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Article

Direct Democracy and Campaigns Against Minorities

Todd Donovan[†]

INTRODUCTION

Direct popular voting on legislation, although rare in most established democracies, is the norm in several American states that make frequent use of the citizen initiative process.¹ In all states, legislators may also refer constitutional amendments to voters for popular approval.² Topics of popular initiatives and constitutional amendments span a wide range, but popular votes on matters of individual rights are one of the more unique and controversial aspects of American direct democracy.³ Americans are frequently asked to make decisions about rights afforded to various minority groups, and to cast

[†] Professor of Political Science, Western Washington University, Bellingham, Washington. Sincere thanks for the opportunity to present an earlier version of this article at the *Minnesota Law Review's* "A More Perfect Union? Democracy in the Age of Ballot Initiatives" symposium in Minneapolis, Minnesota (Oct. 26, 2012). Thanks to Tom Pryor, Andrew Hart, Anne Dwyer, Brian Burke and members of the *Law Review* for their work on the symposium and for their diligent efforts with various drafts of this manuscript. Any remaining errors are my responsibility. Copyright © 2013 by Todd Donovan.

1. Cf. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1510 n.23 (1989) (noting that twenty-four states have the power to force the legislature to refer legislature enactments to the electorate).

2. See, e.g., Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19 (1993) (noting that voters rejected a proposed constitutional amendment).

3. E.g., *id.* at 19–45; cf. Eule, *supra* note 1, at 1503–90 (considering how courts should go about deciding challenges to the constitutionality of voter's enactment as democracy becomes more direct). See generally Derrick A. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (explaining that the threat of direct democracy fueled with elected representatives underperforming causes voters to pursue a "do-it-yourself" method).

votes on policies that are associated with a clearly identifiable minority.⁴

In this Article, I discuss why campaigns and voting on ballot measures associated with rights questions are unique when compared to campaigns and voting for candidates and other ballot measures. In Part I, I discuss how direct-democracy campaigns generally differ from candidate campaigns, and I propose that voter consideration of issues, and voter assessments of groups associated with an issue placed on the ballot, play a more prominent role in direct democracy than in candidate contests. One implication of this is that direct-democracy campaigns focus critical attention on minority groups associated with a policy issue. This means that voting based on stereotypes and negative affect toward a group may be far more pronounced in direct democracy than in other electoral contexts. In Part II, I argue that the unique context of direct-democracy campaigns against minorities also involves a politics of backlash, where legislative and judicial outcomes favoring minorities are targeted for repeal via referendum and initiative. Minority gains achieved in the legislative and judicial arenas can be repealed by an electoral majority that perceives a minority as a threat.⁵

This sets the stage for a discussion of same-sex ballot measures in Part III. There, I provide a brief overview of ballot measures on the subject of lesbian and gay rights, and a description of how lesbian and gay rights and the courts are portrayed in direct-democracy campaigns. My overview of campaign ads illustrates that contemporary campaigns against the right to marry lack the explicit, overt animus of older direct-democracy campaigns against gay rights, but contemporary campaigns continue to make use of enduring stereotypes about the threat of homosexuality. Part IV of this Article explores what I call the spillover effects of direct-democracy campaigns against minorities. Specifically, campaigns against same-sex marriage in 2004 had the capacity to move popular opinion toward being less sympathetic to gays and lesbians as a group. I conclude with Part V, in which I discuss how we might generalize from campaigns against same-sex marriage to a broader understanding of the role of direct-democracy campaigns that

4. *E.g.*, Linde, *supra* note 2, at 19 (rejecting a constitutional proposal aimed against homosexuality).

5. *Cf.* Bell, *supra* note 3, at 2 (explaining how courts use existing constitutional principles to protect minority rights against majoritarian abuses).

attempt to define minority rights. I suggest that—even if courts were to resolve the same-sex marriage debate—without new restraints, the process of direct democracy will continue to facilitate a backlash against minority groups that are perceived as a threat to an electoral majority, and facilitate a backlash against democratic institutions that protect minority rights.

I. CAMPAIGNS FOR CANDIDATES COMPARED TO CAMPAIGNS ABOUT ISSUES

Campaigns and voter decision making on initiatives and referendums differ substantially from candidate contests in several important ways. Voter decisions in candidate contests are aided by a wide range of durable, directly accessible decision heuristics that precede any campaign (such as partisanship⁶ and incumbency⁷). Voter decisions in candidate races are influenced by such factors, as well as by interest group endorsements,⁸ voter evaluations of candidate traits (such as competence, integrity, and reliability),⁹ and potentially by voter response to a candidate's position on a range of issues. Although single-issue voting in candidate contests may be relevant to some voters' decisions, voters demonstrate high levels of uncertainty about a candidate's issue positions, even in presidential elections.¹⁰

6. See ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER UNABRIDGED EDITION* 274 (1960) (noting that one's individual expression of partnership is associated with the individual's statement of voting behavior); see also MICHAEL S. LEWIS-BECK ET AL., *THE AMERICAN VOTER REVISITED* 149–50 (2008) (stating that voting for the same party in successive elections causes more fervent partisan commitment).

7. See generally Gary N. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478, 478–97 (1996) (arguing that the vote-denominated incumbency advantage can be decomposed into direct and indirect effects).

8. See generally Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 951–71 (2001) (asserting that endorsements have obvious heuristic values).

9. Cf. Arthur H. Miller et al., *Schematic Assessments of Presidential Candidates*, 80 AM. POL. SCI. REV. 521, 521–24 (1986) (stating that personality characteristics of the candidates provides an understanding of voter behavior).

10. See Herbert F. Weisberg & Morris Fiorina, *Candidate Preference Under Uncertainty: An Expanded View of Rational Voting*, in JOHN C. PIERCE & JOHN L. SULLIVAN, *THE ELECTORATE RECONSIDERED* 238 (1980) (stating that uncertainty exists in a number of ways, such as a voter misperceiving a candidate's policy position on an issue). See generally Larry M. Bartels, *Issue Voting Under Uncertainty: An Empirical Test*, 30 AM. J. POL. SCI. 709, 709–28 (1986) (contributing a survey response to estimate the respondent's uncertainty

Any single issue associated with a campaign to elect a candidate is thus just one of many factors that influence choices over candidates, and any single issue will thus play a limited role in how candidate campaigns appeal to and affect voters.¹¹ Although a simplification of reality, it is sound to assume that most voters approach candidate contests with pre-existing partisan leanings,¹² and that many others decide based on retrospective evaluations of incumbent performance.¹³ There is limited scope, then, for candidate contests to be based predominately on judgments about a single issue, let alone a single issue associated with rights afforded to a minority group.¹⁴

Direct democracy presents a markedly different context for decision making. As with candidate races, cues and heuristics are available and widely used by voters,¹⁵ but initiative and

about where a candidate stands on the issues).

11. Cf., e.g., John H. Aldrich et al., *Foreign Affairs and Issue Voting: Do Candidates "Waltz Before A Blind Audience?"*, 83 AM. POL. SCI. REV. 123, 123–41 (1989) (resolving the anomaly that voters possess little information about foreign or defense policies, which in turn have negligible impact on their voting behavior).

12. See CAMPBELL ET AL., *supra* note 6, at 274 (noting that one's individual expression of partisanship is associated with the individual's statement of voting behavior); see also Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35, 35–50 (2000) (asserting the impact of partisanship in voting behavior has increased).

13. See generally Morris P. Fiorina, *Economic Retrospective Voting in American National Elections: A Micro-Analysis*, 22 AM. J. POL. SCI. 426, 426–43 (1978) (assessing whether citizens vote against or for the incumbent president's party); D. Roderick Kiewiet & Douglas Rivers, *A Retrospective on Retrospective Voting*, 6 POL. BEHAV. 369, 369–93 (1984) (analyzing retrospective voting in response to actual outcomes that are incumbency-oriented).

14. Candidate campaigns do use issues that appear designed to weaken an opponent by appealing to anxiety and/or prejudice associated with an identifiable minority. See generally TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001). Examples include affirmative action (e.g., Jesse Helms' 1990 US Senate race), immigration (e.g., Pete Wilson's 1994 gubernatorial campaign), and fear of black-on-white crime (e.g., George H.W. Bush's 1988 presidential race). As much as these may be visible in candidate races, they are unlikely to be the dominant cue affecting voter choice, and thus unlikely to be a dominant campaign theme. Cf. Aldrich et al., *supra* note 11, at 123 (asserting that voters have little information about prominent issues, which in turn have negligible impact on their voting behavior).

15. See Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63 (1994) (noting that voters acquire information about policies through "friends, coworkers, political parties, or other groups, which they may then use to infer how a proposition will affect them"); see also SHAUN BOWLER

referendum voting is less directly linked to partisanship and incumbency. Although incumbent elected officials may write ballot questions (this is the only route to the ballot for legislative-referred constitutional amendments¹⁶), incumbents' positions and party endorsements are not listed on the ballot with referendum and initiative questions.¹⁷ Voting directly on a policy question is, by definition, a form of issue voting. Voters clearly do rely on their partisanship,¹⁸ and utilize multiple sources of information when deciding on ballot questions,¹⁹ but narrower forces associated with the single issue at hand are likely to be much more dominant in referendum voting than in candidate voting. At the very least, when we compare the broad range of factors that affect voters in candidate races, decisions on ballot questions occur in a context where a single issue carries (relatively) far more influence.²⁰ By extension, initiatives and referendums that ask voters to make choices about minority rights also ask voters to evaluate members of the minority group that is the subject of the rights question.²¹ Referendums

& TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING AND DIRECT DEMOCRACY 33 (1998) (stating that "with the use of heuristics in political reasoning, different cues might be relevant for different voters").

16. See *Legislatively-Referred Constitutional Amendment*, BALLOTEDIA, http://ballotpedia.org/wiki/index.php/Legislatively-referred_constitutional_amendmenthttp://ballotpedia.org/wiki/index.php/Legislatively-referred_constitutional_amendment (last updated Nov. 3, 2011) (noting under legislatively-referred amendment, the amendment initiated by state's legislature, like an incumbent elected official, can only be approved or rejected by the voters).

17. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes* 5 (Ctr. for the Study of Law and Politics, Working Paper No. 13, 2004) ("[D]irect democracy lacks one of the most powerful cues in candidate elections: party affiliation, a cue that appears on most general election ballots next to candidate names.").

18. See Regina P. Branton, *Examining Individual-Level Voting Behavior on State Ballot Propositions*, 56 POL. RES. Q. 367, 368 (2003) (noting that general relationship between partisanship and voting behavior).

19. See generally Shaun Bowler & Todd Donovan, *Do Voters Have a Cue? Television Advertisements as a Source of Information in Citizen-Initiated Referendum Campaigns*, 41 EUR. J. POL. RES. 777, 777-93 (2002) (using the information sources they use in order to gauge the relative importance of various sources that voters rely upon in making voting decisions).

20. E.g., *Single Issue Voting*, RIGHT TO LIFE MICH., http://www.rtl.org/endorsements/singleissue_voting.html (last visited Apr. 2, 2013) (noting that the United States has a history of "voters who go to the polls to vote for a candidate or against another candidate based on a single issue").

21. This point of linking decisions about an issue to the group that voters associate with the issue is developed in detail in Part II below.

on minority rights have the capacity to be largely about approving or disapproving members of a minority group.²²

As noted above, voters faced with decisions on referendums and initiatives have access to useful cues that may simplify their decision making, but they are also exposed to information about the issue they are deciding on, and information about groups that may be affected by the proposal.²³ Indeed, awareness of which group is affected by a policy may itself be a heuristic that voters use when deciding on a proposal.²⁴ Cues in this context come in two overlapping forms: one associated with liking or disliking a group, and another associated with “what is after all the most vital political information: Who and what one is for or against.”²⁵ The latter may be used by voters as a shortcut to figure out how to agree with opinion leaders or groups they trust, and thus how to vote with their underlying preference on the matter in mind.²⁶ On the other hand, attitudes about the group affected by a policy allow voters a means to reason about the policy. Knowing that a group that the voter likes will benefit from a policy outcome may lead the voter to support action that produces that outcome.²⁷ Conversely, a voter may oppose something if she believes that a group she does not like stands to benefit.²⁸

Information about policy questions on the ballot (and, frequently, the group affected by the question) is available from the official title and summary the ballot that describes the question.²⁹ In many states, voters also receive a government-

22. See Linde, *supra* note 2, at 41 (providing examples of initiatives that approve or disapprove minority groups).

23. Bowler & Donovan, *supra* note 19, at 782–83 (stating that voters use television as a source of information when voting).

24. PAUL M. SNIDERMAN ET AL., REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY 114 (1991) (noting that some voters rely on a likeability heuristic in figuring out the issue position of strategic groups in politics).

25. See *id.* at 115.

26. Cf. Lupia, *supra* note 15, at 66 (noting that voters can make more accurate decisions about voting with information from credible sources); see also Jeffrey A. Karp, *The Influence of Elite Endorsement in Initiative Campaigns*, in SHAUN BOWLER, TODD DONOVAN & CAROLINE J. TOLBERT, CITIZENS AS LEGISLATORS 150 (1998) (asserting that public opinion forms from activities, organized groups, and elected officials).

27. *E.g.*, SNIDERMAN ET AL., *supra* note 24, at 46 (stating that a person is likely to be supportive about AIDS if he is supportive of gay rights).

28. *E.g.*, *id.* at 45–47 (stating that homophobia plays a role in shaping public attitudes concerning the rights of people with AIDS).

29. See, *e.g.*, *2012 Information for Voters*, WILLIAM FRANCIS GALVIN: SECRETARY COMMONWEALTH MASS., http://www.sec.state.ma.us/ele/ele12/ballot_

funded voter's handbook that describes the issue, with arguments for and against,³⁰ which voters often rely upon.³¹ As much as campaigns may have incentives to obfuscate and distort, it is difficult to mount a campaign supporting or opposing a referendum without addressing the substance of the issue on the ballot or without addressing the groups that benefit from or are harmed by the proposal. Although many ballot-measure campaigns are low-budget affairs,³² initiative campaigns have spent more on TV ads than presidential campaigns in some states.³³ Even when ballot measures have lower levels of spending, the presence of a referendum on a state ballot can draw more media attention to the issue than would have otherwise been the case.³⁴

There are likely several ways that voters might reason about a ballot issue, and thus several potential methods that campaigns might use to appeal to voters. Rational voters may require information about how a proposal advances themselves, their group, or their partisan interest.³⁵ Voters concerned with wider social effects of a policy³⁶ may require information about broader consequences of adopting the policy. Each of these models of reasoning presumes that voters are at least modestly

questions_12/message12.htm (last visited Apr. 2, 2013) (explaining that each ballot question will have additional information to help voters).

30. DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 56–58 (1984) (discussing use of voter handbooks).

31. *E.g.*, Bowler & Donovan, *supra* note 19, at 781 (finding that 73% of voter guides are provided by the state); *see* BOWLER & DONOVAN, *supra* note 15, at 58 (exploring what elements of the handbook the voters find useful).

32. *E.g.*, Todd Donovan et al., *Contending Players and Strategies: Opposition Advantages in Initiative Campaigns*, in BOWLER, DONOVAN & TOLBERT, *supra* note 26, at 93–94 (noting that one of California's most celebrated initiatives was an "anti-illegal immigrant Proposition," in which proponents only spent \$800,000).

33. *Cf.* TODD DONOVAN ET AL., STATE & LOCAL POLITICS: INSTITUTIONS & REFORM 102 (2011) ("High levels of spending on initiative TV ads probably increase public awareness of initiatives and may increase public attention to campaign issues." (footnote omitted)).

34. *See, e.g.*, Todd Donovan et al., *Priming Presidential Votes by Direct Democracy*, 70 J. POL. 1217, 1220 (2008) (comparing media attention surrounding gay marriage, on whether gay marriage was an initiative on a state's ballot).

35. *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (discussing utility maximization of rational voters).

36. *See, e.g.*, Donald R. Kinder & D. Roderick Kiewiet, *Sociotropic Politics: The American Case*, 11 BRIT. J. POL. SCI. 129, 131 (1981) (noting that working-class citizens normally support social welfare policies).

sophisticated, have some minimal level of conceptual and cognitive capacities, and are sufficiently motivated. In a world dominated by self-interested voters, campaigns would have incentives to provide voters with information about “what’s in it for them.”³⁷ In a world dominated by voters with broader social concerns, campaigns would have incentives to provide information about broad outcomes associated with policy adoption.³⁸

Alternatively, a ballot issue may tap into values, beliefs, and stereotypes that are “so ingrained over a long period that [they] structure[] voters’ ‘gut responses’” and require no conceptual sophistication.³⁹ Decision making on issues that affect a clearly identifiable group, moreover, may be structured by positive or negative affect for the group.⁴⁰ Different types of ballot issues may elicit different types of reasoning, and any particular issue may find different voters reasoning in terms of self-interest, or social concerns, or gut values. Self-interest may be at the forefront for more voters when reasoning about tax measures,⁴¹ for example, but many voters likely also decide on tax matters in terms of broader social, normative, and ideological concerns.⁴² Societal concerns, conversely, may be relatively more dominant on votes over governance, smoking regulations, drugs policy, or assisted suicide;⁴³ but values, self-interest, ideology, and other forces would also be relevant to voter decisions on such matters.⁴⁴

37. *Id.* at 131 (noting that middle class voters oppose social welfare policies because they gain no benefit).

38. *E.g., id.* at 132 (explaining that citizens concerned about economic effects of voting would want to have that information).

39. Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 AM. POL. SCI. REV. 78, 78 (1980).

40. *E.g.,* SNIDERMAN ET AL., *supra* note 24, at 46 (stating that supporting rights of a person with AIDS stems from some people’s supportive nature to the gay community).

41. *See generally* BOWLER & DONOVAN, *supra* note 15, at 85–106 (examining the motivations of voters in elections that are focused primarily on tax and spending initiatives).

42. *See id.* at 105 (arguing that self-interested motivations do not necessarily supersede one’s “symbolic or ideological determinants of the vote”).

43. *E.g., id.* (suggesting that the policy content of the ballot issues is relevant to determine how voters may vote, which may not be based in self-interest).

44. *See id.* (asserting that based on the policy content, one may vote based on “symbolic themes” or ideology).

II. POLITICS OF BACKLASH: THE UNIQUE CONTEXT OF POPULAR VOTES ON MINORITY RIGHTS

Ballot questions about matters of minority rights present a unique decision context for voters. Clearly, voters will evaluate rights questions in terms of partisan cues,⁴⁵ political ideology,⁴⁶ broad social concerns, and normative concerns about procedural fairness.⁴⁷ Some, particularly those in the affected minority,⁴⁸ could approach the issue in terms of personal self-interest. Yet direct economic self-interest may be less relevant to a majority of voters on questions of minority rights than on questions about taxation and government spending.⁴⁹ With ballot questions on matters whose direct effects of the policy fall on a clearly identifiable and often unpopular minority—such as voting on the rights of foreigners to own property, school desegregation, employment of immigrants, language policy, access to fair housing, access to public services for illegal immigrants, protections against discrimination based on sexual orientation, and related topics—the material costs and benefits that affect many individuals in the majority may be trivial, or ethereal.⁵⁰

The distribution of costs and benefits of such policies is different than that associated with other ballot questions.⁵¹ As a result, economic self-interest may play less of a role in voting

45. See Branton, *supra* note 18, at 372 (stating that studies indicate that a voter's partisan affiliation is consistent with individual voting behaviors on ballot issues).

46. See *id.* (finding that “ideology is associated with voting behavior in approximately 44 percent of the models”).

47. See generally Tom R. Tyler, *Social Justice: Outcomes and Procedures*, 35 INT'L J. PSYCHOL. 117 (2000) (finding that a review of research demonstrates that people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair).

48. Analysis of survey data demonstrates that whites, Latinos, Asians, and African Americans have similar preferences over most ballot measures, but minorities vote differently than whites (and are more likely to oppose) ballot measures that affect minorities adversely. See generally Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Proposition Elections*, 64 J. POL. 154, 154–77 (2002).

49. Cf. BOWLER & DONOVAN, *supra* note 15, at 89 (arguing that it might be easier for a voter to perceive self-interest produced by policies that are tangible, like those concerning fiscal issues).

50. See *id.* at 167 (stating that voters on policy issues concerning minorities are “uncaring” and “unthinking”).

51. Cf. Todd Donovan et al., *Contending Players and Strategies: Opposition Advantages in Initiative Campaign*, in BOWLER, DONOVAN & TOLBERT, *supra* note 26, at 81 (examining the success of passing policies that are broad or narrow in effect).

on rights. With questions of minority rights, regardless of the outcome of the vote, a majority of voters stand to gain (or lose) very little in the way of material benefits. Conversely, tangible costs are targeted to a relatively small minority. As an example, a policy proposal to prevent a few non-citizens from owning land may extend minor economic opportunities to some voters in the majority by marginally decreasing demand for (and thus cost of) property, but the only immediate economic effect is to exclude members of a small minority from ownership. Likewise, barring illegal immigrants from receiving public services can have very marginal economic effects for a majority by reducing the total costs of providing public services paid by voters (tax-payers) in the majority,⁵² but the consequences for the smaller (non-voting, non-citizen) immigrant minority are more material, and immediate. In sum, the economic benefits of policies constraining minority rights are so widely diffused across the majority that they may be trivial to individual majority voters, and largely invisible.

There are examples of referendum voting where self-interested economic voting is grounded in objective factors that affect many voters. Public employees were found to be more likely to oppose a property-tax-cutting measure that would have reduced public-sector funding, whereas people paying higher property taxes were more likely to support it.⁵³ Likewise, people with children in private schools were more supportive of a school-voucher proposal.⁵⁴ These results are consistent with the idea that on fiscal matters voters connect their personal, objective economic situation to support for ballot measures that advance their personal economic interest.⁵⁵ Although subjective perceptions of economic self-interest may be in play as a mode of reasoning for some voters when considering questions on minority rights, it is difficult to conceive of a large group of voters who would foresee tangible economic benefits from something like defining marriage as a union only between a man and a woman. Campaigns on such matters will thus need to find oth-

52. This would assume that other public sector expenditures would not increase as a result of excluding illegal immigrants from access to public services such as education.

53. See, e.g., BOWLER & DONOVAN, *supra* note 15, at 103 n.13 (using Proposition 13 to exemplify that support for the initiative with response to property tax burden).

54. See *id.* at 94.

55. E.g., *id.* at 129 (examining voters' motivations based on a proposition's immediate effect on the person's income).

er ways to convince voters they should be concerned about a minority's rights.

Further, the campaign and decision-making context surrounding initiatives and referendums on minority rights have involved instances where legislative or judicial outcomes that favored a minority have altered a previous majority-supported status quo.⁵⁶ Racial and ethnic minorities have made gains (in terms of rights protections and policies that advantage racial and ethnic minorities) through courts and representative institutions, particularly since the Voting Rights Act succeeded in increasing minority representation in state legislatures.⁵⁷ Yet as legislative bodies have become more representative of racial and ethnic minorities, "the electoral majority is reasserting its power by undercutting and constraining the power of representative government."⁵⁸ Bruce Cain named this backlash phenomena "The New Populism,"⁵⁹ an expression of the concerns of "white middle and working classes"⁶⁰ voters that constrains—by referendum, recall, and citizen-initiated constitutional amendment—the scope of what legislatures (and courts) may do. I would add to this list the use of judicial retention elections to threaten or remove state supreme-court justices who make rulings that are unpopular, as was the case in Iowa after that state's court unanimously upheld a lower-court ruling that al-

56. See Bell, *supra* note 3, at 2 (asserting that courts use existing constitutional principles to protect minority rights against majoritarian abuses).

57. See *id.* at 27 (noting that the Court prevented a dilution of black voting through the 1965 Voting Rights Act). Sexual-orientation minorities have likewise achieved rights gains via courts, and via state and local representative institutions, but this has occurred independent of the Voting Rights Act. See *Voting Rights Act (1965)*, MARTIN LUTHER KING, JR. & GLOBAL FREEDOM STRUGGLE, http://mlk-kpp01.stanford.edu/index.php/encyclopedia/encyclopedia/enc_voting_rights_act_1965/ (last visited Apr. 2, 2013) (noting that the Voting Rights Act only afforded African Americans rights).

58. Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, in BERNARD GROFMAN & CHANDLER DAVIDSON, *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 261, 273 (1992).

59. *Id.* at 273–74. Cain was concerned with the weakening of representative institutions generally, and the broad consequences of this for weaker minority influence over any policy. Although not noted by Cain, the populist backlash is particularly acute with rights questions, and the institutions of direct democracy may also weaken the court's ability to protect minority interests. See *id.* at 275; see also Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiative, and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 733–40 (1994) (arguing that judicial protection is imperative when voters are motivated by popular passion or prejudice).

60. Cain, *supra* note 58, at 274.

lowed same-sex marriage in that state.⁶¹ In 2010, Iowa voters voted out all three of the state supreme court justices who were up for retention.⁶²

A number of anti-minority referendums and initiatives provide examples of popular backlash against minority gains achieved via legislatures and courts. Legislators extended protections against race-based housing discrimination, and by doing so, precipitated a popular initiative that repealed the gains that minorities had achieved in the legislature.⁶³ Elected representatives authorized affirmative-action programs to aid minorities in education and job opportunities, thus triggering initiatives that repealed those policies.⁶⁴ Local councils extended anti-discrimination protections to account for discrimination based on sexual orientation, leading to local referendums⁶⁵ and

61. *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009) (concluding that the offered governmental objective is not substantial, and that equal protection clause would require more).

62. See A.G. Sulzberger, *In Iowa, Voters Oust Judges over Marriage Issues*, N.Y. TIMES (Nov. 3, 2012), <http://www.nytimes.com/2010/11/03judges.html?pagewanted=all&r=O>.

63. See generally Raymond E. Wolfinger & Fred I. Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753 (1968) (discussing voter motivations in overturning California's Rumford Act, which prohibited racial discrimination by realtors and apartment owners. The Act passed in 1963 and was repealed by a ratio of two-to-one in a 1964 referendum).

64. California's Proposition 209 (1996) was a citizen-initiated constitutional amendment designed to repeal existing affirmative action policies. *Proposition 209*, LEGIS. ANALYST'S OFF. (Nov. 1996), http://www.lao.ca.gov/ballot/1996/prop209_11_1996.html. It passed with 54% support. *Votes For and Against November 5, 1996, Statewide Ballot Measures and Constitutional Amendments*, CALI. SECRETARY ST. (Nov. 5, 1996), <http://www.sos.ca.gov/elections/sov/1996-general/votes-for-against.pdf>. After local governments and state universities adopted affirmative action, Arizona's legislature referred a constitutional amendment (Proposition 107 in 2010) to voters to ban such programs. *Proposition 107*, ARIZ. DEP'T ST., OFF. SECRETARY ST. (Aug. 2010), <http://www.azsos.gov/election/2010/info/pubpamphlet/english/Prop107.htm>. Voters approved it with 59% support. *State of Arizona Official Canvass*, ARIZ. DEP'T ST., OFF. SECRETARY ST., 14 (Nov. 29, 2010), <http://www.azsos.gov/election/2010/General/Canvass2010GE.pdf>. Initiative 200 in Washington (1998), Proposition 2 in Michigan (2006), and Initiative 424 in Nebraska (2006) are similar examples. *Complete Text of Initiative 200*, WASH. SECRETARY ST., http://www.sos.wa.gov/elections/1998/i200_text.aspx (last visited Apr. 2, 2013); *Notice of State Proposals*, MICHIGAN.GOV, 5 (Nov. 2006), http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf; NEBRASKA SECRETARY OF STATE, INFORMATIONAL PAMPHLET: INITIATIVE MEASURE #424 (2008), available at <http://www.sos.ne.gov/elec/2008/pdf/pamphlet%20424.pdf>.

65. In 1978, voters in Eugene, Oregon, repealed a local anti-

state-wide initiatives and referendums designed to repeal such policies.⁶⁶ Same-sex marriage legalized by state legislators was repealed by referendum.⁶⁷ Court-mandated school integration produced voter-initiated laws preventing “forced busing” in three states.⁶⁸ Judicial rulings on same-sex marriage have likewise precipitated legislative-referred constitutional amendments⁶⁹ and constitutional initiatives⁷⁰ designed to return policy to a previous majority-supported status quo.

discrimination ordinance. In 1980, voters in Davis, San Jose, and Santa Clara County, California, repealed anti-discrimination ordinances passed by councils in those communities. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 258 (1997).

66. After several communities passed anti-discrimination ordinances, Colorado voters approved Amendment 2 (1992) with 53% support. The initiative constitutional amendment prohibited the state and its local governments from adopting policy that provided that “homosexual, lesbian, or bisexual orientation” entitled a person to claim protected status or discrimination. *Ballot History*, COLO. LEGIS. COUNCIL (1992), <http://www.leg.state.co.us/lcs/ballothistory.nsf>. Oregon Measure 8 (1988) passed with 53% in support, revoked a ban on sexual orientation discrimination that had applied to the state’s executive branch. *Initiative, Referendum and Recall: 1988-1995*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections21.htm> (last visited Apr. 2, 2013); STATE OF OREGON, VOTERS’ PAMPHLET 52 (1988), available at <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1988.pdf>.

67. Question 1 in Maine (2009) was a popular referendum that repealed a Maine bill that legalized same-sex marriage. *Maine Citizen’s Guide to the Referendum Election*, MAINE.GOV (2009), <http://www.maine.gov/sos/cec/elec/2009/intent09.htm>.

68. See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 93 (1989) (noting such initiatives in Colorado, Washington, and California).

69. Question 2 in Hawaii (1998), for example, was a legislative referred constitutional initiative drafted in response to the Hawaii court’s *Baehr* 1993 remand that asked a lower court to prove the state had any compelling interest in banning gay marriage. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The ballot language read: “The proposed amendment is intended to make it absolutely clear that the State Constitution gives the Legislature the power and authority to reserve marriage to opposite-sex couples.” *Hawaii Initiatives and Referenda: Constitutional Amendment 2*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx> (last visited Apr. 2, 2013) (select States: “Hawaii,” Year: “1998,” Election: “General Election,” Measure Type: “Legislative Referendum;” then click “Submit Query”).

70. Proposition 8 in California (2008), a popular initiative, can be seen as a response to the state supreme court ruling in *In re Marriage Cases*, 43 Cal. 4th 757 (Cal. 2008), which held an anti-same-sex marriage statute unconstitutional. See *Prop 8: Arguments and Rebuttals*, CALI. GEN. ELECTION (2008), <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm> (“Because four activist judges in San Francisco wrongly overturned the peo-

The populist backlash associated with many of these rights contests mean that direct-democracy campaigns over questions of minority rights are not simply about a particular right and a particular minority group, but may also reflect a reaction to counter-majoritarian aspects of democracy that are facilitated by courts and representative government. This means that rights questions that reach the ballot are frequently also questions about redefining state constitutions to constrain democratic procedures that produced gains for minorities in the form of legislative policies or rights protections.

Given this unique context for voter reasoning, compared to other measures that reach the ballot,⁷¹ direct-democracy campaigns offer more room for voting on rights questions to be based on animus, negative group affect, negative stereotypes about the targeted group, and animus toward general counter-majoritarian elements of democracy. Campaigns seeking to constrain minority rights thus have incentives to (explicitly or implicitly) provide information that highlights (or generates) animus toward the targeted group. Campaigns also have incentives to appeal to negative stereotypes about the targeted group, and to highlight (and attack) counter-majoritarian elements of democratic institutions. The muted role of economic self-interest and the prominent role of group affect in decision making on these matters makes it, in a sense, rational for campaigns seeking to constrain minority rights to use irrational appeals to fear, and to highlight threats presented by the minority made subject of the ballot question.

One enduring critique of direct democracy is that the process allows a majority of voters' fears and prejudices to be expressed in policies that target minorities and restrict minority rights.⁷² Majority fear of and animosity toward minorities is a problem not simply for direct democracy, but for democracy generally. Classic studies of popular attitudes have established that the public's initial response to questions about "out

ple's vote, we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman.").

71. See *supra* text accompanying notes 8–44 comparing direct-democracy campaigns to candidate elections.

72. See Bell, *supra* note 3, at 13–22 (discussing the threat direct democracy initiatives pose to racial and other discrete minorities); Linde, *supra* note 2, at 21 (expressing concern that "if a state permits lawmaking by statewide initiatives, their legitimate use must exclude measures for motives that the designers of republican government most feared").

groups” is almost universally intolerant.⁷³ Moreover, white voters’ racial attitudes and racial animus have been shown to affect how they vote in candidate contests.⁷⁴ But my argument (which is by no means original) is that the role of anti-minority sentiments may be amplified by direct democracy, and that such sentiments will frequently cause minority rights to be defeated at the ballot box.⁷⁵ Barbara S. Gamble demonstrated that initiatives targeting the civil rights of minorities passed at a much higher rate than initiatives on all other subjects.⁷⁶ Donald P. Haider-Markel and his colleagues also showed that gays and lesbians lost more often than they won when questions about their rights were decided by a public vote.⁷⁷ Caroline J. Tolbert and Rodney E. Hero contend that the popularity of initiatives targeting minorities can be explained in terms of the threat that a diverse racial/ethnic context poses to white voters.⁷⁸

73. See, e.g., SAMUEL A. STOFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES 26–48 (1955) (showing that, compared to the views of community leaders, the general public is usually much less tolerant of nonconformists, such as socialists and atheists).

74. See MENDELBERG, *supra* note 14, at 169–90 (showing the impact of implicit racial messages on voting patterns); KEITH REEVES, VOTING HOPES OR FEARS? 25–42 (1997) (citing studies that show a significant portion of white voters harbor negative attitudes toward black candidates); PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 88–109 (1993) (showing a correlation between negative racial stereotypes and opposition to race-conscious initiatives such as fair housing or affirmative action).

75. See Bell, *supra* note 3, at 2 (“[T]he growing reliance on the referendum and initiative . . . creates a crisis for the rights of racial and other discrete minorities.”); Linde, *supra* note 2, at 22–39 (tracing the history of direct democracy in the United States and its impact on minority rights). *But see* Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020, 1022 (1998) (showing that prior to the debate over marriage, voters, particularly those in larger jurisdictions, were often supportive of gay rights measures, and that direct democracy is not *per se* abusive of minorities). Haider-Markel et al. show that anti-gay outcomes became more common when marriage rights began being the subject of popular votes. 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).

76. Gamble, *supra* note 65, at 258.

77. See Haider-Markel et al., *supra* note 75, at 307 (finding that the pro-gay outcome in direct democracy contests was only 39%). It should be noted that Haider-Markel et al. also found that gays and lesbians lost regularly when their interests were decided in legislative votes. *Id.*

78. Caroline J. Tolbert & Rodney E. Hero, *A Racial/Ethnic Diversity Interpretation of Politics and Policy in the States of the U.S.*, 40 AM. J. POL. SCI. 851, 867 (1996) (arguing that consensuses develop in homogeneous states, but that “[w]here a predominant white . . . population coexists with substantial white ethnic and/or minority populations, social pluralism tends to increase

In sum, previous election results suggest that voters have not been sympathetic to minority rights and interests when questions affecting those issues were placed on ballots.⁷⁹ Indeed, knowledge of popular anti-minority sentiments may be one reason why elites use direct democracy to set policy. Examples of voter-approved ballot initiatives that restrict minority rights or target minorities for differential treatment are numerous. Early in the twentieth century, Oklahomans approved an initiative that stripped voting rights from African Americans.⁸⁰ California voted to prohibit Asians from owning land,⁸¹ and Arizonans passed an initiative that prohibited employment of immigrants.⁸² Since the 1960s, initiatives and referendums have been used to legislate on matters such as race-neutral access to public accommodations, access to fair housing, school desegregation, and protections against discrimination in employment based on sexual orientation.⁸³ Californians approved initiatives repealing fair access to housing.⁸⁴ Voters in Arizona and other states made English an “official” language,⁸⁵ and Colorado passed an initiative that prohibited extending anti-discrimination protections to gays and lesbians,⁸⁶ while voters in multiple states approved initiatives repealing applications of affirmative action when based on criteria of race and ethnicity.⁸⁷

political competition”). *See generally* V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949) (describing the political history of the southern states, highlighted largely by the desire of whites to maintain supremacy); Regina Branton and Bradford Jones, *Reexamining Racial Attitudes: The Conditional Relationship Between Diversity and Socioeconomic Environment*, 49 *AM. J. POL. SCI.* 359 (2005) (discussing the racial threat hypothesis and arguing that it is influenced by the socioeconomic context).

79. *See supra* notes 72–78 and accompanying text.

80. The amendment established an educational requirement for voting, but in effect only applied it to blacks. CRONIN, *supra* note 68, at 92–93.

81. The Act targeted the expanding Japanese farm communities by prohibiting ownership of land by corporations controlled by persons ineligible for naturalization. *Id.* at 93.

82. The initiative required at least 8% of employees of a company employing six or more people to be U.S. citizens. *Id.*

83. *See Gamble, supra* note 65, at 263–65 (listing several examples of each of these types of measures).

84. *Id.* at 255.

85. *Id.* at 260–61.

86. *Id.* at 260.

87. *See generally, e.g.,* LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* (1998) (documenting the campaign and ultimate passage of Proposition 209, which banned public affirmative action programs in California); DANIEL MARTINEZ HOSANG, *RACIAL PROPOSITIONS:*

III. MARRIAGE ON THE BALLOT

Courts have effectively closed the door for citizen legislation on several of the minority-rights questions that previously appeared on state and local ballots. Procedures that allowed (or required) referendums on matters of fair housing,⁸⁸ as well as law produced by referendums or initiative that repealed protections from racial discrimination,⁸⁹ and initiated law that prohibited school integration,⁹⁰ have been found unconstitutional on equal-protection grounds. By the 1980s and 1990s, the matters of minority rights found most frequently on ballots involved attempts to repeal, prevent, or (far less commonly) advance laws that protected people against discrimination based on sexual orientation.⁹¹ Between 1972 and 1996, at least 90 measures dealing with civil rights of gays and lesbians appeared on state and local ballots.⁹² Many of these were “no special rights” measures⁹³ designed to permit discrimination (in

BALLOT INITIATIVES AND THE MAKING OF POSTWAR CALIFORNIA 201–41 (2010) (describing the passage and history behind Proposition 209). For other examples, see *supra* note 64.

88. See *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (finding Akron, Ohio’s requirement for referendums on matters of race and housing a denial of equal protection). *But see James v. Valtierra*, 402 U.S. 137, 142–43 (1971) (finding that a similar California referendum provision did not burden racial minorities).

89. See *Reitman v. Mulkey*, 387 U.S. 369, 386–87 (1967) (upholding a state-court decision that found California’s constitutional initiative repealing a fair-housing statute unconstitutional under the equal protection clause of the Fourteenth Amendment). *But see Spaulding v. Blair*, 403 F.2d 862, 865 (4th Cir. 1968) (holding that submission of an open-housing act to the electorate for rejection or approval via referendum did not deny equal protection).

90. See *Washington v. Seattle School District No. 1*, 458 U.S. 457, 486–87 (1982) (finding that a statewide initiative to end Seattle’s mandatory school busing program unconstitutional because it was approved for racially motivated reasons).

91. See *Gamble*, *supra* note 65, at 245 (“Recently, ballot initiatives that seek to bar governments from passing laws that prohibit discrimination on the basis of sexual orientation have occupied a prominent place among the issues that have reached the ballot.”). In compiling various minority rights initiatives, *Gamble* found many more dealing with gay rights than other issues. See *id.* at 263–65.

92. See DONALD P. HAIDER-MARKEL, FROM BULLHORNS TO PACS: LESBIAN AND GAY POLITICS, INTEREST GROUPS, AND POLICY 359–63 (1997) (listing these measures).

93. Most prominent among these were Measure 9 in Oregon (rejected by voters in 1992 with 56% opposed), Amendment 2 in Colorado (approved by voters in 1992), and Idaho Proposition 1 (rejected by voters in 1994). See *Ballot History*, *supra* note 66; *Initiative, Referendum and Recall: 1988-1995*, *supra* note 66; *1994 Initiative General Election Results-Idaho*, USELECTIONATLAS.ORG (May 23, 2007), <http://uselectionatlas.org/RESULTS/state.php?fips=16&>

employment) based on sexual orientation, but the list also includes a handful of measures dealing with AIDS.⁹⁴ None of these measures directly addressed the issue of marriage.⁹⁵ When the U.S. Supreme Court determined that Colorado's citizen-initiated prohibition against protecting people from discrimination based on sexual orientation amounted to a denial equal protection in *Romer v. Evans*,⁹⁶ initiatives and referendums about sexual orientation discrimination largely disappeared from ballots.⁹⁷

As a political matter, where earlier federal-court decisions ended cycles of direct legislation on questions about minority rights, *Romer* only altered the policy goals of political organizations opposed to gay rights—it did not prevent them from continuing to use the ballot to regulate the rights of gays and lesbians. *Romer*, and a state-court ruling on same-sex marriage in Hawaii,⁹⁸ corresponded with the ongoing qualification of several ballot measures that would amend state constitutions to define marriage as a union between opposite-sex couples only. Voters in Hawaii amended their state's constitution in 1998 in response to a court ruling that questioned whether marriage could be reserved for opposite-sex couples given the equal pro-

year=1994&f=0&off=61&elect=0.

94. For a partial summary of ballot measures involving gay and lesbian rights, see Gamble, *supra* note 65, at 263–65; see also HAIDER-MARKEL, *supra* note 92, at 359–63; ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 17–106, 127–32 (Stephanie L. Witt & Suzanne McCorkle eds., 1997); Donovan & Bowler, *supra* note 75, at 1020–24.

95. See HAIDER-MARKEL, *supra* note 92, at 359–63. It is worth noting that few of the state-level “Defense of Marriage Act” (DOMA) statutes adopted in rapid succession in the 1990s and early 2000s were the result of the popular initiative process. For an overview of these statutes, see *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Law*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx#2> (last updated Nov. 2012).

96. *Romer v. Evans*, 517 U.S. 620 (1996). The court ruled that anti-discrimination laws did not extend “special rights” and that Colorado’s Amendment 2 was motivated by animus toward gays and lesbians, rather than a rational relationship to any legitimate function of government. *Id.* at 631–33.

97. See HAIDER-MARKEL, *supra* note 92, at 636 (showing a lack of ballot initiatives in 1997).

98. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that same-sex marriage is not a fundamental right under the Hawaii constitution, but that statutes restricting it to male-female marriage must be subject to strict scrutiny); see also *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996) (denying church and clergy members’ request to intervene, holding that their right to solemnize only marriages that fit their beliefs would not be infringed if same-sex marriage was allowed).

tection clause of that state's constitution.⁹⁹ Voters in Alaska approved a constitutional amendment banning same-sex marriage that same year.¹⁰⁰ By the late 1990s, social conservative groups shifted emphasis from anti-discrimination laws to marriage and adoption laws.¹⁰¹ Focus on the Family mobilized contributors in 1999 by emphasizing the threat of gay and lesbian adoption, and the danger of teaching of same-sex marriage and tolerance of gay and lesbian clubs in public schools.¹⁰²

Same-sex marriage as a ballot issue gained added momentum in 2003 after the Supreme Court of Massachusetts directed the state to issue marriage licenses to same-sex couples.¹⁰³ A national coalition of religious conservative groups, including Focus on the Family and the Family Research Council, formed in early 2004 "to defend traditional marriage in the wake of a court decision requiring marriage or marriage-type rights for homosexual couples."¹⁰⁴ Conservative activists qualified anti-gay marriage initiatives in six states (Arkansas, Montana, Michigan, North Dakota, Ohio, and Oregon) and state legislators placed constitutional amendments barring same-sex marriage on the ballot in seven others in 2004 (Georgia, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, and Utah).¹⁰⁵ Eleven of these votes occurred in conjunction with the November 2 presidential election.¹⁰⁶ Every measure was approved, usually with large super-majorities in support.¹⁰⁷

99. Question 2, Legislative Power to Reserve Marriage to Opposite Sex Couples Act. *See supra* note 69. This amendment was approved with 69.2% support. *Election Summary Report*, HAWAII.GOV (Nov. 4, 1998), <http://hawaii.gov/elections/results/1998/general/98swgen.pdf>.

100. Alaska's Marriage Amendment (Measure 2) was approved with 68% support. *Election Summary Report*, ST. ALASKA DIVISION ELECTIONS (Dec. 1, 1998), <http://www.elections.alaska.gov/results/98GENR/results.htm>.

101. *See* Todd Donovan et al., *Direct Democracy and Gay Rights Initiatives After Romer*, in *THE POLITICS OF GAY RIGHTS* 161, 169 (Craig A. Rimmerman et al. eds., 2000) (discussing how antigay activists began to move to more incremental policy proposals that could be marketed as maintaining the status quo).

102. *Id.* at 180.

103. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

104. *Volume 2, Issue 1: "Coalition for Marriage" Formed to Advocate "One Man One Woman Marriage"*, MICH. FAM. FORUM ONLINE (Jan. 7, 2004), <http://www.michiganfamily.org/main-resources/Forum%20Online%20Archive/2004/fo-01-07-04.htm>.

105. *See* Todd Donovan et al., *Did Gay Marriage Elect George W. Bush?* 5–6 (unpublished manuscript), available at http://polisci.msu.edu/sppc2005/papers/fripm/dtsp_sppc05.pdf (presented at the State Politics & Policy Conference, East Lansing, Michigan, May 14–15, 2005).

106. Only Louisiana's and Missouri's votes occurred in earlier primary

In 2004, most campaigns against same-sex marriage were low-budget operations, yet they nonetheless had the capacity to contact many voters.¹⁰⁸ Campaigns against same-sex marriage collected signatures in and out of churches, and used grassroots volunteers and churches to distribute campaign literature.¹⁰⁹ The Ohio Campaign to Protect Marriage began collecting signatures in May 2004, submitting 575,000 signatures by August 2004.¹¹⁰ In Michigan, Citizens for the Protection of Marriage sponsored a petition drive to place a constitutional amendment on that state's November 2004 ballot and distributed one million fliers in support of it.¹¹¹ In Oregon, the Defense of Marriage Coalition and the Oregon Family Council began collecting signatures in late May 2004. The Coalition collected 244,000 signatures to qualify the Oregon amendment by July.¹¹²

Contacts with voters were not limited to petitioning. The Ohio campaign placed over 3.3 million phone calls (in a state where 5.6 million citizens cast votes) featuring Ohio's Republican Secretary of State (who co-chaired Bush's state election campaign) to promote Issue 1.¹¹³ The Arkansas "Yes on Amendment 3" campaign gathered 200,000 signatures and led a powerful church-based campaign.¹¹⁴ The *Detroit Free Press* reported that African-American voters in Michigan received thousands of "robo calls" urging them to vote for John Kerry in order to promote the Democrats' goal of defending gay mar-

elections. *See id.* at 5 n.2.

107. States voting in November included Arkansas (Amendment 3, 75% yes), Georgia (Question 1, 76% yes), Kentucky (75% yes), Michigan (Proposal 2, 59% yes), Mississippi (Amendment 1, 86% yes), Montana (Measure CI—96, 67% yes), North Dakota (73% yes), Oklahoma (Question 711, 76% yes), Ohio (Issue 1, 62% yes), Oregon (Measure 36, 57% yes), and Utah (66% yes). Louisiana approved a ban on same-sex marriage at the September 18 primary (Amendment 1, 78% yes), while Missouri approved a Marriage Definition Amendment at the August 3 primary (71% yes). *Id.*

108. *Id.* at 6.

109. *Id.*

110. *Id.*

111. Patricia Montemurri & Marisol Bello, *Proposal 2: Marriage Ban Divides, Unites Religions*, DETROIT FREE PRESS, Oct. 21, 2004, at A3.

112. Sandeep Kaushik, *Gay Marriage Backers Focus on Ore. Battle*, BOS. GLOBE, Sept. 27, 2004, at A3.

113. Jim Siegell, *Media Blitz Begins for Ohio's Issue 1*, CINCINNATI ENQUIRER, Oct. 26, 2004.

114. Jay Barth & Janine Parry, *Arkansas: Still Swingin' in 2004*, in READINGS IN ARKANSAS POLITICS AND GOVERNMENT 361, 368 (Janine A. Parry & Richard P. Wang eds., 2009).

riage.¹¹⁵ Proponents of the 2004 Michigan marriage ban spent nearly \$2 million on their campaign, with the Catholic Church and the Family Research Council providing most of the funding.¹¹⁶

Most campaigns in 2004 featured very little spending by supporters or opponents of same-sex marriage, with nine of thirteen states that year having less than \$100,000 in total spending.¹¹⁷ Total spending by groups opposed to and supporting same-sex marriage in most states in 2004 amounted to less than twelve cents per member of the voting-age population.¹¹⁸ This low value likely reflects that campaigns in favor of marriage bans were conducted via churches,¹¹⁹ and that opponents of same-sex marriage bans failed to mount substantial opposition campaigns in 2004.¹²⁰

No single election year since 2004 has included as many state-wide votes on same-sex marriage, but two additional votes were held in 2005, nine more in 2006, three states voted on marriage in 2008, two in 2009, and five voted on marriage in

115. “When you vote this Tuesday, remember to legalize gay marriage by supporting John Kerry,” the call said. “It’s what we all want. It’s a basic Democratic principle.” Kathleen Gray, *Presidential Campaigns, Voters Upset About Misleading Calls*, DETROIT FREE PRESS, Nov. 1, 2004 (on file with author).

116. Church funding came from the Archdiocese of Detroit, and the Diocese of Lansing, Grand Rapids, Saginaw, Gaylord, Kalamazo, and Marquette. See Dawn Wolfe, *Catholics Against Equality: Michigan Catholics Give \$1 Million to Hurt LGBT Families* Nov. 2, PRIDESOURCE: BETWEEN THE LINES (Jan. 27, 2005), <http://www.pridesource.com/article.html?article=11275>.

117. See SUE O’CONNELL, THE INST. ON MONEY ST. POL., THE MONEY BEHIND THE 2004 MARRIAGE AMENDMENTS 5 (2006), available at <http://www.followthemoney.org/press/Reports/200601271.pdf> (showing that Kentucky, Missouri, Arkansas, Georgia, Louisiana, Montana, Oklahoma, Mississippi, and North Dakota all had total contributions under \$100,000).

118. The author’s calculations are based on data from the National Institute on Money in State Politics. See *id.* (showing the total contribution amounts by state). State voting age populations come from Michael McDonald’s United States Elections Project at George Mason University. See Michael McDonald, *2004 General Election Turnout Rates*, U.S. ELECTION PROJECT, http://elections.gmu.edu/Turnout_2004G.html (last updated Dec. 28, 2011).

119. See generally David E. Campbell & J. Quin Monson, *The Religion Card: Gay Marriage and the 2004 Presidential Election*, 72 PUB. OPINION Q. 399 (2008) (discussing the mobilization of religious groups during the 2004 campaigns).

120. In 2004, Oregon (\$5,368,452 total spending, or \$1.96 per citizen over 18 years old), was an exception to this. A modest campaign against bans on same-sex marriage in 2004 also occurred in Utah (where opponents spent \$0.47 per citizen over 18). For data behind these calculations, see O’CONNELL, *supra* note 117, and McDonald, *supra* note 118.

2012.¹²¹ By 2006, several state-level campaigns over gay marriage had far more funding from individual contributions on both sides than in 2004.¹²² In several states where there was substantial campaign spending, proponents of same-sex marriage heavily outspent opponents (these cases included Wisconsin in 2006,¹²³ Arizona in 2006,¹²⁴ Colorado in 2006,¹²⁵ California in 2008,¹²⁶ Florida in 2008,¹²⁷ Maine in 2009,¹²⁸ North Carolina in 2012,¹²⁹ Maine in 2012,¹³⁰ Minnesota in 2012,¹³¹ and Wash-

121. *Same-Sex Marriage and Domestic Partnerships on the Ballot*, NAT'L CONF. ST. LEGISLATURES (Nov. 7, 2012, 5:10 AM), <http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx>.

122. MEGAN MOORE, NAT'L INST. ON MONEY IN STATE POLITICS, *THE MONEY BEHIND THE 2006 MARRIAGE AMENDMENTS 4* (2007), available at <http://www.followthemoney.org/press/Reports/200707231.pdf>; see O'CONNELL, *supra* note 117, at 5.

123. Opponents of the same-sex marriage ban in Wisconsin outspent proponents by 6:1. Statistical results are on file with the author.

124. Opponents of the same-sex marriage ban in Arizona outspent proponents by nearly 2:1. *Id.*

125. Colorado had two ballot measures related to marriage in 2006. Amendment 43 proposed to ban same-sex marriage, and Referendum I proposed recognizing domestic partnerships. LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMBLY, RESEARCH PUB. NO. 554, ANALYSIS OF THE 2006 BALLOT PROPOSALS 13, 22, 34, 40 (2006). Supporters of Referendum I outspent opponents by nearly 5:1. Opponents of Amendment 43 likewise outspent proponents by nearly 4:1. Nonetheless, Amendment 43 passed, and Referendum I was defeated. Statistical results are on file with the author.

126. Opponents of California's Prop. 8 outspent proponents by 1.5:1. *Id.*

127. Opponents of the same-sex marriage ban in Florida outspent proponents by 2.7:1. *Id.*

128. Opponents of Maine's veto of same-sex marriage outspent proponents by 1.7:1, and spent the equivalent of \$6.25 per person over 18 years of age. *Id.*; see also TYLER EVILSIZER, NAT'L INST. ON MONEY IN STATE POLITICS, *THE MONEY BEHIND THE MAINE MARRIAGE MEASURE 1* (2009), available at <http://www.followthemoney.org/press/ReportView.phtml?r=404>.

129. Opponents of North Carolina's ban on same-sex marriage outspent proponents 1.8:1. Statistical results are on file with the author; see also *Amendment 1 (Primary): Same-Sex Marriage Ban*, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=944> (last visited Apr. 2, 2013).

130. Supporters of Maine's initiative to allow same-sex marriage outspent opponents 3:1. Statistical results are on file with the author. See also *Question 1: This Measure Would Repeal Maines [sic] Current Same Sex Marriage Ban*, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=955> (last visited Apr. 2, 2013).

131. Opponents of Minnesota's ban on same-sex marriage outspent proponents 9.6:1. Statistical results are on file with the author; see also *Minnesota Marriage Amendment: Would Amend the Minnesota Constitution to Prohibit Gay Marriages*, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=953> (last visited Apr. 2, 2013).

ington in 2012¹³²). This funding reflected a movement to far greater spending on TV advertising after 2004, particularly by supporters of same-sex marriage.¹³³ Spending over California's Proposition 8 in 2008—largely a battle of TV ads—topped \$100 million.¹³⁴ In terms of spending per eligible voter, the 2009 initiative campaign in Maine to veto a same-sex marriage law dwarfed what was spent on Proposition 8 in California (\$9.98 per voter in Maine,¹³⁵ compared to \$3.02 per voter on Proposition 8¹³⁶).

Despite high spending against attempts to ban same-sex marriage in states noted above, proponents of marriage bans generally did not need to spend much to win.¹³⁷ A simple ordinary least-squares regression analysis of the relationship between election results from 2004 to 2012 (percent state vote in favor of banning same-sex marriage) and spending reveals an inverse relationship between campaign expenditures and voting. Where more was spent—either in total, by the yes side, or by the no side—a higher proportion of votes were cast in favor of banning same-sex marriage.¹³⁸ The inverse association be-

132. Supporters of Washington's referendum to allow same-sex marriage outspent opponents 5.3:1. Statistical results are on file with the author; *Referendum 74: Allowing Same-Sex Marriage*, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=947> (last visited Apr. 2, 2013).

133. See, e.g., Rachel E. Stassen-Berger, *Minnesota Sees Record Spending on Ballot Issues*, STAR TRIB. (Oct. 31, 2012), <http://www.startribune.com/politics/statelocal/176524841.html?refer=y>.

134. *Proposition 008: Limit On Marriage*, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=485> (last visited Apr. 2, 2013); John Wildermuth, *Prop. 8 Supporters Fight Fierce TV Ad Battle*, S.F. CHRON. (Oct. 11, 2008), <http://www.sfgate.com/news/article/Prop-8-supporters-fight-fierce-TV-ad-battle-3190723.php>.

135. See EVILSIZER, *supra* note 128, at 2; *November 3, 2009 General Election Tabulations: People's Veto and Referendum Questions*, MAINE.GOV, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html> (last visited Apr. 2, 2013).

136. See Peter Quist, *The Money Behind the 2008 Same-Sex Partnership Ballot Measures*, NAT'L INST. ON MONEY ST. POL. (Nov. 18, 2009), <http://www.followthemoney.org/press/PrintReportView.phtml?r=406>; CAL. SEC'Y OF STATE DEBRA BROWN, STATEMENT OF VOTE NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), available at http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf.

137. The rare exceptions to this occurred in Arizona (2008), where marriage ban supporters outspent opponents by 7:1, and California, where marriage ban supporters were heavily outspent, but nonetheless managed to spend \$42,000,000 (\$1.54 per voter). Statistical results are on file with the author; see also QUIST, *supra* note 136.

138. Full statistical results are available from the author. The slope be-

tween yes-side spending and vote support likely reflects endogenous effects associated with the states, rather than yes-side spending reducing vote share. That is, proponents of banning same-sex marriage had little reason to spend on television advertising in heavily conservative states where the ban was sure to pass (such as Mississippi and Alabama), while they had much more need to spend in liberal states like Maine, Oregon, or California, where passage of the marriage bans was less certain.¹³⁹

As of January 2013, the issue had appeared on state ballots thirty-nine times (in thirty-one different states).¹⁴⁰ Prior to 2012, thirty-one states had voted on same-sex marriage, and thirty-two had rejected it.¹⁴¹ Up until 2012, marriage bans were uniformly approved (or marriage equality rejected), regardless of the amount of money spent by rival campaigns.¹⁴² This pattern changed in 2012 when voters in three states (Maine, Maryland, and Washington) approved measures allowing same-sex marriage, and voters in Minnesota rejected a ban on same-sex marriage.¹⁴³ In at least three of these states, supporters of marriage equality outspent opponents.¹⁴⁴

tween state level spending against same-sex marriage across 33 states (dollars per person) and percent of state vote against same-sex marriage was -6.5 ($p < .014$, $R^2 = .18$). The slope between state level spending for same-sex marriage (dollars per person) and percent of vote against marriage was -4.8 ($p < .003$, $R^2 = .26$). The slope between total spending (dollars per person) and percent of state vote against marriage was -3.1 ($p < .003$, $R^2 = .25$).

139. For a discussion of endogeneity and campaign spending on ballot measures, see generally Thomas Stratmann, *Is Spending More Potent for or Against a Proposition? Evidence from Ballot Measures*, 50 AM. J. POL. SCI. 788 (2006).

140. See *Same-Sex Marriage and Domestic Partnerships on the Ballot*, *supra* note 121.

141. *Id.* Arizona rejected a ban on same-sex marriage in 2006, but approved a ban in 2008. *Id.*

142. *See id.*

143. *See id.*

144. See Darrin Hurwitz, *What the Money Gap in the 2012 Marriage Ballot Measures Means for the Future of LGBT Equality*, HUFFINGTON POST (Dec. 3, 2012, 7:13 PM), http://www.huffingtonpost.com/darrin-hurwitz/what-the-money-gap-in-the-2012-marriage-ballot-measures-means-for-the-future-of-lgbt-equality_b_2220629.html?utm_hp_ref=email_share (reporting that each anti-same-sex marriage campaign was significantly outspent by opponents in 2012); Annie Linskey, *Last-Minute Checks Keep Same-Sex Marriage Campaign Alive*, BALT. SUN (Nov. 27, 2012, 11:33 PM), <http://www.baltimoresun.com/news/maryland/politics/blog/bal-last-minute-checks-keep-samesex-marriage-campaign-alive-20121127,0,3476121.story> (stating that supporters of same-sex marriage outraised and outspent opponents of same-sex marriage by more than two to one).

A. LESBIAN AND GAY RIGHTS AS A THREAT TO THE MAJORITY

From 1998 to 2010, opponents of same-sex marriage may not have needed to spend as much as supporters, in part because public opinion was largely on their side,¹⁴⁵ and in part because of their ability to effectively portray a minority right as a threat to the majority.¹⁴⁶ Campaigns to ban same-sex marriage generated information about a threat (to the heterosexual majority) posed by gays and lesbians, as well as attacks on “activist” courts.¹⁴⁷ Placing questions about rights on the ballot corresponds with campaigns and events that stigmatize the minority group made subject to the debate.¹⁴⁸ A discussion of a minority-rights question during a campaign need not be framed with malevolent language in order to stigmatize the targeted group. Campaigns against a particular right may be framed with benevolent, neutral, or malevolent language. As examples, ballot measures that proposed repealing protections against job discrimination based on sexual orientation were couched in terms of “no special rights.”¹⁴⁹ Likewise, rather than mentioning affirmative action in their titles, initiatives repealing such programs emphasized that they were promoting the equal application of “civil rights.”¹⁵⁰

Yet the presence of these measures on a state’s ballot generates information about why the initiative is needed—

145. Gallup public opinion surveys found majorities opposed to “marriages between same-sex couples” from 1996 to 2010. Gallup’s 2011 survey, however, was its first survey since it began tracking the issue to find a majority in support of same-sex marriage. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

146. Helene Slessarev-Jamir, *Religious Conservatives’ Success in Constructing Gay Marriage as a Threat to Religious Liberties* 3 (2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107976## (American Political Science Association 2012 Annual Meeting paper).

147. See, e.g., *Protecting Traditional Marriage*, AM. CENTER FOR LAW & JUST., <http://aclj.org/marriage/protecting-traditional-marriage> (last visited Apr. 2, 2013) (arguing that “[a]ctivist courts and zealous political leaders are engaging in an aggressive campaign to alter the landscape of marriage”).

148. See *Resolution on Opposing Discriminatory Legislation & Initiatives Aimed at Lesbian, Gay & Bisexual Persons*, AM. PSYCHOL. ASS’N, <http://www.apa.org/about/policy/discriminatory-legislation.aspx> (last visited Apr. 2, 2013).

149. See Suzanne McCorkle & Marshall G. Most, *The Idaho Anti-Gay Initiative: A Chronology of Events*, in ANTI-GAY RIGHTS, *supra* note 94, at 51, 54–55. See generally Samuel A. Marcossou, *The “Special Rights” Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137 (1995) (exploring the concept of “special rights”).

150. CHÁVEZ, *supra* note 87, at 126–27.

information that can contain explicit or implicit anti-minority appeals.¹⁵¹ Although anti-minority themes may also surround discussions of the same minority-rights question in non-initiative states, direct democracy can act as a vehicle that generates additional information and media attention that expands the scope of conflict over the question—beyond what it would be in states where it was not put to a popular vote.¹⁵² Stephen P. Nicholson, an American politics scholar, has demonstrated that above and beyond the effects of initiative campaign spending and media attention, voters are significantly more aware of ballot measures involving rights and morality questions than they are of other measures.¹⁵³ Nicholson notes that ballot questions about morality and rights tap into core values and deeply held beliefs¹⁵⁴ that provide for “easy” issue voting associated with “gut responses.”¹⁵⁵ Surveys also demonstrate that voters were aware of gay-marriage measures when they appeared on their state’s ballot.¹⁵⁶

An overview of the content of political advertising from direct-democracy campaigns against same-sex marriage illustrates how marriage rights for lesbians and gays were portrayed as a threat. Conservative Christian organizations active in politics—such as Focus on the Family (FOTF) and The Fami-

151. See generally MENDELBERG, *supra* note 14 (analyzing racially-loaded implicit and explicit communication in the context of campaign strategy).

152. Gamble, *supra* note 65, at 249. For a discussion on the general concept of expanding the scope of political conflict, see generally E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* (1960).

153. For example, over 90% of California voters reported being aware of Proposition 187 in 1994 (denying benefits to illegal aliens), and 86% were aware of Proposition 209 in 1996 (repealing affirmative action). This is higher than awareness surrounding some of California’s more famous initiatives, including the term limit initiative Proposition 140 in 1992 (67% aware), and Proposition 103, the successful auto insurance initiative of 1988 (57% aware). Stephen P. Nicholson, *The Political Environment and Ballot Proposition Awareness*, 47 AM. J. POL. SCI. 403, 405–08 (2003).

154. *Id.* at 407.

155. Carmines & Stimson, *supra* note 39, at 78.

156. A 2004 Pew national survey found that 42% of respondents said they were aware of initiatives and referendums on their November ballot. In states where gay marriage was on the ballot, “gay marriage” and “gay rights” were the second most common responses to an open-ended follow-up question asking “[c]an you think of any particular issues on the ballot.” Twenty-six percent offered these unprompted responses in those states. Press Release, Pew Research Ctr. for the People & the Press, *Democrats, Blacks Less Confident in Accurate Vote Count: Race Tightens Again, Kerry’s Image Improves* 9, 26 (Oct. 20, 2004), available at <http://www.people-press.org/files/legacy-pdf/229.pdf>.

ly Research Council (FRC)—presented the threat of same-sex marriage argument explicitly.¹⁵⁷ The FRC promoted the idea that same-sex marriage threatened straight relationships because it would “probably undercut the norm of sexual fidelity in marriage,” “undercut the procreative norm long associated with marriage,” and foster “an anti-natalist mindset that fuels population decline.”¹⁵⁸ FOTF advocated that the “homosexual rights’ ideology” will result “in changing societal mores and values that deeply impact Americans in their day-to-day relationships with family members, neighbors and co-workers.”¹⁵⁹

In campaign advertisements, the threat of same-sex marriage was regularly presented as a slippery slope. In 2004, the Republican National Committee sent direct mail to Arkansas voters linking gay marriage to “The Liberal Agenda,” and implied that if same-sex marriages were to occur in Arkansas that the Bible would be banned¹⁶⁰ (presumably by liberal homosexuals). A TV ad from Oregon’s 2004 campaign in favor of a constitutional amendment to ban same-sex marriage likewise presented the slippery slope, albeit less overtly, by posing the question, “If we don’t protect marriage now, what’s next? Will marriage mean anything in the future?”¹⁶¹ In recent same-sex

157. See Glenn Stanton, *How We Dishonor God in Our Sex Lives*, FOCUS ON FAM., http://www.focusonthefamily.com/marriage/sex_and_intimacy/gods_design_for_sex/how_we_dishonor_god_in_our_sex_lives.aspx (last visited Apr. 2, 2013); *Human Sexuality*, FAM. RES. COUNCIL, <http://www.frc.org/human-sexuality#homosexuality> (last visited Apr. 2, 2013).

158. *Ten Arguments from Social Science Against Same Sex Marriage*, FAM. RES. COUNCIL, <http://www.frc.org/get.cfm?i=if04g01>. The FRC was active in the 2004 same-sex marriage campaigns, California’s Prop. 8 campaign of 2008, the 2009 Maine campaign against same-sex marriage, and the 2010 judicial recall campaign targeting Iowa Supreme Court justices who had ruled in favor of marriage rights. See O’CONNELL, *supra* note 117, at 3; EVILSIZER, *supra* note 128, at 2; Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, NAT’L INST. ON MONEY ST. POL. (Jan. 10, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=440>.

159. *Revisionist Gay Theology*, FOCUS ON FAM., <http://www.focusonthefamily.com/socialissues/social-issues/progay-revisionist-theology.aspx> (last visited Apr. 2, 2013). In 2004 the 501(c)(4) arm of Focus on the Family was active in anti-same-sex marriage campaigns in Arkansas, Georgia, Michigan, Mississippi, Montana, Ohio, and Oregon. *About FRC Action*, FRC ACTION, <http://www.frcaction.org/about-us> (last visited Apr. 2, 2013); see also O’CONNELL, *supra* note 117, at 16.

160. Letter from Republican Nat’l Comm. to Arkansas Voters (2004) (on file with author).

161. *Defense of Marriage Coalition: Yes on 36-Oregon Constitutional Amendment* (television broadcast 2004), available at <http://www.commercialcloset.org/common/adlibrary/adlibrarydetails.cfm?QID=2024&ClientID=11064>.

marriage campaigns, voters have been told via paid advertisements that second-grade children were being taught that boys can marry boys and girls can marry girls,¹⁶² and that elementary-school students were being forced to watch lesbian weddings.¹⁶³

Nearly all advertising in the 2004 through 2012 election cycles avoided explicitly disparaging homosexuality or homosexuals. Moreover, claims in several ads about the dire consequences of same-sex marriage were often supported with references to published social-science research and federal-court decisions.¹⁶⁴ Two themes in these ads are readily identifiable, however, each defining minority rights as a threat to the majority: (1) same-sex marriage was shown to threaten straight people and their children; and (2) same-sex marriage reflected an attack on the majority by special interests and activist judges who could not be trusted.

Rather than expressly attacking homosexuality, viewers were told about dire secondary consequences of same-sex marriage. An ominous 2008 National Organization for Marriage¹⁶⁵ ad warned, “There’s a storm gathering, the clouds are dark and the winds are strong,” with actors claiming that “advocates of same-sex marriage” will take away a young woman’s freedom, forced a California doctor to choose between her faith and her job, and used “government” to “punish” a New Jersey church group.¹⁶⁶ In the same ad an actor playing a Massachusetts parent says that she is “helplessly watching public schools teach my son that gay marriage is okay.” “Some who advocate for

162. See Stand for Marriage Me., *Everything to Do with Schools*, YOUTUBE (Sept. 22, 2009), <http://www.youtube.com/watch?v=FijVUubUIV3s>; Preserve Marriage Washington, *Reject Referendum 74 TV Ad—“Schools Could Teach”*, YOUTUBE (Oct. 29, 2012), <https://www.youtube.com/watch?v=-yWmSwLk9MA>; ProtectMarriage.com, *Yes on 8 TV Ad: Everything to Do with Schools*, YOUTUBE (Oct. 20, 2008), <http://www.youtube.com/watch?v=7352ZVMKBQM&feature=relmfu>.

163. Protectmarriage.com, *Yes on 8 TV Ad: Truth*, YOUTUBE (Oct. 24, 2008), http://www.youtube.com/watch?v=l61Pd5_jHQw.

164. See *infra* notes 168–70 and accompanying text.

165. The National Organization for Marriage was a major funder of the 2008 Yes on Prop. 8 campaign in California, along with Focus on the Family and the Knights of Columbus. QUIST, *supra* note 136. The National Organization for Marriage was also a major funder of Maine’s 2009 Yes on 1 campaign, as was the Roman Catholic Diocese of Portland. EVILSIZER, *supra* note 128, at 2–3.

166. Nat’l Org. for Marriage, *Gathering Storm TV Ad*, YOUTUBE (Apr. 7, 2009), http://www.youtube.com/watch?v=Wp76ly2_NoI.

same-sex marriage,” viewers were told, will change how straight people live, and leave them “no choice.”¹⁶⁷

The threat of same-sex marriage to children is made explicit. The 2012 campaign in favor of Maine’s Initiative Question 2 claimed “social science”¹⁶⁸ proves that “‘children will pay a severe price’ - with lifelong consequences - if marriage in Maine is redefined.”¹⁶⁹ Consequences (offered without any causal logic) were said to include children growing up in poverty, increased juvenile delinquency, and “drug use, increased risk of teen pregnancy, higher dropout rates, lower educational attainment, poorer physical and emotional health, etc.”¹⁷⁰

Voters are exposed to such claims not only via paid advertising, but through opinion pieces published in local newspapers,¹⁷¹ and through communications from religious officials.¹⁷²

167. *Id.* Rather than referring to gays or lesbians, beneficiaries of the favorable treatment for gays and lesbians are referred to repeatedly as “advocates.” Perhaps by coincidence, *The Advocate* is a prominent LGBT publication. See ADVOCATE, <http://www.advocate.com/> (last visited Apr. 2, 2013).

168. The Family Research Council, National Organization for Marriage, and various campaigns cite a study by University of Texas sociologist Mark Regnerus, as evidence that children raised by gay parents are worse off than children raised by a married mother and father. Andy Birkey, *Gay Marriage Foes Tout Conservative-Backed Parenting Study*, HUFFINGTON POST (June 21, 2012, 12:48 PM), http://www.huffingtonpost.com/2012/06/21/gay-marriage-parenting-study_n_1614226.html. The Regnerus study may be problematic, as it compares children from intact, two parent families to children from families that may not have been intact. See generally Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 752–70 (2012). Dr. Regnerus’ curriculum vitae states he has received \$785,000 in research funding from the Witherspoon Institute and the Bradley Foundation, two socially conservative organizations. See Mark Regnerus, Curriculum Vitae 5 (Jan. 2013), available at www.utexas.edu/cola/files/2829874. The National Organization for Marriage is reported to have been co-founded by an individual who also founded Witherspoon and serves on the Bradley Board. See Birkey, *supra*.

169. Joe Garofoli, *Strategist Behind Proposition 8 Is Loved, Feared*, S.F. CHRON. (July 5, 2012), <http://www.sfgate.com/politics/joegarofoli/article/Strategist-behind-Proposition-8-is-loved-feared-3687342.php> (quoting ProtectMarriageMain.com). Similar claims about effects on children established by social science were also made in the Minnesota 2012 campaign against same-sex marriage. See, e.g., Autumn Leva, Op-Ed., *Marriage Amendment: Vote Yes*, STAR TRIB. (Oct. 21, 2012, 7:29 AM), <http://www.startribune.com/opinion/commentaries/175003381.html?refer=y> (last visited Apr. 2, 2013).

170. *Consequences of Redefining Marriage*, *supra* note 169.

171. See, e.g., David Anderson, *Reject Referendum 74: Redefining Marriage Threatens Children, Business, Liberties*, BELLINGHAM HERALD (Oct. 21, 2012),

But TV ads provide rich illustrations of how the right to marriage is portrayed in paid and unpaid media as a threat. The threat to children played a prominent role in campaigns directed by political strategist Frank Schubert.¹⁷³ The 2009 Maine campaign to repeal a legislatively enacted same-sex marriage statute and California's 2008 Prop. 8 campaign to nullify a state-court ruling in favor of same-sex marriage featured nearly identical TV ads that stressed that "homosexual marriage" has "everything to do with schools."¹⁷⁴ Each ad featured Robb and Robin Wirthlin, a couple from Massachusetts who claimed their second-grade son was being taught that "boys can marry other boys."¹⁷⁵ In each ad, the couple claims, "We tried to stop public schools from teaching children about gay marriage, but the court said we had no right to object or pull him out of class."¹⁷⁶ The Wirthlins' claim about the court ruling against them is bolstered with an on-screen citation to *Parker v. Hurley*, a case in which the First Circuit upheld a decision that dismissed the Wirthlins' challenge to a Massachusetts district's use of a children's picture book that features a prince falling in love with a prince.¹⁷⁷

B. JUDGES AS A THREAT TO THE MAJORITY

Additional TV ads combined the threat to children with an anti-judicial, majoritarian theme. Californians were informed

<http://www.bellinghamherald.com/2012/10/21/2736869/no-on-referendum-74-redefining.html#storylink=misearch>. This article used the same themes from the Maine campaign (and other campaigns) to argue against Referendum 74.

172. See, e.g., Beth Hawkins, *Archbishop Nienstedt's Latest Marriage-Amendment Letter Adds to Catholic Turmoil*, MINNPOST (Aug. 31, 2012), <http://www.minnpost.com/politics-policy/2012/08/archbishop-nienstedts-latest-marriage-amendment-letter-adds-catholic-turmoil>.

173. Schubert directed the 2008 Yes on Prop. 8 campaign in California and the 2009 Yes on Question 1 campaign in Maine. Jesse McKinley, *California Companies Fight Same-Sex Marriage Nationwide*, Dec. 13, 2009, N.Y. TIMES, at A30, available at <http://www.nytimes.com/2009/12/13/us/13marriage.html>. In 2012 he directed the No on Referendum 74 campaign in Washington, the Yes on Amendment 1 campaign in Minnesota, the No on Question 6 campaign in Maryland, and the No on Question 1 campaign in Maine. See *Gay Marriage: Turning the Tide*, ECONOMIST (Sept. 15, 2012), <http://www.economist.com/node/21562975>.

174. Stand for Marriage Me., *supra* note 162; ProtectMarriage.com, *Yes on 8 TV Ad: Everything to Do with Schools*, *supra* note 162. The Maine ad featured a white woman as a school teacher, while the California ad had a Latina portray the teacher.

175. See *supra* note 174.

176. See *supra* note 174.

177. *Parker v. Hurley*, 514 F.3d 87, 93, 107 (1st Cir. 2008).

that “four judges ignored 4 million voters and imposed same-sex marriage.”¹⁷⁸ In the same ad, Pepperdine University School of Law Professor Richard Peterson told viewers that as a result of the California Supreme Court, acceptance of gay marriage in California was now mandatory, and that people were now being sued over their personal beliefs,¹⁷⁹ with “gay marriage taught in public schools.”¹⁸⁰ A nearly identical TV ad broadcast in Maine told viewers that “special interests got the legislature to approve homosexual marriage, and tried to prevent Mainers from voting. But Question 1 gives us our vote.”¹⁸¹ The same Maine ad featured Boston College Law School Professor Scott T. Fitzgibbon, who informed viewers that unless Question 1 passes, there would be a “flood of lawsuits against individuals, small businesses, and religious groups”¹⁸² with “homosexual marriage taught in public schools whether parents like it or not.”¹⁸³ A 2010 ad in Minnesota also claimed “special interests” were “pushing judges and DFL politicians to impose gay marriage on Minnesota” and that “most DFL lawmakers don’t want you to have a say.”¹⁸⁴ Another California ad from 2008 stressed that same-sex marriage “was forced on us by San Francisco judges when gay domestic partners already have the same legal rights” and asked viewers to “think about” what same-sex marriage meant to religious freedoms and to children being taught

178. ProtectMarriage.com, *Yes on 8 TV Ad: Whether You Like It or Not*, YOUTUBE (Sept. 29, 2008), <http://www.youtube.com/watch?v=4kKn5LNhNto&feature=relmfu>.

179. *Id.* The screenshot supporting this claim displayed the California State Supreme Court’s August 18, 2008 decisions in *North Coast Women’s Care Medical Group, Inc. v. San Diego County Superior Court*, a unanimous 2008 California Supreme Court decision finding that doctors must offer fertilization services to lesbians and gays even if doing so poses an incidental conflict with the doctor’s religious beliefs, or find another physician who will do so. *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959, 970 (Cal. 2008).

180. The screen displayed the “*Parker v. Hurley*” citation during this claim. ProtectMarriage.com, *supra* note 178.

181. Stand for Marriage Me., *First Maine Yes on 1 Ad*, YOUTUBE (Sept. 14, 2009), <http://www.youtube.com/watch?v=1U7bs5yHJv4>.

182. *Id.* A citation to “*Elane Photography v. Willock* (N.M. 2d Jud. Dist. Ct.)” appears on screen during this claim. *Id.* The New Mexico Court of Appeals upheld that case and ruled the state’s anti-discrimination statute prohibited discrimination in public accommodations such as wedding photography. *Elane Photography v. Willock*, 284 P.3d 428, 445 (N.M. Ct. App. 2012).

183. A citation to “*Parker v. Hurley*” appears on screen during this claim. Stand for Marriage Me., *supra* note 181.

184. Nat’l Org. for Marriage, *Your Right to Vote Minnesota - Gay Marriage*, YOUTUBE (May 18, 2010), http://www.youtube.com/watch?v=lb_oXcZrDQo.

about same-sex marriage in school.¹⁸⁵ Oregon's 2004 campaign for a constitutional marriage amendment also featured claims about "activist judges are trying to overrule Oregon law by sanctioning same-sex marriages."¹⁸⁶

Several other ads avoided presenting same-sex marriage as direct threat to children, but featured gauzy images of smiling straight couples with young children.¹⁸⁷ In addition to demonstrating what "normal" families should look like and "what is best for children," these ads also emphasized the threat of the judicial branch.¹⁸⁸ One such ad from the 2004 Michigan campaign emphasized that the proposed constitutional amendment on marriage was needed to stop "judges from changing what is already the state law" and that judges do not have the right to "redefine marriage for everybody else . . . voting yes lets the people decide."¹⁸⁹ A similar 2012 TV ad informed North Carolina viewers that marriage has been one man and one woman, because "it's what God created to give children a mother and a father."¹⁹⁰ The ad then switched to a majoritarian appeal, and without irony, claimed that "by defining marriage in the state constitution, only voters can determine what marriage means."¹⁹¹ In other words, North Carolina voters could define (or change) God's will, not judges or legislators.

185. ProtectMarriage.com, *Yes on 8 TV Ad: Have You Thought About It?*, YOUTUBE (Oct. 29, 2008) <http://www.youtube.com/watch?v=3YRQZwNfQ0o&feature=relmfu>.

186. Def. of Marriage Coal., *Yes on 36-Oregon Constitutional Amendment*, COMMERCIAL CLOSET, <http://www.commercialcloset.org/common/adlibrary/adlibrarydetails.cfm?QID=2023&ClientID=11064> (last visited Apr. 2, 2013).

187. See, e.g., Minnesota for Marriage, *First Minnesota For Marriage TV Ad: Good of Marriage*, YOUTUBE (Oct. 1, 2012), <http://www.youtube.com/watch?v=5z3QkveDGNk>.

188. See *id.* (advocating for a marriage amendment so that "only voters can determine the definition of marriage").

189. This language is taken from a 2004 Michigan TV ad produced by several religious officials that was reported to have been broadcast by the American Family Association of Michigan. Am. Family Ass'n of Mich., *TV Ad for Michigan's Marriage Protection Amendment (2004)*, YOUTUBE (Sept. 15, 2012), <http://www.youtube.com/watch?v=1p7JCJsQ5Jg>.

190. Vote for Marriage NC, *Vote for Marriage NC's Pro-Amendment One TV Commercial*, YOUTUBE (Apr. 24, 2012), <http://www.youtube.com/watch?v=TPY5mZt6aL8>.

191. *Id.*

C. APPEALS TO STEREOTYPES IN DIRECT-DEMOCRACY
CAMPAIGNS AGAINST RIGHTS

Contemporary campaigns against marriage rights for lesbian and gay couples lack the explicit hostility directed toward homosexuals that was found from the 1970s to 1990s. As examples, a 1992 Oregon campaign promoting a “no special rights for gays” ballot measure produced video and print material drawing attention to “the gay agenda,” sexual promiscuity, polygamy, pedophilia, and the idea that homosexuality is a matter of choice rather than biology.¹⁹² Oregon’s Measure 9 also featured a ballot title that stated government “must discourage homosexuality,” and the official summary of the measure equated homosexuality with “pedophilia, sadism and masochism” and specified that the state must “assist in setting a standard for Oregon’s youth that recognizes [these behaviors] as abnormal, wrong, unnatural and perverse.”¹⁹³ Former Oregon State Supreme Court Justice Hans Linde cited Measure 9 as a particularly invidious application of direct democracy that violated the Federal Constitution’s Guarantee Clause—largely because the measure appeared to be motivated by animus and contained stigmatizing language directed against homosexuals.¹⁹⁴

During Idaho’s 1994 initiative campaign against anti-discrimination protections, Kelly Walton, founder of the Idaho Citizen’s Alliance (which promoted the initiative) stated that the primary goal of the measure was to “prevent homosexuals from attaining special legal privileges. Goal number two was to prevent the behavior [from] being taught as normal and

192. David Douglass, *Taking the Initiative: Anti-Homosexual Propaganda of the Oregon Citizen’s Alliance*, in *ANTI-GAY RIGHTS*, *supra* note 94, at 27.

193. Linde, *supra* note 2, at 36 n.71 (quoting STATE OF OREGON, VOTERS’ PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 3, 1992, at 93 (1992)). The measure failed with 43% of votes in favor. *Initiative, Referendum and Recall: 1988-1995*, *supra* note 66. The following year, voters in sixteen Oregon municipalities approved local “Sons of Measure 9” ordinances. Gamble, *supra* note 65, at 264.

194. See Linde, *supra* note 2, at 40–41 (arguing that since such ballot measures are motivated so thoroughly by passion and prejudice that they violate the concept of republican government promised by the Guarantee Clause). See generally William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583 (1994) (arguing that the intolerant motives behind anti-gay rights ballot measures justify greater pre-election challenges that would prevent such measures from reaching the ballot).

healthy to our kids in primary and secondary education.”¹⁹⁵ Walton stressed, further, that “many, many homosexuals are recruited at a very young age, low teens, very, very typical. Yes, it’s something that is mostly taught and caught.”¹⁹⁶

Recent campaigns against same-sex marriage evaluated in this article were largely devoid of the overt, stigmatizing language and explicit animus found in the 1990s.¹⁹⁷ Nonetheless, contemporary claims that same-sex marriage threatened children, schools, and religious values did echo older stereotypes about lesbians and gays seeking to obtain “special rights” in order to use the power of government to impose a “homosexual agenda” and “gay lifestyle” on an unwilling public.¹⁹⁸ Psychologists report that traditional negative anti-gay stereotypes include portraits of gay men as “hypersexual, over visible, heretical and conspiratorial.”¹⁹⁹ Content analysis of conservative evangelical Protestant videos and publications such as *Christianity Today* showed homosexuality depicted as a behavior that is chosen or taught (rather than biologically determined), with gay men shown as “predators” who “target children” and are plagued with diseases.²⁰⁰ Contemporary campaign claims that the right for lesbians and gays to marry is equal to teaching about homosexuality in public schools, in particular, dove-tails with enduring stereotypes of gay men as sexual predators who need to “recruit” young people.²⁰¹ The claims of threats to children in campaign appeals may be effective, given that perceptions of threats to children can elicit emotional arousal that

195. Harvey Pitman, *In Their Own Words: Conversations with Campaign Leaders*, in ANTI-GAY RIGHTS, *supra* note 94, at 78.

196. *Id.*

197. See *supra* Part III.A–B (discussing recent campaigns against same-sex marriage).

198. See Douglass, *supra* note 192, at 69 (finding that 12% of letters to the editor regarding homosexuality that were published by *The Idaho Statesman* in the mid-1990s contained the theme of the “gay agenda”).

199. See BARRY D. ADAM, THE SURVIVAL OF DOMINATION: INFERIORIZATION AND EVERYDAY LIFE 24–27 (1978) (describing historical stereotypes of homosexuals); Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in JOHN C. GONSIOROK & JAMES D. WEINRICH, HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 60, 69–70 (1991).

200. DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 76–80 (1997). Herman also finds a theme where ascendant “gay power” is part of the threat. See *id.* at 82–91 (exploring fears of a homosexual agenda).

201. See Pitman, *supra* note 195, at 78 (quoting anti-gay initiative founder Kelly Walton as saying that homosexuality is “something that is mostly taught and caught”).

constrains complex reasoning and leaves parents subject to simplistic reasoning and errors in decision making.²⁰²

In this way, contemporary campaigns against lesbian and gay rights can be seen as descendants from those of the 1970s. Anita Bryant's successful 1977 campaign to repeal a Dade County, Florida anti-discrimination ordinance frequently appealed to stereotypes about the threat of gay men as deviant sexual predators.²⁰³ Gregory M. Herek also notes that Bryant named her campaign organization "Save Our Children," and quotes her as claiming that acceptance of gay teachers "could encourage more homosexuality by inducing pupils into looking upon it as an acceptable life-style" and that "a particularly deviant-minded teacher could sexually molest children."²⁰⁴ Bryant also warned that "militant homosexuality" posed a severe threat to American families.²⁰⁵ Slippery-slope arguments about same-sex marriage being forced on school children found in contemporary campaigns²⁰⁶ echo Bryant circa 1977.²⁰⁷

IV. SPILLOVER EFFECTS OF CAMPAIGNS AGAINST MINORITIES

The previous section established that when same-sex marriage and similar gay rights questions are on the ballot, voters are exposed to information that defines gays and lesbians, or the rights of gays and lesbians, as a dangerous threat. In this Part, I consider the effects of direct-democracy campaigns, not in terms of how the results of these ballot measures structure

202. See IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* 45–80 (1977) (discussing the effects of psychological stress on decision making); Herek, *supra* note 199, at 71 ("Once parents have perceived a threat to their children, however, their level of emotional arousal typically is too high to permit easy assimilation of such complex concepts. Instead, they are prone to overly simplistic thinking, errors of reasoning, and faulty decision-making processes." (citation omitted)).

203. Herek, *supra* note 199, at 70.

204. *Id.*

205. See generally ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* (1977) (Bryant's autobiography detailing her campaign against "militant homosexuality").

206. See, e.g., Protectmarriage.com, *Yes on 8 TV Ad: Truth*, *supra* note 163.

207. See William E. Adams, *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 449 (1998) (quoting Bryant as stating that "if gays are granted rights, next we'll have to give rights to prostitutes and to people who sleep with St. Bernards").

minority rights and public policy, but rather in terms of how the campaigns affect the behavior and attitudes of voters.

A number of empirical studies report that direct democracy has secondary effects on citizens.²⁰⁸ These effects are at least partially independent of policies produced by the process, but they result from citizens being exposed to the process of direct democracy itself.²⁰⁹ Some scholars claim that direct-democracy campaigns make better citizens because the process has “educative effects,” by which voters are regularly asked to cast decisions about policy through direct democracy, and thus make more politically efficacious decisions²¹⁰ and are more knowledgeable of political facts.²¹¹ Others note that some studies finding beneficial educative effects of ballot initiatives cannot be replicated,²¹² and that by regularly challenging the legitimacy of representative government, direct democracy may undermine trust in government.²¹³ At minimum, campaigns over issues placed on the ballot lead to more voters reporting being aware of the issue.²¹⁴ The presence of an initiative on a state ballot may also condition how voters make choices between candidates by priming them to evaluate rival candidates in

208. See, e.g., DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* 138 (2004) (“[C]itizens living in states with frequent ballot initiatives are more motivated to vote, are most interested in and better informed about politics, and express more confidence in government responsiveness than do citizens living in noninitiative states.”).

209. See *id.* at 139 (“The educative effects of ballot initiatives on broad levels of political participation, civic engagement, and confidence in government may be as important for American democracy as the initiative’s direct effect on public policy.”).

210. *Id.*

211. See generally Mark A. Smith, *Ballot Initiatives and the Democratic Citizen*, 64 J. POL. 894 (2002) (finding that “voters from states that heavily use initiatives show an increased capacity over the long term to correctly answer factual questions about politics”).

212. See Joshua J. Dyck & Edward L. Lascher, *Direct Democracy and Political Efficacy Reconsidered*, 31 POL. BEHAV. 401, 412 (2009) (challenging empirical studies that concluded that direct democracy was related to internal and external efficacy); see also Daniel Schlozman & Ian Yohai, *How Initiatives Don’t Always Make Citizens: Ballot Initiatives in the American States, 1978–2004*, 30 POL. BEHAV. 469, 483 (2008) (finding that “grandiose claims about initiatives redrawing the nature of citizenship are overdrawn and, in some instances, wrong”).

213. See Joshua J. Dyck, *Initiated Distrust: Direct Democracy and Trust in Government*, 37 AM. POL. RES. 539, 547 (2009) (“Exposure to direct legislation does seem to initiate distrust in government.”).

214. BOWLER & DONOVAN, *supra* note 15, at 152; Nicholson, *supra* note 153, at 405–08.

terms of the initiative issue the voter is also evaluating.²¹⁵ Voters in states where same-sex marriage was on the ballot in 2004 were significantly more likely to claim that gay marriage was a very important issue when choosing between George W. Bush and John Kerry than were voters in states where marriage was not on the ballot.²¹⁶

Candidates, for their part, sponsor ballot initiative not only to shape policy, but to send cues to voters about the candidate's policy positions and ideology.²¹⁷ Candidates and party officials have also been shown to view ballot initiatives as an indirect means to increase turnout for a preferred candidate,²¹⁸ yet studies have not determined that placing an issue (such as gay marriage) on a state's ballot increased turnout to the benefit of a particular candidate who shared the majority's position on the issue.²¹⁹ There is, however, substantial evidence that ballot measures increase voter turnout in aggregate at the state level, particularly in "midterm" elections that lack the mobilizing forces of presidential contests.²²⁰

The potential turnout, priming, and "educative" effects of direct-democracy campaigns are probably not exclusive to campaigns associated with any particular type of ballot issue. Turnout effects have been found to be associated with the

215. See STEPHEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS 15 (2005) ("If an issue is on the agenda, even if only discussed in one type of race, its effects will be widespread, shaping voters' candidate judgments up and down the ballot.").

216. See Donovan et al., *supra* note 34, at 1298 ("The marriage issue had a stronger effect on support for Bush in states where marriage measures were on the ballot.").

217. Richard L. Hasen, *Parties Take the Initiative (And Vice Versa)*, 100 COLUM. L. REV. 731, 736–37 (2000).

218. *Id.* at 738; see also SMITH & TOLBERT, *supra* note 208, at 118. See generally Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005) (arguing that candidates use initiatives to affect turnout in elections and to highlight campaign issues that they believe will help them win).

219. See Daniel A. Smith et al., *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, 38 ST. & LOC. GOV'T REV. 78, 88 (finding that turnout in Ohio and Michigan increased in 2004 "irrespective of support for the anti-gay marriage amendments").

220. See SMITH & TOLBERT, *supra* note 208, at 37 ("Midterm elections are low-information elections with very few sources of mobilization, thus making the electorate more sensitive to those sources of mobilization that exist, such as ballot measures."); Caroline J. Tolbert, Daniel C. Bowen & Todd Donovan, *Initiative Campaigns: Direct Democracy and Voter Mobilization*, 37 AM. POL. RES. 155, 181 (2009) ("[T]he research provides solid evidence of a turnout effect at the individual level in both presidential and midterm elections.").

number of measures on a state's ballot,²²¹ with levels of campaign spending on ballot measures,²²² and with the salience of the issue (measured in terms of media attention),²²³ but not in terms of issue type. Initiatives on nuclear freeze,²²⁴ same-sex marriage,²²⁵ abortion, and the environment²²⁶ have been found to prime voter considerations about candidates. The empirical literature does not establish that direct-democracy campaigns against minorities have particularly distinctive turnout or priming effects.²²⁷ Nonetheless, the sum of this literature suggests strongly that by having same-sex marriage measures on the ballot, turnout levels may rise, and more voters may be considering the marriage issue when voting on candidates.²²⁸

Yet given the unique context of direct-democracy campaigns against minorities, it would seem that some of the other "educative effects" of direct-democracy process would operate differently here. As noted above, direct-democracy campaigns against minority rights are unique in that they highlight and advertise the threats associated with the targeted minority and the threat (to the majority) of extending rights to the targeted minority. Joshua J. Dyck demonstrates that, whatever positive citizenship effects of direct democracy exist broadly for the majority of citizens, the process creates conflict and decreases social trust where the majority perceives a greater threat of a

221. See Matt Childers & Mike Binder, *Engaged by the Initiative? How the Use of Citizen Initiatives Increases Voter Turnout*, 65 POL. RES. Q. 93, 93 (2012) ("As the number of initiatives on a ballot rises during midterm elections, voter turnout does as well, but these effects do so with diminishing marginal returns as the number of initiatives increases.").

222. Tolbert, Bowen and Donovan, *supra* note 220, at 178 fig.3.

223. See generally Mark A. Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700 (2001) (analyzing the potential of campaigns for ballot measures and elected offices to draw to the polls citizens who otherwise would not vote).

224. NICHOLSON, *supra* note 215, at 61–90.

225. Donovan et al., *supra* note 34, at 1229.

226. NICHOLSON, *supra* note 215, at 52 tbl.4.4.

227. See, e.g., Smith et al., *supra* note 219, at 84 ("[C]ounties with higher levels of support for the measures banning same-sex marriage appear to have had greater support for Bush in 2004, though not higher turnout, compared with the 2000 election.").

228. See, e.g., Donovan et al., *supra* note 34, at 1227–28 ("Our results demonstrate that state same-sex marriage campaigns encouraged some voters . . . to be more likely to see gay marriage as an important issue. That we find this relationship toward the end of the campaign, but not early in the campaign, suggests strongly that the marriage measures were the mechanism that primed some voters to assess candidates in terms of the gay marriage issue.").

minority.²²⁹ He demonstrates further evidence of the minority-threat effect by finding that evangelical Christians who lived near larger gay populations were more likely to support state marriage bans in 2004 than other evangelical Christians.²³⁰

Beyond stimulating awareness of, and interest in an issue, messages associated with ballot measures targeting minority rights can trigger perceptions (among some people) that the group targeted by the ballot question presents some sort of threat.²³¹ These messages can also activate or perpetuate negative stereotypes and predispositions about the targeted group. As a result, popular votes on rights may increase popular animosity toward members of the group whose rights are in question. Derrick Bell, Jr. has argued that the emotionally charged atmosphere surrounding direct-democracy campaigns against minorities “can easily reduce the care with which the voters consider the matters submitted to them,” and that such campaigns reduce voter tolerance.²³²

Research that I have conducted with Caroline Tolbert tested hypotheses about how exposure to direct-democracy campaigns against same-sex marriage in 2004 made some people less accepting of homosexuals.²³³ We found a number of reasons to expect that exposure to and receptivity to information about the threat of same-sex marriage would be more prevalent among people who attended religious services frequently in states where marriage was on the ballot.²³⁴ As for exposure to information, the context surrounding this issue was different in states where marriage was on the ballot. Information about gays and lesbians and about same-sex marriage was certainly

229. Joshua J. Dyck, *Racial Threat, Direct Legislation, and Social Trust: Taking Tyranny Seriously in Studies of the Ballot Initiative*, 65 POL. RES. Q. 615, 618 (2012) (finding an interaction between the proportion of an area that is non-white, and initiative use that erodes trust, resulting in lower trust when initiatives are used in a context of greater racial/ethnic diversity).

230. Joshua J. Dyck & Shanna Pearson-Merkowitz, *The Conspiracy of Silence: Context and Voting on Gay Marriage Ballot Measures*, 65 POL. RES. Q. 745, 752 (2012).

231. See *infra* Part IV.A (discussing how direct-democracy campaigns change perceptions of targeted minority groups).

232. Bell, *supra* note 3, at 18–20.

233. See generally Todd Donovan & Caroline Tolbert, *Do Popular Votes on Rights Create Animosity Toward Minorities?*, 66 POL. RES. Q. 1 (forthcoming Dec. 2013).

234. See *id.* at 10–11 (discussing the issues of exposure to and receptivity of same-sex marriage information).

prevalent in states where marriage was not being voted on.²³⁵ However, people were likely to have experienced a different information environment where marriage was a ballot question.²³⁶ In these states church directories were used to target phone calls about the gay marriage issue to religious voters.²³⁷ In initiative states, groups organized to promote or oppose marriage bans that reached the ballot.²³⁸ Newspapers also directed more news and editorial content to the marriage question closer to election-day in states where it was on the 2004 ballot.²³⁹ Mail with anti-gay-marriage themes was targeted toward religious conservatives and church sermons were used to promote support for the ballot measures.²⁴⁰ Thus, despite low levels of campaign spending on same-sex marriage in 2004, many voters, particularly those who both resided and attended religious services in states where marriage was on the ballot and, were exposed to information about same-sex marriage (and by extension, lesbians and gays) as a threat.²⁴¹

As for receptivity to negative information about gays and lesbians, disapproval of homosexuality has been found to be greater among people who attended religious services regularly and who believed that religion is a very important part of life.²⁴² Given this, we tested if frequent attendance at religious ser-

235. See, e.g., Jim McLaughlin, *Racine Crowd Backs Chick-fil-A's Gay-Marriage Stance*, MILWAUKEE J. SENTINEL (Aug. 2012), <http://www.jsonline.com/news/wisconsin/hundreds-turn-out-in-racine-to-support-chickfila-cc6b5np-164617146.html> (showing how the issue of gay-marriage drew significant attention in Wisconsin, a state without gay marriage on the ballot).

236. See Donovan & Tolbert, *supra* note 233, at 10 (discussing the exposure people received, such as church bulletins or telephone calls); see also Donovan et al., *supra* note 34, at 1220 (discussing the frequency that gay marriage was mentioned in newspapers in states where gay marriage was on the ballot); Smith, *supra* note 223, at 701 (discussing the level of awareness of issues about propositions, and relating it to news coverage and informal discussions among citizens, as well as campaigns).

237. Campbell & Monson, *supra* note 119, at 407.

238. See *supra* Part III (discussing groups that campaigned for and against same-sex marriage).

239. Donovan et al., *supra* note 34, at 1220.

240. Campbell & Monson, *supra* note 119.

241. See Donovan & Tolbert, *supra* note 233, at 17 (“Having a popular vote on the right to marriage corresponded with a significantly increased likelihood that a particular sub-set of respondents rated gays and lesbians at the lowest end of the thermometer scale—those who we assume may have been more likely to be exposed to and receptive to themes that portrayed marriage among same-sex couples as a threat to heterosexuals.”).

242. Gregory B. Lewis, *Black-White Differences in Attitudes Toward Homosexuality and Gay Rights*, 67 PUB. OPINION Q. 59, 66 (2003).

vices by those who were religiously inclined corresponded with a person coming to perceive that gays and lesbians constituted a threat.²⁴³ We tested our hypotheses using public-opinion data collected in period American National Election Study (ANES) surveys.²⁴⁴ ANES surveys asked respondents to rate various groups (including gays and lesbians) on a 0 to 100 feeling-thermometer scale, with ratings above 50 “meaning you feel favorable and warm” toward the group and ratings below 50 “meaning you feel unfavorable and cool” toward the group.²⁴⁵ Although not a direct measure of threat perception, we suggest the thermometer measure serves as a useful surrogate of threat perceptions.²⁴⁶ At minimum, we assumed that people who rated gays and lesbians lower on the scale *after* the campaign against same-sex marriage had grown less sympathetic toward gays and lesbians.²⁴⁷ A rare panel study provided us with a person’s rating of gays and lesbians in 2002, and with the same person’s rating of gays and lesbians immediately after the 2004 election.²⁴⁸ This provided an opportunity to test if an individual’s assessment of gays and lesbians was lower in states where same-sex marriage was on the ballot, while controlling for the respondent’s assessment offered earlier. We tested if rating gays and lesbians very low on the scale (at 10 or lower) corresponded with living in a state where marriage was on the ballot.²⁴⁹

Our results suggested that there was a significant relationship between religiosity and increased animosity toward lesbians and gays in 2004, but that this effect was limited to religious individuals living in states where a same-sex marriage ban was on the ballot.²⁵⁰ As Tolbert and I explained:

Put differently, popular votes on marriage did not correspond with people in those states, on average, growing cooler toward gays and lesbians. Having a popular vote on the right to marriage corresponded

243. Donovan & Tolbert, *supra* note 233, at 13–14.

244. *Id.* at 11.

245. In 2004, the mean rating for gays and lesbians was 44.9, down from 45.2 in 2002. In 2002 14.5% of respondents rated gays and lesbians at 10 or lower. In 2004, 17.2% of respondents rated gays and lesbians at 10 or lower. This compares to mean ratings in 2004 of 65.4 for Hispanics (1.0% at 10 or lower), 66.2% for Asians (1.4% at 10 or lower), 66.5 for Jews (0.7% at 10 or lower) and 68.7% for Blacks (0.7% at 10 or lower). *Id.* at 23.

246. *Id.* at 12–13.

247. *Id.* at 15, 25.

248. *Id.* at 11–12.

249. *Id.* at 9–10.

250. *Id.* at 17, 25.

with a significantly increased likelihood that a particular sub-set of respondents rated gays and lesbians at the lowest end of the thermometer scale—[religiously inclined people] who we assume may have been more likely to be exposed to and receptive to themes that portrayed marriage among same-sex couples as a threat to heterosexuals.²⁵¹

This increased animosity reflects a potential spillover effect of direct-democracy campaigns against minorities that is quite contrary to the positive effects usually portrayed by the “educative effects” literature on direct democracy.²⁵² Despite the fact that contemporary campaigns against same-sex marriage avoid overt, stigmatizing language about gays and lesbians, these campaigns (at least in 2004) appear to have not only mobilized opinion against same-sex marriage, but also against gays and lesbians themselves.²⁵³

It is important to put this result in context. What, for example, is the substantive meaning of finding that some people in states where marriage was voted on became more likely to rate gays and lesbians at the lowest end of a feeling-thermometer scale after a direct democracy campaign? Whatever the meaning of the change in attitudes, this decreased acceptance of (or growth in animosity toward) gays and lesbians was concentrated among people who may have already been predisposed to be less acceptant of gays and lesbians.²⁵⁴ Any effects the 2004 campaigns had on moving opinions against gays and lesbians, moreover, may have been short lived. Large majorities opposed same-sex marriage in 2004,²⁵⁵ but national opinion polls conducted after 2010 documented majority acceptance of same-sex unions.²⁵⁶ Where in 2004 campaigns could have sold the idea that gays and lesbians and same-sex unions were a threat, this appeal may have been less effective after 2010.²⁵⁷ This begs the question, however, of what the short-term effects of these campaigns may have been. For example, campaigns against gay and lesbian rights may, by heightening

251. *Id.* at 17.

252. *Id.* at 20.

253. *Id.* at 19.

254. *Id.* at 17.

255. See generally Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. 151 (2009).

256. For a summary of poll trends, see Nate Silver, *Gay Marriage Opponents Now in Minority*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (Apr. 20, 2011, 11:18 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority/>.

257. Donovan & Tolbert, *supra* note 233, at 21.

animosity toward gays and lesbians among a small sub set of the population, increase hate crimes against gay men and lesbians. Campaigns against same-sex marriage may have additional spillover effects by highlighting unpopular court decisions. If voters respond to campaign attacks on courts, popular regard for the judiciary may suffer as a result.²⁵⁸

V. THE END OF MINORITY THREAT?

Direct-democracy campaigns against minority rights are unique in that they often emerge as a political backlash to minority rights that are portrayed as a threat to the majority.²⁵⁹ Unlike candidate races, and unlike other direct-democracy contests, voter decisions on such matters can be based on affect (or hostility) toward the group targeted by the ballot proposal. Backlash may not be limited to the minority group that poses a threat to the majority.²⁶⁰ Backlash may also include a reaction against the democratic institutions that protect minorities and that are designed to mute the force of majority passion and opinion. Direct-democracy campaigns against the threat of minority rights may also have unique spillover effects. In the case of same-sex marriage rights, state-level anti-marriage campaigns that highlighted the threat of extending marriage rights to lesbians and gays corresponded with a subset of voters in those states growing less sympathetic to lesbians and gays.²⁶¹

But do the campaigns against same-sex marriage inform us about future campaigns against minority rights? It may very well be that the cumulative effect of decades of court decisions overturning initiatives and referendums that restricted minority rights—decisions blocking ballot measures that targeted private religious schools, nullifying measures that allowed race-based housing discrimination, decisions that banned voter-approved school segregation, and decisions that overturned

258. There is evidence of a link between attitudes about same-sex marriage and attitudes about the courts. Opponents of same-sex marriage in Washington state were found to be significantly more likely to support popular election of state supreme court judges than supporters of same-sex marriage (respondents were asked if they favored having a court appointed by a merit system or a court elected directly by voters). Todd Donovan & Shaun Bowler, *Public Attitudes About Reforming Judicial Elections* 24 (unpublished manuscript) (on file with author) (presented at the Pacific Northwest Political Science Association Meeting, Spokane, Washington, Oct. 2007).

259. *See supra* Part II.

260. *See supra* Part II.

261. *See supra* Part IV.A.

measures prohibiting government from protecting gays and lesbians from job discrimination—have shut the door on any future direct-democracy campaigns against minorities and their rights.

One could argue that we may see the end of direct-democracy campaigns against gay and lesbian rights. Popular attitudes about gays and lesbians have been changing, becoming more tolerant since the 1970s. Acceptance of homosexuality,²⁶² support for civil unions,²⁶³ and popular support for full access to marriage²⁶⁴ all increased dramatically since the 1990s. Moreover, immediately after North Carolina voters amended their state's constitution to ban gay marriage in May of 2012, President Barack Obama used the institution's "bully pulpit" to speak out in support of equal rights in marriage.²⁶⁵ President Obama's act could have had the effect of moving opinion even further toward acceptance of LGBT rights,²⁶⁶ or opinion may have already moved. In 2012, voters in three states extended the right to marry to same-sex couples and voters in a fourth state rejected a ban on same-sex marriage.²⁶⁷ The Supreme Court announced that it would determine the constitutionality of California's Prop. 8 and the federal Defense of Marriage Act in 2013.²⁶⁸ The court could end direct legislation on same-sex marriage via the Equal Protection Clause, the Due Process

262. See generally Jeni Loftus, *America's Liberalization in Attitudes Toward Homosexuality, 1973 to 1988*, 66 AM. SOC. REV. 762 (2001) (examining reasons for changing attitudes toward homosexuality).

263. E.g., *Majority Continues to Support Civil Unions*, PEW RES. CENTER (Oct. 9, 2009), <http://www.people-press.org/2009/10/09/majority-continues-to-support-civil-unions/>.

264. Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP POLITICS (May 8, 2012), <http://www.gallup.com/poll/154529/half-americans-support-legal-gay-marriage.aspx> (reporting that Gallup polls found 27% support for marriage between same-sex couples in 1996 had increased to 50% in 2012).

265. Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

266. Benjamin I. Page et al., *What Moves Public Opinion?*, 81 AM. POL. SCI. REV. 23, 39 (1987) (demonstrating that presidents influence public opinion on policies).

267. Lauren Markoe, *2012 Shows a Social Sea Change on Gay Marriage*, WASH. POST (Nov. 7, 2012), http://articles.washingtonpost.com/2012-11-07/national/35506637_1_maryland-and-washington-state-gay-marriage-marriages-between-two-men.

268. Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES, Dec. 8, 2012, at A1, available at <http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html>.

Clause, or the Full Faith and Credit Clause²⁶⁹ just as other courts ended earlier cycles of direct-democracy campaigns against minorities.²⁷⁰ We might conclude from all of this that direct-democracy campaigns targeting the rights of lesbians and gays could become a thing of the past. After all, majority opinion cannot be mobilized against a minority if doing so is unconstitutional, or if the majority is no longer apprehensive about the minority.

Even if, hypothetically, majority opinion or the courts did become fully acceptant of gay rights, direct-democracy campaigns against other minorities would not necessarily cease. For this to be the case, we would need to assume that lesbians and gays were, in effect, the “last minority.” Such an assumption would be challenging, given the history of democracy in America. Since the adoption of direct democracy, there have regularly been minorities whose rights have been decided on state ballots by a majority of voters. The list includes (but is by no means limited to) voting rights for blacks repealed by a white majority,²⁷¹ Catholics targeted by the Ku Klux Klan,²⁷² Catholics and other immigrants targeted by prohibitionists,²⁷³ Japanese immigrants targeted by white prejudice,²⁷⁴ Communists targeted by the California Republican Party,²⁷⁵ African

269. See Thomas M. Keane, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 501–08 (1994) (arguing for recognition of same-sex marriage derived from the Full Faith and Credit Clause).

270. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (applying the Due Process Clause to overrule a citizens’ initiative aimed at eliminating Catholic schools).

271. CRONIN, *supra* note 68, at 92–93.

272. *Oregon Ballot Measure 6, the Compulsory Public Education Bill (1922)*, BALLOTPEdia.ORG, http://ballotpedia.org/wiki/index.php/Oregon_Ballot_Measure_6,_the_Compulsory_Public_Education_Bill_%281922%29 (last modified June 13, 2012); see also *Catholics and Education: Oregon School Initiative, June 26, 1922*, AM. CATH. HIS. RES. CENTER & UNIV. ARCHIVES, <http://cuomeka.wrlc.org/exhibits/show/osc/documents/osc-doc2> (last visited Apr. 2, 2013) (describing the Ku Klux Klan’s role in the ballot initiative).

273. JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 56–57 (1963); Joseph R. Gusfield, *Social Structure and Moral Reform: A Study of the Woman’s Christian Temperance Union*, 61 AM. J. SOC. 221, 225 (1955).

274. Brian J. Gaines & Wendy K. Tam Cho, *On California’s 1920 Alien Land Law: The Psychology and Economics of Racial Discrimination*, 4 ST. POL. & POL’Y Q. 271, 273–76 (2004).

275. JONATHAN BELL, *CALIFORNIA CRUCIBLE: THE FORGING OF MODERN AMERICAN LIBERALISM* 171 (2012).

Americans targeted by opponents of desegregation,²⁷⁶ Latino immigrants targeted by the California Republican Party,²⁷⁷ and AIDS victims targeted by Lynden LaRouche.²⁷⁸

Making this generalization—taking the proposition that gays and lesbians could become a minority whose rights are no longer to be decided by direct democracy to mean that all minority-rights questions will no longer be decided by direct democracy—would also require that we assume political entrepreneurs will no longer find reason to mobilize majority opinion against another threatening minority in the future. Historic precedent and contemporary political practice suggests that these assumptions are wrong.

As an example, Mitt Romney, the 2012 Republican presidential nominee, voiced stereotypes about his opponent that played to popular fears and prejudices about Muslims, a minority that most Americans perceived as being a threat to American culture.²⁷⁹ Romney's language was directed at the president, an African American with the middle name Hussein and the family name Obama.²⁸⁰ Defining himself as something distinctly opposite of (and by implication better than) President Barack Obama, Romney noted publicly that he required no birth certificate to demonstrate that he was American.²⁸¹ Further, Romney falsely claimed, repeatedly, that the African-American president he previously mocked for not being Ameri-

276. Bell, *supra* note 3, at 15–22.

277. See Daniel A. Smith & Caroline Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 ST. POL. & POL'Y Q. 739, 744–45 (2001) (describing the partisan divide in support for an “official English” initiative).

278. Sponsored by a Lyndon LaRouche organization, California Proposition 64 of 1986 would have prevented HIV-positive individuals from attending or teaching in public schools. See Charles Petit, *California to Vote on AIDS Proposition*, SCIENCE, Oct. 17, 1986, at 277.

279. Erik Nisbet et al., THE “BIN LADEN” EFFECT: HOW AMERICAN PUBLIC OPINION ABOUT MUSLIM AMERICANS SHIFTED IN THE WAKE OF OSAMA BIN LADEN'S DEATH 3 (2011), available at http://www.eriknisbet.com/files/binladen_report.pdf. A random sample survey of Americans found most people disagreed that Muslims were trustworthy, most disagreed Muslims were peaceful, most supported a ban on construction of new Mosques, most agreed Muslims “undermine American culture” and most agree that American Muslims should “register their whereabouts with the U.S. government.” *Id.* at 3–4.

280. *Barack Obama*, BIOGRAPHY CHANNEL, <http://www.biography.com/people/barack-obama-12782369> (last visited Apr. 2, 2013).

281. See Philip Rucker & Felicia Sonmez, *Romney Jokes about his Birth Certificate; Obama Campaign Accuses him of Embracing ‘Birtherism’*, WASH. POST (Aug. 24, 2012), http://articles.washingtonpost.com/2012-08-24/politics/35491694_1_romney-adviser-kevin-madden-romney-jokes-governor-romney.

can, (and assumed to be Muslim by many Republicans²⁸²) “sympathize[d] with those [radical Islamists] who waged the attacks” on the American embassies in Benghazi and Cairo.²⁸³ Romney’s claim that Obama sympathized with Islamist attackers was quickly echoed on Twitter by the Republican National Party chair.²⁸⁴

Not long before Romney was promoting the idea that President Obama sympathized with violent, extremist Muslims,²⁸⁵ county officials in suburban Chicago were being forced to reconsider a zoning decision that would have permitted construction of a mosque.²⁸⁶ Facing similar opposition—including public protests, a local Republican congressional candidate linking construction of the mosque to Hamas and Jihad, and lawsuits by opponents—Muslims in Rutherford County, Tennessee, were unable to open a place of worship until a federal judge ordered that it could operate.²⁸⁷ An attempt to site a mosque in Brentwood, Tennessee, was also defeated by popular opposition.²⁸⁸ A proposal for a community center and mosque on Park Place in Manhattan faced public opposition fomented by a group named Stop Islamization of America.²⁸⁹ After President Obama expressed support for “the right to build a place of worship and a community center on private property in lower Manhattan,”

282. Thirty-one percent of Republicans surveyed by Pew Research responded “Muslim” when asked in 2010 what President Obama’s religion was. PEW RESEARCH CTR., GROWING NUMBER OF AMERICANS SAY OBAMA IS A MUSLIM 5 (2012), available at <http://www.people-press.org/files/legacy-pdf/645.pdf>.

283. Kasie Hunt, *Fact-Checking Romney’s Statements on Libya Attack*, MERCURY NEWS (Sept. 14, 2012), http://www.mercurynews.com/presidentelect/ci_21543165/fact-checking-romneys-statements-libya-attacks.

284. Reince Priebus, TWITTER (Sept. 11, 2012, 9:01 PM), <https://twitter.com/Reince/status/245733811747422208> (“Obama sympathizes with attackers in Egypt. Sad and pathetic.”).

285. See Hunt, *supra* note 283.

286. James Fuller, *Mosque Vote Will Test Attendance for Kane County Officials*, DAILY HERALD (Aug. 8, 2012), <http://www.dailyherald.com/article/20120808/news/708089679>.

287. Kim Severson, *Judge Allows Muslims to Use Tennessee Mosque*, N.Y. TIMES (July 18, 2012), <http://www.nytimes.com/2012/07/19/us/judge-allows-muslims-to-use-murfreesboro-mosque.html>.

288. Bob Smietana, *Brentwood Mosque Not Alone in Defeat: Plans for Places of Worship Face Growing Resistance*, TENNESSEAN (May 23, 2010), <http://www.tennessean.com/article/20100523/NEWS06/10923001>. Opposition was led by a United Methodist Church member who claimed that “not enough people understand the political doctrine of Islam.” *Id.*

289. Justin Elliott, *How the “Ground Zero Mosque” Fear Mongering Began*, SALON (Aug. 16, 2010, 6:01 AM), http://www.salon.com/2010/08/16/ground_zero_mosque_origins/.

another Republican presidential candidate—Newt Gingrich—accused the President of “pandering to radical Islam.”²⁹⁰ Survey data suggest Gingrich’s position was closer to the opinions of most Americans than the President’s position.²⁹¹

Land-use decisions affecting the rights of Muslims to construct places of worship have not (yet) reached ballots in American states and communities, but the discussion above illustrates that gays and lesbians are certainly not the last unpopular minority in America whose rights may be determined by the force of popular opinion. Immigrants, smokers, accused criminals, and convicted felons might be added to the list of unpopular minorities whose rights have been and may continue to be decided by voters.²⁹² The political conditions surrounding Muslims in America are similar to conditions associated with other groups that have been made the subjects of popular votes in past decades. As with gays and lesbians in previous decades, a majority of Americans view Muslims as a threat,²⁹³ and prominent, mainstream politicians have sought political advantage by exploiting negative stereotypes associated with the group.²⁹⁴ Switzerland—the only other nation that makes regular use of direct democracy—has already experienced a referendum on the construction of minarets, an architectural feature of Islamic mosques.²⁹⁵ Although only four minarets were ever constructed in that country, proponents of the August 2009 national referendum claimed minarets had no religious value, but, rather, symbolized Islamic intolerance and

290. Romesh Ratnesar, *Ground Zero: Exaggerating the Jihadist Threat*, TIME (Aug. 18, 2010), <http://www.time.com/time/nation/article/0,8599,2011400,00.html>.

291. CNN & OPINION RESEARCH CORP., AUG. 6–10 POLL (2010), available at <http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a1a.pdf>. Sixty-eight percent reported being opposed to the “plan to build a mosque two blocks from the site in New York City where the World Trade Center used to stand.” *Id.* at 3. Eighty-two percent of Republicans were opposed. *Id.* at 8.

292. See Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 297 (arguing that direct democracy is used to limit minority rights).

293. See *supra* note 279.

294. See, e.g., Sabrina Siddiqui, *Romney’s Israel-Palestine Comments Are Latest Chapter in Candidate’s Struggle with Muslims*, HUFFINGTON POST (Sept. 20, 2012, 1:19 PM), http://www.huffingtonpost.com/2012/09/18/romney-israel-palestine_n_1891868.html (describing Romney’s increasingly anti-Muslim rhetoric during the course of his political career).

295. *Swiss Voters Back Ban on Minarets*, BBC NEWS (Nov. 29, 2009) <http://news.bbc.co.uk/2/hi/8385069.stm>.

the “Islamisation” of Swiss society.²⁹⁶ Swiss voters approved the initiative constitutional amendment with fifty-seven percent support.²⁹⁷

CONCLUSION

Minority rights and popular opinion are often in conflict in democratic political systems. Majority opinion may at times trump the interests of minorities under any democratic institution. Legislatures, executives, and even courts can channel popular sentiments into policies that restrict minority rights.²⁹⁸ In this Article, I have argued that there is a unique relationship between majority opinion and minority rights in direct democracy. It is unlike other democratic institutions not simply because choices about rights are made directly by a majority of voters, but because the context of choice is so heavily conditioned by affect toward members of the group and perceptions that the minority presents a threat to the majority. Direct democracy expands the conflict over questions of rights. When minority rights are put to a popular vote, campaigns portray the minority as a threat and thus create spillover effects, with the members of the minority stigmatized in ways that would not have occurred were it not for the campaign against their rights.

Campaigns against the rights of gays and lesbians are but one of many examples of direct democracy expanding conflicts over minority rights. Recurring conflicts associated with minority rights being decided by a popular vote may be seen by some as a sign of robust democratic politics. Others may find direct democracy’s expansion of conflicts over rights a recipe for demagoguery, and a process that is inconsistent with models of democracy that aim to protect minority interests. States need not abandon the popular initiative process to remedy this. A number of state constitutions place substantive subject restrictions on popular initiatives. Massachusetts does not allow initiatives on the subject of religion or the courts.²⁹⁹ Alaska prohibits measures affecting the judiciary.³⁰⁰ Mississippi does not allow

296. Haig Simonian, *Mosque Vote Threatens to Isolate Swiss*, FIN. TIMES (Nov. 23, 2009), <http://www.ft.com/intl/cms/s/0/e8e36bfa-d85f-11de-b63a-00144feabdc0.html#axzz26xR3NGAI>.

297. *Id.*

298. *See supra* Part II.

299. MASS. CONST. art. XLVIII, pt. II, § 2.

300. ALASKA CONST. art. XI, § 7.

initiatives to change the state's Bill of Rights.³⁰¹ Other states prohibit measures on various fiscal questions.³⁰² Unless limits are placed on how initiatives and referendums are used to define minority rights, political campaigns targeting minority rights—with their associated spillover effects—will remain part of the American political system.

301. MISS. CONST. art. XV, § 273, cl. 5. This could also preclude popular votes that would expand rights.

302. *See, e.g.*, ARIZ. CONST. art. IX, § 23; MO. CONST. art. II, § 51; NEV. CONST. art. XIX § 6.