Thwarting Thrasymachus: A New Constitutional Paradigm for Direct Democracy & Protecting Minority Rights

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Direct democracy measures at the state level have been disproportionately successful when they restrict minority rights. The use of direct democracy for such purposes contravenes the structure, history, and philosophical underpinnings of our Constitution. Moreover, it poses structural and practical problems in civil rights litigation under the Supreme Court's intent-based Equal Protection jurisprudence. This Note argues that to ensure that voter might does not define minority rights at the state level, the Supreme Court should adopt a categorical rule under Washington v. Davis *and* Village of Arlington Heights *that obviates plaintiffs' need to show an intent to discriminate when the policymaking body is the entire voting population of a state.*

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* Georgetown Law, J.D. 2017; Columbia University, B.A. 2014. To my loving family and to the thoughtful support of two professors—Professor Susan Low Bloch of the Georgetown University Law Center, whom I must credit for my knowledge of the Equal Protection Clause, and Professor Robert Neer of Columbia University, whom I must credit for inspiring me to tie my newfound legal knowledge to the foundational principles of Western Philosophy instilled in me through Columbia's Core Curriculum.

INTRODUCTION: THE PHILOSOPHICAL LIMITS OF DIRECT DEMOCRACY

A. DEFINING THRASYMACHAN JUSTICE

In *The Republic*, Socrates and his compatriots spend the bulk of their discussion debating the merits of their friend Thrasymachus's initial stance: that the concept of justice is lacking in moral significance because it is merely the product of the self-interest of the powerful.[1] His conclusion, that the normative good is defined exclusively by those with the power to define justice, is ultimately rejected by the group. Thrasymachus himself ultimately concedes, but only after Socrates devises a rigidly structured society in which Philosopher-Kings, with the help of their totalitarian Guardians, govern the many with the best interests of the society—not themselves—at heart.[2] Only through the Kallipolis—the imaginary and rigidly communitarian society that Plato hypothesizes—can justice be something other than "the advantage of the stronger."[3]

For Plato and his colleagues, there was something deeply troubling about Thrasymachus's assertion, something so troubling that an overhaul of society as they knew it might be required to prevent it. However, such a Kallipolis, Plato conceded, would never "see the light of the sun" through any natural political process, leaving the reader wondering whether justice in practice truly is Thrasymachan in nature—nothing more than the advantage of the stronger.[4]

In lieu of the rigid but theoretical Kallipolis, modern political philosophers, including America's Founders, have tried, often in vain, to devise a structure of government that balances two desirable but diametrically opposed characteristics: (1) rule of law by the majority of free and independent individuals,[5] and (2) the ability to protect minority groups from the threat of the majority imposing "Thrasymachan Justice."[6] Indeed, America's founding generation candidly recognized this conflict, opting to negate its effects, rather than to cure its cause, in order to protect the individual self-determination that was to be the hallmark of

1. "[A] democracy sets down democratic laws . . . [a]nd they declare that what they have set down—their own advantage—is just for the ruled . . . . [I]n every city the same thing is just, the advantage of the established ruling body. . . . [S]o the man who reasons rightly concludes that everywhere justice is the same thing, the advantage of the stronger." PLATO, THE REPUBLIC OF PLATO bk. I, at 16 (Alan Bloom trans., BasicBooks 2d ed. 1991). Thrasymachus's stance is encapsulated in the adage "might makes right."

2. *See id*. at bk. VI, at 163–93. However, the subtle veracity of Thrasymachus's position is revealed because the Philosopher-Kings would lead a society where justice is defined by their own concept of the normative good—the philosophical good—the contours of which were the subject of considerable debate at the time by Sophists like the *real* Thrasymachus. *See id*.

3. *See id*. at bk. I, at 16.

4. *See id*. at bk. V, at 154.

5. Modern notions of individualism were foreign to Plato, who saw individualism as subordinate to the needs of the Kallipolis. *See id*. at bk. I, at vii.

6. *See* THE FEDERALIST NO. 10, 57 (James Madison) (advocating for rule by a republican majority as well as the ability to ensure the majority is "unable to concert and carry into effect schemes of oppression").

the new American Republic.[7] As Madison noted in Federalist No. 10,

> Liberty is to faction, what air is to fire, an aliment, without which it instantly expires. But it could not be a less folly to abolish liberty . . . than it would be to wish the annihilation of air . . . because it imparts to fire its destructive agency.[8]

The Founders contemplated a system in which rule by the people was the driving force of government. However, the majority will was also something to be viewed skeptically—something to be tempered to prevent Thrasymachan Justice.[9] To ensure that individualism did not lead to majoritarian tyranny, the Founders opted for a republican government. They favored rule by representative bodies that tempered majoritarian will. A "pure" democracy would lead to the despotism that Plato and his colleagues sought to prevent.[10] To ensure this principle protected citizens from the tyranny of both state and federal majorities, the Founders explicitly provided in the Constitution that the federal government would guarantee that states followed this basic republican philosophy.[11]

This Note argues that nearly half of the states within our confederal system of government have, with the assistance of the Supreme Court's deferential Equal Protection jurisprudence, departed from these fundamentally republican legal and philosophical principles. By providing for rule by the unbridled majority will via ballot initiatives, referenda, propositions, and other plebiscites[12]—hereinafter referred to generally as "direct democracy"—these states have indirectly enabled the kind of majority rule that both Plato and the Founders deliberately rejected. Through direct democracy, these states threaten minority groups with Thrasymachan Justice by subjecting their civil rights to the might of the majority.

B. AN OVERVIEW OF AMERICAN DIRECT DEMOCRACY

Contemporary American direct democracy has several forms. Though all but one requires citizen lawmakers to obtain a requisite number of signatures for petitions before their proposals can be placed on the ballot, the degree of citizen control over the process varies from there. From the system with the least to the most

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7. *Id.*

8. *Id.* at 54.

9. *See id.*

10. ALEXANDER HAMILTON, CONVENTION OF NEW YORK: SPEECH ON THE COMPROMISES OF THE CONSTITUTION (1788), *in* THE WORKS OF ALEXANDER HAMILTON 426, 440 (John C. Hamilton ed., 1850).

11. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4 (the Guarantee Clause).

12. The term "plebiscite" historically referred to a Roman law passed by the popular plebeians' council. *Plebiscite*, OXFORD ENGLISH DICTIONARY (3d ed. 2006). In modern times, the term means "[a] direct vote of all the members of an electorate to decide a question of public importance, [such as] a proposed change in the constitution, union with another state, [or] acceptance of a government programme." *Id.*

citizen control, "referrals" are a process through which the state legislature itself places a policy proposal on the ballot to ensure their decisions have the explicit approval of voters.[13] The policy proposal originates from the state legislature but must be confirmed by the people. Second, there are "referenda" through which voters can use direct democracy to determine what issues the state legislature should take up in its next term.[14] Third, and most critical to this Note's analysis, are "initiatives." These can take several forms,[15] but the critical feature is that the legislature is bypassed entirely with an initiative. The people, via a plebiscite, can enact new statutory laws. In some states like California and Oregon, the people even enact state constitutional amendments.[16] The initiative process takes place while the state legislature and executive—and in the case of constitutional initiatives, even the state judiciary—are relegated to the sidelines.[17]

C. DIRECT DEMOCRACY: THE TRIUMPH OF THRASYMACHUS

Statistical studies of modern American direct democracy schemes show that their use has led to precisely the ill the Founders sought to prevent: Thrasymachan Justice. These studies have shown that direct democracy has been disproportionately used to the advantage of the stronger, to weaken the civil rights of minority groups, and to establish normative notions of justice through the will of the majority.[18] As Barbara Gamble asked in her 1997 article, "Putting Civil Rights to a Popular Vote," "[W]hen citizens have the power to legislate civil rights issues directly, will the majority tyrannize the minority?"[19] The answer was a resounding yes.

> After reviewing over three decades worth of civil rights initiatives and referenda, the answer is quite clear. Citizens in the political majority have repeatedly used direct democracy to put the rights of political minorities to a popular vote. Not only that, anti-civil rights initiatives have an extraordinary record of success: voters have approved over three-quarters of these, while endorsing only a third of all substantive measures [placed on the ballot]. . . . Minorities suffer when direct democracy circumvents that system [of our representative government].[20]

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13. *See* Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1194–96 (2005).

14. *See id.*

15. *See id.*

16. *See, e.g.*, CAL. CONST. art. II, § 8(a) ("The initiative is the power of the electors to propose statutes *and amendments to the Constitution* and to adopt or reject them.") (emphasis added).

17. *See id.* Because a constitutional initiative enacts a state constitutional amendment, it eliminates the possibility of substantive review by state courts. Although federal courts can and do review the constitutionality of state constitutional initiatives. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *rev'd on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

18. *See, e.g.*, Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 261–62 (1997).

19. *Id.* at 245.

20. *Id.*

Gamble's empirical study makes it clear that direct democracy has been used most specifically to the detriment of racial minorities but has also been applied to lessen the rights of a broad range of minority groups.[21] Tools of "pure" democracy have been wielded to attack discrete and insular groups both directly, when the text of the statute specifically references characteristics of the minority group,[22] and indirectly, by hiding the initiative's true policy motives and using veiled language to disparately impact minority groups.[23]

Gamble's study provides statistical evidence for what many scholars had suspected for some time, that there are serious conflicts between the Founders' vision for a republican confederation and the rule of law by majoritarian will which over twenty states have adopted in some form.[24] Julian Eule notes:

> When naked preferences emerge from a plebiscite, it is not a consequence of system breakdown. Naked preferences are precisely what the system seeks to measure. Aggregation is all that it cares about. The threat to minority rights and interests here is structural. This is how the system is *supposed* to work.[25]

Moreover, because modern direct democracy gives the majority the power to change laws at the state level to suit its whims, whatever tolerance the Founders had for the few forms of plebiscite lawmaking at the local level that were in place at the Founding—such as the archetypal New England town meeting[26]—cannot be said to translate to today's direct democracy. Ultimately, whatever the merits for direct democracy might be in other areas of law—such as in the regulation of state taxes or government spending[27]—the serious harm that it has brought to the civil rights of discrete and insular minorities outweighs them handily. This is a principle that is as true today as it was at the Founding.

D. CHARTING A NEW PATH FOR DIRECT DEMOCRACY AND CIVIL RIGHTS

Though its use in areas of taxing and spending is often extolled,[28] direct democracy measures remain most likely to pass, as Barbara Gamble noted, when they are used to reduce the quantum of rights available to minority groups.[29] The impact of these measures has not been isolated to any single minority group.

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21. *Id*. at 255–57, 260.

22. *See, e.g*., Romer v. Evans, 517 U.S. 620, 624 (1996) (describing Colorado's "Amendment 2" ballot referendum, which explicitly references those with "homosexual, lesbian or bisexual" orientations).

23. Gamble, *supra* note 18, at 255–57; *see* Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 307–11 (2007).

24. *See* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 297 (2007).

25. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1551 (1990) (internal citations omitted).

26. Robert G. Natelson, *A Republic, Not A Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 855 (2002).

27. *See* Hoesly, *supra* note 13, at 1196.

28. *See id*. at 1197.

29. *See supra* notes 19–20 and accompanying text.

Rather, it has had far-ranging consequences: Todd Donovan noted in a follow-up to Gamble's study published sixteen years later that "[e]xamples of voter-approved ballot initiatives that restrict minority rights or target minorities for differential treatment are numerous."[30]

It is the use of direct democracy for these purposes that is the focus of this Note. When citizens circumvent the representative lawmaking process envisioned by our Founders, they place the hot iron of the majority will directly against minority groups, without the presence of a tempering legislature between them. These processes have the effect of producing the Thrasymachan Justice that our Constitution is designed to prevent.

This Note will demonstrate the fundamental legal and philosophical problems inherent in how the Equal Protection Clause is applied to laws passed by modern American direct democracy schemes. However, as our Founders did in the Federalist Papers,[31] this Note will argue for curing the deleterious effects of direct democracy without extinguishing the positive motives of liberty and individualism that ground these democratic institutions.

Part I of this Note explores the Founders' views of direct democracy and explains how the structure of the Constitution mandates the Federal Government to police state practices which threaten to bring Thrasymachan Justice to minority groups. Part II will outline the Progressive Era expansion of direct democracy and its "sanction" by the Supreme Court in 1912. Part III will explore the Supreme Court's modern Equal Protection jurisprudence and the use of direct democracy as a tool for restricting minority rights in modern times. Part IV will discuss the structural and practical problems that direct democracy poses for litigants in Equal Protection cases. Part V then will suggest a solution to those structural and practical problems—the automatic application of heightened scrutiny to laws passed by direct democracy upon a showing of disparate impact. This solution will be drawn from existing Equal Protection cases, an originalist understanding of the Constitution, philosophical principles, and functionalist considerations. It will argue for an approach that fits snugly within the contours of contemporary Equal Protection case law, rather than advocating for radical change. At the conclusion of the analysis, this Note will have shown a new path forward for the Supreme Court's direct democracy jurisprudence, one which preserves the proud individualism inherent in citizen lawmaking, while ensuring that justice in the realm of minority rights is not merely "the advantage of the stronger."

I. DIRECT DEMOCRACY AT THE FOUNDING

Part I starts with an overview of the Founders' philosophical inspirations; then explores the Founders' views of direct democracy at the Constitutional

30. *See* Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1744–45 (2013).

31. *See* THE FEDERALIST NO. 10 (James Madison).

Convention, ratification debates, and in the Constitution itself; and ends with a discussion of direct democracy's treatment in the Federalist Papers.

A. THE FOUNDERS' INSPIRATIONS

The Founders were acutely aware of the Thrasymachan ills that "pure" democracy had posed to systems of government in the past and were determined to chart a new course. Varying forms of direct democracy had been in place in the West since the Athenians first gathered to enact measures by popular vote in the fifth century B.C.E.[32] However, Athenian direct democracy was limited in several respects and was viewed skeptically by the Founders.[33]

First, it was only democratic in a semantic sense, because women, slaves (of which there were many), and resident foreigners were unable to vote, and only propertied male citizens could participate.[34] Second, even those who could vote had limited power in practice. To vote, male citizens had to travel to the Pnyx, a dedicated space on a hill in Athens where only 6,000 citizens—estimated to represent at most just twenty percent of the voting-eligible population—could even fit.[35] Thus, participation was limited by practical considerations. Third, the system required more than the passive, anonymous vote by a disinterested citizenry that is possible in modern plebiscites. Voters not only had to be physically present, but they were expected to take advantage of a system in which any one of them was entitled to speak to the gathering by simply raising his hand.[36] This environment placed public pressure on those who might voice dissent, as they would be unable to do so anonymously, except by their votes. Fourth, and most important to the Founders, the system was rife with Thrasymachan Justice. Indeed, it was this system, the Ekklesia (the Assembly)[37], that imposed the death penalty on Socrates—Plato's mentor and teacher[38]—after he spoke in opposition to some of its practices.[39] Socrates's death motivated Plato to write *The Republic* and several of his other dialogues.[40]

The Founders were a group of political elites well-versed in philosophy and history. Their view of Athenian democracy and related systems was decidedly negative, because it had been used and abused to silence political minorities like Socrates and his students; indeed, James Madison so distrusted this system that he wrote in The Federalist No. 55 that even if "every Athenian citizen had been a

32. *See* Mark Cartwright, *Athenian Democracy*, ANCIENT HISTORY ENCYCLOPEDIA (Oct. 13, 2014), http://www.ancient.eu/Athenian_Democracy [https://perma.cc/38VP-3VHW].

33. *See, e.g.*, HAMILTON, *supra* note 10, at 440.

34. *See* Cartwright, *supra* note 32.

35. *Id.*

36. *Id.*

37. The Editors of Encyclopædia Britannica, *Ecclesia*, ENCYCLOPÆDIA BRITANNICA (July 20, 1998), https://www.britannica.com/topic/Ecclesia-ancient-Greek-assembly [https://perma.cc/3339-XR5X].

38. The Editors of Encyclopædia Britannica, *Plato*, ENCYCLOPÆDIA BRITANNICA (Sept. 18, 2017), https://www.britannica.com/biography/Plato [https://perma.cc/P26T-AHTY].

39. George Kateb, *Socratic Integrity*, 40 NOMOS 77, 82 (1998).

40. *See Plato*, *supra* note 38; *see, e.g.*, PLATO, APOLOGY (Benjamin Jowett trans., 1891).

Socrates, every Athenian assembly would still have been a mob."[41]

Moreover, other philosophers whom the Founders read carefully, such as Thomas Hobbes, decried the inefficiency of such a process, opting instead for centralized rule by the despotic Leviathan.[42] Similarly, John Locke—arguably the leading philosophical inspiration to the founding generation—only permitted "pure" democracy to play a role in the formation and acceptance of the social contract, rather than an ongoing role in its operation.[43] Locke was careful to keep the natural rights of individuals—like autonomy of thought, belief, and will—far from the Thrasymachan grasp of the majority.[44] Lastly, Montesquieu—whom the Founders turned to in constructing our system of layered federalism[45]—advocated for three governmental features: (a) separation of powers, (b) republican representation for both the interior and exterior republics, and (c) skepticism of democratic rule.[46] To the Founders, none of these features was present in a direct or "pure" democracy.[47] Democratic institutions, Montesquieu feared, would also generate disrespect for representative institutions because the people would only trust themselves, rather than their deliberative representatives.[48] The Founders shared this fear.

B. DIRECT DEMOCRACY AT THE CONSTITUTIONAL CONVENTION AND RATIFICATION DEBATES

When the Founders traveled to Philadelphia in 1787, they took with them this philosophical knowledge. They sought to construct a republican nation in which the sovereign power of the people was respected, but also viewed skeptically, with an eye toward preventing the Thrasymachan Justice that had been visited upon the Athenians. The structure of the government that the Constitution prescribed makes this clear. Nowhere in the structure of the federal government are plebiscites to be used on their own, without the tempering and mediating influence of another governmental process. The skepticism with which they viewed rule by majority will is shown in four parts of the Constitution: (1) the method of electing of the President, (2) the Article V amendment process, (3) the oft-forgotten Article VII ratification process, and (4) the Guarantee Clause.

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41. *See* THE FEDERALIST NO. 55, at 306 (James Madison).

42. Hobbes's Leviathan cares not for the will of the individual citizens; his job is to act on their behalf, but on his *own* judgment. *See generally* THOMAS HOBBES, LEVIATHAN (Edwin Curley ed., Hackett Publ'g Co. 1994) (1668).

43. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52–53 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

44. *See id*. at 52.

45. Montesquieu's interior republic, closer to the cultural *mores* of the people, would become our state governments, while his exterior republic would become the federal government. *See* MONTESQUIEU, THE SPIRIT OF THE LAWS bk. 8, at 112 (Anne M. Cohler et al. eds., trans., Cambridge Univ. Press 1989) (1748); *see also* THE FEDERALIST NO. 51 (Alexander Hamilton) (explaining the virtues of a government with "interior" and "exterior" structures).

46. *See* MONTESQUIEU, *supra* note 45.

47. *See* THE FEDERALIST NO. 10 (James Madison).

48. MONTESQUIEU, *supra* note 45, at 112 ("[T]he people, finding intolerable even the power they entrust to the others, want to do everything themselves . . . .").

First, the people were not to elect the President by plebiscite. The Constitution provides two alternative means to a true popular vote: the Electoral College and the House's ability to determine the presidency if no candidate obtains a majority of electoral votes.[49] Both involve elected representatives rather than election by plebiscite. Furthermore, proposals to elect the executive without the presence of a mediating representative body were considered and explicitly rejected by the Constitutional Convention.[50]

Second, though the Founders specifically provided for two ways in which the people might amend or change government under the Constitution in the Article V amendment process, none of the paths includes the power to change the Constitution by plebiscite alone.[51] In the first path, Congress must approve any amendment by a supermajority, and in the second, the states have to call for a convention and approve of the convention's actions through their legislatures.[52] This should be of no surprise: the Founders were deeply suspicious of majority will and put into place protective measures to ensure that the Constitution could not be amended solely by a series of plebiscites.

Third, the Constitution's own ratification rules in Article VII further show the Founders' distrust for citizen lawmaking. The clause is just one sentence, requiring that state constitutional conventions vote to ratify the Constitution.[53] Thus, the Constitution's drafters intended for the document to be passed not solely by the people, but also by their elected representatives.

Fourth, and most importantly, the Founders inserted the Guarantee Clause,[54] sometimes referred to as the "Republican Form of Government Clause,"[55] into Article IV. This Clause stands as strong proof that the Founders so distrusted "pure" democracy at any level of government that they believed the federal government should play a role in ensuring the presence of a mediating legislature in the states. The Guarantee Clause has not been the subject of serious Supreme Court interpretation since the Court, in 1912, deemed Guarantee Clause claims nonjusticiable because they present political questions.[56]

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49. U.S. CONST. art. 2, § 1; amend. XII.

50. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 511–12 (Jonathan Elliot ed., 2d ed. 1891) (quoting James Wilson's remarks at the Pennsylvania ratifying convention).

51. *See* U.S. CONST. art. V. Though it is possible that any state legislature might, in turn, pass its ratification duties to its citizens in a plebiscite, that action itself would require some form of legislative action as well.

52. *Id.* This requires legislative action even if the legislature ends up devolving its power to approve or reject any amendment to a popular vote. *See id.*

53. *See* U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

54. U.S. CONST. art. IV, § 4.

55. *See, e.g.*, Chemerinsky, *supra* note 24, at 303 ("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.").

56. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150–51 (1912) (dismissing a Guarantee Clause challenge to Oregon's citizen lawmaking system as presenting political questions); *see also*

Thus, to determine the Clause's purpose, one must look to the Convention and Ratification debates to determine its original public meaning. These debates show that there may be several meanings to the clause, because "[t]he use of the word 'Republican' . . . clearly did not have a single connotation for those who drafted the Constitution, let alone for the far greater number who ratified it."[57] The first and most readily accepted interpretation is that it empowers the federal government to prevent the states from adopting monarchical, aristocratic, or other nobility-based systems of government.[58] The second is that it does exactly what it says—enables the federal government to ensure that states do not adopt nonrepublican (in other words, democratic) institutions that might lead to Thrasymachan Justice. Instead, states were to adopt republican systems of government to ensure that policies would be enacted via a mediating legislature.

The latter view of the Guarantee Clause was espoused by some particularly influential delegates at the Convention. For example, James Iredell, who would become one of the first Supreme Court Justices, saw the Clause as a right for the federal government to "interfere" with the states.[59] Indeed, he saw it as the only legitimate constitutional restriction on state governments.[60] "[O]bjections from Gouverneur Morris and William Houston reveal further that the word 'guarantee' was understood in the Clause as empowering the federal government to assiduously protect republican forms in state constitutions."[61] Additionally, in the Pennsylvania ratification debates, James Wilson—who would later join Iredell on the Supreme Court—argued that "the federal constitution restrains [the states] from any alterations that are not *really republican*" through the Guarantee Clause.[62] Lastly, this expansive view of the Guarantee Clause was also shared by the Constitution's detractors, who saw it as "disallowing state governments from introducing unrepublican alterations or amendments to their constitutions."[63]

However, scholars argue that even if the Guarantee Clause gives the federal government the power to interfere with state systems of government, it does not provide suitable standards by which the government might define "republican

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Luther v. Borden, 48 U.S. 1, 42 (1849) (dismissing a Guarantee Clause challenge as presenting a political question). Part V of this Note will argue that this is a misguided interpretation of modern political question jurisprudence.

57. Eule, *supra* note 25, at 1541.

58. *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 195 (Jonathan Elliot ed., 2d ed. 1891) (quoting James Iredell's remarks at the North Carolina ratifying convention); *see also* U.S. CONST. art. I, § 10 (forbidding states from conferring titles of nobility).

59. *See* Jacob M. Heller, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1745 (2010).

60. *See id*.

61. *Id*. at 1740, 1745 ("Iredell therefore saw and explained the Clause as a right to 'interfere'; to deny to the states 'the operation of [their] own principles.' Indeed, he saw the Guarantee Clause as the *only* legitimate restriction on state governments—even more so than a guarantee of religious liberty.").

62. *See A Freeman II*, PA. GAZETTE, Jan. 30, 1788, reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431, 431 (John P. Kaminski et al., eds., 2001).

63. Heller, *supra* note 59, at 1743.

government."[64] They argue that this is the case because philosophers and the Founders alike did not use the term "republican" with any specific meaning in mind.[65] This Note takes the opposite position given the history of the Clause; that the Clause impliedly leaves it to the federal government to determine the scope of the term "republican" because it is the body to whom the "guarantee" attaches; and that it is, as Professor Heller has argued, more than possible to find "widespread agreement about the core definition of a republican government."[66] Heller's "core definition" requires rule "(1) by the majority (and not a monarch), (2) through elected representatives, (3) in separate, coequal branches."[67] He notes that this definition of the key characteristics of republican government has "garnered near-consensus."[68] In states in which direct democracy is employed—especially the constitutional initiative—only the first of these core requirements is present. Thus, even under a broad definition of "republican government," systems of direct democracy cannot fit the bill.

C. DIRECT DEMOCRACY AND THE FEDERALIST PAPERS

In addition to these four explicit clauses in the Constitution, the Federalist Papers also evince the Founders' distaste for direct democracy. Quotations decrying democratic systems of government are easy to find amongst the Founders.[69] However, the Federalist Papers, which were widely read in the Ratification period, had a powerful impact on the public's understanding of the Constitution at the time of their publication.

One must start with Federalist No. 10, discussing Madison's description of "faction," its ills, and how to treat its symptoms. Madison's concern was not that factions were going to exist in the new nation. Indeed, he treated this as an inevitability in a free society, writing that "[l]iberty is to faction, what air is to fire."[70] Rather than stifling the cause of faction—as Plato would have done in the rigidly communitarian Kallipolis—Madison opted to cure the symptoms of faction by advocating for a system in which no one faction could dominate and in which factions battled for the attention of deliberative and representative legislators rather

64. *See* Natelson, *supra* note 26, at 813–14.

65. Heller, *supra* note 59, at 1718 ("Sketching out [the Guarantee Clause's] exact contours has proven elusive; scholars, jurists, and elected officials jockeyed over its meaning for nearly two centuries.").

66. *Id.*

67. *Id.* This mirrors the definition of "republican form of government" advocated for by the Petitioners in one of the few Guarantee Clause cases the Court has decided. *See* Pac. States Tel. & Tel. Co. v. State of Oregon, 223 U.S. 118, 139 (1912) (summarizing petitioners' argument).

68. Heller, *supra* note 59, at 1718 (noting "[i]f this [definition] sounds familiar, it should: the core meaning of republican government defines the broad outlines of our federal government.").

69. For example, take Governor Morris's approach: "We have seen the tumults of democracy terminate . . . as they have everywhere terminated, in despotism." GOUVERNEUR MORRIS, AN ORATION, DELIVERED ON WEDNESDAY, JUNE 29, 1814, AT THE REQUEST OF A NUMBER OF CITIZENS OF NEW-YORK, IN CELEBRATION OF THE RECENT DELIVERANCE OF EUROPE FROM THE YOKE OF MILITARY DESPOTISM 10 (Van Winkle & Wiley 1814).

70. THE FEDERALIST No. 10, 54 (James Madison).

than for the will of the majority.[71] Madison felt it necessary to speak specifically to the failures of a democratic system in this regard, stating:

> [A] pure democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert, results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such democracies have ever been spectacles of turbulence and contention; . . . and have, in general, been as short in their lives, as they have been violent in their deaths.[72]

To wit, direct democracy at the state level would threaten the structure of the system that the Founders had designed by providing no cure for faction. Meanwhile, the deliberative and balkanized power of a republican government would provide an answer to the risk of Thrasymachan Justice that any large faction might threaten. Similarly, Federalist No. 51—outlining the virtues of checks and balances and the separation of powers—further shows the advantages of a republican form of government in preventing tyranny by majority vote.[73] Ultimately, to John Jay, James Madison, and Alexander Hamilton, the essential character of American government was that it would not be "wholly popular," but entirely representative.[74]

II. DIRECT DEMOCRACY'S PROGRESSIVE-ERA EXPANSION

Part II begins by describing the birth, expansion, and present state of direct democracy in the United States and ends with a critique of the Supreme Court's judicial "sanction" of direct democracy in 1912.

A. THE PROCESS OF EXPANDING DIRECT DEMOCRACY

At the Founding, direct democracy was, for the most part, limited to local town governance. More democratic forms of republican government could be found throughout the original thirteen states, especially in state legislatures in which constituencies were small and term limits were short.[75] However, the contours of today's citizen lawmaking did not begin to take shape until the late nineteenth and early twentieth century, when the Progressives sought to impose direct democracy regimes in the newer, Western states and in older states that called for constitutional conventions.[76]

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71. *Id*. at 57–58 ("A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.").

72. *Id*. at 57.

73. *See* THE FEDERALIST NO. 51, 288 (James Madison) ("[I]n the Federal Republic of the United States[,] . . . all authority in it will be derived from, and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.").

74. *See* THE FEDERALIST NO. 14, 76 (James Madison).

75. *See* Natelson, *supra* note 26, at 855.

76. *See* Hoesly, *supra* note 13, at 1192–93.

The Progressives' goal was to provide citizens with a tool with which they might free themselves from the constraints of state political systems dominated by corrupt political machines, political parties, and corporate interests (in particular, the railroads).[77] These interests had, to Progressives like Theodore Roosevelt, continually frustrated the majority will to the point where there was tyranny by a minority of special interests.[78] Cobbling together support from a curious band of good government advocates—from union labor and suffragettes to prohibitionists and farmer groups—the Progressives achieved their first success in 1898 when they persuaded South Dakota to adopt direct democracy.[79] Their success did not end there, however, and by 1918, twenty-one other states, mostly newer states west of the Mississippi, had provided for some form of direct democracy.[80]

Several noteworthy figures within the Progressive movement strongly advocated for the growth of direct democracy at the state level, especially at state constitutional conventions. President Theodore Roosevelt extolled the virtues of citizen lawmaking in an address to the 1912 Ohio constitutional convention.[81] Roosevelt advocated for direct democracy as a means not only to push the Progressive "good government" agenda, but also to permit voting majorities to exert direct Thrasymachan Justice upon judges who disagreed with the people's perspective on state politics and rights. Specifically, Roosevelt told the Convention, "[w]hen a judge decides a constitutional question, when he decides what the people as a whole can and cannot do, the people should have the right to recall that [judicial] decision if they think that it is wrong."[82]

However, for every famed advocate of direct democracy's growth, there was an equally accomplished detractor. Ever the thorn in Roosevelt's side in 1912, William Howard Taft—an Ohio native who was the incumbent president running against Roosevelt's Bull Moose ticket and Woodrow Wilson's Democratic candidacy[83]—responded to Roosevelt's boldly pro-plebiscite stance by dryly commenting, "[o]ne who so lightly regards constitutional principles, and especially the independence of the judiciary, . . . could not be safely endorsed with successive [sic] presidential terms."[84]

Despite the rapid growth of direct democracy and its popularity in the mostly western states that rapidly adopted it, the onset of the Great Depression and the corresponding growth of federal power that came with Franklin Delano

77. *Id*. at 1192.

78. *See* Talmage Boston, *In the Arena: Theodore Roosevelt and the Law*, 74 TEX. B.J. 508, 511 (2011).

79. *See* DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 16 (1989).

80. *See* Hoesly, *supra* note 13, at 1192.

81. *See* Boston, *supra* note 78, at 512.

82. *Id*.

83. The Editors of Encyclopedia Britannica, *United States presidential election of 1912*, ENCYCLOPEDIA BRITANNICA (October 4, 2016), https://www.britannica.com/event/United-States-presidential-election-of-1912 [https://perma.cc/6ADJ-W6G2].

84. *See* Boston, *supra* note 78, at 512. Taft's reverence for an independent judiciary would serve him well as the nation's tenth Chief Justice. *See id*.

Roosevelt's New Deal policies shifted the policy focus for popular programs, reforms, and rights from the state ballot box to Washington.[85] Direct democracy would not return to the forefront of the American political consciousness until the second half of the twentieth century, when California citizens used plebiscites first to nullify the state's Fair Housing Act in 1964[86] and then later to enact the "Tax Revolution" of 1978.[87]

The specific causes of the growing use of direct democracy for politically conservative causes like the Tax Revolution are likely diverse, numerous, and beyond the scope of this Note. However, one can certainly speculate that among those causes was a desire to rebuff judicial and activist calls for more liberal civil rights jurisprudence at the state level in response to the Supreme Court's rightward shift under Chief Justice Warren Burger.[88] Or from the nation's neoconservative shift in the wake of stagflation. But perhaps the most likely was the growing significance of divisive racial and social issues in American politics after the Civil Rights movement and, later, *Roe v. Wade*.[89] Interestingly, despite the increased use of direct democracy in the states that already had those systems in place, no additional states adopted citizen lawmaking systems after 1970.[90] At present, only twenty-four states have some form of citizen lawmaking.[91]

B. THE JUDICIAL "SANCTION" OF DIRECT DEMOCRACY BY THE SUPREME COURT

The groundwork laid by the Progressives in sowing the roots of modern American direct democracy cannot be understated. However, their effort to insulate it from constitutional challenge, which they were able to accomplish in 1912, is perhaps their most critical achievement.

Oregon adopted direct democracy early in the Progressive movement, amending its state constitution to add it in 1902.[92] Included in these changes was the most powerful form of direct democracy, the constitutional initiative, which is the ability to amend the state's constitution by plebiscite, independent of any

85. *See* Hoesly, *supra* note 13, at 1196.

86. *See* Reitman v. Mulkey, 387 U.S. 369, 374 (1967).

87. *See generally* DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 188–206 (1982).

88. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). This would fall in line with Theodore Roosevelt's stated goal of direct democracy to keep state courts in check, especially in the realm of individual rights.

89. *See* 410 U.S. 113 (1973). For example, Californians were given the opportunity to enact several anti-LGBT propositions during the 1970s, particularly Proposition 6, often referred to as the "Briggs Initiative," which would have prohibited gay people from working for California's public schools. *See* Teresa M. Bruce, *Neither Liberty Nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law*, 5 CORNELL J.L. & PUB. POL'Y 431, 439 & n.63 (1996). The same was true of other states such as Florida, under Anita Bryant's widespread and explicitly homophobic "Save Our Children" campaign. *Id.* at 439–40.

90. *See* Molly E. Carter, Note, *Regulating Abortion Through Direct Democracy: The Liberty of All Versus the Moral Code of a Majority*, 91 B.U. L. REV. 305, 312 (2011).

91. *Id.* at 311.

92. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133–34 (1912).

legislative involvement.[93] In 1906, Oregon voters passed an initiative that imposed a two percent tax upon the gross revenues of certain companies in Oregon.[94]

One such company, the Pacific States Telephone & Telegraph Company, challenged the new tax, asserting that the method of its passage violated the Guarantee Clause of the federal constitution.[95] Specifically, the company argued that "[t]he initiative amendment and the tax in question, levied pursuant to a measure, passed by authority of the initiative amendment, violates the right to a republican form of government which is guaranteed by section 4, Article IV, of the Federal Constitution," and that "[g]overnment by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded."[96]

When the Supreme Court took the case, it addressed this question in a terse opinion, stating, "the contention, if held to be sound, would necessarily affect the validity . . . of every other statute passed in Oregon since the adoption of the initiative and referendum."[97] However, the outcome of the case would eventually be to dismiss Guarantee Clause claims as presenting nonjusticiable political questions.[98]

In reaching this conclusion, the Court believed that *Luther v. Borden* was "the leading and absolutely controlling case."[99] *Luther* concerned the famed "Dorr Rebellion" in Rhode Island, which resulted in Rhode Island's submission of two competing slates of electors to the federal government after a presidential election: one from the state's incumbent government and one from its insurrectional opponent.[100] The Supreme Court was asked to determine which slate of electors was the legitimate one and whether the power of the federal government had to be used to defeat the Dorr insurrection.[101]

However, the central legal question in *Luther* was not "leading and absolutely controlling," in any sense of the phrase, in the *Pacific States* case. The Guarantee Clause challenge in *Pacific States* concerned the first aspect of the Guarantee Clause—that the United States was to guarantee to every state a "Republican Form of Government."[102] In contrast, *Luther* primarily implicated the second part of the Clause—that the United States was to protect "against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot

93. *Id.*
94. *Id.* at 135.
95. *See id.* at 137–38
96. *Id.*
97. *Id.* at 141. The Petitioners also argued that the existence of direct democracy in Oregon violated the extension of statehood provided to it by Congress as well, a claim the Court quickly dismissed under the political question doctrine, as it was the province of Congress to determine statehood eligibility under the Constitution. *Id.* at 141–42.
98. *See id.* at 149–50.
99. *Id.* at 143 (citing Luther v. Borden, 48 U.S. 1 (1849)).
100. *Luther*, 48 U.S. at 36.
101. *Id.* at 38–39.
102. *Pac. States Tel.*, 223 U.S. at 137–38.

be convened), against domestic Violence."[103] The *Luther* court believed determinations about the second aspect of the clause were best left to Congress, and therefore dismissed the case under the political question doctrine.[104]

Pacific States did not present the Supreme Court the same question asked of the Court in *Luther*. The Court treated the case as forcing it to determine whether Oregon's plebiscite tax or its previous tax passed through the normal republican process was the state's legitimate form of government.[105] However, rather than calling on the Court to determine which system was legitimate, all petitioners asked the Court to determine was whether the constitutional initiative was sufficiently republican.[106] In this regard, it was surely within the province of the Court to make such a determination, because it was devoid of the formal recognition and use of military force powers at play in *Luther*. Moreover, the Court was surely capable of making such a philosophical determination. And last, it was also within its constitutional jurisdiction, because the Clause states that the "United States" (the federal government, generally), is to enforce the clause, not Congress specifically.[107]

Ultimately, the Court's erroneous reading of the Guarantee Clause effectively rendered it dead-letter law. Spurred by this major judicial victory, the Progressives continued to advance their citizen lawmaking agenda, using their success to further expand the use of direct democracy west of the Mississippi, and to enact "good government" reforms by plebiscite. Though the future of direct democracy seemed bright, the Progressives, and the Supreme Court, failed to see the danger for Thrasymachan Justice inherent in this "purely" democratic system. Indeed, it was this danger, the one conspicuously left undiscussed by the Court in *Pacific States*, that arguably motivated the Founders to include the Guarantee Clause in the Constitution in the first place. The potential for plebiscites to make minority rights subject to majority voter pressures would be realized when the nation entered the Civil Rights era. Only then, when the Supreme Court's Equal Protection jurisprudence took a deferential shift in the 1970s to the detriment of Equal Protection plaintiffs, were the Founders' fears of Thrasymachan Justice confirmed.

III. DIRECT DEMOCRACY AS A TOOL FOR THRASYMACHAN JUSTICE IN MODERN TIMES

Part III first reviews the different approaches the Warren and Burger Courts took to Equal Protection cases—including cases challenging laws passed through citizen lawmaking—and then evaluates the Rehnquist Court's treatment of direct democracy under the Equal Protection Clause in *Romer v. Evans*.

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103. *See* U.S. CONST. art. IV, § 4; *Luther*, 48 U.S. at 42–43.

104. *Luther*, 48 U.S. at 42 ("[I]t rests with Congress to decide what government is the established one in a State.").

105. *Pac. States Tel.*, 223 U.S. at 150–51.

106. *Id.* at 139.

107. *See* U.S. CONST. art. IV, § 4.

A. THE WARREN AND BURGER COURTS: SHIFTS IN EQUAL PROTECTION JURISPRUDENCE

A thorough understanding of the Thrasymachan power of direct democracy in modern times requires a review of the Supreme Court's shift to a more deferential form of Equal Protection jurisprudence. As this Note argues, a properly enforced Equal Protection Clause can prevent the tyranny of the majority associated with direct democracy.

The Warren Court signaled a left-leaning shift in Equal Protection jurisprudence when it finally fulfilled the Fourteenth Amendment's goal of making the federal government, rather than the states, the principal protector of individual rights. This shift ensured that the Reconstruction Amendments were at last used to effectuate a meaningful abolition of slavery.

At the time, the Court, for the most part, struck down policies that explicitly discriminated against discrete and insular minorities in their texts—Jim Crow laws like those at issue in *Brown v. Board of Education*[108]—that were passed with a tangibly tainted history of discriminatory intent,[109] or those which could not have been passed with anything but a racial animus.[110] The Court was, in this era, demonstrably friendlier to disparate impact claims, although it never explicitly recognized the applicability of the standard outside of the context of Titles VII and VIII of the Civil Rights Act.[111] The Court opted instead to hold that an inference of discriminatory intent could be shown by the text of the law, the practice of its enforcement, or the history of its passage.

One particularly important case in the Warren Court's Civil Rights era invalidation of discriminatory state policies was *Reitman v. Mulkey*, which concerned an Equal Protection challenge to a California constitutional initiative, Proposition 14, which repealed the state's recently enacted fair housing bill.[112] In 1963, California legislators passed one of the nation's first comprehensive fair housing bills, a law banning racial discrimination in all phases of the housing process.[113] However, immediately after it was signed, it drew significant protest from California voters. In a swift and direct rebuke to both state legislators and racial minorities, Californians—spurred by the involvement of special interests in the real estate business[114]—passed Proposition 14 the very next year by a two-to-one

108. 349 U.S. 294 (1955); *see also, e.g.*, Mayor & City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955) (*per curiam*) (invalidating racial segregation in enjoyment of public beaches and bathhouses).

109. *See, e.g.*, Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218 (1964).

110. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

111. Title VII is well-known. *See* 42 U.S.C. §§ 2000e–2000e-17 (2012). Title VIII is sometimes referred to separately as the Fair Housing Act of 1968. *See id.* §§ 3601–3619 (2012). These laws expressly provide for disparate impact claims.

112. *See* 387 U.S. 369, 372–73 (1967).

113. *Id.* at 374.

114. *See* David B. Oppenheimer, *California's Anti-Discrimination Legislation, Proposition 14, and the Constitutional Protection of Minority Rights: The Fiftieth Anniversary of the California Fair Employment and Housing Act*, 40 GOLDEN GATE U. L. REV. 117, 124 (2010).

ratio, repealing the antidiscrimination statute before it had any serious impact.[115]

Thereafter, the California chapters of the NAACP sued to enjoin the enforcement of Proposition 14, arguing that it violated the Equal Protection Clause.[116] In 1967, the Supreme Court agreed, blocking the law in a 5–4 decision.[117] Rather than base its decision on the citizen lawmaking that had produced the discriminatory policy, the Court held that Proposition 14's "immediate objective," its "ultimate effect," and its "historical context and the conditions existing prior to its enactment" all indicated that the law was intended to encourage discrimination by private parties.[118] The omission of a separate discussion of direct democracy was curious, because none of the cases the Court cited as supporting its holding involved laws passed by plebiscite.[119] Although then-Solicitor General Thurgood Marshall urged the Court in oral argument to consider the proposition as being a law of a different character because of its passage by plebiscite, the Court opted for a narrower ruling that declined to specifically discuss the Thrasymachan process by which California voters enacted the law.[120]

Thus, when the Warren Court era ended, and the Court shifted rightward under Chief Justice Burger, the Court had already missed an opportunity to craft bespoke rules for direct democracy. When the Burger Court's Equal Protection case law began requiring stronger showings of discriminatory intent to invalidate laws with discriminatory impact, the Court's refusal to address considerations of direct democracy in *Reitman* would prove costly to discrete and insular minorities living in states with citizen lawmaking.

Though the Warren Court had similarly required a showing of discriminatory intent in many of its cases, the Warren Court was much quicker to presume or imply discriminatory intent from the circumstances of the law's roots, practice, and text than the Burger Court would prove to be.[121] The Court's rightward shift in this area of law came to a head in 1976 with the *Washington v. Davis*[122] decision. There, the Court held that in cases in which plaintiffs can only show a disparate impact to a suspect minority class, and cannot show discriminatory intent,

115. Raymond E. Wolfinger & Fred I. Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 753 (1968).

116. Dictionary of American History, *Reitman v. Mulkey*, ENCYLOPEDIA.COM (last accessed January 25, 2018), http://encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/reitman-v-mulkey [https://perma.cc/8GXS-W6FS].

117. *Reitman*, 387 U.S. at 381.

118. *See id*. at 373–74.

119. *See id*. (citing numerous cases).

120. *See* Oral Argument of Mar. 21, 1967 at 39:57, Reitman v. Mulkey, 367 U.S. 369 (1967) (No. 67–483) (emphasis added), https://www.oyez.org/cases/1966/483 [https://perma.cc/2AHW-NTNQ]. "Proposition 14 [nullifying the state's Fair Housing Act] is not merely a state statute. It's not a statute which is subject to the *ordinary interplay of political pressures* within the jurisdiction of what remains the law. And I say in the question as to the difference between this being a constitutional provision or a statute, the important point is it can only be removed by a vote of the people of California." *Id.*

121. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972) (holding that statistical impact studies showing disparate provision social security benefits by race did not show an Equal Protection violation).

122. 426 U.S. 229 (1976).

the lower rational basis standard of review would apply, rather than the strict scrutiny which normally applies when laws have a racial purpose.[123]

Davis had a profound impact on Equal Protection litigation. Unlike laws passed in the Jim Crow era, more contemporary laws rarely contained explicit legislative history or statutory language that pointedly showed a discriminatory intent.[124] Thus, to combat more modern forms of segregation, litigants had to attempt to prove a racially-motivated purpose. The problem was that lawmakers in the post-Civil Rights era were not so willing to explicitly state their racial animus as they were in Jim Crow times, and quickly became experts in hiding the ball from Equal Protection litigants.[125]

Although a showing of actual subjective animus—based on the explicit views of a sufficient number of lawmakers who initiated the policy—would be sufficient, the Supreme Court did not require it.[126] It continued to permit plaintiffs to prove discriminatory intent through circumstantial means,[127] or by showing a discriminatory impact so powerful that the law could not have been passed with anything other than a discriminatory intent.[128] Thus, the *Davis* standard created a sliding scale approach: the greater circumstantial evidence of discriminatory intent, the less powerful or focused the disparate impact had to be, and vice versa.

After *Davis*, Equal Protection litigants desperately needed greater clarification on the kinds of circumstantial evidence that the Court would deem sufficiently persuasive to infer a discriminatory intent behind a particular policy. The Court supplied this clarification in its next term when it decided *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[129] There, the Court articulated a multifactor test that it would use to determine when to impute to a policy a discriminatory intent proved from the circumstances of its passage.[130] The test asked the courts to review (1) "[t]he historical background of the decision," (2) "[t]he specific sequence of events leading up to the challenged decision," (3) whether there were any "[d]epartures from the normal procedural sequence," and (4) "[t]he legislative or administrative history" of the policy.[131] Thus, in future cases in which policymakers who masked their discriminatory animus passed

123. *Id.* at 239 ("A law or other official act, without regard to whether it reflects a racially discriminatory purpose, is [not] unconstitutional solely because it has a racially disproportionate impact." (emphasis omitted)).

124. *See, e.g.*, Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41, 50 (1987) ("[M]odern forms of prejudice frequently remain invisible even to its perpetrators.").

125. *See* Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

126. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (using legislative history to show a subjectively held intent to discriminate against a politically unpopular group).

127. *See Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .").

128. *See id.* at 241 ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886))).

129. *See* 429 U.S. 252, 267–68 (1977).

130. *See id.* at 266–68.

131. *Id.* at 267–68.

laws with discriminatory impact, litigants had to circumstantially prove intent through the aforementioned four factors.

However, as this Note will demonstrate, the *Arlington Heights* test is wholly inapplicable to cases in which the policy at issue was passed by plebiscite, because the test's four factors presume that the normal republican processes have occurred. As a result, the Warren Court's failure in *Reitman* to carve out specific Equal Protection rules for laws passed through direct democracy would prove to be quite harmful, as litigants attempting to show discriminatory intent in citizen lawmaking are forced to do so using factors that were not written with this separate, nonrepublican form of lawmaking in mind.

B. SEARCHING FOR DISCRIMINATORY INTENT IN CITIZEN LAWMAKING: *ROMER V. EVANS*

The cases that established the Supreme Court's requirement that plaintiffs show a discriminatory intent behind disparate impact policies all involved policies passed through normal republican or administrative processes.[132] However, the Court would soon come to apply them to plebiscite lawmaking—in which lawmaker intent comes not from republican actors but from the voting population of the state. As previously discussed, the Court declined Thurgood Marshall's invitation to carve out special rules for direct democracy in *Reitman v. Mulkey*.[133] In the 1996 case *Romer v. Evans*,[134] the Court once again held that the same rules and tests that apply to republican lawmaking were to be rigidly applied to direct democracy, despite the philosophical differences between the two forms of lawmaking and their different constitutional treatment under the Guarantee Clause.

In many ways, the facts of *Romer v. Evans* function as a perfect archetype of the Thrasymachan Justice that direct democracy can produce. In 1980s and 1990s, there was considerable discrimination against LGBT persons in matters of housing and employment.[135] Such discrimination was rooted in moral disapproval of homosexuality and in the moral panic associated with the spread of HIV/AIDS in the 1980s.[136] In response to this discrimination, several liberal Colorado cities passed local anti-discrimination ordinances protecting LGBT residents.[137] However, more conservative parts of the state opposed these local protections and began a citizen lawmaking effort to repeal them through a constitutional initiative.[138]

In 1992, the opponents of the local anti-discrimination policies succeeded in passing "Amendment 2" through a statewide plebiscite.[139] The amendment prohibited the state, its agencies, and its local governments from enacting any

132. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (invalidating a law "passed by the Legislature of Alabama . . . [that] redefin[ed] the boundaries of the City of Tuskegee").

133. *See supra* notes 118–20 and accompanying text.

134. 517 U.S. 620 (1996).

135. *See, e.g.*, Gamble, *supra* note 18, at 259–60.

136. *See id.* at 261.

137. *Romer*, 517 U.S. at 623–24.

138. *Id.*

139. *See id.*

policies that would provide additional protections to LGBT individuals beyond those provided to other nonminority Coloradans.[140] The text of the constitutional initiative was explicitly discriminatory, deliberately referring to persons of "homosexual, lesbian or bisexual orientation," in defining the class of persons who would be constitutionally incapable of working, on their own or with others, to pass protective policies at any level of government within the state of Colorado.[141]

When the Supreme Court decided the case in favor of the LGBT plaintiffs who challenged the amendment under the Equal Protection Clause, it once again refused to apply a better-fitting set of rules to laws passed by plebiscite. Instead, the Court adopted the same approach articulated in cases like *Reitman*, *Davis*, and *Arlington Heights*—that is, rather than acknowledging that Amendment 2 was passed through a uniquely nonrepublican procedural device with the potential for Thrasymachan Justice, one which might trigger heightened standards of review under the Equal Protection Clause, the Court applied the same analysis it applies to laws passed through traditionally republican processes. Essentially, the Court required the plaintiffs to prove discriminatory intent, because the Court would otherwise likely uphold the law under the rational basis standard of review.[142]

However, in *Romer*, as in *Reitman*, the Court was faced with a problem unique to direct democracy—how, and whether, it should impute to the state's voters a discriminatory intent based on the circumstances and history of the Amendment's passage. In doing so, the Court rather tersely held that the history of the Amendment's passage, along with the lack of any compelling alternative policy justification for the provision, were sufficient to invalidate the law under the form of rational basis articulated in *U.S. Department of Agriculture v. Moreno*.[143] Curiously, Justice Kennedy's majority opinion did not actually cite any part of the factual record in reaching the conclusion that the circumstances had inferentially proven an intent to discriminate.[144] Perhaps this was the result of a paucity of factual material on which he could ground this conclusion, given the absence of any formal legislative history in citizen lawmaking.

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140. *Id.* at 624.

141. *Id.*

142. *See id.* at 634. Under the *Davis* test, if a member of a suspect or quasi-suspect class (for example, a religious minority or gender, respectively) proves discriminatory intent, strict or heightened-intermediate scrutiny will apply. *See* 426 U.S. 229, 239 (1976). However, even for non-suspect, but still identifiable, classes of minorities—like the mentally handicapped—the Court will apply a more searching standard of review if discriminatory intent is shown. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 442–47 (1985). This standard of review, situated somewhere between traditional rational basis and heightened-intermediate scrutiny, is sometimes referred to as "rational basis with bite." *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779–81 (1987).

143. *See Romer*, 517 U.S. at 634–35 (applying rational basis with bite review (citing *Moreno*, 413 U. S. at 534)).

144. *See id.* at 635.

The Supreme Court seemingly had to bend the facts of Amendment 2's passage to conclude it was passed with a discriminatory animus. The Court did not cite to the *Arlington Heights* factors and did not conduct a search for discriminatory intent. Instead, the Court invalidated the initiative under *Moreno* review, a standard that invalidates policies under rational basis where they are passed with a bare "desire to harm a politically unpopular group."[145] Justice Kennedy wrote that, under the *Moreno* standard, "[e]ven laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons."[146] However, in determining whether there were any "legitimate public policies" that could justify Amendment 2, the Court turned to the state government's proffered interests, rather than examining any evidence showing what Colorado voters had actually considered in approving the initiative.[147] Rather than articulating a new or modified intent test, one specifically crafted determining whether there was a discriminatory intent behind the voters' passage of a particular ballot initiative, the Court instead applied an ill-fitting test that had been previously applied to actions taken by legislative bodies.

Thus, in *Romer*, as in *Reitman*, the Court missed an opportunity to devise a bespoke test to better determine whether state voters had violated the Equal Protection Clause by abusing their citizen lawmaking powers for Thrasymachan purposes.

IV. DETERMINING POLICYMAKER INTENT IN THE CONTEXT OF DIRECT DEMOCRACY

Part IV identifies the biggest practical and structural problem plaintiffs and courts face in determining policymaker intent under *Washington v. Davis* when laws are passed by direct democracy, and it ends by concluding that it is inherently impractical to determine policymaker intent in this context.

A. WHOSE INTENT MATTERS?

Equal Protection plaintiffs and courts face a significant practical problem in establishing policymaker intent in the context of direct democracy: determining whose intent matters. In confronting this issue, the Supreme Court erred both in *Reitman* and in *Romer* more than a quarter-century later. In determining whose intent matters, courts could turn to three possible sources: state government actors, initiative proponents, and the people themselves. However, there are practical and structural difficulties in using any or all of these sources to determine policymaker intent in the context of direct democracy. Each will be discussed in turn.

145. *See id.* at 634–35 (quoting *Moreno*, 413 U.S. at 534).
146. *Id.* at 635.
147. *Id.* at 635–36.

B. STATE GOVERNMENT ACTORS

In *Romer*, Justice Kennedy's majority opinion looked to the intent of, and interests proffered by, state government. This is an unsatisfactory approach for two reasons. First, determining legislative intent at the state level—when some states have highly unprofessional legislatures,[148] and many states do not record legislative history in adequately detailed or researchable formats—is already a difficult process.[149] And second, when citizen lawmaking is used to circumvent, rather than utilize, the normal republican lawmaking channels (as with a constitutional initiative), the intent of state lawmakers is, frankly, irrelevant.[150]

Nevertheless, the Court continues to look to state government for the policy interests and intent behind a statute because it has refused, repeatedly since *Reitman*, to craft a test that is uniquely suited to review policies passed by plebiscite.

C. INITIATIVE PROPONENTS

So, if not state government actors, who else might courts look to in determining whether there was discriminatory intent? The next group of persons might be the proponents of an initiative—those individuals or groups that draft the petition, collect signatures, and place their policy on the ballot. This would seem, on its face, to be a more discrete group of persons to whom a court can look in determining whether an initiative was motivated by, say, a racial or religious focus.

There are, however, a few problems with this approach that render it impractical. First, it would seem wrong to impugn to the state's entire voting-age population the prejudices of a few individuals who gathered signatures and drafted a proposal.[151] Second, it would be particularly wrong to do so given that voters might support a law with a discriminatory impact for any number of wholly nondiscriminatory reasons. Were the Court to look to the actions of just a few individuals to determine the intent of perhaps millions of voters, it would be treating citizens as members of groups, rather than as individuals. Third, this approach contravenes recent Supreme Court precedent about the role that petition gatherers play in the citizen lawmaking process.

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148. Though many things can influence legislative professionalism, legislator pay is a critical factor; higher pay ensures that fewer legislators will need lucrative outside employment and will instead make legislating their professional focus. *See, e.g.*, Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 ST. POL. & POL'Y Q. 211, 212 (2007).

149. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 405 (2010) (citing R. MERSKY & D. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 233 (8th ed. 2002)); Torres & Windsor, *State Legislative Histories: A Select, Annotated Bibliography*, 85 L. LIB. J. 545, 547 (1993)); *see also Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring).

150. Though state legislative intent might be *more* relevant when a referral system is used—where state legislators draft the policy, but then call for a statewide vote for its approval or rejection—the ultimate power to decide whether the proposal should become law still does not rest with the statehouse or governor's mansion.

151. *Cf.* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("A law conscripting clerics should not be invalidated because an atheist voted for it.").

In the 2013 *Hollingsworth v. Perry* decision, the Court held that initiative proponents could not properly intervene as defendants to argue for the continued validity of their policy when the state government decided not to defend the law.[152] In *Hollingsworth*, the Republican gubernatorial administration of Arnold Schwarzenegger initially enforced California's highly controversial Proposition 8—the November 2008 constitutional initiative defining marriage as between one man and one woman only that overruled a California Supreme Court decision expanding the marriage right to same-sex couples—but declined to defend it in court.[153] Enforcement of the law was eventually enjoined by Judge Vaughn Walker (who would later come out as gay before retiring),[154] of the U.S. District Court for the Northern District of California.[155] Then, when Schwarzenegger's term in office ended in early 2011, the governor's mansion passed to Democrat Jerry Brown, who similarly declined to defend the law before the Northern District of California, the U.S. Court of Appeals for the Ninth Circuit, or the U.S. Supreme Court.[156] Instead, the Ninth Circuit, through a certified question to the California Supreme Court, permitted the intervenors to defend the law on appeal.[157]

When the case reached the Supreme Court in 2012, Chief Justice Roberts closely examined whether the defendant-intervenors, proponents of the proposition, had standing to defend Proposition 8.[158] Despite the California Supreme Court's holding that they had the power to intervene given their role in the state's citizen lawmaking process under California law, the Supreme Court disagreed.[159]

The Court decided to deny standing for several reasons. First, because Judge Walker's order enjoined state officials from enforcing Proposition 8, and did not enjoin any of the defendant-intervenors specifically, they had not been harmed by the District Court's order such that they had standing to appeal to modify or eliminate that injunction.[160] Second, the Court held that the proponents of Proposition 8 did not play a continued and ongoing role in the enforcement of the policy and that, after having gathered the signatures and placed the referendum on the ballot, they were merely "concerned bystanders" whose grievances not sufficiently acute to give them a "direct stake in the outcome" of the case.[161]

Last, the Chief Justice said that, given that the defendant-intervenors were raising a *jus tertii* claim, asserting the rights of the people of California, they had to

152. 133 S. Ct. 2652, 2668 (2013).

153. *Id*. at 2660; *See In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

154. Jennifer Epstein, *Gay-Marriage Foes: Judge Was Biased*, POLITICO (April 26, 2011, 6:52 AM), http://www.politico.com/story/2011/04/gay-marriage-foes-judge-was-biased-053703 [https://perma.cc/RJP2-8ZF6].

155. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010).

156. *See* Perry v. Brown, 265 P.3d 1002, 1004 (Cal. 2011).

157. *See id*. at 1033 (answering certified question).

158. *See Hollingsworth*, 133 S. Ct. at 2668.

159. *See id*.

160. *Id*. at 2662.

161. *Id*. at 2662–63.

show a strong agency relationship to the people.[162] Here, the Chief Justice wrote that the initiative's proponents did not act as agents of the people such that they could raise claims on their behalf for three reasons. First, the principal in the agency relationship, California's voters, had no control, directly or indirectly, over the proponents or their litigation.[163] Unlike the state Attorney General, or other government officials, they were not accountable to the people. Second, no other formal rules, other than the rules of legal ethics, applied to bind or otherwise cabin the decision making of the proponents when they served as agents in any meaningful sense.[164] And third, the proponents are "free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities," such that they might be indirectly restrained by the limits of state office.[165]

Therefore, in the search for discriminatory intent when laws disparately impacting minority groups are passed through direct democracy, it would seem unwise to look to the proponents of ballot initiatives to determine whether the policy was passed with an improper animus. It would be odd for the Court to hold that referenda proponents lack a sufficiently particularized interest in the policies to defend them in court and then to hold that their intent might be dispositive as to the question of the statute's validity under the Equal Protection Clause.

Thus, the Court cannot turn to state government to determine intent because state government often plays little to no role in the direct democracy process. Further, it cannot turn to proponents of ballot initiatives because the *Hollingsworth* opinion minimized their role in the process as well, highlighting instead the role of the voting population.

D. THE PEOPLE

Because of the foregoing inadequacies, we turn to the last possible source to which a court might look in determining the intent behind a policy passed by citizen lawmaking: the people themselves. This, however, would be an impractical route to pursue. How exactly might a court go about proving the intent of thousands or even millions of voters, when it has already recognized the difficulty in determining the intent of a small, discrete legislative body?[166] Would a court find a policy disparately impacting African-Americans to be discriminatory because a greater percentage of white voters approved it than did African-American voters? If so, how many African-American voters could support such a policy before it

162. *Id.* at 2666–67.

163. *Id.* at 2666–67 (citing 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, Comment *f* (2005)).

164. *Id.* at 2667.

165. *Id.*

166. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 244 n.6 (1981) (Powell, J., dissenting) ("We recognize that a legislative body rarely acts with a single mind and that compromises blur purpose."). If this is true of a small and discrete legislative body, it is even more true of a state with millions of voting-age residents like California.

was no longer discriminatory?[167] Would the Court rely on sociological or statistical analyses to try and circumstantially construct a picture of the average voter's intent?

It seems that there are no ways a Court could effectively and directly prove the intent of an entire state's voting-age population. Furthermore, any indirect means of doing so would run the risk of treating individual voters as members of groups in a statistical or sociological analysis, rather than treating them as freethinking individuals, which might itself violate the Equal Protection Clause.[168] Moreover, if the courts were to require such thorough statistical or sociological analyses to indirectly prove intent in the context of citizen lawmaking, states would first have to provide the data necessary to conduct such studies. Such in-depth data on the actual voting behavior of individuals, sorted by race, income, or religion, for example, would raise significant voter privacy concerns.[169] Lastly, even if this data were available, any standard requiring such a complicated study of voter behavior at one specific point in time from that data would likely come at great financial cost, further burdening Equal Protection plaintiffs.

E. DETERMINING POLICYMAKER INTENT IN THE CONTEXT OF DIRECT DEMOCRACY IS INHERENTLY IMPRACTICAL

Ultimately, there is no suitably discrete group of persons that plaintiffs and courts can turn to in determining whether a law passed through direct democracy was done so with a discriminatory intent. This means that the application of *Washington v. Davis*'s intent requirement to cases involving citizen lawmaking forces plaintiffs to go on a wild goose chase to determine the undeterminable, without even knowing which group of people to look to for evidence of discriminatory intent. This is a wholly unsatisfactory result that renders the Equal Protection Clause functionally inapplicable in direct democracy cases unless a court, as five Justices did in *Romer*, is willing to conclude, without direct evidence, that a law was passed with a bare desire to "desire to harm a politically unpopular group" and invalidate the law under *Moreno*.

The time has come for the Court to recognize that the lawmaking processes that occur in citizen lawmaking are qualitatively different than those that occur in the traditional republican lawmaking process. Indeed, these differences are so significant that the Court must design a test specifically tailored to fit the Equal

167. *Cf.* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1643 n.5 (2014) (Scalia, J. concurring) ("[H]ow many members of a particular racial group must take the same position on an issue before we suppose that the position is in the entire group's interest? Not every member, the dissent suggests . . . . Beyond that, who knows? Five percent? Eighty-five percent?" (emphasis omitted)).

168. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring).

169. *Cf.* Michael Wines, *Asked for Voters' Data, States Give Trump Panel a Bipartisan 'No*,' N.Y. TIMES (June 30, 2017), https://www.nytimes.com/2017/06/30/us/politics/kris-kobach-states-voter-fraud-data.html [https://nyti.ms/2tvt8Wt].

Protection Clause to the reality of direct democracy, and prevent the Thrasymachan Justice that it might threaten.

V. OUTLINING A SOLUTION TO DIRECT DEMOCRACY'S PRACTICAL AND STRUCTURAL PROBLEMS

Part V proposes a solution to the practical and structural difficulties in proving policymaker intent when laws are passed by citizen lawmaking—the automatic application of heightened scrutiny upon a showing of disparate impact—and demonstrates both the effectiveness and definable limits of that solution.

A. THE SCOPE AND ORIGINS OF THE PROPOSED SOLUTION

This Note argues for a simple judicial solution to cure the theoretical and actual Thrasymachan ills associated with direct democracy: the automatic application of heightened intermediate scrutiny to all Equal Protection challenges to laws passed by citizen lawmaking upon a showing of disparate impact by the plaintiff, with the standard increasing to strict scrutiny if the law is shown to disparately impact a suspect class.

This solution is specifically rooted in the Supreme Court's current Equal Protection jurisprudence. Further, such a proposal will obviate the need to show discriminatory intent when laws are passed through a democratic system that makes it nearly impossible to directly or indirectly show discriminatory intent. In doing so, it will use the existence and original philosophical understanding of the Guarantee Clause to color our understanding of *Arlington Heights*'s four-factor test for indirectly showing discriminatory intent. Ultimately, the Court should hold, as a categorical rule, that the use of direct democracy can trigger heightened scrutiny under *Arlington Heights* upon a showing of disparate impact because citizen lawmaking always involves a departure from the "normal procedural sequence" when we define "normal" with the Guarantee Clause in mind.

B. HEIGHTENED SCRUTINY SHOULD BE APPLIED ON A SHOWING OF DISPARATE IMPACT

Given direct democracy's actual and potential use for discriminatory impact, courts should apply heightened standards of review in Equal Protection challenges to laws passed through this inherently nonrepublican lawmaking process. The traditional rationales for heightened standards of review counsel in favor of applying, at a minimum, heightened intermediate scrutiny.

Under heightened intermediate scrutiny, a law is only upheld if the policy (a) serves "important governmental objectives" and (b) is "substantially related to achievement of those objectives."[170] Moreover, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[171] However, in applying heightened intermediate review in the direct democracy context, courts might have to relax this requirement, given that the state government

170. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).
171. United States v. Virginia, 518 U.S. 515, 533 (1996).

attorneys tasked with defending laws passed by plebiscite might not have played any direct role in the law's passage.[172] This heightened standard of review should be applied for three reasons.

First, the traditional justification for rational basis review is absent. Typically, courts defer to the reasoned judgment of legislatures who mediate, deliberate, and compromise to produce policy because the courts trust this traditional lawmaking process.[173] That is, when a legislature passes a law and an executive approves it, the courts are comfortable deferring to the judgment of their two coordinate branches because they know that a reasoned debate on the merits of the policy took place.[174] The courts assume, unless they are shown direct evidence of discriminatory intent under *Washington v. Davis*, or indirect evidence under *Arlington Heights*, that laws motivated by a discriminatory purpose will be weeded out by the protections baked into the normal republican lawmaking process. These protections include, but are not limited to, the presence of representatives whose constituents might be disparately impacted by such a policy speaking out against it, and having their objections noted by their colleagues in a respectful legislative forum. These protections are wholly absent when laws are passed through direct democracy. There is no forum set aside for reasoned policy discussion and there are no formal debates over the merits of a referendum.

Moreover, in a legislature, it is easier for minority or opposition groups to voice their dissent and have their arguments heard and respected by the assembly. In the public realm, however, the superior voting power of the majority can more effectively drown out any dissent by minority groups. When the courts engage in rational basis review, they rely on reasoned policy judgment honed through a republican process. However, in the context of direct democracy, this simply is not the case. Because the traditional justification for rational basis review—reasoned legislative judgment—is absent when laws are passed through citizen lawmaking, the courts should not engage in this deferential standard of review. Instead, they should apply a heightened standard of review upon a showing of disparate impact.

Second, the application of heightened intermediate scrutiny upon a showing of disparate impact better serves to balance federal courts' interests in constitutional avoidance, respecting state policies under federalism, and the Founders' goal of avoiding Thrasymachan Justice. Many a law or policy passed through citizen lawmaking will have a disparate impact upon some discrete and identifiable minority group, but some laws that do so may be backed by sufficiently important

172. *Cf.* Hollingsworth v. Perry, 133 S. Ct. 2652, 2660 (2013) (noting that California state officials continued to enforce but refused to defend Proposition 8 before the District Court).

173. *See, e.g.*, Chemerinsky, *supra* note 24, at 305–06 ("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."). Where there is *no* legislative involvement, the courts have nowhere to ground their trust such that deferential rational basis review might be justified.

174. *See* Eule, *supra* note 25, at 1538.

government interests. By using a more relaxed heightened standard of review than strict scrutiny—which almost always results in the law being invalidated—the federal courts can better serve important federalism and constitutional avoidance interests by more readily permitting a state's policies to pass constitutional muster.[175]

Third, it is superior as a matter of prudence to engage in heightened intermediate scrutiny than what has been commonly referred to as "rational basis with bite."[176] Courts should not hide the ball from Equal Protection litigants when it comes to the applicable standard of review. They should not call the standard of review rational basis when it is, for all intents and purposes, a heightened standard of review approximating heightened intermediate scrutiny. Thus, rather than subjecting laws passed through direct democracy, and outside the normal lawmaking sequences, to nominally rational basis review that may or may not contain judicial "bite" in a given case, the courts should send clearer signals to litigants and policymakers alike by clarifying the standard of review. Rather than pretending to apply rational basis review under cases like *Moreno*, as the Supreme Court did in *Romer*, courts should simply apply heightened intermediate scrutiny.[177]

Ultimately, under *Arlington Heights*, the federal courts already have the authority to look at how a law was passed to determine why it might have been passed.[178] In the context of direct democracy, it is impractical to determine why a majority of the state's voters voted in favor of a policy. When the courts cannot determine why a law was passed, it must look to how it was passed to determine whether it may have been passed with a discriminatory intent. Given the risk of Thrasymachan Justice posed by direct democracy, a structural concern highlighted by the Founders and embodied in the Guarantee Clause, the federal courts should, upon a showing of disparate impact, apply heightened intermediate

175. *Contra* Chemerinsky, *supra* note 24, at 301, 305–06. Chemerinsky argues for the application of strict scrutiny or, alternatively, the invalidation of all forms of direct democracy under the Guarantee Clause. *See id.* at 303, 306. Chemerinsky's standard of review, however, is too strict: it would do a disservice to the federal courts' deep commitment to constitutional avoidance and federalism. Moreover, though his desire to see direct democracy rendered unconstitutional was couched more as an opinion than legal judgment, such an opinion ignores the strong prudential limitation that stare decisis would have on a court's ability to do so in the first place.

176. *See* Pettinga, *supra* note 142, at 779–80.

177. Through the automatic application of heightened intermediate scrutiny, rather than subjecting plebiscites to varying degrees of rational basis review, this approach avoids a troubling development in constitutional law—the blending together of the various forms of rational basis. *See id.* However, some scholars have accused the Supreme Court of blending heightened intermediate scrutiny with strict scrutiny, increasing the government's burden when it is not warranted. *See, e.g.*, Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in* Grutter *and* Gratz *and Beyond*, 7 N.Y. CITY L. REV. 357, 365–66 (2004) (noting that Justice Ginsburg's articulation of heightened intermediate scrutiny in *United States v. Virginia* elevated the government's burden to something closer to, yet short of, strict scrutiny). To the extent that is true, this Note recognizes that possible weakness. In response, however, the purpose of this Note is to propose a solution to Thrasymachan Justice within the four corners of contemporary constitutional law—rather than to propose radical changes to the tiers of scrutiny currently in place.

178. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

scrutiny—or strict scrutiny if the group disparately impacted is a suspect class[179]—to an Equal Protection challenge to laws passed by plebiscite. The Guarantee Clause shows that the use of "pure" democracy is always a departure from the normal, republican lawmaking sequences that the Founders sought to guarantee to the states. Were it to adopt this proposed solution, the Supreme Court would at last develop a bespoke test to deal with the unique Thrasymachan ills associated with direct democracy, nearly fifty years after Thurgood Marshall beseeched the Court to do so in *Reitman v. Mulkey*.

C. THE GUARANTEE CLAUSE SHOULD BE USED TO COLOR EQUAL PROTECTION JURISPRUDENCE

If the Supreme Court were to overrule *Pacific States* and treat Guarantee Clause claims as justiciable rather than as political questions,[180] such a decision could, when taken to its extreme, be used to strike down the constitutional initiative and other forms of direct democracy as unconstitutional.[181] However, this far-reaching result is highly unlikely to occur due to the doctrinal limits of stare decisis. Courts would be hard-pressed to invalidate a century's worth of citizen lawmaking because there is tremendous and systemic reliance on the institution of direct democracy by policymakers, courts, and the people.[182] Therefore, just because the Guarantee Clause might present justiciable questions for a federal court does not mean a court must enforce the Clause to its fullest extent. In fact, prudential considerations like the doctrine of stare decisis and the importance of deferential federalism would counsel against such a result. The courts might still conclude that, given the substantial republican roots, foundations, and protections contained in state governments that do use direct democracy, the Clause is not violated by the occasional use of citizen lawmaking—in other words, a sprinkling of citizen lawmaking does not render the entire state government's structure non-republican in violation of the Clause.

However, even if the Guarantee Clause is not read to its extreme, it still may and should be used to add color to and better inform the Supreme Court's understanding of the Equal Protection Clause when laws impacting minorities are passed by plebiscite. The Guarantee Clause stands as explicit textual evidence of the philosophical principle adopted by the Founders that a system of republican government is the best way to avoid Thrasymachan Justice. Courts should not be

179. This approach somewhat parallels Justice Thurgood Marshall's "sliding scale" standard for Equal Protection claims. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319–325 (1976) (Marshall, J., dissenting); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 97–98 (1973) (Marshall, J., dissenting); *see also* Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 370 & n.192 (2014).

180. The legal basis for such a reversal could be found in *Pacific States*' erroneous reliance on *Luther v. Borden*, a factually distinguishable case, as articulated in Part II. *See supra* Section II.B.

181. *See* Chemerinsky, *supra* note 24, at 303.

182. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (recognizing the societal reliance interests behind the stare decisis doctrine).

in the business of reading any clause out of the Constitution.[183] The Supreme Court should restore the Guarantee Clause by using it to better tailor the Court's Equal Protection jurisprudence to consider the practical and structural problems direct democracy creates.[184]

D. DIRECT DEMOCRACY IS ALWAYS A DEPARTURE FROM THE "NORMAL" LAWMAKING SEQUENCE

Modern Equal Protection case law readily supplies a clear, textually-rooted means through which the Supreme Court could use the Guarantee Clause to better shape its understanding of the Fourteenth Amendment in the context of direct democracy. As discussed in Part III, the Supreme Court articulated a four-factor test that Equal Protection plaintiffs must use to indirectly prove discriminatory intent when direct evidence of intent is unavailable in its 1977 opinion in the *Arlington Heights* case.[185] These factors are (1) "[t]he historical background of the decision," (2) "[t]he specific sequence of events leading up to the challenged decision," (3) whether there were any "[d]epartures from the normal procedural sequence," and (4) "[t]he legislative or administrative history" of the policy.[186] If a plaintiff can successfully employ these four factors to circumstantially impute a discriminatory intent to a policy with a disparate impact, then a court does not apply the default rational basis review required by *Washington v. Davis*. Instead, it will apply the scrutiny triggered by the levels of discreteness and isolation associated with the class the policy disparately impacts.[187]

The third of these factors focuses on whether a law was passed through the normal lawmaking channels or through a lawmaking process that was abnormal such that it might be more likely to contain constitutional defects. For example, in the 1987 case *United States v. Yonkers Board of Education*,[188] the Second Circuit held that the city of Yonkers had "deviated from its normal procedural sequences" when it ignored the usual substantive standards and tests used to determine the placement of low-income housing in order to specifically avoid placing low-

183. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." Marbury v. Madison, 5 U.S. 137, 174 (1803). This would similarly comport with an original understanding of the Constitution when read through the traditional canons of statutory interpretation. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–79 (2012) (discussing the "surplusage canon" of statutory interpretation). Ignoring the Constitution's commitment to republican government in the states would reduce the Guarantee Clause to mere surplusage in violation of *Marbury*'s basic principle.

184. In this regard, it is possible that the Supreme Court could use the Guarantee Clause to color its Equal Protection jurisprudence even if the Clause itself was still blocked from judicial enforcement by the political question doctrine.

185. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977).

186. *Id.* at 267–68.

187. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–47 (1985) (articulating a four-factor test for determining a class's degree of discreteness and insularity).

188. The events that lead to this case were popularized in the 1999 book, *Show Me a Hero*, by Lisa Belkin, and a 2015 miniseries of the same name. *See generally* LISA BELKIN, SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION (1999); SHOW ME A HERO (HBO 2015).

income housing in certain upscale neighborhoods so as to concentrate its construction in poorer, majority-minority areas of the city.[189] The Second Circuit held that the city's departure from the usual standards it had previously employed to determine the placement of low-income housing was strong circumstantial evidence that the decision to place low-income housing only in certain neighborhoods was done so with a discriminatory intent.[190]

As applied to direct democracy, this third *Arlington Heights* factor can be quite powerful if courts read it broadly, taking the Guarantee Clause into account when they conduct their Equal Protection analysis. To determine whether something departs from the normal procedural sequence, the courts must determine in any given case what "normal" means. The Guarantee Clause—which guarantees a republican government—provides further indication that the Founders intended "normal" processes to mean republican processes. This Note has argued that, given the philosophical underpinnings of the Constitution and the existence of the Guarantee Clause, the Founders intended the "normal" lawmaking sequence to be a republican one. Simply put, a "normal" sequence is one that, at a minimum, involves a representative legislative body that can mediate and temper the will of the majority.

Thus, when laws are enacted through direct democracy, they are always enacted through a departure from the normal procedural sequences, particularly when we define "normal" in a constitutional sense using the Guarantee Clause to better inform our understanding of normalcy. Given Barbara Gamble's analysis of direct democracy's actual use for Thrasymachan purposes,[191] courts should view the use of citizen lawmaking as a departure from the normal procedural sequence that is strongly persuasive evidence that a law may have been passed with a discriminatory intent, given both the structural potential for citizen lawmaking to do just that, and the practical problems associated with proving discriminatory intent when laws are passed by plebiscite.

E. THE FEDERAL COURTS CAN READILY AND EFFECTIVELY LIMIT DISPARATE IMPACT CLAIMS

Some may argue that the broad sanctioning of disparate impact claims for Equal Protection challenges to laws passed via citizen lawmaking will result in a rapid increase in litigation under a legal framework unfamiliar to the federal courts under the Equal Protection Clause. However, these prudential counterarguments are not convincing for three reasons.

First, the federal courts are well-equipped to handle disparate impact claims. Federal judges are familiar with disparate impact analysis because it is the

189. United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1222 (2d Cir. 1987).

190. "Given even that fraction of the proof recited here as to the impact of the City's decisions, the sequences of events, the procedural deviations, the convenient disregard of substantive standards, and the explicit and veiled statements of racial concerns, we regard as frivolous the City's contention that the evidence is insufficient to support the district court's finding that the City made its subsidized housing decisions with a segregative purpose." *Id.*

191. *See* Gamble, *supra* note 18, at 261–62.

required legal framework for claims under Titles VII and VIII of the Civil Rights Act.[192] Because the federal courts have expertise in applying this analytical framework, and because litigants can turn to precedent involving Titles VII and VIII for guidance, the legal system can easily tolerate an increased number of such claims in states employing direct democracy. Second, the federal courts and Equal Protection litigants already work within the framework of heightened intermediate scrutiny because such a standard applies to all claims of discrimination on the basis of sex.[193]

Third, the federal courts already have ample tools at their disposal to limit the reach of disparate impact claims and to ensure that a small statistical impact on a group does not immediately trigger the heightened scrutiny for which this Note argues. Courts can rely on the Federal Rules of Evidence, specifically Rule 702,[194] and Supreme Court jurisprudence interpreting that rule.[195] These rules empower federal judges to act as "gatekeepers" in order to keep out frivolous or uncorroborated statistical evidence of disparate impact—the kind of evidence that opponents of this solution might argue would become more commonplace if frivolous claims are brought.

These rules supply a ready and familiar means of ensuring that disparate impact claims are proven by well-tested statistical methods. Rule 702 limits the admissibility of expert testimony in the federal courts and, under the framework argued for here, can control the type of evidence used to show that a disparate impact has occurred.[196] For example, a mere showing of some impact would not be enough. Expert witnesses called upon to demonstrate the required disparate impact would have to show that it passes muster under *Daubert*, which would require the disparate impact to be proven to a statistically significant basis, and using statistical methodologies that can be tested and repeated to ensure its validity.[197]

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192. *See* 42 U.S.C. §§ 2000e–2000e-17, 3601–3619 (2012). Some members of the Supreme Court have expressed skepticism over the continued validity of disparate impact claims under both Title VII and Title VIII. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2526 (2015) (Thomas, J., dissenting). However, disparate impact claims are still viable and frequently used to enforce both statutory provisions. *See id.* at 2525 (Kennedy, J., for the Court).

193. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996).

194. *See* FED. R. EVID. 702. Because federal Equal Protection suits are brought through federal question jurisdiction, the Federal Rules of Evidence will apply in every case.

195. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–98 (1993). Statistical analyses like multivariate regression can frequently pass the *Daubert* test when properly conducted and are particularly useful to plaintiffs in disparate impact claims. *See* Thomas J. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299, 1299 (1984).

196. *See* FED. R. EVID. 702.

197. The federal courts should pay attention to three common defects when litigants use multivariate regression to prove or disprove the existence of disparate impact: (1) the omission of certain critical variables, (2) small sample sizes, and (3) low thresholds of statistical significance. *See* Joni Hersch & Blair Druhan Bullock, *The Use and Misuse of Econometric Evidence in Employment Discrimination Cases*, 71 WASH. & LEE L. REV. 2365, 2411–20 (2014).

Thus, to the extent that the solution proposed by this Note would increase the volume of Equal Protection cases attacking direct democracy, the federal courts are well-equipped to limit the reach of frivolous claims. These legal protections provide strong bulwarks against any prudential counterarguments to the solution proposed here.

F. THE DEFINABLE LIMITS OF THIS SOLUTION COUNSEL IN FAVOR OF ITS ADOPTION

There are three important limitations that the solution proposed by this Note offers. These limitations ensure that the scope of this Note's solution will not lead to a "slippery slope."

First, this solution does not require that direct democracy be rendered wholly unconstitutional. Instead, it merely smooths some of the sharper edges of direct democracy to ensure that it is not abused—as Barbara Gamble and others have shown—to pursue Thrasymachan Justice against minority groups. This solution only requires laws passed through citizen lawmaking be subjected to a higher standard of review, because the legislative deliberation that rational basis review is grounded in is wholly absent. Though some might read a fully enforced Guarantee Clause to that extreme,[198] the strong doctrinal limitations of stare decisis and constitutional avoidance ensure that such an extreme reading of the Clause would be unlikely.

Second, the reach of the proposed solution would be cabined strictly to the Equal Protection Clause. It would be wholly unnecessary to extend its reach to the realm of fundamental rights, because the Court already applies strict scrutiny when it reviews laws burdening the exercise of fundamental rights.[199]

Third, the application of heightened scrutiny would not be automatic in every case involving direct democracy. Heightened scrutiny would only be triggered upon the plaintiff showing that the challenged law disparately impacts a discrete and identifiable class of persons such that said disparate impact can be sufficiently proven on a statistical basis. Thus, because this solution is limited in application to cases in which a disparate impact is shown to be statistically significant for Rule 702 and *Daubert*, only a disparate impact against groups that can be discretely defined for statistical purposes can trigger heightened scrutiny.

In sum, these limitations ensure that this solution could not lead to a slippery slope in the realm of Equal Protection and therefore counsel in favor of its adoption.

CONCLUSION: THE TRIUMPH OF REPUBLICAN GOVERNMENT

What the Founders knew of political philosophy and what was placed into our Constitution in the Guarantee Clause should be respected. What they knew of the tyranny of the majority, and what they knew of cures for its ills, should be respected. When our Founders decided that it was better to endow our new nation

198. *See, e.g.*, Chemerinsky, *supra* note 24, at 306.
199. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

with a republican government—with a tempering legislature that might better protect minority groups—than with a "pure" democracy, they made the choice, as Plato had done, to deliberately counter the possibility that justice might become nothing more than "the advantage of the stronger." Rather than countering it with a rigid communitarian Kallipolis, stifling the fire of Thrasymachan Justice by eliminating the air that lets liberty breathe, the Founders decided that a mediating legislature, an assembly of greater minds elected by citizens of all groups competing for political success, would be a superior solution.

We should respect that wish. By permitting citizens in certain states to define the scope of minority rights through majority might, the Supreme Court has shirked its duty to uphold both the philosophical structure of our Constitution and the Guarantee Clause's promise that the states are to provide for a republican form of government. The result of this failure makes it practically impossible for victims of direct democracy to use the Equal Protection Clause to challenge the Thrasymachan Justice to which they were subjected. Only by providing for heightened standards of review for all citizen lawmaking that disparately impacts minority groups can the Supreme Court fulfill the Founders' promise to counter Thrasymachan Justice.