

WHEN A MAJORITY DOES NOT RULE: HOW SUPERMAJORITY REQUIREMENTS ON VOTER INITIATIVES DISTORT ELECTIONS AND DENY EQUAL PROTECTION

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INTRODUCTION

When voters in Washington state went to the polls on November 6, 2007, they faced six ballot questions and a slate of candidates running for various local and state offices.¹ The measures included one citizen-sponsored initiative, one legislature-approved referendum, and four proposed state constitutional amendments that the legislature had passed already.² Voters approved the citizen-sponsored initiative by a narrow margin, 51% to 48%.³ The initiative required that a supermajority of the legislature approve a statewide tax increase before it can become law.⁴ In effect, Washington voters imposed a supermajority on its elected officials to raise taxes, and on the very same ballot, they approved a measure that eliminated a supermajority requirement on voters.⁵ The state constitution required 60%

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¹ Wash. Sec'y of State Sam Reed, 2007 General Election Results, http://www.secstate.wa.gov/elections/previous_elections.aspx (follow "2007 General Results" hyperlink) (last visited March 29, 2008) [hereinafter *Wash. 2007 Gen. Election Results*].

² *Id.* A note on terminology is appropriate. There are several different kinds of initiatives and referendum. States can have direct initiatives, whereby a citizen-proposed law takes effect if it wins at the polls, or indirect initiatives, which enable legislatures to alter or disapprove of the proposal. Many states have statutory initiatives, which have the effect of a state law when passed. Several states also have an initiative process for constitutional amendments. On the referendum side, typically the referendum is a law or constitutional amendment first passed by the legislature and then submitted to the citizenry for their approval in the next election. Both initiatives and referendum are considered forms of direct democracy, since citizens are actively engaged in the legislative process.

³ *Id.*

⁴ Wash. Sec'y of State Sam Reed, Initiative Measure 960, <http://vote.wa.gov/Elections/Measure2007.aspx?a=960&c=2> (last visited March 29, 2008) [hereinafter *Initiative Measure 960*]; see also Chris McGann, *Initiatives: Insurance Reform Gets a Big Yes From Voters, Eyman Measure Finds Strong Support Outside King County*, SEATTLE POST-INTELLIGENCER, Nov. 7, 2007, at A10, available at http://seattlepi.nwsourc.com/local/338609_otherinits07.html ("I-960 is complex, and the opposing camps are in stark disagreement about what it would actually do.").

⁵ Compare Initiative Measure 960, *supra* note 4, with Wash. Sec'y of State Sam Reed, Engrossed House Joint Resolution 4204, <http://vote.wa.gov/Elections/Measure2007.aspx?a=4204&c=7> (last visited

of voters to approve school property-tax levies for passage.⁶ Although there was no organized opposition to repealing this supermajority (it is not easy politically to oppose funds for school children), the measure barely passed—50.6% to 49.3%.⁷ The obvious question is why did Washington voters want a supermajority requirement to apply to their elected officials, but not to themselves? Was it the context that mattered—raising statewide taxes versus raising local funds for area schools? Was it distrust in elected representatives, resentment of increasing tax burdens, or a desire to acquire more legislative power for themselves? None of these queries are perfectly answerable. Perhaps many voters were not even aware of their seeming inconsistency on supermajorities when they cast their ballots.

Supermajorities exist in statutory and constitutional schemes at several levels.⁸ The rationales for imposing supermajority requirements differ, though in many cases they are intended for “extraordinary actions.”⁹ Washington voters were not the first—and likely will not be the last—to consider a supermajority issue in a ballot question.¹⁰ In 1998, voters and legislators in Utah chose to enact a new regulation on their initiative process.¹¹ They amended the Utah Constitution to read: “legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.”¹² Voter initiatives requiring supermajorities are more the exception than the rule—nearly all electoral measures in Utah are subject only to a majority vote.¹³

March 29, 2008). The measure was titled Engrossed House Joint Resolution 4204—Proposed to the People by the Legislature—Amendment to the State Constitution.

⁶ See Howard Buck, *Election 2007: Supermajority's Days Numbered?*, COLUMBIAN (Wash.), Oct. 19, 2007, at A1, available at http://www.columbian.com/news/localNews/2007/10/10192007_Election-2007-Supermajoritys-days-numbered.cfm.

⁷ Op-Ed, *A Simple “Yes” on Simple Majority*, SEATTLE TIMES, Nov. 2, 2007, at B6, available at 2007 WLNR 21704519; *Wash. 2007 Gen. Election Results*, *supra* note 1.

⁸ The United States Constitution includes numerous provisions requiring a legislative supermajority. See *infra* note 50 and accompanying text. A number of states have supermajority requirements for various measures, such as tax increases, and local governments often require them for zoning and tax measures. Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133, 137-38 (1999).

⁹ BLACK'S LAW DICTIONARY 975 (8th ed. 2004). The full definition of supermajority is: “A fixed proportion greater than half, such as two-thirds, esp. a percentage required for a measure to pass. Such a majority is needed for certain extraordinary actions, such as ratifying a constitutional amendment or approving a fundamental corporate change.” *Id.*

¹⁰ See *Gordon v. Lance*, 403 U.S. 1, 3 (1971).

¹¹ S.J. Res. 10, 52d Leg., Gen. Sess. (Utah 1998). The Utah state legislature passed Senate Joint Resolution 10, which became Proposition 5, on February 25, 1998. The proposition asked, “Shall the Utah Constitution be amended to require a two-thirds vote in order to adopt by initiative a state law allowing, limiting, or prohibiting the taking of wildlife or the season for or method of taking wildlife?”

¹² UTAH CONST. art. VI, § 1(2)(a)(ii).

¹³ *Petition for Writ of Certiorari at 2, Initiative and Referendum Inst. v. Herbert*, 127 S. Ct. 1254 (2007) (No. 06-534), 2006 WL 2985280 (“No initiative measure in any other subject must satisfy a content-based supermajority requirement before it can become law.”). *But see* UTAH CONST. art. XI, § 2

When wildlife groups argued that this heightened standard was unconstitutional, the Tenth Circuit disagreed.¹⁴ The Tenth Circuit ruled that the regulation raised no freedom of speech issues.¹⁵ Neither the Utah District Court nor the Tenth Circuit addressed possible violations of the Equal Protection Clause.¹⁶

This Comment argues that supermajority requirements on voter initiatives without a legitimate public purpose violate the Equal Protection Clause. Such regulations impermissibly impact the electoral process by failing to treat votes in the same manner and with the same weight.¹⁷ While voting rights cases under the Equal Protection Clause are commonly thought to involve individual rights—such as the notion of one person/one vote—a group or aggregate rights framework is a more instructive lens through which to view these cases.¹⁸ Part I briefly discusses the history and scope of voter initiatives—how and why they are used, and the role of supermajorities within and outside of the initiative context. Throughout this Comment, the Utah supermajority requirement on wildlife initiatives provides a useful tool to understand how supermajorities work in practice. Therefore, Part II analyzes in depth the Tenth Circuit’s opinion upholding Utah’s supermajority, and pays particular attention to the views of a dissenting judge. Part III discusses the historic constitutionality of supermajorities and argues that courts should view supermajorities within the initiative context with suspicion because of the likelihood that they harm a political group. Part IV proposes a framework for approaching supermajorities by viewing voting rights as aggregate rights under the Equal Protection Clause.

I. BACKGROUND

A. *Voter Initiatives*

Thomas Jefferson famously advocated for a federal Constitution that each generation would amend.¹⁹ His view reflected the republican ideal that all citizens should participate regularly and actively in a democracy.²⁰ By requiring frequent changes to the Constitution, the Founders could ensure

(“A county seat may be moved only when at a countywide general election two-thirds of those voting on the proposition vote in favor of moving the county seat.”).

¹⁴ Initiative and Referendum Inst. v. Walker, 450 F.3d 1082, 1098-99 (10th Cir. 2006) (en banc).

¹⁵ *Id.* at 1100-01.

¹⁶ Initiative and Referendum Inst. v. Walker, 161 F. Supp. 2d 1307 (D. Utah 2001), *aff’d*, 450 F.3d 1082 (10th Cir. 2006).

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part IV.B.

¹⁹ See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 12-13 (5th ed. 2005).

²⁰ *Id.* at 12.

that citizens would be engaged in the issues of the day. Over two hundred years and just twenty-seven amendments later, it is clear that Jefferson's proposal has not carried the day. However, citizen engagement is very much alive at the state level, where twenty-four states allow citizens to place initiatives on the ballot.²¹ Some of these states allow initiatives both to amend the state constitution and initiatives to enact a specific statute.²²

Ballot initiatives were born in the Progressive Era as a means to check state legislatures, increase voter turnout, measure public interest and support for various causes, and enact public policies that state legislators would not or could not make law themselves.²³ In the states that permit the initiative process, it has been a popular means to effect change—or at the very least to bring issues to the forefront of the public's attention—and it is becoming increasingly so.²⁴ In the 1970s, there were 183 statewide votes on initiatives.²⁵ There was a 30% increase in the next decade, and by the 1990s, there were nearly four hundred initiatives.²⁶ In the 2006 elections alone, there were seventy-nine initiatives on which state voters cast their ballots—the third highest since the initiative process was first used in 1902.²⁷ Despite its popularity, however, the initiative process is by no means an easy road to success; from 1900 to 2002, more than two thousand initiatives appeared on ballots, and voters approved about eight hundred of these measures.²⁸

The low success rate may be due in part to the fact that citizens often employ initiatives to take especially important or divisive issues directly to the voters.²⁹ In recent years, citizens have voted on initiatives to institute term limits, legalize marijuana, alter primary voting systems, and regulate

²¹ Initiative and Referendum Inst., State I&R, http://www.iandrinstitute.org/statewide_i&r.htm (last visited April 10, 2008). Twenty-one of these states allow either direct or indirect initiatives for statutes. Three states (Florida, Illinois, and Mississippi) do not allow statutory initiatives, but do allow initiatives and legislative referendum to amend the state constitution. Nat'l Conference of State Legislatures, *The Initiative and Referendum States* (Feb. 27, 2007), <http://www.ncsl.org/programs/legismgt/elect/irstates.htm>.

²² Nat'l Conference of State Legislatures, *supra* note 21.

²³ DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* 3 (2004).

²⁴ NAT'L CONFERENCE OF STATE LEGISLATURES, *FINAL REPORT AND RECOMMENDATIONS OF NCSL I&R TASK FORCE 1 (2002)* [hereinafter NCSL I&R TASK FORCE], http://www.ncsl.org/programs/legismgt/irtaskfc/IandR_report.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ INITIATIVE AND REFERENDUM INST., *INITIATIVE USE 1904-2006*, at 1 (2006), [http://www.iandrinstitute.org/IRI%20Initiative%20Use%20\(2006-11\).pdf](http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(2006-11).pdf).

²⁸ SMITH & TOLBERT, *supra* note 23, at xiii.

²⁹ *See id.*

abortion.³⁰ Since the beginning, special interest groups have used the initiative process to advance their policies or to block their opponents' attempts at reform.³¹ For example, during the early 1900s, voters in four states refused to give women the right to vote, several states opposed Prohibition measures, and industrialists succeeded in a number of states in blocking initiatives to limit the workday to eight hours.³² Since those early days, an "initiative industrial complex" has developed, giving rise to full-time consultants and year-round campaigns to build war chests in preparation for election years.³³ As the initiative process has become more institutionalized, spending, not surprisingly, has skyrocketed; by the 1930s, the costs of some initiative campaigns began to run into the millions of dollars, and by 1998, groups spent over sixty million dollars on just one California proposition alone.³⁴ Despite this increasing institutionalism and criticism from scholars and political elites, the voting public continues to view the initiative as a positive aspect of the electoral process.³⁵

Given the significance and frequency of voter initiatives, states highly regulate the process, as they do with all election procedures.³⁶ Courts understand that "[s]ubstantial state regulation is a prophylactic that keeps the democratic process from disintegrating into chaos."³⁷ In many states that have an initiative process, the state allows both statutory and constitutional initiatives.³⁸ When both kinds of initiatives are available, citizens often choose to amend the constitution, if it is not more difficult to do so, because a state legislature is less likely to repeal a constitutional amendment than a

³⁰ See MATHEW MANWELLER, *THE PEOPLE VERSUS THE COURTS: INITIATIVE ELITES, JUDICIAL REVIEW AND DIRECT DEMOCRACY IN THE AMERICAN LEGAL SYSTEM* 7 (2004); SMITH & TOLBERT, *supra* note 23, at xiii.

³¹ SMITH & TOLBERT, *supra* note 23, at 27-28; see also Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 *DRAKE L. REV.* 971, 982 (2007) ("Proponents of initiatives and referenda likewise argue that special interest politics play a smaller role in direct democracy campaigns than they do in the state legislative process.").

³² SMITH & TOLBERT, *supra* note 23, at 27-28.

³³ Todd Donovan et al., *Political Consultants and the Initiative Industrial Complex*, in *DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 101, 101 (Larry J. Sabato et al. eds., 2001).

³⁴ Daniel Smith, *Campaign Financing of Ballot Initiatives in the American States*, in *DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA*, *supra* note 33, at 71, 75-77.

³⁵ SMITH & TOLBERT, *supra* note 23, at 70-71. *Contra* NCSL I&R TASK FORCE, *supra* note 24, at 1 (arguing that in states where the process is used with high frequency, there are seeds of frustration and citizens and legislators are voicing their opposition to the process. Indicative of the problems with the process is NCSL's own formation of a committee to review the various state systems, and to recommend specific changes to improve these systems).

³⁶ See *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

³⁷ *Perez-Guzman v. Gracia*, 346 F.3d 229, 238 (1st Cir. 2003).

³⁸ See *Initiative & Referendum Inst.*, *supra* note 21.

statute.³⁹ Many states limit the subject matter of initiatives, or allow the legislature to put an alternative reform on the ballot as another option for voters.⁴⁰ States also regulate the process leading up to an initiative's placement on a ballot, for example, by requiring that a state official review the draft initiative for substantive or technical problems.⁴¹ State officials regulate who drafts the petition and ballot titles and summaries; whether a fiscal analysis is needed and where it is published if necessary; how to challenge the fiscal analysis or ballot title; whether you need signatures of supporters before the ballot title is drafted or after; who may circulate petitions; how many signatures are needed; how these signatures are certified; and many other detailed aspects of the process.⁴² States can also require that initiatives receive more than 51% of the vote to pass—so called supermajority requirements.⁴³ In effect, many of these requirements limit how citizens participate in elections, on what issues they can participate, and how effective their participation is.

The United States Supreme Court has acknowledged the strong interest—indeed, the duty—that states have to regulate the election process.⁴⁴ Article I of the United States Constitution specifically commits this power to the states for determining the time, place, and manner of federal elections.⁴⁵ While there is nothing in the Constitution regarding the initiative process, courts have long upheld states' power to create and implement such a system, so long as the regulations comport with the United States Constitution.⁴⁶

³⁹ NCSL I&R TASK FORCE, *supra* note 24.

⁴⁰ *Id.* at 14-15.

⁴¹ *Id.* at 23.

⁴² *Id.* at 25-38.

⁴³ See NCSL I&R TASK FORCE, *supra* note 24, at 57-62. There are other ways to institute a supermajority, such as by requiring that the votes cast on an initiative equal a certain percentage of total votes cast in the election. See *id.* at 58-59.

⁴⁴ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (“States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992))).

⁴⁵ U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed by each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

⁴⁶ See *Meyer v. Grant*, 486 U.S. 414, 424, 428 (1988) (holding that a state statute prohibiting the payment of petition circulators must comply with the First Amendment).

B. *Supermajorities*

While there is no textual support in the United States Constitution for a state initiative process, there are several references to supermajorities.⁴⁷ Some scholars have argued that supermajority rules underlie the federal Constitution and contribute to creating an effective government.⁴⁸ Scholars point to the Federalist papers and to the text of the Constitution itself both in support of supermajorities and to argue that the Founding Fathers wanted only to use supermajorities in extraordinary circumstances.⁴⁹ The Constitution includes several requirements for supermajorities, such as overriding a Presidential veto and ratifying a treaty.⁵⁰ Politicians and scholars have focused renewed attention on supermajorities since 1994, when the United States House of Representatives voted to require a two-thirds vote of that body to approve any federal income tax increase.⁵¹

At the heart of the academic debate on supermajorities is whether they subvert fundamental American principles, or improve the functioning of government.⁵² For example, scholars argue that supermajority requirements on the Congress help shield policymaking from the significant influences of special interests, and require representatives to come to a consensus and not to be overly responsive to the ever-changing whims of the public on hot-button issues.⁵³ On the other side of this debate are those who argue that a core principle of American democracy is that a majority rules, and therefore

⁴⁷ Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, the Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L. J. 363, 372 n.25 (1998).

⁴⁸ John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705-07 (2002); Somini & Devins, *supra* note 31, at 998 (“[T]he much-criticized supermajority requirements of Article V [of the U.S. Constitution] may help mitigate theangers of political ignorance.”).

⁴⁹ King, *supra* note 47, at 388-94 (1998) (explaining the source for arguments that Madison opposed supermajorities and the sources for those who argue Madison supported supermajorities).

⁵⁰ U.S. CONST. art. I, § 3, cl. 6 (impeachment); U.S. CONST. art. I, § 5, cl. 2 (expelling a member of the House or Senate); U.S. CONST. art. I, § 7, cl. 2 (overriding a Presidential veto); U.S. CONST. art. II, § 2, cl. 2 (treaty power); U.S. CONST. art. V (amending the Constitution); *see also* King, *supra* note 47.

⁵¹ Michael Wines, *The 104th Congress: Congressional Roundup, G.O.P. Tax Plan May Lack Support*, N.Y. TIMES, Jan. 13, 2005, at A22, available at 1995 WLNR 3780595. This proposal was part of the Contract with America. The House voted on the requirement the very first day of the 104th Congress. *Id.* While some argued that this quick vote did not afford the major policy shift the debate it needed, sponsors such as Rep. Newt Gingrich defended the vote by arguing they had a political mandate from voters who elected the new members in the Republican Revolution.

⁵² *See* Comment, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1539 (1995) (arguing that supermajority rules threaten constitutional commitments to simple majority rule); McGinnis & Rappaport, *supra* note 48, at 705. *But see* King, *supra* note 47, at 405-06 (“[T]he Constitution’s supermajority requirements . . . serve to buttress . . . majority rule . . .”).

⁵³ McGinnis & Rappaport, *supra* note 48, at 707-08.

supermajorities violate this basic notion.⁵⁴ From an economic perspective, supermajority rules may prevent some laws that would have yielded net benefits if they became law.⁵⁵ Professors McGinnis and Rappaport identify what they call “marginal legislation”—bills that would garner more than 50% of votes (and thus pass under a majority rule system), but fewer votes than what is required to meet the supermajority threshold.⁵⁶ A significant number of initiative votes could also be characterized as a kind of marginal legislation. For example, during the 1998 elections, successful initiatives on average received just 54% of the votes—barely a simple majority.⁵⁷

There are also serious concerns that supermajorities entrench current political views and make it more difficult to overturn the status quo.⁵⁸ In *Initiative and Referendum Inst. v. Walker*, a Utah case in which the Tenth Circuit upheld a supermajority requirement for voter initiatives related to hunting, a dissenting judge argued that “the current majority has enshrined its present views into perpetuity.”⁵⁹ The judge feared that the supermajority requirement would essentially rig future elections and prevent a majority of citizens from successfully bringing an issue directly to the people.⁶⁰ In particular, Judge Lucero argued that the Tenth Circuit was not appropriately redressing the plaintiffs’ claims because “[t]hose who aspire to become the majorities of tomorrow, but are discriminated against today, have no recourse other than the courts. Future majorities that spring from today’s unpopular opinions should not be strangled by the dead hands of the past.”⁶¹

However, some scholars who support supermajority rules recognize that entrenchment of issues can cut the other way.⁶² By requiring a supermajority, the majority will need to build consensus with the opposition in order to garner enough support to meet the supermajority threshold.⁶³ Thus, “supermajoritarianism” can help prevent minority alienation.⁶⁴ But this argument is better suited for defending supermajority requirements for legislators, where there is constant deliberation and active consensus-building, than in support of supermajorities for initiatives.⁶⁵ There are fundamental

⁵⁴ *Id.* at 705.

⁵⁵ John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1127-28 (2007).

⁵⁶ *Id.*

⁵⁷ Brief of Petitioners-Appellants at 28, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (No. 02-4105), 2002 WL 34180592.

⁵⁸ *Walker*, 450 F.3d at 1110 (10th Cir. 2006) (Lucero, J., concurring in part and dissenting in part).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1114.

⁶² See McGinnis & Rappaport, *supra* note 55, at 1180.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *infra* Part IV.

differences between legislatures and the initiative process, and it is significant that most of the supermajority requirements in the Constitution relate to Congressional action—not to holding the people to this higher threshold.⁶⁶ Even those who support supermajorities in legislative contexts have conceded: “[T]here are many instances when supermajority rules are not justified because they do not sufficiently improve the quality of legislation or have significant costs.”⁶⁷

In *Town of Lockport v. Citizens for Community Action at the Local Level*, a case where a referendum was at issue, the United States Supreme Court noted that “[t]he equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives are of limited relevance [in] analyzing the propriety of recognizing distinctive voter interests in a ‘single-shot’ referendum.”⁶⁸ Among the differences highlighted by the Court were that initiatives are direct expressions of voter intent and the policy at issue is either approved or disapproved.⁶⁹ When it comes to electing legislators, even if a voter’s choice does not win, that voter is still represented and may still be able to influence policymaking and the legislator’s choices.⁷⁰ In contrast, when a voter’s choice on an initiative fails, the voter must then abide by the law set, or challenge the initiative in court to try to delay or prevent its implementation.

Although single-shot referenda differ from candidate elections, supermajorities in the initiative process are a rare animal. Therefore, it is useful to look at supermajorities in other contexts, even if the other situations are only partially analogous or parallel. Regardless of the context, a supermajority requirement at its core is “a form of weighted voting.”⁷¹ As the Supreme Court has found, “[a]n individual’s constitutionally protected right to cast an equally weighted vote cannot be denied even by a majority of a State’s electorate . . . [a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”⁷² The next Part looks in detail at this very issue—where a majority of Utah voters has decided that majority should not rule, and a vote’s weight may not be equal to that of other votes when it comes to initiatives on wildlife issues.

⁶⁶ See *supra* note 50 and accompanying text.

⁶⁷ McGinnis & Rappaport, *supra* note 48, at 708.

⁶⁸ *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 266 (1977).

⁶⁹ *Id.*

⁷⁰ *Davis v. Bandemer*, 478 U.S. 109, 131-32 (1986) (“[T]he power to influence the political process is not limited to winning elections . . . a group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult . . .” (citing *Mobile v. Bolden*, 466 U.S. 55, 111 (1980) (Marshall, J., dissenting))).

⁷¹ King, *supra* note 8, at 143.

⁷² *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964).

C. *The Fourteenth Amendment's Equal Protection Clause*

Because this Comment argues for an unconventional interpretation of the Equal Protection Clause, a brief review of how courts typically have proceeded in applying the Clause is instructive. Scholars describe the Supreme Court's traditional approach to equal protection analysis as asking and answering three questions: "First, how has the government defined the group being benefited or burdened (the question of 'means')? Second, what is the goal the government is pursuing (the question of 'ends')? Third, is there a sufficient connection between the means the government is using and the ends it is pursuing (the question of 'fit' or 'nexus')?"⁷³ The first question is often interpreted as an inquiry into whether the law targets an identifiable class, such as with a race-based policy. In other words, the equal protection inquiry frequently focuses on a suspect class, a compelling state interest, and whether the government action is narrowly tailored to accomplish that interest.

Although it may seem that classification can make or break an equal protection claim, courts are not overly formalistic, as they recognize the political and legislative need to allocate resources or benefits by certain characteristics or demographics.⁷⁴ Moreover, there is a strain of equal protection analysis that identifies not a suspect class, but a fundamental right, such as voting rights.⁷⁵ As the Supreme Court has stated:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is pre-servative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.⁷⁶

The Supreme Court further discussed the role of fundamental rights in equal protection analysis in *Romer v. Evans*.⁷⁷ There, the Supreme Court found that a voter-approved amendment to the Colorado Constitution, which would have outlawed protections against discrimination based on sexual orientation, violated the Equal Protection Clause.⁷⁸ The Court clearly suggested that you need not have a suspect class to find an equal protection violation:

⁷³ STONE ET AL., *supra* note 19, at 501.

⁷⁴ See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁷⁵ *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (internal citations omitted); *Bush v. Gore*, 531 U.S. 98, 104 (2000).

⁷⁶ *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

⁷⁷ 517 U.S. 620, 631-35 (1996).

⁷⁸ *Id.* at 635.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, *if a law neither burdens a fundamental right nor targets a suspect class*, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.⁷⁹

Furthermore, the Court suggested that government action that burdens a fundamental right would be subject to heightened scrutiny, while only a rational basis test is necessary for cases that implicate neither fundamental rights nor a suspect class.⁸⁰

In *Romer*, the Court announced protection for a class of people who historically have not received any increased protection from the judicial system. In its analysis, the Court seemed attuned to fairness and to ensuring that there is a legitimate government interest in the regulation.⁸¹ In broad language, the Court asserted that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁸² The Court also emphasized that the legislative purpose cannot be based on animosity for those whom the regulation hurts, whether they be a traditionally identifiable class or not.⁸³ Professor Cass Sunstein argues that the purpose does not even have to rise to the level of animus for it to be invalid—an effort to prefer one group over another might be enough. He argues:

When the government operates to benefit *A* and burden *B* . . . political strength [is not] a legitimate justification . . . [t]he institution that made the discrimination must be attempting to remedy a perceived public evil, and must not be responding only to the interests or preferences of some of its constituents.⁸⁴

In addition to the focus on fundamental rights, there are also equal protection cases that underscore the importance of process. In *Hunter v. Erick-*

⁷⁹ *Id.* at 631 (emphasis added) (citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)).

⁸⁰ *Id.*; see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38, 54-55 (1973) (applying a rational basis test in reviewing an equal protection claim regarding unequal funding for poor public schools).

⁸¹ *Romer*, 517 U.S. at 632-33.

⁸² *Id.*

⁸³ *Id.* at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ‘[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.’” (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

⁸⁴ Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 134 (1982).

son,⁸⁵ the plaintiff challenged an amendment to the Akron, Ohio city charter that required the town council to submit any proposal about housing discrimination based on race, religion, or ancestry to the people for approval by a majority of voters.⁸⁶ The amendment to the city charter came about only after the city had established a fair housing law and a Commission to help respond to and resolve claims of discrimination.⁸⁷ The plaintiff argued that the process violated the Equal Protection Clause because it made it more difficult for people fighting housing discrimination to get needed protection because ordinances had to receive a majority of votes at the next election, while all other town ordinances simply became effective upon passage by the Town Council.⁸⁸

A majority of the Supreme Court held that the process in question disproportionately affected those citizens who would benefit under the law prohibiting housing discrimination based on race, religion, or ancestry.⁸⁹ Although the law in *Hunter* involved identifiable classes, the majority recognized that the law's defect also inhered in the process:

Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.⁹⁰

In his concurring opinion, Justice Harlan focused much attention on the fact that the city already had a procedure in place to address housing issues sensibly and legally.⁹¹ Justice Harlan wrote:

Most laws which define the structure of political institutions . . . are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents.⁹²

In his view, the amendment to the city charter was thus wholly unnecessary—there was no legitimate purpose.⁹³

While the Court has used various approaches—suspect class, fundamental rights, process—to apply the Equal Protection Clause to different

⁸⁵ 393 U.S. 385 (1986).

⁸⁶ *Id.* at 386.

⁸⁷ *Id.*

⁸⁸ *See id.* at 390-91.

⁸⁹ *Id.*

⁹⁰ *Id.* at 392-93 (internal citations omitted).

⁹¹ *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).

⁹² *Id.* at 393.

⁹³ *Id.* at 395-96.

situations, there especially remains disagreement about the proper approach in cases regarding the political process. For example, in *Davis v. Bandemer*,⁹⁴ there were several questions over what the proper test was under the Equal Protection Clause.⁹⁵ Justice White, writing for a plurality, thought that the correct test involved a showing of intentional discrimination against an identifiable group that had discriminatory effect.⁹⁶ The plurality further explained:

[A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.⁹⁷

This case was later repudiated in *Vieth v. Jubelirer*⁹⁸ by just a plurality of four justices.⁹⁹ The Court deciding *Vieth* was badly fractured, which demonstrates that there are no easy answers when it comes to many political cases, including partisan gerrymandering.¹⁰⁰

Courts' equal protection inquiries have taken several forms over the years.¹⁰¹ Because the doctrine and the analysis are not rigidly set,¹⁰² this Comment argues that there is room for another approach to electoral cases. Some of the Court's reasoning in *Hunter*, *Romer* and elsewhere supports the notion that supermajority requirements on voter initiatives without a legitimate public purpose violate the Equal Protection Clause. As discussed later in Part IV, there may be more life to the Equal Protection Clause than previously recognized.

⁹⁴ 478 U.S. 109 (1986).

⁹⁵ See *id.* at 138-43 (plurality opinion).

⁹⁶ *Id.* at 127.

⁹⁷ *Id.* at 133.

⁹⁸ 541 U.S. 267 (2004).

⁹⁹ *Id.* at 306 (plurality opinion).

¹⁰⁰ Justice Kennedy concurred in the opinion, while three of the four dissenting Justices each presented a different proposal for how judicial review of partisan gerrymandering should proceed. *Id.* at 305 (Kennedy, J., concurring); *id.* at 317 (Stevens, J., dissenting); *id.* at 342 (Souter, J., dissenting). For example, and instructive when thinking of the Utah initiative case, Justice Breyer suggested that the remedy should be focused on the "unjustified entrenching in power of a political party that voters have rejected." *Id.* at 365 (Breyer, J., dissenting).

¹⁰¹ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1, at 675 (3d ed. 2006) ("Usually equal protection is used to analyze government actions that draw a distinction among people based on specific characteristics . . . [s]ometimes, though, equal protection is used if the government discriminates among people as to the exercise of a fundamental right . . . such as voting, access to the judicial process and interstate travel.").

¹⁰² See Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 10 (1972) (noting the "open-endedness" of the fundamental right analysis under the Equal Protection Clause and suggesting it "invited the spinning of analogies to justify strict scrutiny of one area after another.").

II. RECENT REGULATION OF THE UTAH INITIATIVE PROCESS

Utah was the second state in the nation to adopt a constitutional or legislative initiative process, doing so in 1900, just two years after South Dakota broke this ground.¹⁰³ Utah has both a direct initiative process, by which citizens can enact statutes directly, and an indirect process, whereby approved ballot measures go to the legislature for technical corrections and approval before becoming law.¹⁰⁴ The initiative process in Utah, like that in other states, has several provisions in place to ensure that the process is fair.¹⁰⁵ For instance, citizens must gather signatures equal to at least 10% of the votes cast in the last regular general election, and the signatures must come from at least 26 of the state senate districts.¹⁰⁶ Although Utah led the nation in enabling citizens to engage in direct democracy, its use and success has been muted over the years. From 1960 to 2004, just seventeen citizen initiatives were placed on the ballot in Utah, and voters approved only four of them.¹⁰⁷

To understand why the state legislators and the citizens of Utah would want to impose heightened restrictions on an already difficult process, we must look at forces coming from beyond the state's borders. During the 1990s, several national and regional groups that opposed hunting and advocated for wildlife conservation decided to mount state initiative campaigns to reform state wildlife laws.¹⁰⁸ They were successful in several Western states, including Washington, Oregon and Idaho.¹⁰⁹ In 1996, the Cougar Coalition publicly announced its intention to use the Utah voter initiative process to "advance the cause of predator protection."¹¹⁰ The next year, the national Humane Society began to make its own preparations to promote an initiative on wildlife in Utah.¹¹¹ Some also feared a more locally-based as-

¹⁰³ Howard R. Ernst, *The Historical Role of Narrow-Material Interests in Initiative Politics, in DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA*, *supra* note 33, at 1, 11.

¹⁰⁴ Nat'l Conference of State Legislatures, *supra* note 21.

¹⁰⁵ See NCSL I&R TASK FORCE, *supra* note 24, at 25-38.

¹⁰⁶ UTAH CODE ANN. § 20A-7-201(2)(a)(i)-(ii) (2007).

¹⁰⁷ The State of Utah Elections Office, Results of Utah Initiatives and Referendums, 1960-2004, available at <http://elections.utah.gov/ResultsofUTInitiativesandReferendums2004.htm> (last visited April 9, 2008).

¹⁰⁸ Petition for Writ of Certiorari, *supra* note 13, at 2-4 (quoting Utah Senate sponsor Leonard M. Blackham as saying "there are petitions being driven in many states and placed on the ballot to stop the hunting" and Representative Michael R. Styler saying, "are we being threatened in Utah? Well, California, Oregon, Washington, Colorado, Arizona, and last year, Idaho have experienced these initiatives.").

¹⁰⁹ Rich Landers, *Utah Voters Pass Wildlife Proposition; Flies in Face of Animal-Rights Activists*, SPOKANE SPOKESMAN-REV., Nov. 15, 1998, at G2.

¹¹⁰ *Walker*, 450 F.3d at 1085-86 (internal quotation marks omitted).

¹¹¹ *Id.* at 1086.

sault on hunting when the state restricted the number of deer hunting permits that could be issued annually.¹¹²

A. *The Push for Proposition 5*

As a result of the successes at the ballot boxes in other states, a group of Utah politicians and citizens became concerned that these “East Coast” interest groups would threaten the state’s hunting laws.¹¹³ Traditionally, hunting is an important and cherished pastime in Utah, where many families participate in annual deer hunts or hold reunions in the mountains during the hunting season.¹¹⁴ On February 25, 1998, the state legislature passed Senate Joint Resolution 10, which provided for amending the state constitution to require a two-thirds majority vote to pass any initiative dealing with the taking of wildlife or hunting season.¹¹⁵ As required under Utah law to amend the state constitution, the resolution instructed the Lieutenant Governor to submit the resolution to the citizens during the next general election.¹¹⁶ The resolution then became Proposition 5, which was one of six propositions on the ballot in November 1998.¹¹⁷

Proponents of Proposition 5 argued that it would help ensure that Utah’s wildlife management system would be controlled by experts with the requisite technical knowledge, rather than by citizens at the ballot box.¹¹⁸ Proponents cast themselves as being “pro-wildlife” while vilifying opponents of the Proposition as “local animal extremists” and “extremist groups pushing a Washington D.C. liberal agenda using ballot initiatives.”¹¹⁹ Opponents of the Proposition based their arguments on direct democracy. They advised voters that amending the state constitution to require a two-thirds majority for wildlife initiatives would run counter to the tradition of majority rule.¹²⁰ The opponents of the measure struck a more even tone than those in support by underscoring the importance of the ini-

¹¹² Stephen L. Eliason, *Structural Foundations, Triggering Events, and Ballot Initiatives: The Case of Proposition 5*, 29 WILDLIFE SOC’Y BULL. 207, 208 (2001).

¹¹³ Judy Fahys, *Hunters’ Shot Heard Round the State, All Propositions Pass, Hunters Win Passage of Proposition 5*, SALT LAKE TRIB., Nov. 4, 1998, at A1.

¹¹⁴ Eliason, *supra* note 112, at 208.

¹¹⁵ S.J. Res. 10, 52d Leg., Gen. Sess. (Utah 1998).

¹¹⁶ *Id.*

¹¹⁷ Fahys, *supra* note 113.

¹¹⁸ Initiative and Referendum Inst. v. Walker, 450 F.3d 1082, 1086 (10th Cir. 2006) (“State Representative Michael Syler praised the performance of existing regional wildlife management councils and ‘expressed concern that certain groups from outside the state want to manage Utah wildlife practices through initiative petition.’”).

¹¹⁹ Petition for Writ of Certiorari, *supra* note 13, at 4 (quoting the 1998 Utah Voter Information Pamphlet).

¹²⁰ See Editorial, *Trying to Undo Wildlife Wrong*, DESERET MORNING NEWS, Oct. 30, 2000, at A6.

tiative process and the need for voters to have a fair and effective process by which they could check the legislature and enact policies in the public interest.¹²¹

Supporters of the Proposition raised over half a million dollars to conduct a sophisticated media campaign, and opponents could not match it, with a comparatively paltry \$56,662 in their coffers.¹²² Ironically, while proponents of the measure often argued that it was East Coast or Washington, D.C.-based groups opposing Proposition 5, one of the biggest supporters of the Proposition was a group based outside of Utah.¹²³ Perhaps because the Proposition's proponents relied on television and other advertisements, or because they had support from United States Senators Orrin Hatch and Bob Bennett, Utah Governor Mike Leavitt, and other high-profile Utahans, the supporters of Proposition 5 were victorious on election day.¹²⁴ A slim majority (56%) of Utah voters passed Proposition 5, and the Constitutional amendment took effect on January 1, 1999.¹²⁵

B. *Taking Proposition 5 to Court*

The passage of Proposition 5 prompted a lawsuit in which wildlife advocacy groups¹²⁶ argued that the amendment violated the federal Constitution.¹²⁷ The Tenth Circuit, en banc, ruled that the supermajority requirement of the wildlife amendment did not implicate First Amendment rights at all.¹²⁸ The court did not address the possibility that the supermajority re-

¹²¹ *See id.*

¹²² Fahys, *supra* note 113.

¹²³ *Id.* ("Proponents mainly came from hunting and fishing groups in Utah, but the measure also got lots of money from wildlife and hunting groups outside the state. One of the main supporters was a Minnesota-based coalition eager to make sure animal-welfare initiatives are tougher to pass.")

¹²⁴ *Id.*

¹²⁵ S.J. Res. 10, 52d Leg., Gen. Sess. (Utah 1998); Eliason, *supra* note 112, at 208.

¹²⁶ Plaintiffs in the case included the Initiative and Referendum Institute (a nonprofit research center based at the University of Southern California), the Humane Society of the United States, Fund for the Animals, Humane Society of Utah, Utah Environmental Congress, Utah state Representative David M. Jones, and several individual citizens. Petition for Writ of Certiorari, *supra* note 13, at ii. A number of pro-hunting groups filed amici curiae, to support the supermajority requirement, including the Utah Wildlife Federation, Utah Foundation for North American Wild Sheep, Sportsmen for Fish and Wildlife/Sportsmen for Habitat, Utah Farm Bureau Federation and Utah Bowman's Association. *Id.* at ii-iii. Among the individuals who filed amici was Karl Malone, famed NBA star and a hero throughout Utah for his 18 seasons with the Utah Jazz. Malone is an avid hunter, who has long been involved with the Utah Wildlife Board and other pro-hunting outfits in the state. *See* Brett Prettyman, *Malone's Aim: Making Hunting 'Cool' for Kids, Mailman Has a Hunting Message to Deliver*, SALT LAKE TRIB., Nov. 21, 2001, at C1.

¹²⁷ Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1082 (10th Cir. 2006).

¹²⁸ *Id.* at 1099.

quirement violated the Equal Protection Clause.¹²⁹ The majority found that the First Amendment protects political speech that accompanies the initiative process, but “it does not protect the right to make law, by initiative or otherwise.”¹³⁰ The court did not view the regulation as burdening political speech protected by the First Amendment because the regulation did not deny anyone the right to propose an initiative or vote for an initiative.¹³¹ According to the majority, the regulation here was on the process, not on the speech.¹³² Given this finding, it is especially interesting that the court did not decide to raise the issue under the Equal Protection Clause *sua sponte*.

The majority in the Tenth Circuit argued that striking down the Utah constitutional amendment would be akin to saying that the federal Constitution protects not only the right to vote, but the right to vote for a winner.¹³³ The Tenth Circuit did not think striking the amendment was its proper role.¹³⁴ But the Tenth Circuit missed the point. Courts regularly decide what electoral outcomes will occur in various kinds of election cases, such as with gerrymandering issues.¹³⁵ In those cases, courts have some measure of control over election results—“they may not pick the candidate who ultimately wins, but they dramatically affect who that candidate is likely to be.”¹³⁶

Judge Lucero, one of three judges who concurred in part and dissented in part, saw the issue differently.¹³⁷ Lucero took a far less formalistic view of the political speech associated with the initiative process. Lucero’s opinion recognized the entwinement of process and speech in initiatives, and elections in general, where the procedures and actions are so suffused with political messages that they cannot be separated.¹³⁸ This led him to conclude that “election laws that discriminate against a minority’s views implicate fundamental rights enshrined in the First Amendment.”¹³⁹ Lucero looked at the practical effects of this new state constitutional requirement and realized that a current majority of voters and legislators in Utah had

¹²⁹ Plaintiffs only brought a First Amendment claim before the lower court, and thus the Tenth Circuit did not have to examine whether the Equal Protection Clause applied. *Id.*; see *infra* Part IV (analyzing *Walker* under the Equal Protection Clause).

¹³⁰ *Walker*, 450 F.3d at 1099.

¹³¹ *Id.* at 1099-1100.

¹³² *Id.* at 1103.

¹³³ *Id.* at 1101.

¹³⁴ *Id.* at 1103.

¹³⁵ Heather K. Gerken, *Election Law Exceptionalism? A Bird’s Eye View of the Symposium*, 82 B.U. L. REV. 737, 747 (2002).

¹³⁶ *Id.*

¹³⁷ *Walker*, 450 F.3d at 1110 (Lucero, J., concurring in part and dissenting in part).

¹³⁸ *Id.* at 1112 (“In America, at least, one cannot silently campaign—supporting an initiative *requires* speech.”) (emphasis added).

¹³⁹ *Id.* at 1110.

succeeded in entrenching the status quo for years to come.¹⁴⁰ He saw what this portends for the future: “Now, regardless of whether a future majority—even a 66% majority—of the population supports a change in wildlife laws, such future majority will be unable to use the initiative process to enact its preferences into law.”¹⁴¹ Judge Lucero found that the constitutional provision essentially would dictate election outcomes and ensure that a current (bare) majority of Utah citizens impose their will not just on the minority of today, but also on the majority of tomorrow.¹⁴²

Judge Lucero did not believe the heightened bar for wildlife initiatives was an appropriate burden, in light of the lack of a substantial state interest justifying the burden.¹⁴³ In contrast, the majority argued that the regulation at issue was not burdensome because people were still allowed to vote—they just needed more votes to win.¹⁴⁴ But the United States Supreme Court has rejected arguments similar to this, finding instead that burdens may be invalid even if they do not completely deny a person’s ability to exercise a right.¹⁴⁵ Judge Lucero’s viewpoint—essentially that the regulation was outcome determinative and thus impermissible—has support from the Supreme Court, albeit from a dissenting opinion, which argues that “[s]tates do not have a valid interest in manipulating the outcome of elections” or in shielding the status quo, such as “the major parties” or any established interest, “from competition.”¹⁴⁶

This case focuses only on the First Amendment because the plaintiffs chose not to pursue an Equal Protection Clause claim, perhaps because of the Supreme Court’s prior unwillingness to entertain such claims in political cases, including initiative and partisan gerrymandering issues.¹⁴⁷ Judge Lucero apparently believes that the First Amendment is a better vehicle for such challenges than the Equal Protection Clause because the clause will “always push the court to the political question of whether the partisan purpose has been excessive.”¹⁴⁸ While this may well be true for more general

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1111-13.

¹⁴³ *Walker*, 450 F.3d at 1111-13.

¹⁴⁴ *Id.* at 1101 (majority opinion). The majority rejected the plaintiffs’ argument that the regulation chilled or marginalized their speech by asserting, “[t]he First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail.” *Id.*

¹⁴⁵ *Maher v. Roe*, 432 U.S. 464, 487-88 (1977) (Brennan, J., dissenting) (reviewing various rights, including to travel, access courts, vote and freedom of speech, and concluding that the Court “ha[s] repeatedly found that infringements of fundamental rights are not limited to outright denials of those rights.”); *Clingman v. Beaver*, 544 U.S. 581, 610 (2005) (Stevens, J., dissenting) (“[I]n assessing burdens on that right [to vote]—burdens that are not limited to absolute denial of the right—we should focus on the realities of the situation, not on empty formalism.”).

¹⁴⁶ *Id.* at 609.

¹⁴⁷ *Walker*, 450 F.3d at 1111 (Lucero, J., concurring in part and dissenting in part); *see also Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

¹⁴⁸ *Walker*, 450 F.3d at 1111.

electoral cases, such as gerrymandering, it is more effective to analyze supermajorities in initiatives under the Equal Protection Clause precisely because it is the process—not speech—that the regulation burdens. The next Part will discuss how and why courts have traditionally found supermajorities constitutional, as a prelude to an analysis of these heightened requirements in the initiative context under an Equal Protection Clause framework.

III. THE CONSTITUTIONALITY OF SUPERMAJORITIES

The Constitution has [proceeded] from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority will not systematically treat others less well than it treats [itself]. Malfunction occurs when [the] ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out . . . [We] cannot trust the ins to decide who stays out.¹⁴⁹

A supermajority, at its worst, can enable the “ins” to stay in for as long as their power bloc holds. In the initiative context, where the “channels of political change” are already highly regulated by states and dominated by funds and rhetoric from special interests, supermajorities only cause further malfunction. A supermajority should garner close scrutiny by courts on equal protection grounds to determine if there is a legitimate public purpose. However, many courts, including the nation’s highest, have yet to see it this way. This Part will explore a seminal case, *Gordon v. Lance*,¹⁵⁰ in which the Supreme Court upheld the constitutionality of a supermajority and two more recent cases applying that precedent.¹⁵¹ Although not all of these cases involve supermajorities in the initiative context, they are crucial to understanding how courts view these requirements.

A. *Leading up to Gordon v. Lance*

In 1962, the United States Supreme Court found a violation of the Equal Protection Clause in a voting rights case for the first time in *Baker v. Carr*.¹⁵² Since *Baker*, the Court has found, time and again, that redistricting and other schemes of weighted voting are unconstitutional if they deny the right to vote or discriminatorily dilute votes.¹⁵³ In the wake of these cases, opponents of supermajorities have used this precedent, in particular the idea of vote dilution, to strongly support their argument that supermajorities are

¹⁴⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 101-03 (1980); see also STONE ET AL., *supra* note 19, at 776.

¹⁵⁰ 403 U.S. 1 (1971).

¹⁵¹ *Id.* at 3.

¹⁵² 369 U.S. 186, 228 (1962).

¹⁵³ King, *supra* note 8, 145-47 (1999).

not constitutionally valid.¹⁵⁴ For instance, when *Baker* was decided, about four states required a supermajority of voters to approve municipal bonds.¹⁵⁵ Plaintiffs challenged three of these supermajority requirements, and the State Supreme Courts in California and West Virginia, as well as the federal District Court in Minnesota, found constitutional violations.¹⁵⁶ However, at least four other state courts and one federal court had come to the opposite conclusion—a significant split among courts that set the stage for *Gordon v. Lance*.¹⁵⁷

B. *Gordon v. Lance*

In *Gordon*, voters in Roane County, West Virginia challenged the requirement that 60% of voters must approve bond indebtedness or tax increases in order for those measures to take effect.¹⁵⁸ Fifty-one percent of voters had cast their ballot in support of a \$1.8 million bond that would be used for improving public school facilities.¹⁵⁹ This was the fifth time that a majority of Roane County citizens had voted to incur debt to be used to improve public schools—but each time the voters failed to meet the 60% threshold.¹⁶⁰ Having failed at the ballot box, the voters turned to the court, and argued that the supermajority requirement violated the Equal Protection Clause.¹⁶¹ The West Virginia Supreme Court agreed, holding that the citizens' votes had not been counted equally due to the 60% threshold.¹⁶²

The United States Supreme Court reversed this decision and ruled that the regulation “does not violate the Equal Protection Clause or any other provision of the Constitution.”¹⁶³ Key to the Court's decision was its finding that the supermajority did not impermissibly discriminate against an identifiable class of people.¹⁶⁴ The voters—in particular those who voted for the bond indebtedness—were not an “identifiable class” under the Equal Protection Clause. The Court seemed to signal that its ruling was not confined to the specific facts of this case by broadly writing: “We conclude that

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 144.

¹⁵⁶ *Id.* at 143.

¹⁵⁷ *Id.*

¹⁵⁸ *Gordon v. Lance*, 403 U.S. 1, 3 (1971).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Lance v. Board of Ed. of Roane County*, 170 S.E.2d 783, 791 (W. Va. 1969), *rev'd* *Gordon v. Lance*, 403 U.S. 1 (1971).

¹⁶³ *Gordon*, 403 U.S. at 8.

¹⁶⁴ *Id.* at 5-6 (finding that the measure “singles out no discrete and insular minority for special treatment. The three-fifths requirement applied equally to all bond issues for any purpose, whether for schools, sewers, or highways.”).

so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.”¹⁶⁵

However, the Court did hedge on two issues. First, it conceded that the 60% regulation placed an increased burden on voters and that “any departure from strict majority rule gives disproportionate power to the minority.”¹⁶⁶ In addition, the Court qualified its broad statement that the regulation did not violate any part of the Constitution by adding in a footnote “[w]e intimate no view on the constitutionality of . . . giving a veto power to a very small group.”¹⁶⁷ These statements suggest the Court clearly believed supermajorities could violate the Constitution in certain circumstances. For instance, it seems likely the Court would strike down a 90% supermajority requirement because it would essentially give 11% of the voting population “veto power” to prevent initiatives from passing.

Professor Brett King has criticized the *Gordon* decision as “one of the most poorly reasoned High Court opinions in the post-New Deal era.”¹⁶⁸ King argues that the problems with the opinion stem in large part from the Court’s confusion over its precedent from three different kinds of cases—vote dilution, vote denial, and “political process equal protection.”¹⁶⁹ King argues that *Gordon* could either fall under a vote dilution analysis or a process analysis.¹⁷⁰ In cases involving burdens on the electoral process, the judicial inquiry is typically whether an identifiable class has been treated unfairly and whether there are state interests that might legitimately justify any burden on these voters.¹⁷¹ These are not “voting rights cases per se because . . . [they] utilize the political process to make it more difficult or costly for such rights to be enjoyed.”¹⁷²

Other scholars view *Gordon* as more of a vote dilution case than a political process case. For example, Professor Jerry Calvert has noted that “in *Gordon*, the Court erred. There is an identifiable class of citizens that is disadvantaged. The majority of voters who voted ‘yes’ had been disenfranchised because their votes were given less weight than those who had voted ‘no.’”¹⁷³ In the context of voter initiatives, the political process rationale for explaining how supermajorities violate the Constitution is more convincing

¹⁶⁵ See *id.* at 7.

¹⁶⁶ *Id.* at 6.

¹⁶⁷ *Id.* at 8 n.6.

¹⁶⁸ King, *supra* note 8, at 145.

¹⁶⁹ *Id.* at 147.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; see *infra* Part IV.

¹⁷² King, *supra* note 8, at 147.

¹⁷³ Jerry W. Calvert, *The Popular Referendum Device and Equality of Voting Rights—How Minority Suspension of the Laws Subverts “One Person-One Vote” in the States*, 6 CORNELL J. L. & PUB. POL’Y 383, 404 (1997).

than the vote dilution argument.¹⁷⁴ However, both approaches are logical, and because the Supreme Court in *Gordon* switches back and forth between them, it is understandable why some cases after *Gordon* seem to grasp onto only the vote dilution inquiry.

C. *The Constitutionality of Supermajority Requirements since Gordon v. Lance*

In a 1974 general election in Illinois, a state judge lost his position because voters failed to re-elect him with the required 60%.¹⁷⁵ The Illinois state constitution mandated approval by supermajority in all elections for state judges seeking to retain their current seats.¹⁷⁶ When the judge only received 59% of the vote, he and citizens voting for him brought suit, arguing constitutional violations, in *Lefkovits v. State Board of Elections*.¹⁷⁷ The District Court upheld the supermajority requirement, finding that it did not discriminate against an identifiable class and thus did not violate equal protection.¹⁷⁸ For the *Lefkovits* court, lack of a discriminatory classification was determinative, and the court held that voters did not constitute an identifiable class.¹⁷⁹

There have been a number of cases since *Gordon* involving supermajority requirements for bond referenda or tax levies, one of the most common electoral schemes in which supermajorities are used.¹⁸⁰ At issue in *Gray v. Town of Darien*¹⁸¹ was the Town Council's approval of a \$2 million bond to fund moderate rental housing.¹⁸² Citizens opposed to the bond petitioned for a town-wide referendum, which, if successful, would override the Town Council's vote issuing the bond.¹⁸³ The referendum needed a majority of votes to pass and the votes in favor had to equal at least 25% of all eligible voters in the town.¹⁸⁴ While a majority of voters supported the referendum, they did not meet the 25% threshold.¹⁸⁵ Proponents argued that the

¹⁷⁴ See *infra* Part IV.

¹⁷⁵ *Lefkovits v. State Bd. of Elections*, 400 F. Supp. 1005, 1006 (N.D. Ill. 1975), *aff'd* 424 U.S. 901 (1976).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1016.

¹⁷⁹ *Id.*

¹⁸⁰ See Brief for Utah Wildlife Federation et al. as Amici Curiae Supporting Defendants-Appellees at 5 n.6, 6, *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (No. 02-4105), 2003 WL 25514933 (listing cases resolved in light of *Gordon*).

¹⁸¹ 927 F.2d 69 (2d Cir. 1991).

¹⁸² *Id.* at 70.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 70-71.

¹⁸⁵ *Id.* at 71-72. There were 2,334 votes against issuing the bond for rental housing—262 votes short of meeting the 25% threshold.

supermajority requirement violated the Equal Protection Clause.¹⁸⁶ The Second Circuit found that *Gordon* controlled and that there was no constitutional violation because there was no discriminatory impact on any class of citizens.¹⁸⁷ The Second Circuit argued that “[t]he fact that the provision makes it more difficult for those opposed to a decision of the town’s elected officials to change that decision than would be the case if only a simple majority were required is constitutionally irrelevant.”¹⁸⁸

In both *Gray* and *Lefkovits*, the courts’ decisions turned on whether voters were an identified class against whom the voting regulation discriminated. Although both decisions emphasize the importance of class, neither decision engaged in a thoughtful analysis of whether these voters could or should be considered an identifiable class. But, as the next Part discusses, there is a better framework under the Equal Protection Clause with which to view these cases. Because these cases involve voting rights—fundamental rights—it becomes “irrelevant” (in the words of the Second Circuit) whether there is an identifiable class involved. The fact that the regulation or law burdens a fundamental right is enough to trigger strict scrutiny under the Equal Protection Clause.

In the wake of its decision in *Gordon v. Lance*, the United States Supreme Court consistently sent the message that lower courts should uphold supermajorities in accord with *Gordon*.¹⁸⁹ Proponents of supermajorities look to the Court’s decision in *Gordon* and its progeny as strong prudential support for the legitimacy of the heightened bar. However, a closer look at the subject matter of many cases since *Gordon* reveals that the vast majority involve bond issuances or other fiscal matters.¹⁹⁰ In the last decade, a number of states have considered imposing supermajorities on tax or fiscal initiatives.¹⁹¹ Perhaps the long line of Supreme Court precedents striking down supermajorities can be distinguished from supermajorities in the initiative context for their content—the state’s taxing and spending power. Courts and legislatures may deem supermajorities appropriate for fiscal policy because of the short and long term consequences involved. As Professor Issacharoff has noted, “public indebtedness shifts obligations cross-temporally,” and so a supermajority requirement can be useful as a means to ensure those who commit to the indebtedness “submerge their preferences into a broader constituency that includes (through the operation of the

¹⁸⁶ *Id.*

¹⁸⁷ *Gray*, 927 F.2d at 72.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *Brenner v. School Dist.*, 403 U.S. 913 (1971); *Bogert v. Kinzer*, 403 U.S. 914 (1971); *Mihaly v. Westbrook*, 403 U.S. 915 (1971); *Mize v. Alhambra City School Dist.*, 403 U.S. 927 (1971).

¹⁹⁰ See *supra* note 189, where each case involved a two-third vote requirement for school or local bonds.

¹⁹¹ NCSL I&R TASKFORCE, *supra* note 24, at 61. For example, Arizona and California have considered a supermajority for any initiative that changes state revenues and Mississippi has considered a 60% threshold for any initiative that would cost \$100 million or more. *Id.*

voting rule) a vicarious proxy for the future generations that will bear a substantial part of the obligation.”¹⁹²

Bonds and tax increases impose requirements on citizens. In contrast, initiatives affecting subject matter such as wildlife do not necessarily impose any strict requirements or costs on citizens. By approving an initiative to issue a \$2 million bond for public schools, citizens are committing themselves, and future residents, to that expense. This differs from an initiative regarding wildlife policy, which may be a broad law that gives discretion to the state agency on how to implement the policy objective. The next Part examines an equal protection approach to supermajorities in the initiative context that helps to distinguish these cases further from tax and bond measures.

IV. USING AN EQUAL PROTECTION CLAUSE FRAMEWORK TO ANALYZE SUPERMAJORITIES

In *Baker v. Carr*,¹⁹³ the Supreme Court’s first look at a voter challenge to redistricting, the Court held that the Equal Protection Clause provided a mechanism under which citizens could challenge the constitutionality of such an election-related law.¹⁹⁴ The Court then essentially punted the case to the lower courts, remanding to the District Court and guiding it only in its endeavor by voicing confidence in the court’s ability to determine whatever remedy is appropriate, should the court indeed find that a remedy is needed.¹⁹⁵ However, the Court did note that “[j]udicial standards under the Equal Protection Clause are well developed and familiar”¹⁹⁶ As the sections below discuss, we see in voter initiative, electoral and generally political cases, however, that this is not altogether true.

A. *The Equal Protection Clause in the Context of Voting*

Courts have long been protective of the integrity and fairness, both political and procedural, needed for elections and democratic government.¹⁹⁷ A classic example of equal protection of election laws is the one person/one vote formulation, which the United States Supreme Court articulated in *Reynolds v. Sims*.¹⁹⁸ The plaintiffs in *Reynolds* challenged a reapportion-

¹⁹² Samuel Issacharoff, *Democracy and Collective Decision Making*, 6 INT’L CONST. L.J. 231, 249-50 (2008).

¹⁹³ 369 U.S. 186 (1962).

¹⁹⁴ *Id.* at 197-98.

¹⁹⁵ *Id.* at 198; *see Reynolds v. Sims*, 377 U.S. 533, 556 (1964).

¹⁹⁶ *Baker*, 369 U.S. at 226.

¹⁹⁷ *But see Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

¹⁹⁸ *Reynolds*, 377 U.S. at 541-43.

ment in Alabama as having denied or diluted African American voters' right to vote.¹⁹⁹ The Court asserted in *Reynolds* that the federal Constitution includes protections of the right to vote in both federal and state elections, so long as the voter meets the requisite qualifications.²⁰⁰ Therefore, plaintiffs challenging the constitutionality of an election regulation can bring claims under both the First and Fourteenth Amendments. Justice Stevens explained the important role of equal protection in election cases:

The Equal Protection Clause requires every state to govern impartially. When a State adopts rules governing its election machinery or defining its electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.²⁰¹

This statement is especially applicable to supermajority requirements, which when used to entrench the current status quo, favor one side of the electorate over the other.

Courts understand the gravity of their role in adjudicating election issues and even election outcomes.²⁰² Although the traditional equal protection analysis described above seems as though it could be hastily or easily applied, courts, as we have seen, are far more deliberative in their application.²⁰³ For example, in *Storer v. Brown*,²⁰⁴ the plaintiff challenged a California regulation requiring independent candidates to be separated from a political party for at least a year before being able to participate in a primary election in the state.²⁰⁵ The Supreme Court explained that the rule to apply is not a:

litmus-paper test . . . and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is . . . very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged'²⁰⁶

This inquiry suggests that when it comes to voting rights, courts should be willing to go beyond the basic three-question structure of the equal protec-

¹⁹⁹ *Id.* at 544.

²⁰⁰ *See id.* at 558 (citing *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963)).

²⁰¹ *Karcher v. Daffett*, 462 U.S. 725, 748 (1983) (citation omitted); *see also* *Calvert*, *supra* note 173, at 403.

²⁰² *See* *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

²⁰³ *See supra* Part I.C.

²⁰⁴ 415 U.S. 724 (1974).

²⁰⁵ *Id.* at 726-27.

²⁰⁶ *Id.* at 730 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

tion inquiry, and should examine legislative intent, the pretext of the law, and its benefits and burdens on citizens of any group. The inquiry in the dissenting opinion in *Storer* goes even further. The dissent recommended looking at whether there are alternatives to the option the state chose that could accomplish the same or similar objectives in a less burdensome manner.²⁰⁷ Justices Brennan, Marshall, and Douglas, in dissent, cautioned that “governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.”²⁰⁸

This more intensive inquiry in voting cases has important implications for reviewing the constitutionality of supermajorities in the initiative process. First, if courts inquire into the legislative intent and pretext behind initiative regulations, it will help them better understand whether there is animus or impermissible partisan favoritism at the root of the regulation. Second, looking at whether there are other options available will enable courts to consider if a different approach might be less burdensome. This forces courts to view the requirement at issue in the larger context of the state’s political structure and initiative regulatory scheme.²⁰⁹ The Supreme Court’s precedents in *Reynolds* and *Storer* underscore the importance of equal protection in voting rights because of the political realities that force those in power to preserve their authority at the expense of the politically weak.

B. *Voting Rights as Aggregate Rights*

While voting rights are commonly understood as individual rights, the Supreme Court has recognized that voting *power* comes from numbers—not from the individual alone.²¹⁰ As Professor Issacharoff explains:

[T]he right to cast an effective ballot implied more than simply the equal weighting of all votes, as per the one-person, one-vote rule. To be effective, a voter’s ballot must stand a meaningful chance of effective aggregation with those of like-minded voters to claim a just share of electoral results.²¹¹

Similarly, in a 2005 case upholding an Oklahoma election statute, Justices O’Connor and Breyer acknowledged that “the aggregation of votes is, in some sense, the essence of the electoral process. To have a meaningful

²⁰⁷ *Id.* at 760 (Brennan, J., dissenting) (“And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’”).

²⁰⁸ *Id.* at 756 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)).

²⁰⁹ See *supra* Part I.A (discussing the various regulations states impose on the initiative process).

²¹⁰ See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883 (1995).

²¹¹ *Id.*

voice in this process, the individual voter must join together with like-minded others at the polls.”²¹²

Courts have long understood the need to protect groups of voters. While courts originally construed the one person/one vote formulation created in *Reynolds v. Sims* to apply only to individual votes, they quickly extended it to apply to racial groups.²¹³ Later, in *Davis v. Bandemer*, the Supreme Court addressed the issue of partisan gerrymandering—a claim that involves the disadvantaging of a political group by redistricting.²¹⁴ In *Davis*, the Court upheld the redistricting plan, and found that it did not dilute votes.²¹⁵ But the Court acknowledged that redistricting can, in some circumstances, deny equal protection if it results in the “effective denial to a minority of voters of a fair chance to influence the political process.”²¹⁶ Similarly, in *Bush v. Gore*, the United States Supreme Court wrote:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.²¹⁷

One scholar, Professor Heather Gerken, promotes the use of an aggregate rights framework in analyzing cases involving voting blocs, such as gerrymandering or a challenge to an initiative.²¹⁸ The framework recognizes the right of any individual, as a member of a group, to bring a claim that a state regulation dilutes, harms, or otherwise handicaps an individual’s right to vote or the effectiveness of the individual’s vote.²¹⁹ The framework does not guarantee success—it merely provides the opportunity for members of groups not traditionally considered part of a protected class to have their collective voice heard. For example, an environmentalist or a registered Republican could assert a claim. Gerken concedes that applying such a framework is not easy:

What makes the voting-rights cases distinct is that they take place in the context of the political process. Because of the way that process works, groups—and the political structures

²¹² *Clingman v. Beaver*, 544 U.S. 581, 600 (2005).

²¹³ *Reynolds v. Sims*, 377 U.S. 533, 560-62 (1964); Richard Briffault, *Electoral Redistricting and the Supreme Court: Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL’Y 397, 402 (2005).

²¹⁴ *Davis v. Bandemer*, 478 U.S. 109 (1986).

²¹⁵ *Id.* at 141-43.

²¹⁶ *Id.* at 133.

²¹⁷ *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

²¹⁸ Heather K. Gerken, *Federal Courts and Electoral Politics: Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681-82 (2001).

²¹⁹ *Id.*

through which their preferences are aggregated—matter. An individual's best chance of making her voice heard is by aggregating her voice with like-minded voters²²⁰

An aggregate rights framework underscores the very essence of the voting process, which is counting or aggregating the votes to determine a specific outcome. In initiative cases, there are usually only two options: a voter can vote yes or a voter can vote no.²²¹ In some states, the voter does not even have the choice of withholding her vote; not answering an initiative question, but casting a ballot for a candidate, results in a no vote on the initiative.²²² A supermajority requirement renders a majority of votes effectively worthless at the polls. The citizens still have the right to cast their ballot—their access has not been limited at all.²²³ But their vote has been substantially separated from, or dispersed from, votes of like-minded citizens, with the result that there is no feasible way for these votes to join together to become an effective bloc.²²⁴

Under a regime with a supermajority requirement, voters do not have the opportunity to aggregate their votes as effectively as under a simple majority system.²²⁵ To understand more fully how the aggregate rights framework would apply in cases of supermajorities in voter initiatives, the wildlife initiative from Utah is an instructive example.

V. THE UTAH INITIATIVE AS A CASE STUDY

Recall that the Utah constitutional amendment imposes a two-third majority requirement on any initiative regulating the taking of wildlife.²²⁶ This regulation is not vote dilution in the traditional sense of spreading voters across various districts or compacting them all into one district to reduce their overall power.²²⁷ This supermajority requirement can result in a situation where 66% of the voters want something to happen, but because 34% have voted the other way, it will not happen. The simple majority has no power. Their votes—individually and in the aggregate—are as ineffective

²²⁰ Gerken, *supra* note 135, at 745. Gerken also raises a concern over what preconceptions or biases judges may bring to cases involving the law of democracy because “a court cannot decide whether an individual is ‘equally’ able to participate in the democratic process or is ‘equally’ represented without a theory about what democratic participation or representation means. When adjudicating many voting claims, then, judges may make judgments about what political outcomes should obtain in a ‘fair’ political process, whether or not they acknowledge this fact.” *Id.* at 746.

²²¹ NCSL I&R TASKFORCE, *supra* note 24, at 1.

²²² *Id.* at 61.

²²³ Gerken, *supra* note 218, at 1681-82.

²²⁴ *Id.*

²²⁵ See Issacharoff, *supra* note 210, at 883.

²²⁶ See *supra* Part II.

²²⁷ Briffault, *supra* note 213, at 402.

as if they were split into separate districts for apportionment purposes. Recall as well that courts understand the unique circumstances involved in voting cases, and have sometimes altered the traditional three-question equal protection inquiry to address more effectively the complexities of voting rights. Yet in *Initiative and Referendum Inst. v. Walker*, neither the federal District Court in Utah nor the Tenth Circuit gave more than passing mention to an equal protection analysis.²²⁸ This section conducts an equal protection analysis of the Utah case, and uses the aggregate rights framework to show that the Utah initiative violates the Equal Protection Clause.

A. *The Supermajority Is a Substantial Burden*

The Supreme Court has recognized that some regulations of the initiative process can inhibit participation, for example by “mak[ing] it less likely that [voters] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.”²²⁹ There are similar effects in the Utah case. First, wildlife measures are the only initiatives subject to a supermajority requirement.²³⁰ The high threshold discourages and intimidates citizens and public interest groups who do not think they will be able to attract that much support.²³¹ There is good reason for this discouragement. Just one quarter of initiatives subject to a supermajority requirement became law in the United States between 1996 and 2000.²³² In fact, most initiatives pass by very slim margins. During the 1998 elections, only 21.6% of successful initiatives received 66% or more of the votes; the average was just 54%—barely a simple majority.²³³

The supermajority essentially chills participation for those who support wildlife protections. This effect has occurred elsewhere. In 1992, Arizona voters passed an initiative that implemented a supermajority requirement on legislators when creating new taxes.²³⁴ According to a supporter of the supermajority, “it has achieved its desired effect: ‘These days the legislators don’t even bother to propose new taxes.’”²³⁵ Should this same result occur in Utah, the proponents of the supermajority requirement will succeed in entrenching the status quo for years to come. Wildlife groups and concerned citizens will be woefully ineffective in mounting campaigns to

²²⁸ See *supra* Part II.

²²⁹ *Meyer v. Grant*, 486 U.S. at 414, 423 (1988).

²³⁰ See *supra* Part II.

²³¹ *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1110 (10th Cir. 2006) (en banc) (Lucero, J., concurring in part and dissenting in part).

²³² Brief for Petitioners-Appellants, *supra* note 57, at 28.

²³³ *Id.*

²³⁴ Calvert, *supra* note 174, at 419-20.

²³⁵ *Id.* at 420.

reform wildlife laws because of the heightened standard. This is a substantial burden on these citizens' rights to have their votes aggregated in a meaningful way. The Supreme Court has held that the right to vote "also includes the right to have the vote counted at full value without dilution or discount . . . that federally protected right suffers substantial dilution [where a] favored group has full voting strength and the groups not in favor have their votes discounted."²³⁶ There is a strong argument that the state legislators in Utah were using the constitutional amendment and Proposition 5 as a vehicle for passing it, to shape the rules of the game in their favor.

B. *The Supermajority Requirement Is Unnecessary*

In the past, the Supreme Court has "upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself."²³⁷ The Utah supermajority is not evenhanded because there were already other safeguards in place on the initiative process to protect its fairness. For example, Utah initiatives are subject to at least seven public hearings throughout the state, must receive enough signatures from registered voters to get on the ballot, and must receive state certification.²³⁸

There are also alternatives available to regulate wildlife initiatives other than a supermajority. For example, the state could have required initiatives to go through the state regulatory agency for comments and proposed changes before receiving certification. Or the provision could have permitted wildlife initiatives only through the indirect initiative process, which requires approval by the legislature before becoming law. These would have been less extreme mechanisms to achieve the supposed purpose of the law, better regulating wildlife management practices. Several states have considered requiring an initiative that imposes a supermajority to itself garner a supermajority to pass.²³⁹ Oregon has such a system, and the National Conference of State Legislatures has recommended that states consider adopting a similar provision.²⁴⁰ If Utah had such a measure in place, Proposition 5 would have failed, because just 56% of the electorate voted in favor of it.

²³⁶ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

²³⁷ *Clingman v. Beaver*, 544 U.S. 581, 593, 597 (2005).

²³⁸ UTAH CODE ANN. § 20A-7-204.1(1)(a)-(b), § 20A-7-201(2)(a)(i)-(ii), § 20A-7-207 (2007).

²³⁹ NCSL I&R TASK FORCE, *supra* note 24, at 59.

²⁴⁰ *Id.*

C. *The Supermajority Requirement Lacks a Legitimate Purpose*

The legislative history and the express arguments in support of the proposition belie the true intent of the measure, which was not to regulate the process fairly.²⁴¹ The measure was designed to entrench the status quo and block reform efforts in the area of wildlife protection. Although proponents of the measure argued that it was not discriminatory because the amendment would subject all wildlife measures (apparently meaning both pro- and anti-hunting) to the same standard, the context behind the campaign shows the legislators' actual goal.²⁴² As the Supreme Court noted in *Storer v. Brown*, the inquiry into whether there has been an equal protection violation can examine the pretext and legislative intent of the regulation.²⁴³ The sponsors of Proposition 5 expressly admitted that the purpose was to "make it much more difficult in the State of Utah to do an anti-hunting, anti-fishing type initiative" and to "discourage" animal welfare groups from pursuing such measures.²⁴⁴

As the Supreme Court has cautioned in the past, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."²⁴⁵ In Utah, the supermajority limits the efficacy of voters whose interests align with the wildlife groups opposed to Proposition 5. A supermajority requirement narrowly tailored to truly improve wildlife management practices would almost certainly pass constitutional muster. The supermajority requirement that Utah currently has in place does not. Its stated purpose is a legitimate public goal, but the proponents' animus and desire for near-permanent entrenchment do not contribute to the law's legitimacy.

What are the alternatives for those wishing to advance wildlife issues in Utah? They can lobby the elected members in the state legislature. They can lobby the Governor and other officials in the administration. But the point of the initiative process is to take an issue directly to the voters—often an issue that the elected representatives do not want to deal with, maybe because it is too divisive, or it requires an unpopular stance that might be dangerous to take in an election year, or maybe it is just not "sexy" enough to deserve discussion time in the legislature. The Supreme Court has recognized:

[T]he State is itself controlled by the political party or parties in power which presumably have an incentive to shape the rules of the electoral game to their own benefit . . . As such re-

²⁴¹ Petition for Writ of Certiorari, *supra* note 13, at 2-4.

²⁴² *Id.* at 2-5.

²⁴³ *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see supra* Part IV.B.

²⁴⁴ Petition for Writ of Certiorari, *supra* note 13, at 2-3 (footnote omitted).

²⁴⁵ *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

strictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition.²⁴⁶

The cause for concern in Utah is significant. The supermajority requirement is discriminatory and unnecessary, and impermissibly violates equal protection of the laws. Unfortunately, the federal courts did not seem to understand fully the implications of upholding the supermajority requirement. In contrast, the Utah Supreme Court has stated:

Because of the fundamental nature of the right of initiative and its significance to the political power of registered voters of the state, the vitality of ensuring that the right is not effectively abrogated, severely limited, or unduly burdened by the procedures enacted to enable the right and to place initiatives on the ballot is of paramount importance.²⁴⁷

The Utah Supreme Court, unlike the federal courts before which the case against Proposition 5 was brought, seemed to understand it is within the courts' authority and proper role to protect the integrity of the political process, and the "competitive vitality of the electoral system."²⁴⁸ Courts thus can be seen as "important institutional actors standing against the manipulation of electoral institutions" and ensuring that current majorities do not bind future generations of voters, such as through impermissible supermajority rules.²⁴⁹

CONCLUSION

Since the voter initiative process was first used at the beginning of the twentieth century, it has continued to gain importance and momentum. There are few, if any, signs of the process disintegrating or slowing down. Although participation in elections only hovers at about half of eligible voters, citizens continue to use the initiative process to promote worthy causes and significant reforms. Whatever your view of the initiative process's impact on democracy and formation of good public policy, it seems that it is here to stay. Given its perseverance, it is incumbent upon states to regulate their processes appropriately and reasonably, and it is equally important that courts have a sound framework with which to analyze and adjudicate cases arising from initiative disputes.

The supermajority requirement imposed by the amendment to the Utah Constitution should have garnered a harder look by the courts as to its con-

²⁴⁶ *Clingman v. Beaver*, 544 U.S. 581, 603 (2005).

²⁴⁷ *Gallivan v. Walker*, 54 P.3d 1069, 1082 (Utah 2002).

²⁴⁸ Issacharoff, *Democracy and Collective Decision Making*, *supra* note 192, at 263-64.

²⁴⁹ *Id.*

stitutionality. There is no compelling state interest justifying it. It is aimed at a specific group of voters with a specific, discrete viewpoint. It harms their ability to engage in the voting process effectively, and it chills their speech by limiting their future endeavors. Despite all this, a federal circuit court upheld the regulation and the Supreme Court refused to grant certiorari. In fact, the federal courts did not even think the case implicated the Equal Protection Clause.

As a result, a slim majority of Utahans can now rig elections in their favor for years to come, at the expense of a large minority, if not a majority, of voters. The Equal Protection Clause, as the Supreme Court has analyzed it in previous voting rights cases, is a strong constitutional basis from which to argue for better protections for the initiative process. Courts should adopt an aggregate rights framework in reviewing equal protection violations by state initiative regulations. This approach will give the courts the leeway they need to consider more than just the individual voter, and to intervene when states or political factions threaten to corrupt electoral systems.

In his dissent in *Reynolds v. Sims*, Justice Harlan concluded, “I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.”²⁵⁰ In Utah, so-called political reform has resulted in a state constitutional provision that enables as few as one third of the voting public to carry the day, even in situations where a clear majority of voters are united. In this case, it is the Tenth Circuit, and ultimately the Supreme Court by not granting certiorari, that are enabling a complacent—and worse, a smothered—body politic to evolve.

²⁵⁰ *Reynolds v. Sims*, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).