting of the House of Representatives and the Senate).¹⁴⁰ During the first constitutional convention, the legislature may amend the initiative amendment with a three-fourths vote, but the second convention cannot change the amendment in any way.¹⁴¹ The constitutional conventions are held in two consecutive years and even though a quarter of the votes of the legislature does not seem like a difficult number to obtain, this hurdle has proven to be substantial.¹⁴² "Of the dozen or so constitutional initiatives that have been presented to the Massachusetts legislature with the requisite number of signatures, only three have been approved by the legislature and forwarded to the people."¹⁴³

Despite the low number of successful constitutional amendments initiated by the people, similar to Switzerland, the mere presence of the initiative process allows the people to place pressure on the

139. See ELLIS, *supra* note 40, at 138.

140. *Id.* at 137.

141. MASS. CONST. art. XLVIII, § 4.

142. See ELLIS, *supra* note 40, at 137.

143. *Id.*

legislature.¹⁴⁴ “The most notable example was an initiative introduced in the legislature in 1966, which called for a reduction of the membership in the lower house from 240 to 160.”¹⁴⁵ The initiative passed the first constitutional convention, but failed in the second by only one vote.¹⁴⁶ Several years later under considerable public pressure the legislature referred its own “House Cut” plan to the electorate in 1974 and it was approved by eighty percent.¹⁴⁷ “Massachusetts’ cumbersome amendment process meant its citizens had to wait almost a decade to secure the desired change; on the other hand, the system worked, even with an amendment that directly threatened the livelihood of every state legislator.”¹⁴⁸ Striking a balance between the United States’ Federal constitutional amendment process and California’s initiative process, Massachusetts provides its citizens with a way to influence their state constitution while the legislature acts as a safeguard against extreme measures.

After a Massachusetts Supreme Court decision, *Goodridge v. Department of Public Health*, where the court held denying gay couples equal marriage rights was unconstitutional,¹⁴⁹ citizens moved to amend the state’s constitution to prohibit same-sex marriage.¹⁵⁰ On March 4, 2004, the initiative received 92 votes in favor and 105 opposed in the first constitutional convention, which allowed the measure to proceed to the second.¹⁵¹ During the second constitutional amendment on September 14, 2005, the amendment failed with a vote of 157 to 39, a stark contrast to the previous vote.¹⁵² The difference between the two constitutional conventions reflects the change in public attitude and that a vote in favor of same-sex marriage was more politically acceptable.¹⁵³ Senator Brian P. Lees, the Republican

144. See ELLIS, *supra* note 40, at 137.

145. *Id.*

146. *Id.*

147. *See id.*

148. *Id.* at 138.

149. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

150. Rachel Lewis, *After Vote, Both Sides in Debate Energized*, BOSTON GLOBE, Sept. 15, 2005, available at http://www.boston.com/news/local/massachusetts/articles/2005/09/15/after_vote_both_sides_in_debate_energized/.

151. *Id.*

152. *Id.*

153. See Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A-14, available at <http://www.nytimes.com/2005/09/15/national/15amendment.html?ex=1284436800&en=2fcd2de4099e5435&ei=5090&partner=rssuserland&emc=rss>.

minority leader who voted for the amendment during the first constitutional convention, stated after the second:

[T]oday gay marriage is the law of the land . . . voting for the amendment . . . would mean taking action against our friends and neighbors who today are currently enjoying the benefits of marriage . . . gay marriage has begun and life has not changed for the citizens of the commonwealth, with the exception of those who can now marry who could not before.¹⁵⁴

Therefore, the Massachusetts system gave people and legislators an opportunity for a “sober second thought” and generated an outcome that protected the rights of a minority group.

VII. Recommended Reforms to the California Initiative Process

I suggest the following reforms would improve California’s current constitutional amendment initiative system: California’s signature requirement can remain the same, but instead of the Secretary of State waiting only 131 days before placing the measure on the ballot, the measure, like in Switzerland and Massachusetts, should be submitted immediately to the legislature. Once before the legislature, the Massachusetts model should be followed by requiring the proposed amendment to receive support of a quarter of the legislature (40 out of 120)¹⁵⁵ at two state constitutional conventions, which would be simply a joint meeting of the California Assembly and Senate in two consecutive years. This institutional safeguard would allow the legislature to debate the merits of the amendment on two separate occasions and allow the legislatures to gauge public support over the course of two years. Similar to the Massachusetts system, if the initiative does not pass the two constitutional conventions, the measure does not go to the ballot.

If the initiative amendment makes it to the ballot, I propose California adopt Switzerland’s system at this point in the process, which allows the legislature to provide the electorate with a countermeasure that addresses the problems still apparent with the proposed amendment. In addition, the double-majority vote or an increase in vote total, like the Swiss system should be implemented.

154. *Id.*

155. *See WILSON & EBBERT, supra note 67, at 84.*

If California applied a double-majority vote, it would require a majority of the entire electorate and a majority of all the counties' vote totals; however, California could use a super majority vote (two-thirds vote of the electorate) requirement to avoid the difficulties, due to the size of the state and number of counties, in determining the vote distribution of every county. Judicial review would remain in place for challenges to both proposed and passed initiatives.

Conclusion

In California, judicial review plays an important role as the institutional check on the initiative system. Despite the California Supreme Court's indispensable role as protector of minority rights, the struggle between the electorate and the court to settle on a definition of marriage highlights how the court should not be the only institutional actor checking the electorate. Moreover, the court should not be the first and last check when the electorate is seeking to amend the state constitution. In general, to amend a constitution there are many steps in the process to ensure amendments reflect both deep public support and deliberation. The California constitutional amendment initiative process lacks safeguards to protect the state constitution and minority groups from the whims of the majority. The California constitutional amendment initiative process should incorporate institutional checks from both the Massachusetts' and Switzerland's processes.

Proposition 8 is a quintessential example of how the initiative system allowed the electorate to amend the constitution without deliberation or safeguards in place to protect the interests of a minority group. The purposes of my proposed reforms are to guarantee that multiple institutional actors are assessing the benefits and negative effects of the proposed amendments, both institutional actors and the electorate are given time to reflect on the impact the measure will have on all people in the state. Moreover, the reforms would ensure that the state constitution is not constantly being amended by a majority who might simply have an initial visceral reaction to a particular social behavior or marginalized group. California should still have a process where the electorate is heard, but the process should provide institutional checks to ensure that a majority of the vote cannot tyrannize a minority group. Tolerance needs time for a "sober second thought."