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# NOTES

## REGULATING ABORTION THROUGH DIRECT DEMOCRACY: THE LIBERTY OF ALL VERSUS THE MORAL CODE OF A MAJORITY

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#### INTRODUCTION

More than a year before the 2010 elections, news outlets began reporting on initiative campaigns to place “personhood” measures on ballots in several states around the country, including California, Colorado, and Florida.<sup>1</sup> Under the relevant state laws, if a sufficient number of signatures is gathered in each state, the electorate will vote on whether the state constitution should be amended to “declare that ‘personhood’ – and all rights accorded human beings – begins at conception” in an effort to undermine abortion rights.<sup>2</sup> Proponents of these measures differ slightly in their reasoning for supporting the movement. Many vocal pro-life supporters explicitly state that passage of personhood measures by voters should and will provide the Supreme Court with an opportunity to overturn *Roe v. Wade*,<sup>3</sup> the decision that legalized abortion,<sup>4</sup> and subsequent decisions that have protected a right to abortion.<sup>5</sup> Others offer a more subtle rationale, suggesting that the spread of these measures will serve to alert citizens and officials about the issue.<sup>6</sup>

Regardless of the rationale, supporters of limitations and bans on abortion are increasingly employing direct democracy processes to present these questions directly to voters across the country. In some states citizens themselves draft the language and collect petition signatures to place the measure on upcoming ballots. In others, legislators sympathetic to the movement introduce the measure for voter consideration. In a few states,

<sup>1</sup> Robin Abcarian, *Abortion Foes Try to Establish Legal ‘Personhood’ for Fetuses*, BOS. GLOBE, Sept. 29, 2009, at A12 (“From Florida to California, abortion foes are . . . raising money for campaigns to place so-called personhood measures on ballots in 2010.”).

<sup>2</sup> *Id.* The title of this Note is a reference to a statement in the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which established the current standard by which abortion laws are judged. 505 U.S. 833, 850 (1992) (“Our obligation is to define the liberty of all, not to mandate our own moral code.”).

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> *Id.* at 154.

<sup>5</sup> See Dale A. Oesterle, *The South Dakota Referendum on Abortion: Lessons from a Popular Vote on a Controversial Right*, 116 YALE L.J. POCKET PART 122, 122 (2006) (“The declared purpose of [a 2006 South Dakota act put to the voters in a referendum] is to offer the Supreme Court an opportunity to overturn its landmark decision in *Roe v. Wade*.”); Abcarian, *supra* note 1 (characterizing supporters of recent initiatives as “tired of . . . laws that limit but do not abolish abortion” and trying to “put an end to legalized abortion”).

<sup>6</sup> Abcarian, *supra* note 1 (quoting Keith Mason, cofounder of Personhood USA: “Our goal is to activate the population.”).

legislatures have successfully passed personhood laws, but these measures will not take effect unless a majority of voters approve.<sup>7</sup>

In these states, the people will vote on state laws that directly conflict with federal law legalizing abortion. While the United States Supreme Court has never ruled on the precise issue of whether citizens may vote on measures that would contradict federal abortion law,<sup>8</sup> two state courts have addressed citizen initiatives that would limit abortion rights beyond the scope of federal law. In 1992, the Supreme Court of Oklahoma struck an initiative from a state ballot proposal prior to the election because the measure, if enacted, would be unconstitutional under the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>9</sup> In 1994, the Supreme Court of Wyoming addressed a similar initiative. The court ultimately allowed the initiative to remain on the ballot because the measure was not unconstitutional in its entirety, but held that a completely unconstitutional measure would not be allowed on the ballot.<sup>10</sup> The continuing use of direct democracy to address abortion rights and restrictions ensures that these tensions will remain as individuals fail to understand the full consequences of their votes.

This Note will proceed as follows: Part I will summarize the history of direct democracy in the United States; Part II will review the arguments for and against these processes; Part III will analyze the use of direct democracy to address abortion specifically; Part IV will discuss judicial review of such measures; and Part V will analyze the use of abortion initiatives and referenda to effect change in the constitutional culture generally. Whether the process is used to change state or national law, or as a means to shape the cultural debate across the country, this Note argues that direct democracy is not an appropriate means to address the abortion question.

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<sup>7</sup> For current status of personhood movements in individual states, see *Get Involved*, PERSONHOOD USA, <http://www.personhoodusa.com/map> (last visited Nov. 12, 2010). The map provides links describing current activity in each state. *Id.* Additionally, South Dakota and Colorado voters have previously considered personhood measures, South Dakota by referendum in 2006, Oesterle, *supra* note 5, at 122, and Colorado by initiative in 2008, Abcarian, *supra* note 1.

<sup>8</sup> In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Supreme Court discussed the preamble of a Missouri statute expressing the state legislature's "findings" that "[t]he life of each human being begins at conception." *Id.* at 504. The majority held that the Court need not rule on the constitutionality of the preamble because the state had not applied or threatened to apply it in a way that would necessarily impose abortion restrictions that were invalid under *Roe v. Wade*. *Id.* at 505-07.

<sup>9</sup> *In re Initiative Petition No. 349*, 838 P.2d 1, 3 (Okla. 1992) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming the "essential holding" of *Roe v. Wade*, that before viability, a woman has the right to seek an abortion "without undue interference from the State"))).

<sup>10</sup> *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 289 (Wyo. 1994).

## I. THE HISTORY OF DIRECT DEMOCRACY

A. *Definitions and Terminology*

Two types of direct democracy<sup>11</sup> – the initiative and the referendum – allow people to vote on laws and issues directly rather than voting for agents to represent their preferences.<sup>12</sup> Within these two basic structures, a number of variations exist. Through the initiative, citizens propose and draft their own legislation or state constitutional amendments.<sup>13</sup> If a petition raises a sufficient number of signatures, the proposed measure is placed on the ballot.<sup>14</sup> Only through the direct initiative do citizens draft, propose, and pass their own laws unassisted. The direct initiative is sometimes referred to as “substitutive direct democracy” because “the voters can completely bypass the legislative and executive branches of government.”<sup>15</sup> An indirect initiative, on the other hand, is a citizen draft that is submitted to the legislature, which subsequently may enact the proposal.<sup>16</sup> If the legislature does not act within a specified time period, the measure then goes to the voters for their consideration.<sup>17</sup>

The legislature may also present proposed or existing laws or amendments to voters for approval or repeal through a referendum.<sup>18</sup> The indirect initiative and the referendum are sometimes called “complementary direct democracy,” requiring the voters and the legislature to act together.<sup>19</sup> There are three versions of referenda: mandatory, voluntary, and popular. Under a mandatory or compulsory referendum, state constitutions require that certain legislation be

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<sup>11</sup> This Note uses the term direct democracy to refer to any process or combination of processes in which citizens vote on legislation or constitutional amendments directly. Other sources may use the term plebiscite in this context.

<sup>12</sup> THOMAS E. CRONIN, *DIRECT DEMOCRACY* 1 (1989). The recall election, by which voters may remove state and local officials from office, is a third form of direct democracy. *Id.* at 2 (“The recall differs from impeachment in that the people, not the legislature, initiate the election and determine the outcome with their votes.”). This Note will not address the politics or legal consequences of recall elections.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM 799, 800 (1995).

<sup>15</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1510 (1990); see also Daar, *supra* note 14, at 801 (“By circumventing the legislative process, voters can create law by initiative without the same scrutiny and mechanisms that accompany enacted legislation.”).

<sup>16</sup> Eule, *supra* note 15, at 1511.

<sup>17</sup> *Id.* (“If the legislature adopts an indirect initiative, the resulting law should be seen as a product of representative government, not direct democracy.”).

<sup>18</sup> CRONIN, *supra* note 12, at 2.

<sup>19</sup> Eule, *supra* note 15, at 1512 (“Legislative passage is prerequisite but inadequate: Without voter endorsement the legislative effort fails; without legislative passage the electorate has nothing to vote on.”).

submitted to the electorate.<sup>20</sup> In a voluntary referendum, the legislature has the option, rather than the requirement, to refer the measure to the voters.<sup>21</sup> Finally, through the popular referendum, citizens can petition for referral of a measure before it becomes effective.<sup>22</sup>

B. *Historical Development of Direct Democracy Practices*

Direct democracy in the United States has its roots in the philosophy of Thomas Jefferson.<sup>23</sup> Although he never advocated direct democracy practices specifically, Jefferson's "trust in the wisdom and goodness of the numerical majority" combined with "a deep suspicion of government" led to a great respect for the will of the people.<sup>24</sup> During the early years of the Republic, citizens in a few states voted directly on state constitutions. Massachusetts and New Hampshire voters, for example, approved new state constitutions in the late Eighteenth Century.<sup>25</sup> Western states also submitted proposed constitutions to the electorate for approval before formally joining the union throughout the Nineteenth Century.<sup>26</sup>

The common understanding is that the direct democracy practices used today originated with the Progressive movement;<sup>27</sup> however, this may be something of a misconception. Today's procedures, particularly the initiative, actually have stronger roots in the similar, but distinct, Populist movement of the late Nineteenth Century.<sup>28</sup> The Populist movement consisted largely of farmers and laborers who stood against the special interests that had developed in politics, believing that these interests were selfish and that "the 'people' (not

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> CRONIN, *supra* note 12, at 2 (also referring to this version as the "petition referendum"); Eule, *supra* note 15, at 1512.

<sup>23</sup> CRONIN, *supra* note 12, at 40.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 41.

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., DAVID B. MAGLEBY, DIRECT LEGISLATION 20 (1984) (describing "[t]he dramatic expansion of citizen participation in politics and government achieved by the Progressives"); Daar, *supra* note 14, at 832 (suggesting that, following citizen ratification of a few state constitutions, "[i]nterest in direct democracy resurged with the Progressive movement of the early twentieth century"); Eule, *supra* note 15, at 1512 ("Direct democracy, the conventional history tells us, was a response of the Progressive Reform movement . . .").

<sup>28</sup> See Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? 33, 33 (Larry J. Sabato et al. eds., 2001) (arguing that "the Populist conception of the initiative process has prevailed over the Progressive conception"). Magleby also recognizes that "[t]he Progressive movement drew strength from the Populist movement's inroads." MAGLEBY, *supra* note 27, at 20.

the moneyed elite) must control the government.”<sup>29</sup> This belief “led [Populists] to advocate, almost obsessively, direct legislation by the people,” making direct democracy a focus of the Populist movement.<sup>30</sup> It was this radical goal of Populism that led to the first statewide discussions of direct democracy around the country.<sup>31</sup> In 1898, under Populist leadership, South Dakota became the first state to permit initiatives and referenda.<sup>32</sup> Recognizing the need to appeal to a wider base, however, some Populists began advocating for a more minimalist approach to direct democracy. One advocate of this approach described the initiative as “the medicine of the constitution, cautiously administered when occasion might require; not its daily bread.”<sup>33</sup> These early developments show that the first major adoptions of direct democracy came from distinctly Populist sources.

The goals of the Progressives in the early Twentieth Century differed from those of the Populists. Progressives were concerned with the corruption that party machines and narrow special interests caused, evidenced by the secrecy and haste of state legislatures, often acting under bribes or threats.<sup>34</sup> Progressives did advocate more direct citizen involvement in that they wanted “to liberate the legislative process from the temptations of corrupt influences, and to allow the expression of popular sentiment to be accurately reflected in policymaking processes.”<sup>35</sup> Unlike the Populists, however, most Progressives did not expect direct democracy to become the policymaking norm, but rather a possible course of action towards a more open political process generally.<sup>36</sup> Thus, many Progressives adopted Populism’s later minimalist rationale to continue advocating the cautious, complementary use of direct democracy to further their own ideals. For example, progressive President Woodrow Wilson suggested that “[d]irect legislation . . . was not ‘a substitute for representative institutions, but only . . . a means of stimulation and control . . . a sobering means of obtaining genuine representative action on the part of legislative bodies.’”<sup>37</sup> In this way, direct democracy fit within Progressivism’s theory of

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<sup>29</sup> Cain & Miller, *supra* note 28, at 34-35.

<sup>30</sup> *Id.* at 35 (“For many Populists, adoption of the mechanisms of direct democracy overshadowed nearly every other issue.”).

<sup>31</sup> See generally RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 27-30 (2002) (discussing Populist efforts in several states including New Jersey and Oregon).

<sup>32</sup> *Id.* at 26; *South Dakota*, INITIATIVE & REFERENDUM INST. AT U.S.C., <http://www.iandrinstute.org/South%20Dakota.htm> (last visited Nov. 12, 2010).

<sup>33</sup> ELLIS, *supra* note 31, at 30-32 (quoting Harvey Scott, conservative editor of the *Oregonian*).

<sup>34</sup> CRONIN, *supra* note 12, at 56; Cain & Miller, *supra* note 28, at 36.

<sup>35</sup> CRONIN, *supra* note 12, at 57.

<sup>36</sup> MAGLEBY, *supra* note 27, at 23 (“Most Progressives did not assume that all political or policy questions could be decided via direct legislation. Rather, their intent was that direct legislation should complement a more open process for choosing representatives.”).

<sup>37</sup> ELLIS, *supra* note 31, at 33.

politics that advocated for occasional initiative, referendum, and recall, along with direct election of senators and women's suffrage,<sup>38</sup> rather than looming as a single obsession as it had for Populists.<sup>39</sup>

Bruce Cain and Kenneth Miller summarize the important differences between the Populist and Progressive conceptions of direct democracy, suggesting that the divergence was a result of distinct motives and expectations and Populism's "more radical ultimate vision."<sup>40</sup> They continue, "Populists mistrusted legislatures generally and wanted to substitute direct popular control for representative government, which they regarded as a less pure form of democracy. Progressives, by comparison, wanted voters to check the legislature, but they did not want to replace representative government altogether."<sup>41</sup> The comparison concludes:

[T]he Progressives sought to use the initiative to enhance the responsiveness, professionalism, competence, and expertise of government. By contrast, the Populists sought, then as now, to substitute the wisdom of the people . . . for the deliberations of elected officials. This tension between Populist and Progressive notions of direct democracy is echoed in the current debate over initiative lawmaking.<sup>42</sup>

This tension indeed underlies the arguments made in favor of and against direct democracy generally and regarding measures on abortion specifically.<sup>43</sup>

Due to variations in Populist and Progressive influences, direct democracy processes are not equally available in every state today.<sup>44</sup> The initiative, by which citizens have the opportunity to bypass the representative branches completely, is available in only twenty-four states and the District of Columbia.<sup>45</sup> Each state, however, does provide for voter referendum in some form.<sup>46</sup> Every state except Delaware uses the mandatory referendum for legislative amendments to state constitutions.<sup>47</sup> In addition, twenty-six states

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<sup>38</sup> MAGLEBY, *supra* note 27, at 23.

<sup>39</sup> See *supra* note 30 and accompanying text.

<sup>40</sup> Cain & Miller, *supra* note 28, at 37.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 38.

<sup>43</sup> See *infra* Part III.

<sup>44</sup> Progressives did call for direct democracy on a national scale. MAGLEBY, *supra* note 27, at 23.

<sup>45</sup> See *infra* Appendix A. Voters may pass statutes by initiative in twenty-one states, and amend the state constitution by initiative in eighteen states. *Id.* States that allow the initiative in both cases are: Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *Id.* Initiatives are limited to the passage of statutes in six states – Alaska, Idaho, Maine, Utah, Washington, and Wyoming – and the amendment of state constitutions in three – Florida, Illinois, and Mississippi. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *States with Legislative Referendum (LR) for Statutes and Constitutional Amendments*,

and the District of Columbia allow some version of the referendum – either legislative or popular – for enacting statutes.<sup>48</sup> A number of other states have considered direct democracy processes over the past forty years, but no additional state has adopted the initiative or referendum since the 1970s.<sup>49</sup>

### C. *The History of Direct Democracy and Abortion*

Neither the use of direct democracy to legislate on abortion nor the specific “personhood” initiative is new in the 2010 election cycle. As of 2002, twelve states had held a total of twenty-four statewide votes of some form on abortion issues.<sup>50</sup> Of these measures, just five have passed, two resulting in pro-choice victories and three in pro-life victories.<sup>51</sup> In 1972, just prior to the Supreme Court’s decision legalizing abortion in *Roe v. Wade*, Michigan and North Dakota voters defeated initiative measures that would have made abortion legal.<sup>52</sup> Throughout the 1980s, abortion-related ballot issues largely addressed funding.<sup>53</sup> Then following the Supreme Court’s decision in *Webster v. Reproductive Health Services*,<sup>54</sup> which reaffirmed *Roe*’s central holding protecting a right to abortion but indicated that the Court may allow stricter regulation of the procedure,<sup>55</sup> many measures began attempts to either codify or limit existing procedures.<sup>56</sup> In 1990 Oregon voters rejected two abortion-related initiatives, one that would have required parental consent for minors and another that would have banned the procedure across the board.<sup>57</sup> The

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INITIATIVE & REFERENDUM INST. AT U.S.C., <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Legislative%20Referendum%20States.pdf> (last visited Oct. 16, 2010).

<sup>48</sup> See *infra* Appendix B. These states are: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.*

<sup>49</sup> A few states that had adopted and subsequently rejected direct democracy in the late Nineteenth and early Twentieth Century have re-adopted the practices in recent years. See *infra* Appendix A. States that have recently considered adoption include Alabama, Connecticut, Delaware, Georgia, Hawaii, Kentucky, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, and Texas. CRONIN, *supra* note 12, at 51.

<sup>50</sup> Amy L. Pritchard, *A Brief History of Abortion Related Initiatives and Referendum*, in INITIATIVE AND REFERENDUM ALMANAC 492, 494 (M. Dane Waters ed., 2003). Those states were, in order of most votes on the subject to least: Colorado, Oregon, Washington, Arkansas, Michigan, North Dakota, Alaska, Massachusetts, Rhode Island, Arizona, Maryland, and Maine. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Pritchard, *supra* note 50, at 493.

<sup>53</sup> *Id.*

<sup>54</sup> 492 U.S. 490 (1989).

<sup>55</sup> *Id.* at 521.

<sup>56</sup> Pritchard, *supra* note 50, at 493.

<sup>57</sup> Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty*:

following year voters in Corpus Christi, Texas, defeated a personhood initiative that would have amended the city charter.<sup>58</sup> Voters in Oklahoma submitted an initiative for the 1992 ballot that would criminalize abortion except in certain limited exceptions.<sup>59</sup> The state supreme court struck the initiative from the ballot upon determination that the initiative was unconstitutional under federal law.<sup>60</sup> In 1994 Wyoming voters proposed an initiative regulating definitions, procedures, and funding for abortions.<sup>61</sup> Pro-choice citizens likewise used direct democracy in the early 1990s, passing initiatives in Nevada and Washington to codify protections for pre-viability abortions under current federal law.<sup>62</sup>

Direct democracy votes to protect or limit abortion rights continued throughout the following decade, with attempts to ban the so-called “partial birth” abortion, a specific type of second-trimester abortion procedure,<sup>63</sup> becoming prevalent in the late 1990s.<sup>64</sup> When South Dakota passed a measure in 2006 to prohibit abortion except to protect the life of the woman, abortion rights advocates considered the benefits of challenging the ban with a referendum rather than with a lawsuit, which could give courts an opportunity

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*Strategies for Making the Rights Real*, in ABORTION AND THE STATES 223, 250 (Jane B. Wishner ed., 1993).

<sup>58</sup> *Id.* Voters may be able to use direct democracy at the local level even in states that otherwise do not allow the process. See CRONIN, *supra* note 12, at 2-3; Tari Renner, *Local Initiative and Referendum in the U.S.*, INITIATIVE & REFERENDUM INST. AT U.S.C., <http://www.iandrinstute.org/Local%20I&R.htm> (last visited Nov. 12, 2010) (estimating that ninety percent of cities in the United States employ some version of the referendum).

<sup>59</sup> *In re* Initiative Petition No. 349, 838 P.2d 1, 6 (Okla. 1992) (explaining the only exceptions: “grave impairment of the female’s physical or mental health,” “rape,” “incest,” and “grave physical or mental defect of the fetus”).

<sup>60</sup> *Id.* at 12. The court held that the initiative violated the recent Supreme Court holding in *Casey*. *Id.* at 3.

<sup>61</sup> *Wyo. Nat’l Abortion Rights Action League v. Karpan*, 881 P.2d 281, app. at 294 (Wyo. 1994). In response to a pre-election challenge, the Supreme Court of Wyoming held that, while some aspects of the initiative would be unconstitutional, the measure could not be stricken from the ballot unless the entire proposed bill was unconstitutional. *Id.* at 289. It appears, however, that this initiative was not ultimately on the ballot, as records show only two initiatives on Wyoming ballots in 1994, one addressing gaming and one addressing government administration. INITIATIVE & REFERENDUM ALMANAC, *supra* note 50, app. at 593. Wyoming voters only addressed one issue – term limits – during the next election in 1996. *Id.* app. at 596.

<sup>62</sup> Pine & Law, *supra* note 57, at 250. The Nevada initiative also mandated a referendum in the event that restrictive abortion measures passed in the future. *Id.*

<sup>63</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 136-37 (2007) (describing various abortion procedures).

<sup>64</sup> Pritchard, *supra* note 50, at 493 (reporting that half of the “statewide measures since the 1992 elections advanced by pro-life advocates” have been on “partial birth abortion procedures”).

to reconsider *Roe v. Wade*.<sup>65</sup> A petition gathering the required number of signatures delayed the effective date until a referendum, and voters ultimately defeated the bill.<sup>66</sup> Pro-life groups angered by the Supreme Court's 2006 decision in *Gonzales v. Carhart* – which reaffirmed a woman's right to have an abortion while upholding the federal prohibition on specific abortion procedures<sup>67</sup> – reasserted their efforts supporting extreme regulations and prohibitions of abortion, including personhood measures.<sup>68</sup> South Dakota voters rejected another abortion ban in 2008, this time one that allowed exceptions in cases of rape, incest, and danger to the health of the mother.<sup>69</sup> In 2008, Colorado voters defeated the first of the recent wave of personhood amendments.<sup>70</sup> Democratic political consultant Amy Pritchard summarizes the significance of abortion initiatives and referenda within government processes:

The impact and significance of these statewide ballot measures should be viewed in the context of legislative, judicial and executive action at the state and federal levels. Victories and losses in the legislatures and courts have had a profound impact [on] the type, timing, and substance of abortion related measures. Ballot measures have served as a fourth branch of government – each branch being used to promote, protect, and defend as well as create, change, and overturn a variety of laws that relate to abortion.<sup>71</sup>

The efforts to place personhood measures on more ballots in 2010 and beyond continue this trend. By the summer of 2010, Colorado was the only state that had succeeded in gathering enough signatures to place a personhood initiative on the 2010 ballot,<sup>72</sup> although Mississippi will follow with a measure

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<sup>65</sup> Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. TIMES, Mar. 7, 2006, at A14.

<sup>66</sup> Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P8.

<sup>67</sup> *Carhart*, 550 U.S. at 161-67 (analyzing the federal ban on the so-called “partial birth” abortion under the undue burden standard).

<sup>68</sup> David J. Garrow, *Significant Risks Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 37.

<sup>69</sup> Glenn Kessler, *California Voters Narrowly Approve Same-Sex Marriage Ban; Limits on Abortion Rejected in Colorado and South Dakota*, WASH. POST, Nov. 6, 2008, at A44 (reporting rejection of the abortion ban by a vote of 55% to 44%).

<sup>70</sup> Abcarian, *supra* note 1; Kessler, *supra* note 69.

<sup>71</sup> Pritchard, *supra* note 50, at 493.

<sup>72</sup> *Backers of ‘Personhood’ Measure Regroup*, BOS. GLOBE, July 27, 2010, at A2. The measure is now known as “Amendment 62.” *Id.* Of the other states mentioned at the beginning of this Note, California has submitted proposed language for its personhood measure, and Florida is currently collecting signatures for a petition to place a measure on the ballot. PERSONHOOD USA, *supra* note 7.

on the ballot in 2011.<sup>73</sup> Additionally, voters are gathering signatures in at least six states, including Missouri.<sup>74</sup>

## II. THE CONCEPT OF DIRECT DEMOCRACY: A GENERAL ANALYSIS

### A. *Arguments in Favor of Direct Democracy*

Proponents of direct democracy suggest that the process has several benefits over representative procedures.<sup>75</sup> This Note will address the arguments that are both most common and most relevant in the context of abortion.

#### 1. Measure of Public Opinion

First, advocates argue that direct democracy most accurately measures public opinion on a given issue.<sup>76</sup> They suggest that “[m]ajoritarian democracy . . . is the core of our constitutional system” but that “the legislature seems far removed from majority preferences.”<sup>77</sup> Both the Populists<sup>78</sup> and the Progressives<sup>79</sup> held similar views. Proponents contend that when voters are asked for their views on an issue directly, there is a stronger argument that “the result reflects the majority’s preference.”<sup>80</sup> Thus proponents of the initiative and referendum suggest that these processes carry more democratic legitimacy and strengthen democratic government generally<sup>81</sup> by allowing the people to speak directly. For example, Professor Dale Oesterle, responding to the South Dakota referendum that rejected an abortion ban in 2006, declared the referendum to be a “useful method for handling controversial issues.”<sup>82</sup> He argues that the “procedure would increase the legitimacy and decrease the polarization of law on controversial questions” because the electorate would “feel included in the resolution of the issue.”<sup>83</sup> Similarly, Kristi Burton, the law student who proposed the first personhood measure in Colorado, sees the

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<sup>73</sup> *Mississippi: Abortion Bans on 2011 Ballot*, N.Y. TIMES, Apr. 2, 2010, at A15.

<sup>74</sup> Laura Bauer, *Voters Asked to Confer ‘Personhood’ to Embryos*, CHI. TRIB., Apr. 8, 2010, at C25.

<sup>75</sup> See generally CRONIN, *supra* note 12, at 10-11; MAGLEBY, *supra* note 27, at 27-29; Daar, *supra* note 14, at 830. Each of these sources’ benefits lists is non-exhaustive.

<sup>76</sup> MAGLEBY, *supra* note 27, at 28 (“Direct legislation is the most accurate way to determine public opinion on political issues.”).

<sup>77</sup> Eule, *supra* note 15, at 1513-14.

<sup>78</sup> See *supra* note 29 and accompanying text.

<sup>79</sup> See *supra* note 35 and accompanying text.

<sup>80</sup> Eule, *supra* note 15, at 1514; see also Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1144 (1986) (“If a government decision is made pursuant to a referendum, of course, there is good reason to believe that it reflects the majority’s preferences.”).

<sup>81</sup> MAGLEBY, *supra* note 27, at 28.

<sup>82</sup> Oesterle, *supra* note 5, at 123.

<sup>83</sup> *Id.*

initiative as a means to place the question before the citizens to decide for themselves.<sup>84</sup>

## 2. Decreased Impact of Special Interest Groups

A second argument in favor of direct democracy is that these practices are less susceptible to the influences of special interest groups than are representative politics.<sup>85</sup> The Progressives feared that, because interest groups had all the resources, they would effectively make all major policy decisions, leaving the people out of the process.<sup>86</sup> Proponents of direct democracy assert that special interest lobbyists control legislatures due to their ability to operate more secretly through committees and party leadership.<sup>87</sup> They suggest that the open processes of direct democracy will reduce this control.

## 3. Participation and Legitimacy

The third category of arguments that proponents of direct democracy make relates to voter participation. Under representative government, critics allege, parties frame the decisions, inducing citizens to withdraw from politics,<sup>88</sup> leading to alienation and apathy.<sup>89</sup> In contrast, initiative and referendum should produce “open, educational debate,”<sup>90</sup> leading citizens to develop civic virtue and inducing them to participate in politics.<sup>91</sup> Professor Oesterle suggests that continued use of the process would “promote public discussion and debate, educate voters on important policy matters, and cause voters to pay attention to the actions of their elected representatives.”<sup>92</sup> Advocates of direct democracy also predict “initiatives will promote government responsiveness and accountability . . . [because if] officials ignore the voice of the people, the people will have an available means to make needed law.”<sup>93</sup> Finally, Professor Thomas Cronin relates the popular fear that, when representative leaders are unresponsive, “controversial social issues frequently have to be resolved in the judicial branch,” made up largely of un-elected individuals.<sup>94</sup> The prospect of judges actively making law is problematic to those who argue that

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<sup>84</sup> Adam Cayton-Holland, *Meet Kristi Burton, the 21-Year-Old Pro-Lifer Behind the Personhood Amendment*, DENVER WESTWORD NEWS (Sept. 25, 2008), <http://www.westword.com/2008-09-25/news/meet-kristi-burton-the-22-year-old-pro-lifer-behind-the-personhood-amendment/1>.

<sup>85</sup> CRONIN, *supra* note 12, at 11; MAGLEBY, *supra* note 27, at 27-28.

<sup>86</sup> MAGLEBY, *supra* note 27, at 27-28.

<sup>87</sup> ELLIS, *supra* note 31, at 102.

<sup>88</sup> MAGLEBY, *supra* note 27, at 28.

<sup>89</sup> CRONIN, *supra* note 12, at 11.

<sup>90</sup> *Id.*

<sup>91</sup> MAGLEBY, *supra* note 27, at 11.

<sup>92</sup> Oesterle, *supra* note 5, at 123.

<sup>93</sup> CRONIN, *supra* note 12, at 10.

<sup>94</sup> *Id.* at 11.

constitutional interpretation allows different choices, and that courts should sustain any rational choice by a coordinate branch.<sup>95</sup> With these arguments, supporters suggest that direct democracy is a superior alternative to representative government. Those who believe that direct democracy is likely to stimulate enlightened discussion and increase the legitimacy of decision-making likewise believe that these benefits are particularly applicable to controversial social issues such as abortion regulation.

## B. *Arguments Against Direct Democracy*

### 1. Dangers of Majoritarianism

Several of the arguments in favor of initiative and referendum use are misplaced. First, while it may be true in some cases that direct citizen votes on issues better reflect the wishes of the people, the federal government was not set up to automatically implement the will of the people.<sup>96</sup> The Framers specifically designed the structure of the federal and state governments to guard against bare majoritarianism.<sup>97</sup> In the *Federalist Papers*, James Madison warned against the “instability, injustice, and confusion” of popular governments.<sup>98</sup> Madison’s warnings against factions, which he described as “a number of citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community,”<sup>99</sup> strongly influenced the constitutional structure he advocated. He reasoned that because the causes of factions lay in human nature and could not be cured, government could only guard against their effects.<sup>100</sup> The goal in designing the structure of the government was “[t]o secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government,” because Madison knew that “a pure democracy . . . can admit of no cure for the mischiefs of faction.”<sup>101</sup> Thus the Founders chose a republic over a pure democracy in order to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens.”<sup>102</sup> Madison specified throughout his arguments that the function of

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<sup>95</sup> James B. Thayer wrote a prominent exposition of this deferential standard. Thayer argued that courts should only strike down the actions of a coordinate branch when that actor has made a clear mistake. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

<sup>96</sup> Eule, *supra* note 15, at 1514 (“The gap between the will of the majority and the voice of the legislature, it turns out, is there by constitutional design.”).

<sup>97</sup> *Id.* at 1522.

<sup>98</sup> THE FEDERALIST NO. 10, at 71-72 (James Madison) (Clinton Rossiter ed., 2003).

<sup>99</sup> *Id.* at 72.

<sup>100</sup> *Id.* at 75.

<sup>101</sup> *Id.* at 75, 76.

<sup>102</sup> *Id.* at 76.

the government was in part to act reasonably in the face of the people's passions.<sup>103</sup> Alexander Hamilton also echoes Madison's ideas:

When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.<sup>104</sup>

These rationales for structuring the government as a republic rather than a pure democracy demonstrate that the Founders were skeptical of the direct will of the majority. Thus the Constitution "guarantee[s] to every State in this Union a Republican Form of Government."<sup>105</sup> This historical intent suggests that there are not only practical but also legal arguments against the initiative and referendum.<sup>106</sup>

## 2. Presence of Special Interests

Additionally, it is unclear that direct democracy processes are freer of special interest influences than representative democracy. Many analyses suggest that interest groups are just as likely, if not more, to dominate in ballot votes on issues than in representative politics. A number of these analyses involve specific studies of the correlation between interest group spending and ballot success.<sup>107</sup> While such an inquiry is beyond the scope of this Note, the involvement of interest groups must be relevant to the analysis of the benefits of direct legislation. History demonstrates that special interests have impacted direct democracy for as long as policymakers have turned to these processes to avoid such effects.<sup>108</sup> There is empirical support for these theories about the presence of interest groups in debates over ballot issues. For example, groups as varied as labor unions, Indian tribes, and casinos influenced initiatives and

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<sup>103</sup> See THE FEDERALIST NO. 51, *supra* note 98, at 320 (James Madison) (emphasizing the importance of the republic "to guard one part of the society against the injustice of the other part"); THE FEDERALIST NO. 63, *supra* note 98, at 382 (James Madison) (suggesting that government must control the "irregular passion" of the citizenry).

<sup>104</sup> THE FEDERALIST NO. 71, *supra* note 98, at 431 (Alexander Hamilton).

<sup>105</sup> U.S. CONST. art. IV, § 4.

<sup>106</sup> See Brief of the Gay and Lesbian Lawyers of Philadelphia as Amicus Curiae Supporting Respondents at 17, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (arguing for judicial scrutiny of an initiative curtailing protection of homosexuals against discrimination). The Brief notes that courts commonly appeal to the *Federalist Papers* "to discern the Framers' intended constitutional design and to comport present day decisions with that design." *Id.* at 3 n.3.

<sup>107</sup> See generally CRONIN, *supra* note 12, at 99-116; MAGLEBY, *supra* note 27, at 145-51.

<sup>108</sup> See ELLIS, *supra* note 31, at 55 (citing a 1930s study demonstrating that lobbying had similar effect on both initiatives and referenda and on legislative politics to show that "special interests have long been central players in the initiative process").

referenda throughout the Twentieth Century.<sup>109</sup> Similarly, the Catholic Church has played an active role in debates over ballot measures on euthanasia.<sup>110</sup> More recently, the Mormon Church heavily influenced, and arguably swayed, the success of California's Proposition 8, which banned gay marriage in the state.<sup>111</sup> These patterns suggest that direct democracy has not been recently captured by special interests; rather, they have been an influence all along.<sup>112</sup>

Professor David McCuan suggests that the involvement of interest groups is related to the "professionalization" of direct democracy, by which consultants and firms run initiative and referenda campaigns as they do candidate races.<sup>113</sup> He asserts that the success of these campaigns perpetuates the cycle and increases interest group influence over election measures.<sup>114</sup> Similarly, Professor Sylvia Lazos Vargas suggests that organized, well-funded interests are necessary for direct democracy success for four reasons: (1) proponents need money to put their initiative on the ballot; (2) a campaign is necessary to sell the idea to the voters; (3) petitions must be organized to collect the required number of citizens; and (4) initiative campaigns increasingly hire expert legal advisors.<sup>115</sup> Analyses of initiative trends suggest that specialized or "narrow" interest groups can have a particular impact on direct votes, as they are willing to pursue their ends "at the expense of the public good."<sup>116</sup> These analyses demonstrate how direct democracy allows special interests to undermine the people's will, rather than directly expressing the people's voice as expected, and is thus not a cure for the lobbyist presence in the legislature. The benefits and detriments of special interest participation may be debated; however, the influence of special interests is significant in direct democracy, as it is in representative democracy.

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<sup>109</sup> *Id.* at 106-08.

<sup>110</sup> Daar, *supra* note 14, at 851.

<sup>111</sup> Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1. The Mormon campaign contributed "as much as half of the nearly \$40 million raised on behalf of the measure," including more than \$5 million in the two weeks before the election. *Id.*

<sup>112</sup> ELLIS, *supra* note 31, at 109.

<sup>113</sup> David McCuan, *Can't Buy Me Love: Interest Group Status and the Role of Political Professionals in Direct Democracy*, in INITIATIVE-CENTERED POLITICS 51, 54 (David McCuan & Stephen Stambough eds., 2005).

<sup>114</sup> *Id.* at 54-55.

<sup>115</sup> Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 417-19 (1999).

<sup>116</sup> McCuan, *supra* note 113, at 72 (discussing specific initiatives in California); *see also* ELLIS, *supra* note 31, at 102 ("Similarly, the initiative process tends to be more favorable for issues in which the gains are widely distributed and the costs are borne by a few."). California's Proposition 8 also illustrates this point, as the Mormon Church harnessed vehement support for the ban to overcome apathetic opposition. *See* McKinley & Johnson, *supra* note 111, at A11.

### 3. Lack of Education and Participation

Contrary to direct democracy proponents' predictions, ballot measures often fail to give voters sufficient opportunity for education and participation on the issues at stake. As Professor Eule suggests, "popular votes do a flawed job of discovering what 'the people' really want."<sup>117</sup> As one contributing factor, because voters generally rely on parties and candidates for political cues, voters are often unable to identify the answers to ballot questions that correspond with their political opinions and are less likely to vote on the measure at all.<sup>118</sup> Data from the 1970s demonstrate that as many as one-third of voters – already a reduced segment of the total populace – do not respond to initiative or referendum propositions.<sup>119</sup> Those who are poor, less educated, or of minority race are particularly less likely to vote on these measures.<sup>120</sup> Additionally, without the cues of party identification and incumbency, voters who do respond to ballot questions may be confused and incorrectly translate knowledge about a topic generally or even a particular measure into a vote consistent with their opinions on the issue.<sup>121</sup> Thus the weakness of direct democracy can go beyond failure to yield the benefits predicted and result in uninformed and even mistaken voting.

Further, direct democracy "offer[s] only binary choices, but the set of solutions to a given problem is seldom so limited,"<sup>122</sup> implying that a voter may select an option that is closest to, but not representative of, his or her preference. The Supreme Court has acknowledged this failing of the initiative and referendum. While recognizing that the measure at issue in a case was approved by a majority of voters, the Court refused to give weight to this argument in favor of the measure because "neither of the proposed plans was, in all probability, wholly acceptable to the voters."<sup>123</sup> These analyses suggest that direct democracy expresses only approximate preferences of a portion of the voting population rather than reflecting educated participation of the people as a whole.

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<sup>117</sup> Eule, *supra* note 15, at 1514. *But see* Daar, *supra* note 14, at 838-39 (citing California and Washington initiatives in which exit polls "showed a relatively high level of voter comprehension" resulting in voters making substantive decisions).

<sup>118</sup> MAGLEBY, *supra* note 27, at 111 ("When less educated voters are asked to vote on complex and often technical issues, they are less able to connect their political opinions and choices with a vote and therefore are less likely to participate.").

<sup>119</sup> *See id.* at 104 (reporting that approximately two-thirds of Massachusetts citizens vote on all of the statewide propositions, which mirrors the results of a 1972 national survey).

<sup>120</sup> *Id.* at 104-05.

<sup>121</sup> *See id.* at 141; Eule, *supra* note 15, at 1518-19 (suggesting that citizens may not vote at all, or may vote contrary to their own desires, due to confusion or apathy).

<sup>122</sup> Eule, *supra* note 15, at 1520-21.

<sup>123</sup> *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 731-32 (1964).

#### 4. Danger to Minority Rights

The literature reveals several additional arguments against the use of direct democracy relating to the problems the initiative and referendum create with the democratic and political processes. Direct democracy presents situations in which a bare majority can exercise its will over the minority, a situation against which the Framers tried to guard. This “tyranny of the majority” includes two concepts.<sup>124</sup> The majority can constitute a specific group “enact[ing] legislation adversely affecting those in the minority,” or majoritarian domination can be “simply the result of a democratic process in which the candidate or ballot measure with the most votes prevails.”<sup>125</sup> While direct democracy may implicate both versions, the second risk is especially inherent when a majoritarian vote may affect the personal decisions of individuals.<sup>126</sup> Similarly, the Framers were concerned that “[i]f a majority be united by a common interest, the rights of the minority will be insecure.”<sup>127</sup>

Thus the republic was designed with what Professor Julian Eule terms the “divided power filter” and the “entrenched-rights safety net.”<sup>128</sup> By dividing power both among the branches of government and between the federal and state governments, the Framers ensured that no majoritarian faction could control all government power, thereby limiting the impact on individual rights.<sup>129</sup> They also determined that “a few matters would have to be entrenched – placed beyond the reach of majority preferences, filtered or not.”<sup>130</sup> By removing these safeguards, direct democracy allows a majority of voters to impose its will on the rest of society.<sup>131</sup>

#### 5. Lack of Deliberation

A final, significant problem with the initiative and referendum stems from their departure from the representative process. Many argue that the discussion, debate, and compromise inherent in representative lawmaking are preferable to the swift action of an impassioned majority.<sup>132</sup> Legislative debate

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<sup>124</sup> Daar, *supra* note 14, at 842.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 843 (arguing against majoritarianism when a “collective decision may have an enormous impact on the way . . . fellow citizens lead their lives.”); *see also* Lazos Vargas, *supra* note 115, at 513 (arguing that “initiatives and referend[a] dramatically increase the potential that actions taken by majority groups will jeopardize” the rights of fellow citizens).

<sup>127</sup> THE FEDERALIST NO. 51, *supra* note 98, at 320 (James Madison).

<sup>128</sup> Eule, *supra* note 15, at 1527-30.

<sup>129</sup> *Id.* at 1528 (“The multiplicity of interests and sects would limit the people’s power to act as a collective body and thereby ensure the security of minority civil and religious rights.”).

<sup>130</sup> *Id.* at 1529.

<sup>131</sup> *See* Brief, *supra* note 106, at 1.

<sup>132</sup> *See* Eule, *supra* note 15, at 1526-27 (asserting that, whereas representative government provides “opportunity . . . for deliberation and debate[,] . . . [p]opular masses

offers lawmakers a chance to compromise, amend, or redefine a measure in order to attract a wider base of support, while initiatives offer restricted alternatives whose provisions cannot be amended before approval or rejection.<sup>133</sup> Professor Eule particularly praises the deliberative effects of representative government: “Knowledge and exposure are effective weapons against prejudice. Debate and deliberation inevitably lead to better informed judgment. Enlarging one’s exposure to competing ideas and perspectives induces greater sensitivity and checks partiality.”<sup>134</sup> In contrast, direct democracy provides little incentive to work towards deliberation because each citizen votes individually and in secret.<sup>135</sup> Resulting measures are likely to pass or fail based on stereotypes or misinformation rather than educated debate.<sup>136</sup> These arguments suggest that, in addition to departing from the Framers’ intended legislative structure and increasing the likelihood that voters’ opinions will not be accurately translated, direct democracy’s lack of deliberation and debate risks creating measures that are not carefully reasoned and responses by voters who are not aware of the complexity of the issue or the implications of their votes. The following analysis will apply these arguments against the use of direct democracy in the context of abortion initiatives.

### III. ANALYSIS OF THE USE OF INITIATIVES AND REFERENDA TO ADDRESS ABORTION ISSUES

The arguments against direct democracy are especially significant when the initiative and referendum are used to regulate abortion. The fact that direct democracy avoids the constitutional mechanisms established to safeguard minority rights against majoritarian influence is particularly problematic when that right is constitutionally protected.<sup>137</sup> The possible profound impact of special interests on initiative and referendum outcomes likewise has implications for measures addressing abortion regulation, given the strength and intensity of interests on both sides.<sup>138</sup> Additionally, the possibility of uninformed voting has severe implications in this context.<sup>139</sup> Finally, the lack

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too quickly form preferences [and] fail adequately to consider the interests of others”).

<sup>133</sup> *Id.* at 1520-21.

<sup>134</sup> *Id.* at 1555.

<sup>135</sup> *See Daar, supra* note 14, at 841 (arguing that any benefits of public awareness of the ballot issue and provisions do not necessarily translate into consideration, discussion, and deliberation because “[u]nlike legislators, who can be held accountable for their decisions by their constituents, voters are not motivated to learn and consider the variety of views held on a ballot subject”).

<sup>136</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 986-88 (N.D. Cal. 2010) (finding that prejudice resulting from stereotypes and misinformation has spurred recent initiative and referendum efforts to limit gay rights).

<sup>137</sup> *See infra* Part III.A.

<sup>138</sup> *See infra* Part III.B.

<sup>139</sup> *See infra* Part III.C.

of deliberation and compromise that direct democracy provides in comparison to representative processes likewise creates serious consequences when legislating abortion issues.<sup>140</sup>

A. *Majoritarianism and the Danger to a Constitutionally Protected Right*

Abortion initiatives and referenda demonstrate the effects of majoritarianism that the Framers sought to prevent, as these campaigns and votes exhibit impassioned factions and threaten majority control over individual rights. Submitting an issue to majority vote necessarily provides inadequate protection for minority rights.<sup>141</sup> Use of the initiative to address bioethical issues such as abortion and euthanasia avoids specific representative safeguards, resulting in a problematic form of majoritarianism.<sup>142</sup> The ability of citizens to control aspects of their neighbors' lives contradicts the right to direct one's own physical destiny that courts have traditionally protected.<sup>143</sup> The Supreme Court has held that the right to abortion is constitutionally protected, grounding the rationale for the right in the "personal dignity and autonomy" afforded to each person to make personal decisions.<sup>144</sup> The Court reasoned that "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."<sup>145</sup> Thus, Professor Daar argues, "[g]iven that the state, through its legislature, cannot create laws that violate the liberty interests of its citizens, neither can voters draft and enact such laws."<sup>146</sup>

Although Professor Daar argues against use of the initiative to legislate on euthanasia, her considerations are equally important when applied to abortion-related initiatives. The *Casey* opinion specifies that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."<sup>147</sup> The Court emphasizes that the woman retains the "right to make the ultimate decision" regarding her pregnancy before viability.<sup>148</sup> While initiatives that would act to prohibit abortion completely in all or the majority of cases, such

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<sup>140</sup> See *infra* Part III.D.

<sup>141</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304-05 (2000) (holding elections inadequate to safeguard freedoms of speech and religion because an "election does nothing to protect minority views but rather places the [people] who hold such views at the mercy of the majority").

<sup>142</sup> Daar, *supra* note 14, at 843.

<sup>143</sup> *Id.*

<sup>144</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). *Casey* reaffirmed the "essential holding" of *Roe v. Wade* that a woman may choose to have an abortion before viability. *Id.* at 846.

<sup>145</sup> *Id.* at 851.

<sup>146</sup> Daar, *supra* note 14, at 847.

<sup>147</sup> *Casey*, 505 U.S. at 877.

<sup>148</sup> *Id.*

as the personhood measures, would obviously be unconstitutional under this analysis, other measures should be equally suspect if they cross the line between encouragement and coercion. Although these measures might survive a rational basis review, initiatives that violate *Roe* and *Casey* are invalid under the more stringent review applied to measures that infringe on constitutionally protected interests.<sup>149</sup> Additionally, these same considerations suggest practical as well as legal arguments against using the initiative to regulate abortion, regardless of ultimate constitutionality. The Court has protected the right to abortion precisely because of the personal nature of the decision.<sup>150</sup> Individuals may express their views against abortion or even try to persuade their fellow citizens, but drafting or voting on a law that would compel a choice amounts to coercion by the majority over an individual right.

### B. *The Politics of Special Interests*

Abortion initiatives and referenda also present an instance in which the power of special interests can play a significant role in the shaping and passage of a measure. Ultra-conservative and religious organizations have already established a strong presence in support of personhood measures. Focus on the Family, a Christian group, endorsed the Colorado initiative in 2008 several months before the vote.<sup>151</sup> The personhood campaigns in place for the 2010 elections and beyond operate under the umbrella of the national pro-life organization Personhood USA, which proclaims on its website, [personhoodusa.com](http://personhoodusa.com), the religious motives and reasoning behind the campaign.<sup>152</sup> The group's website states: "The Primary Mission of Personhood USA is to serve Jesus by being an Advocate for those who cannot speak for themselves, the pre-born child."<sup>153</sup> The state-level organizations likewise use strong appeals to religious doctrine and support in order to justify and promote

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<sup>149</sup> For example, the Supreme Court upheld a state law criminalizing sodomy on the grounds that the law did not infringe on a constitutionally protected right and survived rational basis review. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The Court later overturned the decision and invalidated such laws because they infringed on citizens' autonomy interests and could not withstand the required more stringent review. *Lawrence v. Texas*, 539 U.S. 558, 565-67, 574 (2003). A California district court, however, recently found that a referendum based on prejudices could not withstand even rational basis review. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995-1003 (N.D. Cal. 2010). The court specifically found that "a private moral view . . . is not a proper basis for legislation." *Id.* at 1002.

<sup>150</sup> *Casey*, 505 U.S. at 851 ("Our law affords constitutional protection to personal decisions relating to . . . procreation.").

<sup>151</sup> Sarah Kliff, *Roe v. Wade v. Kristi*, NEWSWEEK (Oct. 31, 2008), <http://www.newsweek.com/id/166730>.

<sup>152</sup> Sarah Kliff, *I Am Zygote, Hear Me Roar*, NEWSWEEK (Nov. 2, 2009), <http://www.newsweek.com/id/220442/page/1>.

<sup>153</sup> PERSONHOOD USA, *supra* note 7, <http://www.personhoodusa.com>.

their message.<sup>154</sup> Additionally, while the campaign to support Amendment 62, the current personhood initiative in Colorado, describes itself as “a grass-roots organization of Colorado citizens,” the movement in fact involves and is led by national anti-abortion figures, many of whom have religious ties.<sup>155</sup> While use of religious groups as a means of support and promotion is neither unique to abortion initiatives nor in any way underhanded, this evidence demonstrates that, contrary to the arguments of direct democracy advocates, the initiative process is equally susceptible to special interest involvement.

Pro-choice groups have also rallied in response to proposed measures. After the South Dakota legislature passed a strict abortion law, Planned Parenthood “pledged to use any means necessary” in response, and ultimately collected the number of signatures required to place the question before citizens in a referendum.<sup>156</sup> NARAL Pro-Choice America maintains a page alerting supporters to the possibility and ramifications of personhood efforts and providing a link to view choice-related measures by state.<sup>157</sup> These examples indicate that, in the abortion context, pro-life and pro-choice interest groups alike are particularly well-organized, well-funded, and committed. Special interests dominate the debate surrounding abortion initiatives and referenda as much as they dominate representative legislation on the issue. Thus the initiative has become another tool for special interests, rather than the open discussion by the average citizen that direct democracy proponents originally envisioned.

### C. *The Danger of a Lack of Information: Consequences and Implications*

Educated and informed voting on the issues is an especially important consideration for abortion initiatives. Ted Miller, spokesman for NARAL Pro-Choice America, expressed these concerns over the personhood measure on the Colorado ballot in 2008. Subsequent reports characterized the pro-choice advocates as being “concerned that voters will be confused by the language of proposals in Colorado and other states that doesn’t specifically mention abortion but talks generally about defining ‘personhood’ as beginning at the

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<sup>154</sup> For example, Personhood Colorado’s website contains a link to special resources for supportive churches. See *Pastors and Churches*, PERSONHOOD COLO., <http://personhoodcolorado.com/pastors-and-churches> (last visited Nov. 29, 2010). Personhood Missouri’s page also provides materials for churches and presents a list of the churches and religious organizations that have endorsed the movement in that state. See *Endorsements*, PERSONHOOD MO., <http://www.personhoodmissouri.com/content/endorsements-1> (last visited Nov. 29, 2010); *Information for Churches*, PERSONHOOD MO., <http://www.personhoodmissouri.com/content/information-churches> (last visited Nov. 29, 2010).

<sup>155</sup> *Backers of ‘Personhood’ Measure Regroup*, *supra* note 72, at 2.

<sup>156</sup> See Davey, *supra* note 65, at A1; Davey, *supra* note 66, at P8.

<sup>157</sup> “*Personhood*” Measures, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/what-is-choice/abortion/abortion-personhood-measures.html> (last visited Nov. 29, 2010).

moment of fertilization.” Miller feared that “many people won’t understand the potentially profound consequences.”<sup>158</sup> Other abortion-rights advocates emphasized that personhood measures could affect law relating to birth control and assisted reproduction in addition to abortion.<sup>159</sup> A Nevada judge rejected a similar initiative petition for a personhood measure because the language was “too general in nature” suggesting that “voters would not understand the impact.”<sup>160</sup>

The risk that many voters will not comprehend the complexity of an abortion measure or accurately express preferences presents a danger that voters will not consider or understand the implications of their choice for others, or even themselves.<sup>161</sup> For example, many may vote on a general abortion ban or restriction without realizing that there is no exception, even to save the life of the mother or in the case of rape. Even Kristi Burton, the law student who sponsored the first personhood initiative in Colorado, believes that a personhood amendment would not necessarily directly affect the rights and lives of women across her state.<sup>162</sup> This lack of education suggests a failure of civic society, as the general electorate is poorly equipped to make decisions that will be binding on the ability of others to make personal decisions.

#### D. *The Need for Deliberation*

Even assuming that direct democracy produces well-educated voters, the process still lacks the deliberation that good policymaking demands, particularly for controversial social issues like abortion. Burton defended her proposed measure by asserting, “I don’t think it’s a matter of me telling women how to live their lives . . . . That’s why it’s on the ballot. That’s why every voter in Colorado gets to decide. I’m simply putting a question before the voters of Colorado . . . .”<sup>163</sup> This defense suggests that direct democracy is a beneficial means to promote individual decision on sensitive issues. The fact that each voter will cast an opinion on the issue, however, is only a part of the deliberation that is crucial to sensitive issues such as abortion. Direct democracy purports to enhance debate between citizens and democratic deliberation.<sup>164</sup> Professor James Fleming refers to this type of deliberation as “deliberative democracy,” or the capacity to “deliberat[e] about and judg[e] the

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<sup>158</sup> Judith Graham & Judy Peres, *Rights for Embryos Proposed*, CHI. TRIB., Dec. 3, 2007, at C1.

<sup>159</sup> *Id.*

<sup>160</sup> Bauer, *supra* note 74, at C25.

<sup>161</sup> See *supra* notes 121-122 and accompanying text.

<sup>162</sup> See Cayton-Holland, *supra* note 84. Burton saw her initiative as laying “a common-sense foundation, a concrete definition” through which to separately address issues of birth control and abortion, rather than as legislating directly on women’s rights. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See *supra* notes 90-95 and accompanying text.

justice of basic institutions and social policies as well as the common good.”<sup>165</sup> Professor Fleming argues, however, that there is a second type of deliberation, which he terms “deliberative autonomy,” through which citizens “deliberat[e] about and decid[e] . . . how to live their own lives.”<sup>166</sup> He argues that both types are equally important to the laws of the United States.<sup>167</sup> The opportunity for the personal deliberation inherent in deliberative autonomy is absent from a measure that imposes a solution to a decision of a personal nature, such as abortion, on an individual. The fact that each individual citizen once cast a vote against or in favor of that solution as an initiative or referendum does not mean that the decision was deliberative in this second sense. Thus, although advocates of initiatives argue that direct democracy promotes citizen participation and deliberation, these measures at best promote deliberative democracy, but not necessarily deliberative autonomy.

Empirical evidence suggests that direct democracy does not adequately promote even deliberation in the public, democratic sense. Analyses suggest that when direct democracy is used to address complex and controversial issues, public discussion becomes heated and contested, fracturing community relations rather than encouraging thoughtful communication.<sup>168</sup> It can be difficult to sustain a productive discussion of a controversial initiative, because direct democracy often allows voters to express views that are “overtly prejudicial” and use rhetoric that is “more blunt and pointed” than is used in representative discussions.<sup>169</sup> Finally, direct democracy promotes what Professor Lazos Vargas calls “we-they thinking,” through which advocates frame issues in terms of existing “intergroup divisions,” emphasizing tensions rather than encouraging compromise.<sup>170</sup> This analysis suggests that an initiative attempting to regulate issues like abortion could be more harmful than helpful to society.

Opposing arguments demonstrate the need for further discussion, deliberation, and compromise on abortion issues. Kristi Burton asserts that “[the abortion issue] is simple” because the initiative definitively determines when an embryo becomes a person.<sup>171</sup> Others argue that the issue is anything but simple and therefore requires careful consideration of the many aspects of abortion regulation, something that the initiative does not provide. Linda

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<sup>165</sup> JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY* 3 (2006).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 4 (“[These principles] reflect two bedrock structures of our constitutional scheme: deliberative political and personal self-government.”).

<sup>168</sup> Lazos Vargas, *supra* note 115, at 506 (“[D]irect democracy can evoke intergroup strife, feelings of resentment, anxiety over social change, and even prejudice in its rawest form . . . [and] has the potential to seriously damage a civic fabric already frayed by the ongoing political conflicts of a polity undergoing fundamental changes.”).

<sup>169</sup> *Id.* at 514.

<sup>170</sup> *Id.* at 514-15.

<sup>171</sup> Graham & Peres, *supra* note 158, at C1.

Wharton, who represented the plaintiffs in *Casey*, cautions against narrow or mechanical application of the *Casey* standard.<sup>172</sup> Wharton emphasizes that each abortion decision requires consideration of the “real life challenges of poverty, youth, and violence that exacerbate the hardships of abortion restrictions” in a specific instance.<sup>173</sup> The initiative process provides no means to consider these individual issues or apply principles to a specific case.

Further, abortion is an issue over which voters are likely to have specific, nuanced opinions that do not translate well into a yes-or-no vote on a single measure, particularly one so extreme as those that would establish personhood for fetuses. The results of a May 2007 Gallup poll indicate that “relatively few Americans are positioned at either extreme of the spectrum of beliefs – saying abortion should be legal in either all circumstances (26%) or illegal in all circumstances (18%).”<sup>174</sup> Since 1975, approximately fifty to sixty percent of Americans have described their position on the issue as believing abortion should be legal “only under certain circumstances.”<sup>175</sup> Recent polls show a continuation of this trend.<sup>176</sup> The fact that direct democracy asks for a single response to a proposed measure makes it difficult for these middle positions to be taken into account.

The South Dakota referendum in 2006 demonstrates this effect:

In 2006, the South Dakota legislature enacted a ban on abortions that included only a narrowly drawn exception for women who would die if denied an abortion. When this ban was presented to voters through a ballot initiative, the measure was defeated. Opinion polls suggested that voters found the ban too extreme because it lacked exceptions for rape, incest, and the woman’s health.<sup>177</sup>

Any or all of these possible exceptions, as well as many other considerations, could define a voter’s position on abortion, but direct democracy provides no

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<sup>172</sup> Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 486 (2009) (arguing that courts should avoid a mechanical analysis in abortion cases and should instead “assess[] the specific evidentiary record to decide whether these provisions would unduly burden the women of a particular state”).

<sup>173</sup> *Id.* at 489.

<sup>174</sup> Lydia Saad, *Public Divided on “Pro-Choice” vs. “Pro-Life” Abortion Labels*, GALLUP (May 21, 2007), <http://www.gallup.com/poll/27628/Public-Divided-ProChoice-vs-ProLife-Abortion-Labels.aspx>.

<sup>175</sup> *Id.*

<sup>176</sup> See, e.g., Leonor Vivanco, *Divided They Stand*, CHI. TRIB., Dec. 23, 2009, at 6 (“[B]oth [pro-choice and anti-abortion] sides see gray areas, underscoring the complexity of the issue. There are those who think abortion should be legal in all instances, those who think it should be illegal in all instances and many variations on the question of legality in between.”).

<sup>177</sup> Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 601 (2009).

means to address these nuances. Unlike representative government, which provides opportunity for debate and compromise, voters must vote yes or no on the measure as it is presented to them. Additionally, once a proponent begins gathering signatures for an initiative petition, the language of the proposed measure is not normally amendable.<sup>178</sup> This constraint provides no means for adjusting the law, resulting in an absence of the education and deliberation that direct democracy purports to promote. Thus, the direct democracy process provides an avenue for those who, like Burton, believe the issue is a simple one that can adequately be addressed by a yes or no vote; however, direct democracy proves to be an inappropriate means to adequately consider the personal and individual nature of the decision that is increasingly becoming the focus of the abortion debate.

The failure of direct democracy to foster popular deliberation makes the process particularly inadequate to address abortion questions. Professors Amy Gutmann and Dennis Thompson present the abortion debate as a classic example of a “deliberative disagreement,” a conflict in which “citizens continue to differ about basic moral principles even though they seek a resolution that is mutually justifiable.”<sup>179</sup> Gutmann and Thompson advocate deliberation generally as a means to address moral conflict in society, arguing that citizens should make decisions after careful consideration of various claims, including broader positions than they might normally consider, in order to recognize what is at stake for others as well as themselves.<sup>180</sup> In the context of the deliberative disagreement over abortion, they urge deliberation based on mutual respect and consideration of civic responsibilities.<sup>181</sup> Gutmann and Thompson specifically praise *Casey*’s undue burden standard as fostering this type of deliberative environment.<sup>182</sup> This endorsement suggests that any initiative that would restrict abortion rights beyond the *Casey* holding is unwise from a civic deliberation standpoint. The above discussion demonstrates, however, that direct democracy is not a process that fosters this type of deliberation.<sup>183</sup> By permitting charged, prejudicial rhetoric and preventing compromise and individual consideration, direct democracy makes very difficult the kind of deliberative discussion that is necessary when addressing a controversial moral issue such as abortion.

Analysis of initiatives and referenda addressing abortion and the surrounding experiences demonstrates that the use of direct democracy in the abortion context presents significant problems regarding bare majoritarianism

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<sup>178</sup> See, e.g., Daar, *supra* note 14, at 836.

<sup>179</sup> AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 73 (1996)

<sup>180</sup> *Id.* at 41-43.

<sup>181</sup> *Id.* at 79-81.

<sup>182</sup> *Id.* at 87 (“The ‘undue burden’ standard has been recognized as acceptable from a variety of moral perspectives and is therefore a promising way of seeking an economy of moral disagreement on abortion.”).

<sup>183</sup> See *supra* notes 133-135 and accompanying text.

at the expense of individual rights, special interests, lack of education and information, and absence of deliberation and compromise. For these reasons, direct democracy is not an appropriate means to regulate abortion law.

#### IV. JUDICIAL REVIEW OF INITIATIVES AND REFERENDA

##### A. *Judicial Review in Theory*

An important aspect in the analysis of initiatives and referenda relating to abortion is how courts will treat these measures if they are passed. Much of the debate over judicial review of these measures discusses whether judicial interpretation of the Constitution is counter-majoritarian.<sup>184</sup> This discussion becomes more complex after consideration of the relative democratic nature of representative and direct democratic processes. In one of the first analyses of this issue, Professor Eule presented the question this way: “Should the conflict between the lawmaker and judge be played out differently when the people express their preferences directly rather than through an agent?”<sup>185</sup>

Professor Eule acknowledges that intuition suggests that measures passed by initiative and referenda deserve a more deferential judicial review, given that they express the will of the people directly.<sup>186</sup> While this position has not been widely accepted, some support exists in constitutional debate. For example, Justice Black once argued that letting citizens establish policy through the initiative process is “as near to a democracy as you can get” and that measures passed this way should therefore have greater force against judicial review than representative measures.<sup>187</sup> Similarly, Justice Scalia has described direct democracy as the “most democratic of procedures” in support of an argument for minimum rationality review.<sup>188</sup> Cain and Miller identify opinions on judicial review as another area in which Populists, who support greater deference for direct democracy measures, differ from Progressives, who retain

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<sup>184</sup> This discussion focuses on what Alexander Bickel called the “counter-majoritarian difficulty.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962). Bickel argued that “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.” *Id.* at 16-17.

<sup>185</sup> Eule, *supra* note 15, at 1505.

<sup>186</sup> *Id.* at 1506.

<sup>187</sup> Cain & Miller, *supra* note 28, at 54-55; Eule, *supra* note 15, at 1506. Justice Black made the statement during oral arguments of the case *Reitman v. Mulkey*, 387 U.S. 369 (1967). Eule, *supra* note 15, at 1506 (quoting 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 668 (Philip B. Kurland & Gerhard Casper eds., 1975)).

<sup>188</sup> *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting). One wonders, however, if this is actually Justice Scalia’s position on judicial review of direct democracy, or if he simply supported the substance of the particular initiative at issue in this case, which prevented the passage of laws prohibiting discrimination on the basis of sexual orientation.

concerns about the effect of pure majoritarianism on representative government and individual rights.<sup>189</sup>

Eule suggests the Supreme Court has not recognized this potential difference as significant as a matter of constitutional law.<sup>190</sup> If the Court mentions at all that a measure originated under direct democracy, the opinion generally treats the case exactly as it would a measure of representative democracy.<sup>191</sup> The most often cited example of this treatment is Chief Justice Burger's statement that "[i]t is irrelevant that the voters rather than a legislative body enacted [the law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."<sup>192</sup> The Court's record, however, has been slightly inconsistent. Within the context of equal protection jurisprudence, for example, the Court has upheld several initiatives and referenda, praising the measures as expressions of the people, but invalidated others without distinguishing between the cases to scholars' satisfaction.<sup>193</sup> Professor Lazos Vargas argues that this failure is problematic because this lack of analysis leaves lower courts without guidelines as to how to review initiatives and referenda.<sup>194</sup>

The Supreme Court has explicitly rejected more lenient treatment for direct democracy, however. In 1964, the Court refused to sustain a measure simply because it was a result of direct democracy.<sup>195</sup> The decision by Chief Justice Warren reasoned that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections,"<sup>196</sup> asserting, "[a] citizen's

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<sup>189</sup> Cain & Miller, *supra* note 28, at 54.

<sup>190</sup> Eule, *supra* note 15, at 1505 ("The unspoken assumption . . . seems to be that the analysis need not vary as a result of the law's popular origin.").

<sup>191</sup> *Id.* at 1505 & n.5 (noting that, as of 1990, the Court had addressed at least thirty-three ballot measures this way). Eule also suggests that if the Court had acknowledged the popular origin of the measure at issue in other cases, this number would have been higher. *Id.* at 1505 n.5. The Court has held that the validity of the initiative and referendum cannot be challenged on the basis of the Republican Guarantee Clause of Article IV of the Constitution. *Pac. States Tel. & Tel. v. Oregon*, 223 U.S. 118, 149-51 (1912).

<sup>192</sup> *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981). For citations, see Daar, *supra* note 14, at 847 and Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731, 749 n.80 (2000).

<sup>193</sup> Lazos Vargas, *supra* note 115, at 475.

<sup>194</sup> *Id.* at 405 ("[T]he Supreme Court has failed to provide a coherent or even internally consistent analysis of how courts ought to go about reviewing direct democracy measures affecting minority interests and rights.").

<sup>195</sup> *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736 (1964) ("[T]he fact that [a measure] is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act.").

<sup>196</sup> *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (quotation marks omitted)). Federal District Judge Vaughn Walker also made this argument, quoting *Barnette*, in his opinion declaring unconstitutional Proposition 8,

constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”<sup>197</sup> Additionally, Chief Justice Warren quoted with approval the arguments of the dissenting judge in the court below, whose position the Court ultimately adopted:

It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. . . .

It is no answer to say that the approval of the polling place necessarily evidences a rational plan.<sup>198</sup>

Thus, it appears that the Supreme Court makes no distinction between initiatives and referenda and representative legislation.

Professor Eule suggests that arguments for and against judicial review work differently in the context of direct democracy and that courts should review these measures more stringently.<sup>199</sup> Eule emphasizes that direct democracy eliminates the other constitutional filters, leaving the judiciary alone to guard against majoritarianism.<sup>200</sup> Thus he argues:

Where, however, the filtering system has been removed, courts must play a larger role – not because direct democracy is unconstitutional, nor because it frequently produces legislation that we may find substantively displeasing or short sighted, but because the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate.<sup>201</sup>

By placing judicial review in the context of intentional constitutional restraints, Professor Eule identifies the importance of the courts when they represent the sole check on majority will.

Eule also argues that many of the arguments for judicial restraint do not apply to direct democracy as they do to representative measures. While many suggest that judicial review usurps the functions reserved for other branches of government, this Separation of Powers argument is not applicable when state laws are tested against the Federal Constitution.<sup>202</sup> The presumption that

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California’s referendum repealing the state court decision that legalized gay marriage. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994-95 (N.D. Cal. 2010).

<sup>197</sup> *Lucas*, 377 U.S. at 736-37.

<sup>198</sup> *Id.* at 737 n.30 (quoting *Lisco v. Love*, 219 F. Supp. 922, 944 (D. Colo. 1963) (Doyle, J., dissenting)).

<sup>199</sup> Eule, *supra* note 15, at 1507 (“[J]udicial review of direct democracy frequently calls for *less* rather than more restraint.”).

<sup>200</sup> *Id.* at 1525 (“[M]ost of the ways the Constitution devises to filter majority preferences are absent from direct democracy.”).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1534 (arguing that, in these cases, “the supremacy clause of Article VI demands a larger role from the judiciary”).

legislation is constitutional is likewise inapplicable when considering the products of direct democracy.<sup>203</sup> Specifically, Eule asserts, “the Constitution does not ask the voters to assess a measure’s constitutionality,” whereas Article VI does make this requirement of legislators by demanding that they take an oath to support the Constitution.<sup>204</sup> Finally, while many argue that courts should defer to the legislature’s ability to find facts and make policy, Eule presumes that courts perform this function “with a lot more proficiency than the electorate” and thus have no need to restrain themselves on grounds of institutional competence.<sup>205</sup> Thus Eule demonstrates that many of the arguments for judicial restraint are based on the judiciary’s relationship to the legislature and therefore have little bearing on how the judiciary should operate when faced with an act of the electorate directly.

Similarly, many jurisprudential scholars have suggested that certain arguments for judicial restraint do not apply when the Court is addressing state measures, which is necessarily the case with the initiative and referendum. Justice Oliver Wendell Holmes famously asserted, “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”<sup>206</sup> Thus Holmes argued that federal judges are better equipped than state officials to judge the constitutionality of state laws because federal judges are “trained to national views.”<sup>207</sup> Professor Jesse Choper, while arguing that federal courts should not adjudicate claims raising federalism questions, asserted that federal judges should indeed adjudge claims from state actions based on “true constitutional questions of personal rights.”<sup>208</sup> Choper asserts: “In America, the Federal Constitution, not the federal system, seeks to guarantee individual rights; and the federal judiciary, not the processes of state and local government, provides the most effective method for their enforcement.”<sup>209</sup> These ideas, by arguing that federal courts must strictly review the actions of the states generally, lend additional support for Eule’s claim that courts should review actions of the electorate more strictly than decisions of legislations. Together, these analyses

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<sup>203</sup> *Id.* at 1537 (“There is no reason to believe that plebiscite campaigns will address the measure’s constitutionality.”).

<sup>204</sup> *Id.* at 1536-37.

<sup>205</sup> *Id.* at 1538. James B. Thayer’s arguments for judicial deference to a coordinate branch are inapplicable in the case of direct democracy for the same reason. Thayer argued that courts should use his deferential “clear mistake” doctrine when reviewing the actions of a *coordinate* branch. Thayer, *supra* note 95, at 144. The powers of the voters are not coordinate with those of the courts.

<sup>206</sup> OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

<sup>207</sup> *See id.* at 296.

<sup>208</sup> Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1558-59 (1977).

<sup>209</sup> *Id.* at 1619.

provide a strong argument that courts, particularly federal courts, should not defer on the question of validity of an initiative or referendum simply because it is a product of the people.

Professor Eule applies his arguments differently to the various types of direct democracy. He argues for more judicial scrutiny of the indirect initiative or “substitutive plebiscite,” particularly those that deal with individual rights and equal application of laws.<sup>210</sup> Because these processes provide for no deliberation and little public debate, often discourage self-education by appealing to a voter’s worst instincts, and operate under a “one-shot, winner-take-all” system that does not allow for coalitions or trading, the courts should play a bigger role in protecting the Constitution’s guarantees.<sup>211</sup> Judicial review of complementary direct democracy, under Eule’s thesis, depends on the function of the popular vote, even though the measure is first filtered through the legislative process.<sup>212</sup> He suggests that positive votes that endorse the legislative action deserve deference because they uphold measures that have been successfully filtered.<sup>213</sup> In contrast, negative votes, those that obstruct the legislature’s action create dangers of majority tyranny similar to those posed by substitutive plebiscites because they allow a popular majority to block legislation that could impact minority rights.<sup>214</sup> Eule also suggests that the popular referendum is similarly deserving of attentive judicial review because the process “affords an opportunity for inflamed majorities to take away gains that minority groups have struggled to achieve through the representative system.”<sup>215</sup> The various analyses of judicial review of the products of initiatives and referenda demonstrate that the differences between representative and direct democracy may well have legal significance. Many of these differences stem from the failing of the initiative and referenda to sufficiently address concerns regarding individual rights and the risks of bare majoritarianism, factors that the representative political process specifically takes into account. The analyses in turn suggest a lens through which to view the adequacy of direct democracy as a means to address controversial issues, regardless whether these measures are ultimately challenged in court or even enacted at all.

An additional question in the area of judicial review of direct democracy is whether courts should rule on the validity of a proposed measure before it is

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<sup>210</sup> Eule, *supra* note 15, at 1559. Professor Eule uses the terms “direct democracy” and “plebiscite” interchangeably. He also distinguishes between “substitutive” measures – direct initiatives – that bypass the legislature altogether, and “complementary” processes – indirect initiatives and referenda – in which the legislature plays a role. *Id.* at 1510-12; *see also supra* notes 15-22 and accompanying text.

<sup>211</sup> Eule, *supra* note 15, at 1555-56.

<sup>212</sup> *Id.* at 1573 (“Complementary plebiscites are birds of a different feather.”).

<sup>213</sup> *Id.* at 1574.

<sup>214</sup> *Id.* at 1574-75.

<sup>215</sup> *Id.* at 1578.

passed. Professor Stanley Friedelbaum presents arguments in favor of pre-enactment review, describing the perception of the successful initiative as having “the aura of an inviolable option” that cannot be questioned.<sup>216</sup> The argument suggests that courts must address the measure before a winning vote suggests that the measure is inviolable. In contrast, Professor Eule cautions against pre-enactment review, arguing that the judiciary should preserve its resources, given the possibility that the proposed measure will fail.<sup>217</sup> Each of these positions has been advanced at the state court level.

B. *Judicial Review of Abortion Initiatives in Practice: Oklahoma and Wyoming*

Two state courts have specifically addressed the constitutionality of initiative petitions addressing abortion. In 1992, the Supreme Court of Oklahoma struck an initiative from the state ballot because the measure, if enacted, would be unconstitutional under the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>218</sup> The proposed initiative would have criminalized all abortions except in narrow cases of risk to the physical or mental health of the mother, rape, incest, or physical or mental defect of the fetus.<sup>219</sup> Because the prohibition would have applied even to pre-viability abortions, the resulting state law would be in conflict with federal law.<sup>220</sup> The Oklahoma Supreme Court held that the initiative right did not extend to a vote on a measure that would be unconstitutional.<sup>221</sup> The court asserted, “[w]e are required to preserve a woman’s right to make a decision to obtain an abortion before viability to maintain harmony with the law. This position is diametrically opposed to the proposal presented.”<sup>222</sup>

The dissent argued against judicial review prior to a vote on the measure:

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<sup>216</sup> Stanley H. Friedelbaum, *Initiative and Referendum: The Trials of Direct Democracy*, 70 ALB. L. REV. 1003, 1009 (2007).

<sup>217</sup> Eule, *supra* note 15, at 1585-86 (“The judiciary’s ability to command popular acceptance is a limited resource and should not be squandered on hypothetical transgressions.”).

<sup>218</sup> *In re Initiative Petition No. 349*, 838 P.2d 1, 3 (Okla. 1992).

<sup>219</sup> *Id.* at 6

Initiative Petition No. 349 *criminalizes and absolutely prohibits* abortions except in four narrow circumstances: 1) grave impairment of the female’s physical or mental health; 2) rape as defined in 21 O.S.1991 §111; 3) incest as defined in 21 O.S.1991 §885; and 4) grave physical or mental defect of the fetus.

*Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 7 (“While the electorate has a constitutional right to amend the Oklahoma Constitution, it is this Court’s responsibility to see the petitions for change actually reflect the voters [sic] intent and comply with the requirements set out in both the Constitution and the statutes.” (quoting *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990))).

<sup>222</sup> *Id.* at 7-8.

The people have a constitutional right to vent their anger and frustration through the initiative process in an effort to effect change in their government. The proponents are correct that central core political issues such as abortion should be submitted to a vote of the people when presented by an initiative petition. . . . A healing between competing sides of the abortion question may never be reached but perhaps, if allowed, a vote of the people could be a beginning.<sup>223</sup>

The majority, in rejecting this view, acknowledged that a possible purpose of such petitions could be to provide a “test case” in the event that federal law was changed; however, the judges identified a change in federal constitutional law on abortion as the ultimate goal implicit in the initiative.<sup>224</sup> The Oklahoma Supreme Court rejected this use of direct democracy, holding that the initiative process “was never intended to be a vehicle for amending the United States Constitution – nor can it serve that function in our system of government.”<sup>225</sup> The opinion further explained:

The danger . . . is that, in effect, citizens may be led to believe that their votes on matters of intense public concern count, when this Court is already fully aware that the proposed measure is subject to being struck down as unconstitutional within months should the voters approve it. Conversely, the vote on an indisputably unconstitutional measure will almost certainly be distorted by wide-spread citizen awareness of the invalidity of the measure. In any event, a truly meaningful vote on the initiative becomes impossible.<sup>226</sup>

Thus, in this case, the state court did not allow a vote on a measure that would impose unconstitutional regulation on the right to abortion, even as an inquiry into public opinion or expression of constitutional interpretation.

In 1994, the Supreme Court of Wyoming addressed a similar issue. The court in that case ultimately allowed the initiative measure to remain on the ballot only because the measure was not unconstitutional in its entirety.<sup>227</sup> The opinion held, nevertheless, that the court would invalidate an initiative that, if enacted, would contradict the constitution before the popular vote.<sup>228</sup> The court reasoned, “if such a measure were clearly unconstitutional, there would be no purpose in submitting it to the electorate under the initiative process. The initiative process was designed and intended for a different purpose than

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<sup>223</sup> *Id.* at 14 (Hodges, V.C.J., concurring in part, dissenting in part).

<sup>224</sup> *Id.* at 10.

<sup>225</sup> *Id.* at 11, 11 n.24 (citing *Hawke v. Smith*, 253 U.S. 221, 230-31 (1920) for the point that the use of direct democracy procedures to alter the federal Constitution is a violation of Article V).

<sup>226</sup> *Id.*

<sup>227</sup> *Wyo. Nat’l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 283-34 (Wyo. 1994).

<sup>228</sup> *Id.* at 288.

simply providing a formal straw vote.”<sup>229</sup> In this case, the court determined that one provision of the proposed initiative would violate existing abortion law.<sup>230</sup> It was only because other provisions in the same initiative would have been constitutional if enacted that the court allowed a popular vote in this case.<sup>231</sup> The Oklahoma and Wyoming cases demonstrate judicial treatment of abortion initiatives that, if enacted, would be unconstitutional. These cases suggest judicial disapproval of such initiatives, even for purposes of political expression or advocacy of constitutional change.

#### V. PERSONHOOD MEASURES AS A FORM OF SOCIAL MOVEMENT POPULAR CONSTITUTIONALISM

An alternative explanation for initiatives addressing abortion, particularly those taking extreme positions such as the personhood measures, is that advocates intend to alter the way citizens and officials think about political issues rather than to change existing law immediately. While many supporters of personhood measures explicitly state goals of changing abortion law and prompting a legal challenge to be answered in the Supreme Court, other rationales suggest that pro-life advocates are also trying to gain momentum for their cause. For example, Keith Mason, cofounder of Personhood USA, says that the organization’s goal is “to activate the population.”<sup>232</sup> Similarly, Kristi Burton’s continued efforts after her proposal was defeated in Colorado suggests that she also intended to alter the broader legal culture.<sup>233</sup> Additionally, one of the purported benefits of direct democracy generally is to “promote government responsiveness and accountability” by providing an alternate avenue through which citizens can voice their concerns.<sup>234</sup>

These broader rationales for personhood movements suggest that such initiatives might be characterized as a form of social movement popular constitutionalism by which “popular social movements outside the courts transform the norms that ultimately are accepted by the courts.”<sup>235</sup> Professor Reva Siegel, a prominent legal scholar in this area, suggests that “citizens can

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (“The proposed initiative makes no allowance for a woman’s pre-viability decision with respect to a non-therapeutic abortion. If it were adopted, it could not withstand challenges under the rule of *Roe* and *Casey*, and it clearly would be unconstitutional under those standards.”).

<sup>231</sup> *Id.* at 289. It appears, however, that this abortion initiative was never submitted to the Wyoming electorate for a vote. See *supra* note 61.

<sup>232</sup> Abcarian, *supra* note 1.

<sup>233</sup> See Kliff, *supra* note 152. Burton stated “this is a start, and now we need to keep going.” *Id.*

<sup>234</sup> CRONIN, *supra* note 12, at 10.

<sup>235</sup> James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377, 1379-80 (2005).

shape constitutional understanding without amending the Constitution.”<sup>236</sup> Professor Mathew Manweller also specifically likens direct democracy campaigns to social movements.<sup>237</sup> Manweller characterizes the majority of those who spearhead abortion-related initiatives as “zealots.”<sup>238</sup> He describes zealots as “very passionate about [the] initiative’s topic” and “unwilling to compromise, even if compromise leads to a scaled back level of success.”<sup>239</sup> He also acknowledges that zealots use direct democracy to challenge the legal system as it stands, and are thus unlikely to see their initiatives upheld by courts, or even qualified for the ballot.<sup>240</sup>

Manweller also argues that homogeneous-zealot coalitions have “behavioral pathologies” that can be self-destructive.<sup>241</sup> One of these pathologies Manweller characterizes as a “bunker mentality,” the view that initiative drafters and activists adopt in which they are leading a political crusade against dissenters and skeptics.<sup>242</sup> One of the failings of this approach, which Manweller identifies as common among pro-life advocates, is the tendency to use legal precedent and advice only to the extent that such information would support the initiative, but never as an opportunity to address potential failings and strengthen the measure.<sup>243</sup> Another problematic behavior that homogeneous-zealous initiative campaigns have in common with social movements is the fact that, for these participants, legislative success is not necessarily a short run goal.<sup>244</sup> Thus, it is possible for these groups to pursue strategies that seem illogical but actually further a broader agenda. Manweller suggests that initiative campaigns, like social movements, may be waged in order to challenge existing law, to send a political message by attracting attention, or to weaken opposition interest groups by forcing them to commit resources to oppose the initiative.<sup>245</sup>

Additionally, Professor Siegel and Professor Robert Post have used this conception to describe citizen action in response to abortion jurisprudence. They point out that, while many criticized *Roe v. Wade* as a decision that should not have been made by the courts, others reacted to the substance of the

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<sup>236</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1340 (2006) (describing “many forms of popular engagement in constitutional advocacy [and] the responsiveness of officials to such advocacy”).

<sup>237</sup> MATHEW MANWELLER, *THE PEOPLE VERSUS THE COURTS* 134 (2004).

<sup>238</sup> *Id.* at 42.

<sup>239</sup> *Id.* at 41.

<sup>240</sup> *Id.* at 45.

<sup>241</sup> *Id.* at 162-63.

<sup>242</sup> *Id.* at 167-68.

<sup>243</sup> *See id.* at 169 (discussing the way some initiative drafters take the “lawyer as lifeline” approach, relying on lawyers to “indicate what is possible rather than what is probable”).

<sup>244</sup> *See id.* at 173.

<sup>245</sup> *Id.* at 173-74.

constitutional reasoning<sup>246</sup> – with “*Roe* rage.”<sup>247</sup> Post and Siegel then suggest that, while a jurisprudential critique may be useful to advance professional disapproval of a decision, advocates of a particular position will also engage in a popular debate in order to “mobilize citizens to exert political pressure to alter constitutional meaning.”<sup>248</sup> The analysis continues:

Progressive accounts of *Roe* rage conflate professional and popular critique in just this way. Although it is commonly asserted that *Roe* rage was a response to judicial overreaching, a number of historians have demonstrated that political mobilization against the liberalization of abortion began well before *Roe* and challenged all efforts, both legislative and adjudicative, to reform criminal abortion laws. Americans who entered politics to oppose *Roe* were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy.<sup>249</sup>

Thus viewing abortion initiatives and referenda through the lens of social movement popular constitutionalism suggests that personhood initiatives in particular may be aimed at shaping popular views rather than affecting abortion law directly.

The development of the personhood movement over the past few years demonstrates the effects of social movement popular constitutionalism. Following years of pro-life attempts to restrict abortion rights incrementally, the movement has been steadily growing.<sup>250</sup> After failures to garner enough signatures in Mississippi, Michigan, and Georgia in 2005, 2006, and 2007, respectively, placement of Burton’s 2008 initiative has been followed by a nationwide movement.<sup>251</sup> Today Personhood USA has thirty-seven state-level affiliates, many of which are gathering signatures for initiative petitions.<sup>252</sup> This progress suggests that the personhood movement may present exactly the type of discussion proliferation that social movement popular constitutionalists seek in order to begin to alter constitutional culture outside the courts.

While the theory underlying advocacy of social movement popular constitutionalism is sound, direct democracy is not an appropriate means through which to gauge and mobilize support for a particular position on abortion. The fact that many view an initiative as merely symbolic, with little

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<sup>246</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 410 (2007) (“[J]urisprudential objection by itself is rarely sufficient to inspire a political movement capable of altering the complexion of constitutional politics.”).

<sup>247</sup> *Id.* at 377.

<sup>248</sup> *Id.* at 410.

<sup>249</sup> *Id.* at 410-11.

<sup>250</sup> See Bauer, *supra* note 74, at C25; Kliff, *supra* note 152.

<sup>251</sup> See Kliff, *supra* note 152 (reporting that after the three failed attempts, new personhood campaigns “kick off regularly”).

<sup>252</sup> *Id.*; see also Bauer, *supra* note 74, at C25.

or no chance of becoming law or withstanding challenge in court, does not reduce the problems that direct democracy presents in addressing certain issues. Additionally, a vote on a measure that is obviously unconstitutional under existing doctrine is a skewed means through which to gauge public opinion and promote constitutional understanding.<sup>253</sup> This reasoning on the potential failure of voters to take an initiative such as the personhood measure seriously for a variety of reasons suggests that direct democracy provides a poor means through which to advocate constitutional change. The Supreme Court of Oklahoma articulated this position well, stating: "If enacted, [the measure] could not withstand a *Casey*-based challenge; and, at best, it would serve as an expensive, non-binding public opinion poll. Were we to allow the initiative to be submitted to the people, a costly, fruitless, and useless election would take place."<sup>254</sup> The above analysis on the perils of using direct democracy to address abortion demonstrates that a publicly-funded, official election is not an appropriate or effective way to pursue social movement popular constitutionalism.

#### CONCLUSION

Recent years have seen a trend toward addressing regulation of abortion rights through the initiative and referendum. The 2010 and 2011 elections could be significant for this movement, as several states are working towards placing these measures on their ballots. Research into these movements demonstrates that these propositions may reflect efforts to challenge existing law and efforts to effect change among the way citizens and scholars think about abortion rights. Although neither the practices of direct democracy themselves or their use to address controversial social issues including abortion is new, legal analysts and courts alike have not yet reached unshakable conclusions about the merits or constitutionality of these measures.

The decisions of the Oklahoma and Wyoming Supreme Courts provide well-reasoned opinions by which to analyze this issue, but the dearth of Federal Supreme Court doctrine on the issue of direct democracy generally and the emergence of personhood initiatives suggest that this issue will continue to pose questions. Analyses of direct democracy demonstrate, however, that the initiative and referendum are not appropriate means to address the issue of abortion rights and regulations. These measures allow a majority to infringe on an individual right that is constitutionally protected under federal law. The presence of well-organized and well-funded interest groups has the potential to distort and manipulate a popular vote on the issues. The difficulties inherent in direct democracy generally and abortion regulation specifically will result in poorly-informed choices by voters who may not realize or comprehend the implications of their votes. Finally, direct democracy processes do not facilitate the kind of deliberation that is necessary to address the abortion

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<sup>253</sup> See *supra* note 226 and accompanying text.

<sup>254</sup> *In re* Initiative Petition No. 349, 838 P.2d. 1, 12 (Okla. 1992).

question. These problems present failures of civic virtue, as voters alone are unable to translate their preferences and needs into an acceptable policy.

#### EPILOGUE

On November 2, 2010, Colorado voters rejected Amendment 62 by a margin of 71% to 29%.<sup>255</sup> Against support from Personhood USA,<sup>256</sup> Planned Parenthood and NARAL reinforced opponents of the measure,<sup>257</sup> demonstrating increasing national interest group involvement in local direct democracy campaigns on controversial issues such as abortion. The amendment's opponents assert, however, that their campaign was successful in "educating voters on the far-reaching consequences of this measure,"<sup>258</sup> suggesting that pro-choice advocates are aware of the particular dangers inherent in presenting abortion questions directly to the voters. Because the personhood movement plans to try again, both in Colorado and across the country,<sup>259</sup> policymakers, judges, and voters alike should carefully consider the implications of addressing the abortion issue through direct democracy.

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<sup>255</sup> *Colorado Amendment 62: Definition of a Person*, CNN (Nov 3, 2010, 7:03 PM), <http://www.cnn.com/ELECTION/2010/results/individual/#COI01>.

<sup>256</sup> Keith Mason, *Amendment 62 Continues Long Road to Victory by Gaining Percentage Points over 2008*, PERSONHOOD USA (Nov. 3, 2010, 9:13 PM), <http://www.personhoodusa.com/press-release>.

<sup>257</sup> Electa Draper, *The Colorado Vote Amendment 62 "Personhood" Initiative Sinks by 3-1 Margin*, DENVER POST, Nov. 3, 2010, at B-02.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*; Keith Mason, *supra* note 256.

APPENDIX A: STATE DIRECT DEMOCRACY STATISTICS, BY PROCESS<sup>260</sup>

State	Date Adopted*	Initiative Available		Popular Referendum		Legislative Referendum	
		Amendment	Statute	Amendment	Statute	Amendment	Statute
AL	—	NO	NO	NO	NO	YES	NO
AK	1956	NO	YES	YES	YES	YES	NO
AZ	1911	YES	YES	YES	YES	YES	YES
AR	1910	YES	YES	YES	YES	YES	YES
CA	1911	YES	YES	YES	YES	YES	YES
CO	1912	YES	YES	YES	YES	YES	NO
CT	—	NO	NO	NO	NO	YES	NO
DE	—	NO	NO	NO	NO	NO	YES
DC <sup>261</sup>	1970	N/A	YES	N/A	YES	N/A	NO
FL	1972	YES	NO	NO	NO	YES	NO
GA	—	NO	NO	NO	NO	YES	NO
HI	—	NO	NO	NO	NO	YES	NO
ID	1912	NO	YES	YES	YES	YES	YES
IL	1970	YES	NO	NO	NO	YES	YES
IN	—	NO	NO	NO	NO	YES	NO
IA	—	NO	NO	NO	NO	YES	NO
KS	—	NO	NO	NO	NO	YES	NO
KY	1910	NO	NO	YES	YES	YES	YES
LA	—	NO	NO	NO	NO	YES	NO
ME	1908	NO	YES	YES	YES	YES	YES
MD	1915	NO	NO	YES	YES	YES	YES
MA	1918	YES	YES	YES	YES	YES	YES
MI	1908	YES	YES	YES	YES	YES	YES
MN	—	NO	NO	NO	NO	YES	NO
MS	1914/1992	YES	NO	NO	NO	YES	NO
MO	1908	YES	YES	YES	YES	YES	YES
MT	1904/1972	YES	YES	YES	YES	YES	YES
NE	1912	YES	YES	YES	YES	YES	YES
NV	1905	YES	YES	YES	YES	YES	YES
NH	—	NO	NO	NO	NO	YES	NO
NJ	—	NO	NO	NO	NO	YES	NO
NM	1911	NO	NO	YES	YES	YES	YES
NY	—	NO	NO	NO	NO	YES	NO

<sup>260</sup> DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 217-311 (1989); *State I & R*, INITIATIVE & REFERENDUM INST. AT U.S.C., [http://www.iandrinstute.org/statewide\\_i%26r.htm](http://www.iandrinstute.org/statewide_i%26r.htm) (last visited Nov. 1, 2010); *States with Legislative Referendum (LR) for Statutes and Constitutional Amendments*, *supra* note 47.

<sup>261</sup> Daar, *supra* note 14, at 833 n.163.

State	Date Adopted*	Initiative Available		Popular Referendum		Legislative Referendum	
		Amendment	Statute	Amendment	Statute	Amendment	Statute
NC	—	NO	NO	NO	NO	YES	NO
ND	1914	YES	YES	YES	YES	YES	YES
OH	1912	YES	YES	YES	YES	YES	YES
OK	1907	YES	YES	YES	YES	YES	YES
OR	1902	YES	YES	YES	YES	YES	YES
PA	—	NO	NO	NO	NO	YES	NO
RI	—	NO	NO	NO	NO	YES	NO
SC	—	NO	NO	NO	NO	YES	NO
SD	1898/ 1972/1988	YES	YES	YES	YES	YES	YES
TN	—	NO	NO	NO	NO	YES	NO
TX	—	NO	NO	NO	NO	YES	NO
UT	1900/1917	NO	YES	YES	YES	YES	YES
VT	—	NO	NO	NO	NO	YES	NO
VA	—	NO	NO	NO	NO	YES	NO
WA	1912	NO	YES	YES	YES	YES	YES
WV	—	NO	NO	NO	NO	YES	NO
WI	—	NO	NO	NO	NO	YES	NO
WY	1968	NO	YES	YES	YES	YES	NO
<b>Totals</b>		18 States	21 States + DC	24 States	24 States + DC	49 States	23 States
		24 States + DC		24 States + DC		50 States	

\*Refers to adoption of popular initiative and/or referendum only

APPENDIX B: STATE DIRECT DEMOCRACY STATISTICS, BY TARGET<sup>262</sup>

State	Constitutional Amendments	Statutes
AL	Legislative Referendum	None
AK	Popular Referendum Legislative Referendum	Initiative Popular Referendum
AZ	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
AR	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
CA	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
CO	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum
CT	Legislative Referendum	None
DE	None	Legislative Referendum
DC <sup>263</sup>	n/a	Initiative Popular Referendum
FL	Initiative	None
GA	Legislative Referendum	None
HI	Legislative Referendum	None
ID	Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
IL	Initiative Legislative Referendum	Legislative Referendum
IN	Legislative Referendum	None
IA	Legislative Referendum	None
KS	Legislative Referendum	None
KY	Popular Referendum Legislative Referendum	Popular Referendum Legislative Referendum
LA	Legislative Referendum	None
ME	Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum

<sup>262</sup> SCHMIDT, *supra* note 260; *State I & R*, *supra* note 260; *States with Legislative Referendum (LR) for Statutes and Constitutional Amendments*, *supra* note 47.

<sup>263</sup> Daar, *supra* note 14, at 833 n.163.

<b>State</b>	<b>Constitutional Amendments</b>	<b>Statutes</b>
MD	Popular Referendum Legislative Referendum	Popular Referendum Legislative Referendum
MA	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
MI	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
MN	Legislative Referendum	None
MS	Initiative	None
MO	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
MT	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
NE	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
NV	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
NH	Legislative Referendum	None
NJ	Legislative Referendum	None
NM	Popular Referendum Legislative Referendum	Popular Referendum Legislative Referendum
NY	Legislative Referendum	None
NC	Legislative Referendum	None
ND	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
OH	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
OK	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
OR	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
PA	Legislative Referendum	None
RI	Legislative Referendum	None

<b>State</b>	<b>Constitutional Amendments</b>	<b>Statutes</b>
SC	Legislative Referendum	None
SD	Initiative Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
TN	Legislative Referendum	None
TX	Legislative Referendum	None
UT	Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
VT	Legislative Referendum	None
VA	Legislative Referendum	None
WA	Popular Referendum Legislative Referendum	Initiative Popular Referendum Legislative Referendum
WV	Legislative Referendum	None
WI	Legislative Referendum	None
WY	Popular Referendum Legislative Referendum	Initiative Popular Referendum
<b>Totals</b>	49 states	26 states + DC