# INTERPRETATION ON THE BORDERLINE: CONSTITUTION, CANONS, DIRECT DEMOCRACY

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"Politics," Ambrose Bierce once said, is "[a] strife of interests masquerading as a contest of principles, . . . [t]he conduct of public affairs for private advantage."[1] So believed the Progressives, who sought to remedy the perceived corruption and stagnancy[2] of legislatures by empowering the citizenry itself to make laws.[3] The Progressive legacy of direct democracy—through ballot initiative and referendum—exists in about half of the states in the country.[4] Unhappily, this supplement to representative democracy is not itself free from attack. Bierce himself noted one potential problem with it when he defined "referendum" as "[a] law for submission of proposed legislation to a popular vote to learn the nonsensus of public opinion."[5]

Cynicism aside, it is increasingly obvious that direct democracy has become a frequent and highly controversial means of developing

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1. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 103 (Crowell 1979) (1911).

2. On legislative deadlock, see *id.* at 92, defining "opposition": "In politics the party that prevents the Government from running amuck by hamstringing it."

3. *See, e.g.*, RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955).

4. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1509-10 (1990). Actually, this computation presents a narrow picture of the influence of lawmaking by the voters. Although only about half of the states allow voters to propose positive law through the initiative process, in all states except Delaware state constitutional amendments must be ratified by the voters. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL 2-3 (1989).

5. BIERCE, *supra* note 1, at 114. Bierce also defined "vote" as "the instrument and symbol of a freeman's power to make a fool of himself and a wreck of his country." *Id.* at 148.

public policy.[6] The public-law issues associated with ballot propositions are recurrent and controversial as well. In the 1995 Term, for example, a divided Supreme Court invalidated a Colorado ballot measure limiting the opportunities of sexual-orientation minorities to use the ordinary state and local legislative processes to obtain legal protection against discrimination.[7] In the 1996 Term, the Supreme Court declined to entertain a constitutional challenge to a law adopted by Arizona's voters making English the official language of their state government.[8] In both cases the voters adopted ambiguous statutory text, from which potentially knotty questions of statutory as well as constitutional interpretation arise.[9]

Although direct democracy seems increasingly central to the American political and legal agenda, it resides at the margins of the formal American lawmaking process. The United States Constitution establishes a representational form of government which excludes federal direct democracy, even for constitutional amendments.[10] The Constitution also provides that "the United States shall guarantee to every State in this Union a Republican Form of Government."[11] Based on this clause, and familiar passages from the contributions of James Madison to *The Federalist Papers*, commentators have suggested the federal framers viewed representative lawmaking as an essential element of republican government.[12]

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6. *See* CRONIN, *supra* note 4, at 3-4 (surge in usage of direct democracy attributable to visibility and success of California's tax-cutting Proposition 13, adopted in 1978); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 5-7 (1984) (noting that Proposition 13 was not unique—many controversial ballot issues began appearing in the 1970s). *See generally* DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989) (tracing revival of direct democracy since 1970). For thorough general examinations of direct democracy from a legal perspective, see Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347 (1985) (book review); Clayton Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

7. *See* Romer v. Evans, 116 S. Ct. 1620 (1996).

8. *See* Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997) (vacating the case as moot).

9. *See infra* Part II.

10. For discussion of the movement in the 1970s urging a national initiative process, see Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965 (1979).

11. U.S. CONST. art. IV, § 4.

12. *See* Eule, *supra* note 4, at 1522-43; Hans Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 ORE. L. REV. 19, 22-30 (1993). Both Eule and Linde stress Madison's familiar distinctions between a "pure Democracy" and a "Republic," the latter being a representative system designed to extend a measure of sovereignty to the people while protecting against the tyranny of faction.

Moreover, lawmaking by simple-majority ballot creates obvious problems not simply of form, but of fairness and equity as well. In public affairs, at least, function follows form. A majority of voters may find ballot propositions a convenient vehicle for visiting iniquity upon minority interests. Indeed, the controversies involving direct democracy that have reached the Supreme Court have often concerned measures targeted against the interests of racial,[13] sexual-orientation,[14] or other minorities.[15] Additionally, property owners[16] and corporations[17] have arguably sometimes been singled out for an unfair share of the collective societal burden.[18] These highly visible controversies have affected the scholarly discourse in public law. A half-century ago, a leading public-law scholar might confidently conclude that "[s]o far as large problems of public welfare are concerned, [direct democracy] is markedly more likely [than the legislature] to reach a

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Major works associated with the "republican revival" in constitutional theory in the 1980s include Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1043 (1988); Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

13. *See* Crawford v. Board of Educ., 458 U.S. 527 (1982); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Oyama v. California, 332 U.S. 633 (1948). *See generally* Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

14. *See* Romer v. Evans, 116 S. Ct. 1620 (1996). *See generally* Linde, *supra* note 12; Symposium, *The Constitutionality of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491 (1994) [hereinafter symposium].

15. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (invalidating a statute burdening ethnic and religious minority).

16. *See, e.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976).

17. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

18. Of course, not all problems associated with majority rule involve majority oppression of minorities. Public choice theory demonstrates that in many circumstances a minority interest can take advantage of majority apathy or difficulty in organizing. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 23 (1991); Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985). Theoretically, at least, direct democracy might be a way to balance the lawmaking process. This is a subject for another article, but an obvious problem with this notion is that, in light of the expense and organizational demands, concentrated interests may often control direct democracy and effectively manipulate the unorganized majority. *See* Elizabeth Garrett, Who Directs Direct Democracy? (Jan. 1997) (unpublished manuscript on file with the author).

fair and socially valuable result."[19] Today, in contrast, the commentary is unrelentingly critical.[20]

Despite its formal and functional tension with republican form and values, legislation by ballot is well ensconced in the states and localities. The simple power of deferring to "We the People" in this putatively pure form probably means that direct democracy, once available, becomes entrenched.[21] The Supreme Court itself has not only declined the invitation to invalidate state ballot propositions as resulting from a lawmaking process inconsistent with the Republican Form of Government Clause,[22] but it has also opined that state and local popular lawmaking processes demonstrate "devotion to democracy."[23] Furthermore, there may be something too strident, too all-encompassing about any frontal attack upon direct democracy. For

19. Max Radin, *Popular Legislation in California: 1936-46*, 35 CALIF. L. REV. 171, 190 (1947).

20. *See, e.g.*, Bell, *supra* note 13; Eule, *supra* note 4; Linde, *supra* note 12; MAGLEBY, *supra* note 6; Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995); Symposium, *supra* note 14. Interestingly, Richard Parker's recent monograph promoting a populist approach to constitutionalism contains almost no mention of direct democracy, instead focusing upon other (albeit related) topics such as the antipopulist sensibilities of the day, the lack of congruity between legislative outcomes and the interests of ordinary people, and the elitist quality of constitutional discourse among academics and (presumably unelected) judges isolated from the common people. *See* RICHARD D. PARKER, "HERE, THE PEOPLE RULE" (1994). Thus, even Parker seems to have confined his analysis to the prevailing federal- and legislature-centric model of constitutional analysis today that I describe *infra*, in text accompanying notes 28-39.

There is much of interest in Parker's volume, but little of direct assistance for the current project. The only clear reference I found to direct democracy was in the suggestion that the constitutionality of a ballot proposition might be affected by "the ways public opinion was manipulated by elites." *Id.* at 101. It might be suggested, in response, that it is hard to imagine any ballot proposition today arising from anything approximating pristine popular opinion. Through the growth of a sophisticated "initiative industry," "well financed, concentrated interests have begun to play a dominant role in the initiative arena." Schacter, *supra*, at 128; *see also* Garrett, *supra* note 18. To be sure, significant structural changes in direct democracy—contribution or expenditure limitations to initiative campaigns, for example—might ameliorate some of the problems of manipulation. Any success along those lines would require, of course, major modification in current constitutional doctrine, which protects such contributions under the banner of free speech. *See Citizens Against Rent Control*, 454 U.S. 290 (1981). Moreover, contribution limitations would be unhelpful in attacking another familiar problem with direct democracy—appeals to prejudice and hysteria—today best represented by our recent history of anti-gay ballot campaigns. Are such appeals "manipulation" or simply the expression of common (although certainly controversial and arguably hateful) values protected by freedom of speech?

21. *See* Eule, *supra* note 4, at 1507-08; David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 COLO. L. REV. 13, 43 (1995).

22. *See infra* text accompanying note 30.

23. James v. Valtierra, 402 U.S. 137, 141 (1971).

every successful ballot measure that seems mean-spirited, there may be another that rather uncontroversially promotes the public interest by reforming the political arena,[24] or protects public goods, such as a clean environment, against despoilment at the hands of those beholden to private incentive structures.[25] That direct democracy may serve high-minded goals, and may do so in a way that combats elite influence or narrow economic forces, makes any modern-day effort to abolish it both politically impossible and misguided as a matter of public policy.

The predominant issues of public law that concern direct democracy reside on a number of fault lines. The most obvious is the political borderline between utopian policy processes and political reality. More subtly, these problems are situated on the structural borderline between republican government and populism. These knotty concerns are also located on the divide between constitutional and statutory interpretation. For a variety of reasons, direct democracy is probably more likely than legislative lawmaking to produce ambiguous statutory text.[26] More generally, the same concerns animating constitutional analysis of direct democracy measures should also influence the way in which they are interpreted.[27]

This essay considers the relationship between these structural and interpretive borderlines. Part I describes the constitutional and interpretive problems that arise in the context of direct democracy. Part II presents an integrated analysis of these problems under which canons of interpretation are used to promote a cautious approach to resolving the issue of ballot propositions displacing existing law. Both Parts I and II accept, for purposes of analysis, the prevailing wisdom concerning the tension between direct democracy and the values associated with republicanism in general and the Republican Form of Government Clause in particular. Finally, Part III briefly considers alternative understandings of the role of the people in our constitutional scheme, under which direct democracy might be considerably more privileged.

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24. *See* Eule, *supra* note 4, at 1559-60 (discussing ballot measures that reform governmental structure).

25. Among the most common ballot propositions during the revival of direct democracy in the 1970s were environmental measures, such as bottle deposit mandates. *See, e.g.*, CRONIN, *supra* note 4, at 73.

26. *See infra* text accompanying notes 102-03.

27. *See infra* Part II.

# I
# AN INTRODUCTION TO THE CONSTITUTIONAL AND INTERPRETIVE PROBLEMS OF BALLOT MEASURES

## *A. Direct Democracy and the Legislature- and Federal-Centric Nature of Legal Scholarship*

Direct democracy raises fascinating questions of public law and policy, yet legal scholarship has only infrequently addressed the topic. This relative lack of focused discussion may be attributable to a variety of factors.

Constitutional theory has been occupied with assessing the "countermajoritarian difficulty," a supposed dilemma arising when a court strikes down a measure adopted by a democratically elected legislature as unconstitutional.[28] The "court versus legislature" nature of this debate has largely excluded the consideration of statutes enacted by the people.

In addition, the countermajoritarian difficulty is almost always assessed with judicial enforcement of the Constitution in mind. Federal constitutional analysis of direct democracy measures has thus been warped from the start. The source of this skewing is a nearly century-old precedent: *Pacific States Telephone & Telegraph Co. v. Oregon*.[29] In *Pacific States*, the Supreme Court held that the claim sketched out above—that a state law adopted directly by the people lacks a "republican" character and thereby runs afoul of the Republican Form of Government Clause—is nonjusticiable.[30]

Moreover, the countermajoritarian difficulty is usually posited as a concern with unelected judges who have life tenure, such as Article III judges, displacing the choices of elected representatives. As a result of *Pacific States*, as well as the state-rooted nature of direct democracy, the great majority of cases involving initiatives and referenda are lodged with state courts. True to their progressive heri-

28. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 35 (1962).

29. 223 U.S. 118 (1912).

30. A careful reading of *Pacific States* suggests, however, that although federal judges are precluded from entertaining challenges to state direct democracy processes as violative of the Republican Form of Government Clause, state judges are not similarly handicapped. *See* Hans Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994) (arguing that state judges are, in fact, duty bound to entertain these claims).

Incidentally, although the clause in Article IV is customarily referred to as the Guaranty (or Guarantee) Clause, I agree with Julian Eule that the shorthand reference to it should emphasize the nature rather than the mere existence of the guarantee. *See* Eule, *supra* note 4, at 1541 n.158.

tage, virtually all states that allow direct democracy also elect their judges.[31] This mix of non-legislatively created legislation, state-court venue, and elected judges does not correspond to the paradigm upon which the great bulk of contemporary constitutional scholarship is based.

At first blush, judicial invalidation of statutes adopted by direct democracy seems to create even more of a crisis of countermajoritarianism. While some state courts have held that legislation adopted by direct democracy may deserve special judicial deference,[32] it is difficult to assess whether this rhetoric is ever transformed into reality. Furthermore, when *elected* judges trump the preferences of the *voters*, assessing the degree of countermajoritarianism that the court has imposed is no simple matter. Compounding the difficulty is the sense that there is an appropriate countermajoritarian judicial role in checking the tendency of unfettered majorities to run roughshod over minority interests.[33] Just how one might mediate majoritarianism and minority rights—to reconcile what Mark Tushnet starkly posits as a choice between "the tyranny of the majority" and "the tyranny of the judiciary"[34]—has not been often examined when the majority will is expressed directly on a ballot proposition rather than indirectly through legislative channels, and when the judges hold office by election.

Public-law scholarship outside the realm of constitutional law is also federal- and legislature-centric. For example, perhaps the most thorough attempt to construct an overall approach to subconstitutional public law, the legal process materials of Hart and Sacks,[35] devoted only a few pages to ballot propositions.[36] They viewed direct democracy as a poor substitute for legislative policymaking.[37] This is not surprising since much of their theory of legal process is based on a

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31. *See* Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 735 n.11 (1994).

32. *See, e.g.*, Legislature v. Eu, 816 P.2d 1309 (Cal. 1991).

33. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

34. *See* Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1061 (1980).

35. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

36. *See id.* at 649-70.

37. *See id.* at 668-69 (suggesting the initiative cannot function as a substitute for the legislature and expressing concerns about whether ballot propositions are carefully drafted and adequately considered, especially in light of the absence of collective deliberation and the inability to amend them).

conception of the legislature as both a centerpiece of governmental legitimacy and an institution capable of engaging in a lawmaking partnership with courts and executive officials.[38] Integrating direct democracy into this intricate framework would have required substantial recalibration of legal process theory. Neither Hart and Sacks, nor anyone else, have ever tried to do so. We still live in a legal world heavily influenced by legal process theory,[39] which makes the failure to integrate direct democracy within that framework all the more unfortunate.

In recent years, a few exceptions to the general scholarly neglect of direct legislation have emerged. Julian Eule has written a fine analysis of the constitutional problems associated with direct democracy.[40] Jane Schacter has thoughtfully examined the difficulties inherent in interpreting statutes adopted through the ballot.[41] From his unique perspective as both a longstanding public-law scholar and a former Supreme Court justice in a state replete with legislation by ballot, Hans Linde has assessed the special tensions between republican government and direct democracy.[42] Other commentators have considered the general aspects of direct democracy,[43] focusing in particular on its procedural aspects[44] and the recent controversies surrounding its use.[45]

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38. For example, Chapter 5 of Hart & Sacks is premised upon a primary lawmaking role for legislatures and considers the various ways in which the legislature can integrate courts and administrative officers into enforcement schemes. *See* HART & SACKS, *supra* note 35, at 693-1007.

39. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994).

40. *See* Eule, *supra* note 4. A more recent analysis worth examining is Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994). For an earlier, useful analysis, see Bell, *supra* note 13. For an assessment in light of public choice theory, see Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991).

41. *See* Schacter, *supra* note 20.

42. *See* Linde, *supra* note 12; Linde, *supra* note 30; Hans Linde, *When Is Initiative Lawmaking Not 'Republican Government'?*, 17 HAST. CONST. L.Q. 159 (1989).

43. *See* Briffault, *supra* note 6; Gillette, *supra* note 6.

44. *See, e.g.*, Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995); Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47 (1995); James D. Gordon, III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298 (1989); Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 U.C.L.A. L. REV. 936 (1983); Comment, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879 (1991).

45. *See, e.g.*, Symposium, *supra* note 14.

As valuable as these contributions are, they present only a scattered and partial examination of direct democracy within the broader streams of public-law theory. As I shall suggest, even the two most global efforts, the worthwhile contributions of Eule and Schacter, take a piecemeal perspective on this problem.

### *B. Eule and Federal Constitutional Analysis of Direct Democracy*

Julian Eule[46] is a federal constitutional theorist.[47] Not surprisingly, his concern with judicial review of ballot measures is based on federal constitutional values. He concludes that because most ballot propositions undergo none of the republican filtering processes,[48] constitutional judicial review of these measures should include a "harder look" than that accorded legislatively adopted laws.[49] This step, Eule argues, would help flush out unwise or discriminatory measures.

One premise for Eule's conclusion is that important federal constitutional doctrines are based on presumptions rooted in benign judicial assumptions about the legislative process. Such notions can be seen in the deferential review of the rationality of most legislation[50] and in the rule that, absent a showing of discriminatory intent, the equal protection clause is not violated by a facially neutral statute that disproportionally disadvantages a group especially protected by that clause.[51] In these instances, the presumption seems to be that legislatures do not engage in irrational or prejudiced actions. The legislative process—structured in committees so that openness of agenda, empirical inquiry, input from all affected interests and deliberation in the public interest are encouraged—helps ensure that legislative outcomes are rational and reflect the public will.[52] Legislators themselves are bound by an oath of office to support the Constitution[53] and, as judges might well presume, are motivated to some degree by public-spirited-

46. Julian Eule died a couple of months after I presented this paper at the November 1996 symposium. (For a brief obituary, see L.A. TIMES, February 5, 1997, at A18, *available in* 1997 WL 2179359.) A fine fellow as well as a significant scholar, his contributions to the assessment of direct democracy live on beyond his untimely demise. As a small tribute to the enduring quality of his writings, I have left the verbs referring to him and his work in the present tense.

47. Among his many writings on federal constitutional law is a leading assessment of dormant commerce clause doctrine. *See* Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

48. *See* Eule, *supra* note 4, at 1522-28, 1539-45, 1553-58.

49. *See id.* at 1558.

50. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 313-17 (1993).

51. *See* Washington v. Davis, 426 U.S. 229 (1976).

52. *See, e.g.*, HART & SACKS, *supra* note 35, at 695.

53. *See* U.S. CONST. art. VI, cl. 3.

ness.[54] In direct democracy these safeguards are absent, and for Eule, that means judges should be less deferential.[55]

A relevant question for Eule's analysis is whether these judicial presumptions are descriptive or normative in nature. By my reading, Eule treats them as largely descriptive and based on some judicial appreciation of the actual capacities of legislatures in light of their structures, procedures, and composition. This implicit assumption renders Eule subject to criticism on empirical grounds: first, that perhaps legislatures may not perform in a manner consistent with these generous presumptions; and second, that direct democracy may function better than he assumes.[56]

An alternative analysis would suggest that Eule's approach to legislated statutes is largely rooted in normative assumptions. Even if legislatures do not always perform up to par, the argument would go, our public law will most closely approximate a desirable state if judges indulge in these assumptions. Indeed, it is precisely this normative understanding that best explains the legal-process theory of Hart and Sacks.[57] Their theory postulates that the reasoned elaboration of public-law principles by judges is rooted in the assumptions that all law is purposive[58] and that legislators are "reasonable [people] pursuing reasonable purposes reasonably."[59]

A central question regarding this normative understanding then becomes whether the reasoned elaboration of public law in general, and of constitutional law in particular, can be coherently achieved under Hart and Sacks' two assumptions.[60] Assuming that their approach remains tenable, does shifting its application to the products of direct democracy change the analysis in any way?

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54. *See generally* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311 (1987).

55. *See* Eule, *supra* note 4, at 1539-45.

56. *See id.* at 1556-58 (identifying and attempting to respond to these charges). For commentary embracing these assertions, see, e.g., Briffault, *supra* note 6; Gillette, *supra* note 6.

57. *See, e.g.*, Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1093 (1995); Peter L. Strauss, Comment, *Legal Process and Judges in the Real World*, 12 CASE W. RES. L. REV. 1653, 1659-60 (1991).

58. *See* HART & SACKS, *supra* note 35, at 148.

59. *Id.* at 1378.

60. One of the most thorough challenges to legal-process theory on this score appears in an essay written by Duncan Kennedy while a law student at Yale. *See* Duncan Kennedy, Utopian Rationalism in American Legal Thought (June 1970) (unpublished essay, Yale University) (briefly described in Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 665-66 (1993)).

One response to this inquiry, which is consistent with Eule's analysis, is that the judicial presumptions animating public-law analysis are based on a combination of both normative assumptions and observable empirical outcomes. If the presumptions lack any plausible empirical basis when tested against the results of direct democracy, they cannot long survive the transfer to the context of direct democracy. While this decay might arise from the effects of the cynical acid of scholarly criticism, my own sense is that such failure would be more attributable to the inexorable revelation of reality and subsequent erosion of utopian assumptions that arise out of the case-by-case process of litigation. The Supreme Court and the rest of the American legal community have seen some vivid contemporary examples of public law arising from direct democracy at its rawest, at its most hostile to subordinated groups[61] and at its most seemingly arbitrary.[62]

In the final analysis, I concur with Eule that courts ought to adopt less utopian assumptions about the outcomes of direct democracy than they do about legislative products. The hope that courts might actually do so could be justified on a rather cynical ground: the courts lack "plausible deniability" for these assumptions in the context of direct democracy, and thus the use of these assumptions is more easily revealed as judicial subterfuge concealing the play of judicial power rather than deference to another lawmaking agency. Furthermore, values traditionally associated with our public law (for example, the protection of subordinated groups and the avoidance of ill-constructed lawmaking processes) cut against overly romanticizing the processes and outcomes of direct democracy as well.

The most significant problem with Eule's approach may lie in its implementation. Many federal constitutional doctrines were created against the backdrop of legislative lawmaking and therefore may translate poorly to the context of direct democracy. To take one of Eule's examples,[63] the requirement, rooted in *Washington v. Davis*,[64] of a showing of discriminatory intent to indict a facially neutral statute that disproportionately disadvantages a group within the special purview of the Equal Protection Clause may be defensible when legislatively created laws are involved. This approach leaves to the legislature the balancing of such factors as severity of disproportionate impact versus cost to the public of curing those discriminatory effects.

61. *See, e.g.*, Romer v. Evans, 116 S. Ct. 1620 (1996); Reitman v. Mulkey, 387 U.S. 369 (1967).
62. *See, e.g.*, City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976).
63. *See* Eule, *supra* note 4, at 1561-68.
64. 426 U.S. 229 (1976).

Although the evidentiary burdens inherent in making out a claim under *Washington v. Davis* are severe, they are not, in theory, at least, insurmountable.[65] At bottom, the cause of action is similar to one sounding in intentional tort—a familiar paradigm. But how can such an approach be used when the statute in question originated from the people? In the first place, it has been seriously suggested that each voter has a First Amendment right to cast a ballot however she chooses.[66] More fundamentally, even if voter motivations are constitutionally cognizable, how could collective voter prejudice be proven in light of the secret ballot? The Supreme Court may follow the election returns, but should constitutional invalidation follow the Gallup Poll?[67]

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65. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (striking down a state constitutional provision on the ground that it had been adopted for discriminatory reasons); Rogers v. Lodge, 458 U.S. 613 (1982) (upholding finding of discriminatory intent in the maintenance of a voting scheme that diluted minority electoral power).

66. *See* Kirksey v. City of Jackson, 663 F.2d 659, 662 (5th Cir. 1981). *Cf.* Arthur v. City of Toledo, 782 F.2d 565, 573-74 (6th Cir. 1986) (the court may not investigate voter motivation unless discrimination was the only possible motive). These cases seem in tension with *Romer*, in which the Court rather confidently concluded that the Colorado electorate had adopted an anti-gay initiative out of animus. Perhaps, however, the Court simply embraced the *Arthur* approach and concluded that the only possible explanation for the measure was an intent to harm sexual orientation minorities.

67. In theory, divining the intent of the electorate might seem to be no different from determining the intent of a legislature, for both require attributing motivations to a multi-member body. In practical terms, however, the inquiries strike me as radically different. The burden is on the plaintiff to show that the decision was made "at least in part 'because of,' not merely 'in spite of,'" its disparate impact upon a group especially protected by equal protection norms. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). When a legislature was the enacting agency, the requisite evidence to satisfy this difficult burden might come from a historical record clearly revealing racism. However, this is exceedingly unlikely to occur in recent times for reasons both attractive (things are better on these scores, one hopes) and unattractive (public officials bent on discrimination have learned to keep their mouths shut and to use code phrases). Other evidence might come from legislative staff. Still other, circumstantial evidence might involve suspicious procedural irregularities lurking in the background of the legislation. *See generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

When a measure is adopted through direct democracy, none of these evidentiary sources is likely to fit the context. No legislative sponsor, committee chair, or core of legislative supporters might be shown to have been improperly motivated. To be sure, perhaps the motivations of the interest group sponsoring the ballot drive could be examined. Presumably, however, the leaders of the movement will be sophisticated enough to avoid creating any "smoking gun" evidence. Moreover, if the electorate adopts the measure for nondiscriminatory reasons, it seems nonsensical to invalidate the statute because it got on the ballot through tainted intent. *See* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Indeed, the actions of the group undertaking the ballot drive might well be viewed as private rather than state action. Unless the electorate clearly embraces obvious illicit motives of that group, it

Eule correctly notes these problems, but then is left in the unhappy situation of the incremental reformer who has, perhaps, proven too much. Consistent with the logic of his argument, he suggests that the *Washington v. Davis* requirement be loosened or abandoned when ballot measures are assessed.[68] To the extent Eule proposes a substantial modification in constitutional doctrine simply because the state law in question is the product of direct democracy, the implementation of his proposal is a decidedly uphill task. The Supreme Court has said that for purposes of judicial review, state laws adopted by the voters should be treated no differently from statutes adopted by the legislature.[69] The Court's actual performance may have occasionally failed to follow this precept,[70] but it has never overtly shifted doctrinal gears when facing a ballot measure.

In addition to this practical concern, Eule's approach presents a more theoretical problem. Eule never clearly specifies what doctrine regarding motive should replace *Washington v. Davis* in the context of direct democracy. A great deal of our law, whether legislatively or popularly enacted, has a disproportionately discriminatory effect upon subordinated groups in general, and upon those groups subject to heightened constitutional protection in particular. In the context of direct democracy, should the discriminatory-intent requirement be jettisoned in favor of some sort of balancing test under which the harm of the discriminatory effects would be weighed against whatever gov-

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is hard to see how an equal protection violation could arise. *Cf.* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("[P]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Under *Washington v. Davis*, the key question, then, is why the electorate embraced the measure. Except in the most obvious cases, such as *Romer*, the only practical way to attempt to investigate motive would be to invade the sanctity of the secret ballot. *But cf. Arlington Heights*, 429 U.S. at 268 n.18 (seemingly suggesting a prima facie case is necessary before motivations of legislators may be directly probed). Even if that is done, one might well end up with equivocal polling data driven as much by the phrasing of the questions as anything else. Finally, assuming that expert testimony based on polling data indicates that one important motivation of the electorate was racial, for example, is that sufficient reason to invalidate the measure? If so, a major portion of the electorate that considers its own reasons for supporting the measure nondiscriminatory may feel cheated. *Cf.* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810). If not, then there is simply no judicial review, as a practical matter, of facially neutral ballot measures that have a disparate impact unless, perhaps, the only possible explanation for their motivation is an illicit one.

68. *See* Eule, *supra* note 4, at 1562.

69. *See* U.S. Terms Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1858 n.19, 1864 n.32 (1995); Eule, *supra* note 4, at 1505-06.

70. *See* Eule, *supra* note 4, at 1562-67 (discussing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982), and Crawford v. Bd. of Educ., 458 U.S. 527 (1982)).

ernmental interests are supported by the law in question?[71] Or should courts use some sort of quasi-psychological inquiry about whether the public act in question conveys, for example, an obvious—even if "unintentional"—racist meaning?[72] Needless to say, neither of these approaches has much going for it from the standpoint of judicial manageability.

Eule limits his inquiry to constitutional judicial review. In a footnote, he acknowledges that "[a] full picture of a hard judicial look might embrace different rules of statutory construction as well as different standards of constitutional interpretation."[73] Could this other piece of the public-law puzzle hold more promise than the evolution of constitutional doctrine?

### *C. Schacter and the Interpretation of Ballot Measures*

Jane Schacter, a scholar of statutory interpretation,[74] has substantially advanced our understanding of how courts approach the task of construing ballot propositions.[75] She demonstrates that, as one might expect given judicial reluctance to treat the products of direct democracy specially, state courts routinely purport to apply the same tools of statutory interpretation to the products of direct democracy that they apply to legislatively created laws.[76] In particular, state courts uniformly assert that the touchstone of statutory meaning is the intent of the enacting body.[77] As Schacter shows, applying this search for intent to the context of direct democracy is so fraught with difficulty as to appear unrealistic.[78] If courts really wanted to know what might have gone through the minds of the voters, she contends, judges would examine media accounts, political advertising, and other informal information that had come before the voters and, according to social science research, probably had the most impact upon them.[79] Instead,

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71. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g en banc*, 461 F.2d 1171 (5th Cir. 1972), *repudiated in* Washington v. Davis, 426 U.S. 229, 244-45 and n.12 (1976).

72. *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

73. Eule, *supra* note 4, at 1573 n.313.

74. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) [hereinafter Schacter, *Metademocracy*].

75. *See* Schacter, *supra* note 20.

76. *See id.* at 117-19.

77. *See id.* at 117.

78. *See id.* at 119-30.

79. *See id.* at 130-38.

courts routinely refuse to consider such materials.[80] Judges examine more formal sources including statutory language, official ballot material, and the relationship between the statute in question and other state laws.[81] However, social science,[82] personal experience,[83] and common sense all suggest voters are unlikely to study and understand, much less rely upon, such materials.

Accordingly, Schacter concludes that this approach is a highly dubious method for identifying or measuring the collective intent of the electorate.[84] She also contends that voter intent is largely incoherent anyway, and that voters cannot possibly foresee or have some determinate intent about the interpretive ambiguities likely to arise in later litigation.[85]

Schacter considers two basic alternatives to the prevailing popular-intent approach. First, she briefly examines the possibility of judicial consideration of a wider range of informal materials, so that the judicial search for popular intent could be more realistically grounded in the ideas to which voters are most likely responding.[86] She rejects this approach because this mass of material is highly diffuse and cacophonous, and therefore unlikely to lead to any determinate understanding of voter intent.[87] She also suggests that judicial consideration of such sources would encourage partisans to structure their popular appeals with an eye toward subsequent judicial interpretation.[88] She opts, instead, for her second alternative: crafting rules of statutory interpretation specifically for the direct democracy context.[89]

I agree with Schacter's conclusion that we should consider constructing what might be called an "interpretive regime"[90] for direct democracy measures. I further concur that such an approach should

80. *See id.* at 123.
81. *See id.* at 119-23.
82. *See id.* at 139-44 (citing social science studies on voter lack of awareness and understanding of such formal sources).
83. *See, e.g.*, Eule, *supra* note 4, at 1569-71 (recounting his own lack of understanding, as a voter, of all the pros and cons concerning an important, but complicated, California ballot proposition).
84. *See* Schacter, *supra* note 20, at 138.
85. *See id.* at 123-30.
86. *See id.* at 144-45.
87. *See id.*
88. *See id.* at 146.
89. *See id.* at 147-67. She also briefly considers two incremental reforms—improving the voter information pamphlet and urging courts to look at the overall, somewhat abstract purposes of the ballot proposition rather than the more concrete and specific intentions that may have lurked behind it. *See id.* at 145-47.
90. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW 265, 267 (Ian Shapiro ed., 1994).

eschew any technique purporting to eliminate judicial discretion in deference to some other, supposedly extra-judicial source of meaning (such as statutory text or voter intent).[91] She persuasively argues that these extra-judicial approaches cannot deliver the determinacy they promise and threaten to lead judges into either honest confusion or a dishonest rhetoric of deference to that which does not exist.[92]

As with Eule's proposal, however, the major difficulty with Schacter's idea may lie in its implementation. For her, the interpretive regime constructed for direct democracy should seek to "resolve statutory ambiguity based on underlying ideas about 'democratizing' the direct lawmaking process."[93] Thus, framing "interpretive rules for the [ballot] initiative process requires identifying the ways in which the democratic aspirations of the direct democracy process are compromised."[94]

Ultimately, however, the process-oriented, democracy-enhancing rules Schacter suggests are few and diffuse. One such rule, designed to counteract the difficulties that the electorate faces in understanding and deliberating over ballot measures, would open up the litigation process concerning the meaning of an ambiguous ballot measure so a wide range of interests beyond the particular adverse parties could participate and put forward information and plausible interpretations.[95] Another suggested rule would be to interpret ambiguous words narrowly when it seems especially likely that the ballot proposition could be tainted by abuse and manipulation by "highly organized, concentrated, and well-funded interests."[96]

Both of these proposed rules are worth considering. However, as formulated, neither is likely to have much impact upon public law. Encouraging greater litigative discourse in the legal community before a ballot measure is definitively interpreted appears fine in form but is pointless in practice unless unorganized interests may participate in the process. This proposal requires the courts to redistribute resources they do not have.[97] Moreover, the informational and deliberative

91. *See* Schacter, *supra* note 20, at 153-55.

92. *See id.* at 153-55. Other commentators have developed the same point. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321-22 (1990) [hereinafter Eskridge & Frickey, *Statutory Interpretation*]; Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 547 (1992).

93. Schacter, *supra* note 20, at 153.

94. *Id.* at 154.

95. *See id.* at 155-56.

96. *Id.* at 157.

97. Schacter acknowledges this problem when she urges the appointment of "pro bono representation for unrepresented, or even unorganized, interests." *Id.* at 156.

problems associated with direct democracy are endemic, not just limited to the unusual case. Specifying the factors that might identify a subset of ballot propositions to be subjected to fuller public participation—actually, involving more attorneys attempting to represent discrete elements of the public—is probably impossible to do in the abstract and on a case-by-case basis translates into little more than a plea for increased judicial sensitivity. Schacter's second proposal, for narrow interpretation of ballot measures that seem especially likely to have been the product of abuse or manipulation, suffers from the same difficulties—an inability to isolate cases based on defined criteria and a resulting tendency simply to urge judges to do the "right thing" when they can feel their way toward it.

In my judgment, these concerns should not be viewed as fatal to Schacter's proposals. Indeterminacy and reliance upon judicial "situation sense"[98] are endemic to essentially all law reform proposals—at least to those nondeductive and modest enough to have some chance of success. There remains a further difficulty, however, with Schacter's analysis requiring more extended attention.

Like Eule, Schacter analyzed direct democracy as raising two discrete classes of problems: those of (federal) constitutionality and those of statutory interpretation.[99] Eule, a constitutional scholar, focused on the former and avoided the latter; Schacter, an analyst of statutory interpretation, did the opposite. In these two studies, constitutional analysis and statutory interpretation are like east and west, and ne'er the twain do meet. In reality, however, as Part II of this essay demonstrates, they are part and parcel of the same overall enterprise. Indeed, I shall contend that the borderline between them is inexact, shifting, and highly permeable. After developing this analysis, Part II turns to an integrated constitutional and subconstitutional analysis of direct democracy, working within the prevailing assumptions that legislation by ballot is in tension with federal constitutional republican values and that it threatens to infringe upon individual rights.

98. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 268-85 (1960).

99. *See* Schacter, *supra* note 20, at 109-10, 157 n.216.

## II
## INTEGRATING CONSTITUTIONAL AND INTERPRETIVE ANALYSIS OF BALLOT MEASURES

The disjunction drawn between constitutional and interpretive analysis of ballot propositions is unfortunate. There are at least two principal reasons—one procedural, the other more substantive—for conjoining constitutional analysis and statutory interpretation of ballot measures.

### *A. The Procedural Relationship of Constitutional and Interpretive Analysis*

Schacter touches upon the procedural question in her consideration of the judicial response to ballot measures which seem to result from abuse and manipulation of powerful interests. She argues: "In the face of factors [indicating abuse], but in the absence of a claim or finding of unconstitutionality, courts should be reluctant to construe ambiguous words in initiative laws expansively."[100] In a footnote, she then states:

> When a court is construing an initiative *solely* to determine its constitutionality, these same factors militate in favor of an opposite rule of construction. A court confronted with a constitutional initiative that targets a socially subordinated group, for example, would better account for the risks of abuse if it assumed in its constitutional analysis that the initiative would be applied broadly, not narrowly. In the context I address, however, a court applies an initiative that has either survived, or not demanded, constitutional scrutiny.[101]

At first glance, this suggestion of interpretive flip-flopping might seem nonsensical. After all, must we not determine what the measure "means" before we can decide whether it is constitutional? Ultimately, I will reject Schacter's proposal, at least in the form in which she posits it, but, first, let us examine why it is a natural enough suggestion to make in the context of direct democracy.

As Schacter demonstrates, one problem endemic to direct democracy is that the text of many ballot measures, as well as the materials

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100. *Id.* at 157. She later summarizes the "'danger signals' that increase the risk of abuse of the initiative process: length, complexity, confusing wording, obscurity about the effect of an affirmative vote, heavy advertising (especially when coded with race-based or similar symbols), and propositions explicitly or implicitly targeted at socially subordinated groups." *Id.* at 159.

101. *Id.* at 157-58 n.216.

accompanying the proposals (such as the booklet issued by the state), can be overwhelmingly long, complex, obscure, confusing, vague, or ambiguous.[102] At least sometimes good reason exists to fear that such unclear drafting was strategically adopted by proponents bent on manipulating the process.[103] When even the supposedly sober second thought of post-hoc judicial scrutiny can make neither heads nor tails out of the text of a ballot measure, what is to be done about its meaning?

The most recent controversies involving direct democracy to cross the Supreme Court's agenda illustrate this problem well. At issue in *Romer v. Evans*[104] was a Colorado initiative measure that amended the state constitution to deny certain rights and political opportunities to gays, lesbians, and bisexuals.[105] This was exactly the sort of ballot proposition designed to harm a subordinated group that Schacter has in mind.[106] The state contended that the provision simply put "gays and lesbians in the same position as all other persons"[107] and did "no more than deny homosexuals special rights."[108] The Colorado Supreme Court rejected that reading, concluding instead that the amendment repealed all state and local laws and policies specifically securing protection for gays, lesbians, and bisexuals from private or public discrimination on the basis of sexual orientation and forbade the enactment of such laws or policies in the future.[109] The United States Supreme Court suggested that the amendment might well also deprive gays, lesbians, and bisexuals "even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[110]

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102. *See id.* at 139-43.
103. *See id.* at 125-26, 129-30, 146, 156-57.
104. 116 S. Ct. 1620 (1996).
105. The amendment provided:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST. art. II, § 30(b).
106. *See supra* note 100.
107. *Romer*, 116 S. Ct. at 1624.
108. *Id.*
109. *See* Evans v. Romer, 854 P.2d 1270, 1284-85 (Colo. 1993).
110. *Romer*, 116 S. Ct. at 1626. As an example, the Court noted state statutes subjecting agency action to judicial review under an arbitrary-and-capricious standard, making it a criminal offense for a public officer knowingly to refuse to perform a duty

Should a narrow or broad reading of the amendment be preferred? The United States Supreme Court happily embraced the authoritative understanding of the state law adopted by the Colorado Supreme Court. In so doing, the Court found an easy way to accommodate Schacter's suggestion that subordinated groups might be best protected constitutionally by broad understandings of ballot measures targeted at them.[111] But what if no state court has authoritatively construed the measure in question? Or what if the authoritative state construction means that the statute violates the Supreme Court's understanding of the federal constitution, while under another plausible interpretation of the statute the federal constitutional problem would evaporate?

At least some of these problems were lurking in *Arizonans for Official English v. Arizona*.[112] The voters of Arizona amended their state constitution to make English "the official language of the State of Arizona."[113] Although the amendment is fairly elaborate,[114] exactly

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imposed by law, prohibiting "unfair discrimination" in insurance, and prohibiting discrimination in state employment on specified factors "or other non-merit factor." *See id.*

111. *See supra* text accompanying notes 101-02.

112. 117 S. Ct. 1055 (1997).

113. ARIZ. CONST. art. XXVIII, § 1.

114. The entire amendment provides as follows:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

1. *English as the official language; applicability*.

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

(i) The legislative, executive and judicial branches of government.

(ii) All political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities.

(iii) All statutes, ordinances, rules, orders, programs and policies.

(iv) All government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This state and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. *Requiring this state to preserve, protect and enhance English*.

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona.

*3. Prohibiting this state from using or requiring the use of languages other than English; exceptions*.

Section 3. (1) Except as provided in Subsection (2):

what it requires the state and its employees to do is unclear. Like Colorado in *Evans*, Arizona interpreted the amendment very narrowly. According to the Arizona Attorney General, the provision simply means that the official, formal acts of the state itself—its statutes, executive proclamations, and so on—must be undertaken in English.[115] In contrast to *Evans*, however, the federal courts considering the Arizona ballot measure had no state judicial authoritative construction upon which to rely.[116] The plaintiffs in the Arizona case contended that the amendment forbids persons such as state employees or legislators from using any language other than English in their job-related activities.[117] Plaintiffs further alleged that the prohibition violates their first amendment rights.[118] The Ninth Circuit agreed both with the plaintiffs' interpretation of the provision and with their understanding of free speech rights.[119]

Was this correct? Why not adopt the state's proffered narrow interpretation and save the amendment from constitutional invalidity?

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(a) This State and all political subdivisions of this State shall act in English and no other language.
(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.
(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.
(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:
(a) To assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.
(b) To comply with other federal laws.
(c) To teach a student a foreign language as a part of a required or voluntary educational curriculum.
(d) To protect public health or safety.
(e) To protect the rights of criminal defendants or victims of crime.
4. *Enforcement; standing*.
Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

*Id.*

115. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc) (focusing on § 3(1)(a) of the amendment).

116. The case was filed in federal court, and both the district court and the Ninth Circuit refused the State's request to certify the question of the meaning of the amendment to the state courts. *See* 69 F.3d at 930-31.

117. *See id.* at 924-25.

118. *See id.* at 925.

119. *See id.* at 931-47.

This seemingly procedural question is, of course, related to the famous concurring opinion by Justice Brandeis in *Ashwander v. Tennessee Valley Authority.*[120] Brandeis generally counseled in his *Ashwander* opinion that courts should avoid deciding constitutional issues if possible.[121] More specifically, he argued that they should embrace the longstanding canon of statutory interpretation that a court should prefer an interpretation of a statute that avoids constitutional issues.[122] The canon is an important one. Yet it has rarely been assessed in any detail,[123] much less with respect to ballot measures, where the context of direct democracy may alter the canon's appropriate usage.[124]

### *B. Substantive Relationship of Constitutional and Statutory Interpretation*

The second, more substantive problem lurking beneath Schacter's analysis is that her proposed "metademocratic" approach to interpreting ballot propositions seems insufficiently linked to the Constitution.[125] Recall that Eule examined the Constitution, but not statutory interpretation, and Schacter approached the puzzle the other way around. In reality, however, the two are intimately related, and speaking of one without the other presents an unduly limited perspective.

The point is a simple one: many of the important values that drive statutory interpretation are derived from the Constitution, broadly understood. As I explain, each of the commonly proposed overall theories of interpretation is rooted in a particular conception of the judicial role under the separation of powers. Moreover, many of the established canons of statutory interpretation are best understood as promoting values linked to the Constitution. In this Section, I discuss these propositions in their ordinary context—the interactions of judges with legislatively enacted laws. I then turn, in the next Section, to some special problems that arise in attempting to apply that model to ballot propositions.

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120. 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

121. *See id.* at 347.

122. *See id.*

123. For two recent exceptions to this generalization, see Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71.

124. For further discussion of this problem, see *infra* text accompanying notes 182-85.

125. In this respect, Schacter relies rather summarily upon her earlier article, which does consider this linkage. *See* Schacter, *Metademocracy*, *supra* note 74.

There are three established approaches to statutory interpretation: literalism, intentionalism, and purposivism.[126] The one most obviously laden with legal-process values is purposivism, the technique proposed by Hart and Sacks.[127] A common complaint about this approach is that its flexibility and indeterminacy allow judges too much lawmaking discretion in attributing meaning to a statute,[128] thereby overstepping their appropriate role under the separation of powers.[129] In contrast, intentionalism seeks merely to implement the intentions of the enacting legislature,[130] and at least today's version of literalism purports simply to give the statute the understanding that its text conveys to the ordinary user of the English language.[131] The contrast in these last two approaches is itself rooted in differing conceptions of the separation of powers: are judges to be the faithful agents of the lawgiver or of the "law"?

Because legislative intent and statutory textual meaning are slippery concepts at best, even perhaps illusory in many cases,[132] they must, as a practical necessity, be supplemented by interpretive rules or guidelines. The conventions of statutory interpretation suggest that canons of interpretation may guide the process of attributing meaning

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126. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 513-631 (2d ed. 1995); HART & SACKS, *supra* note 35, at 1111-12.

127. *See* HART & SACKS, *supra* note 35, at 1374-80. In summary, under their approach to statutory interpretation, "a court should . . . [d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved." *Id.* at 1374.

128. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 472-73 (1989) (Kennedy, J., joined by Rehnquist, C.J. and O'Connor, J., concurring in the judgment) (contending the problem with "spirits," or purposes, "is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice").

129. *See, e.g.*, *id.* at 473. Justice Kennedy stated:

> Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.

*Id.*

130. For thoughtful defenses of intentionalism, see, e.g., RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985); Martin Redish & Theodore Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994).

131. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

132. *See, e.g.*, Eskridge & Frickey, *Statutory Interpretation*, *supra* note 92, at 324-45.

to a statute. The canons are available for even the most positivist interpreter today: Justice Scalia, the most enthusiastic interpretive literalist of our times, has made the "established canons" an essential element of his inquiry.[133]

Canons are simply interpretive guidelines which, by dint of judicial repetition, take on the appearance, if not the reality, of a legal rule. Some canons purport to provide guidance to textual meaning.[134] Others, driven by judicial notions of comparative institutional competence under our separation of powers, place primary interpretive responsibility on nonjudicial entities.[135] Another set of canons implement the legal-process goals of rendering statutory law coherent and of promoting continuity rather than abrupt change.[136] Still others, more patently rooted in judicial value judgments, create presumptions that statutory meaning is consistent with certain values derived from constitutional or common law.[137]

It is this last set of canons, which might be called the "substantive canons,"[138] that most vividly demonstrates the extent to which statutory and constitutional interpretation must be viewed as segments of a continuous function rather than as discrete activities. A general canon in this category, mentioned earlier,[139] is the one counseling that, if reasonable, courts should interpret statutes to avoid serious constitutional difficulties. This canon assumes that the statute has run up against a strongly enforced constitutional value. Yet it is in the inverse situation—one in which the constitutional norm is not enthusiastically enforced through judicial review—that one encounters several more specific substantive canons. Two examples should suffice to illustrate this canonical protection of underenforced constitutional norms.[140]

First, consider the venerable rule of lenity, which counsels that ambiguities in criminal statutes should be construed against the government.[141] Perhaps originally justified as a way to counteract the in-

133. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting).
134. *See* ESKRIDGE & FRICKEY, *supra* note 126, at 634-45.
135. *See id.* at 634.
136. *See* David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).
137. *See* ESKRIDGE & FRICKEY, *supra* note 126, at 652-705.
138. *See id.* at 652.
139. *See supra* text accompanying notes 120-22.
140. On underenforced constitutional norms generally, see Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).
141. *See* ESKRIDGE & FRICKEY, *supra* note 126, at 655-75.

flexible and draconian criminal penalties of the old common law,[142] the rule of lenity today may well serve different purposes. In a criminal justice system that provides essentially no meaningful constitutional limitations upon prosecutorial discretion, this canon provides a judicial justification for trimming expansive statutory language which might provide tempting opportunities to overzealous or improperly motivated prosecutors. It also helps implement the constitutional due-process value of fair notice, at a time when the "void for vagueness" notion in constitutional law is rarely invoked to terminate a prosecution on constitutional grounds.

A second underenforced constitutional norm protected by a canon of statutory interpretation arises in federalism cases. It is an oft-told tale, not yet complete, that the current Supreme Court believes that Congress has overstepped its legislative authority and invaded the sovereignty of the states. The short version of one modern chapter of the story goes like this: after first upholding congressional authority under the commerce clause to regulate core state functions of an economic character in *Maryland v. Wirtz*,[143] then changing its mind eight years later in *National League of Cities v. Usery*[144] and invalidating an exercise of that power, the Court took another about-face and revalidated the power nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[145] That ended the story as a formal matter of judicial review, but not as a more general matter of using the tools of public law to implement constitutional values. For in *Gregory v. Ashcroft*,[146] decided only six years after *Garcia*, the Court took what is perhaps the kinder, gentler tack. The *Gregory* Court concluded that a federal regulatory statute would not control core state functions unless that power was unmistakable on the face of the statutory text.[147]

The basis, justification, and application of this federalism canon demonstrate the potential usefulness of quasi-constitutional canons. The constitutional problem in federalism cases is apparent. Under our Constitution, nothing is more basic than the notion that the Congress has only limited, delegated legislative powers, and that the states are the presumptive sovereigns within their domains. Whether subjecting

142. *See id.* at 656.
143. 392 U.S. 183 (1968).
144. 426 U.S. 833 (1976).
145. 469 U.S. 528 (1985).
146. 501 U.S. 452 (1991).
147. *See id.* at 460-61. The Court in *Gregory* essentially borrowed the clear-statement canon adopted in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), governing congressional abrogation of the states' Eleventh Amendment immunity to suit in federal court.

the core sovereign activities of a state to supervening federal regulation is, therefore, a significant constitutional question. After the New Deal, however, when the Supreme Court upheld wide-ranging congressional power at the expense of the states, the question could no longer be "may Congress regulate states?" Rather, it has become "when has Congress gone too far in regulating states?" Judges are particularly ill-suited to make such judgments, which require linedrawing or balancing that can be neither easily defended in neutral terms nor easily replicated in later cases. Indeed, in *Garcia* the Court stated that one important factor in abandoning judicial review of such congressional legislation was that the question asked under *National League of Cities*—whether the federal law "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions"[148]—had proved itself incapable of principled and predictable judicial resolution.[149]

But this prudential constraint on judicial review need not discourage other techniques of protecting the constitutional values at stake. *Gregory* concluded that congressional authority to invade core state functions was an "extraordinary power in a federalist system," one "that we must assume Congress does not exercise lightly."[150] The Supreme Court in *Gregory* then implemented this approach by concluding that "inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[151]

*Gregory* does not stand alone. The Court has taken a similar approach to the enforcement of another constitutional structural principle—the nondelegation doctrine. The New Deal, again, was the turning point; since that period the Court has refused to invalidate federal statutes on the ground that they contain overbroad or ill-defined delegations of lawmaking authority to administrative agencies. As with constitutional federalism, after the New Deal the nondelegation question became "when has Congress gone too far?" Once again, the federal judiciary has not considered the issue capable of principled judicial solution. Yet, despite its arguably nonjusticiable character, the question of where the lawmaking functions of Article I end and the functions of executing and administering the laws under Article II begin is surely a constitutional issue of real magnitude. As with *Greg-*

148. *Nat'l League of Cities*, 426 U.S. at 852.
149. *See Garcia*, 469 U.S. at 531, 548.
150. 501 U.S. at 460.
151. *Id.* at 464.

*ory*, the Court has sought to address all these concerns by transforming the nondelegation issue from one of constitutional law into one of statutory interpretation.[152]

How might such quasi-constitutional canons of statutory interpretation mediate the cluster of tensions concerning the countermajoritarian difficulty of judicial review in general and the problems of justiciability and precedential deference to Congress in particular? In theory, at least, the canons

> can protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly. Protecting underenforced constitutional norms through [canons] makes sense: it is not ultimately undemocratic, because Congress can override the norm through a statutory clear statement; such rules still provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution.[153]

Thus the canons, as a matter of statutory interpretation, perform some of the same functions as reforms of constitutional judicial review proposed by scholars of constitutional law to lessen the problem of the countermajoritarian difficulty. They amount to suspensive vetoes—"remands" to the legislature—that may foster legislative deliberation on important constitutional values but ultimately leave the legislature with the authority to override the judicial decision.[154] In short, the canons police the borderline between constitutional and statutory interpretation. There are intriguing possibilities, as well as potentially difficult problems, in attempting to employ this model as a way to mediate tensions on another borderline, that between republican government and direct democracy.

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152. *See* Mistretta v. United States, 488 U.S. 361, 371-79 (1989) (nondelegation doctrine essentially unenforceable as matter of constitutional law, but may be considered in narrowly construing a statute to avoid arguably undue delegation).

153. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992).

154. *See generally* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 16-17 (1957); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

### *C. Quasi-Constitutional Canons, General Interpretive Techniques, and Direct Democracy*

#### *1. The Allure of the Quasi-Constitutional Approach.*

At first glance, there is a striking similarity between the quasi-constitutional approach taken in federalism and nondelegation cases and the problem of applying the constitutional value of republican government in the context of ballot propositions. Judicial review in all three areas is essentially nonexistent for the same reasons. Under *Pacific States*,[155] federal courts are as disqualified from carrying out a frontal constitutional attack on direct democracy as they are from drawing firm lines against congressional intrusion upon state sovereignty or congressional delegations to administrative agencies. Yet in all three areas salient constitutional questions exist. Judicial reluctance to intervene in each instance is rooted in prudential concerns of justiciability. Indeed, the Supreme Court has explicitly stated that its avoidance of republican-form-of-government questions is attributable to the absence of "judicially discoverable and manageable" standards for judicial review.[156] The temptation to transform constitutional judicial review into kinder, gentler, and more manageable subconstitutional canonical interpretive limits would seem, at first blush, as irresistible in the context of direct democracy as it has been for federalism and nondelegation issues.

A similar conclusion seems plausible when the concern shifts from the structural constitutional concern of republicanism to the protection of specific individual rights against invasion through direct democracy. This might involve assessing whether, for example, the electorate was improperly motivated in adopting a facially neutral ballot measure that disproportionally affects a racial minority.[157] The problem might be mediated to some extent, however, if ambiguities in the statute are interpreted to avoid disparate impact. This approach might appear to be a garden-variety application of the canon of avoiding constitutional questions, but in reality, given judicial reluctance to invalidate ballot measures in such circumstances, it is more consistent with the use of canonical methods to protect underenforced constitutional norms. Similarly, by analogy to *Romer v. Evans*, in which the Supreme Court applied a heightened constitutional rationality standard to invalidate an anti-gay ballot proposition,[158] ballot propositions that

155. *See* 223 U.S. at 118.
156. Baker v. Carr, 369 U.S. 186, 217 (1963).
157. *See supra* text accompanying notes 63-67.
158. *See supra* note 61.

threaten equal-protection values even outside the context of disparate impact on a group specially protected by equal protection precedents could be, as Schacter suggested, subjected to narrow interpretation.[159]

*2. Problems of Applying the Quasi-Constitutional Approach*

There are, however, potentially formidable problems with applying quasi-constitutional interpretive techniques in the context of direct democracy. They are rooted in the federal- and legislature-centric backdrop against which the quasi-constitutional approach has evolved.

First, the canonical method has been premised on the presence of the legislative process. In establishing a clear interpretive regime under which constitutional values are protected through statutory rather than constitutional interpretation, the hope is that Members of Congress—who have, after all, taken an oath to uphold the Constitution—will earn this judicially granted authority to have the last say by deliberating about these values when they consider sensitive legislation. If Congress fails to state clearly its intent to encroach on these values, the courts will construe the statute so as to avoid the intrusion on the norms, remanding the issue for a second—and, it is assumed, more focused and conscientious—round of legislative deliberation and careful drafting. In this way, the supposedly nonjusticiable problems of line-drawing and balancing are resolved by Congress rather than the courts.

This approach is not easily translated to the regime of direct democracy. The electorate is not an ongoing institution with regular sessions and elaborate deliberative processes consisting of individuals duty-bound to uphold the Constitution who are just waiting for a judicial remand so that they can get it right the next time. Instead, the electorate never formally convenes at all, to deliberate or otherwise. At no point does the individual voter solemnly raise her hand and swear to uphold constitutional values. Indeed, the electorate as a body has only one official function: the casting of ballots. Once that is done, the electorate disaggregates, to come together again only at some distant future date. Each time it assembles, its composition is not a precise identity and number, like the members of a legislative body, but rather consists solely of those registered voters who care to vote on that given day. In short, the only formal function of direct democracy is aggregation of preferences on an intermittent basis.

Second, statutory interpretation theory in general and policy-based canonical interpretation in particular are probably premised not

159. *See* Schacter, *supra* note 20, at 157.

just upon the presence of legislators, but upon some generous assumptions about them as well. For example, Hart and Sacks constructed their purposive approach to statutory interpretation on certain premises: that statutes, like all other law, are designed to promote the general purposes of the legal process as well as the specific purposes animating them; that legislators are reasonable people pursuing reasonable purposes reasonably; and that accordingly courts have broad authority not simply to avoid "absurd results," but to harmonize the overall law in pursuit of reasonable outcomes.[160] Whatever might be thought about the descriptive accuracy of these generous assumptions about legislators,[161] they have little applicability to the context of direct democracy. I do not mean to libel the electorate but rather to suggest that, because all that direct democracy does is aggregate preferences, little reason exists to suppose the resulting law fits snugly into the rest of the law as a functional matter and is driven by the same "reasonable" concerns that animate legislators. In essence, Hart and Sacks incorporated the ideal of republican legislative deliberation into their theory, which makes their approach hard to translate to ballot measures.

Of course, the Hart and Sacks legal-process approach is not the only method of approaching statutory interpretation. Curiously, however, if the other approaches accept policy-based canons—and it has never been doubted that they do—the other methods probably incorporate the Hart and Sacks mentality about legislative deliberation on public values. In any event, whatever might be said about overall theories of statutory interpretation, any court considering the application of quasi-constitutional canons might seem to be buying into assumptions about reasonableness and the deliberative capacities of lawmakers—premises not easily translated to direct democracy. Indeed, attempting to do so would be such a patent normative move on the part of judges that they might be subjected to far more ridicule than if they simply struck down the statute as unconstitutional.

Consider, in this regard, the application of a set of what are usually fairly uncontroversial canons—those encouraging coherence and continuity in law. As David Shapiro has explained, many established canons, such as the one disfavoring implied repeals, are designed to lead courts in ambiguous situations to maintain continuity with prior law rather than to embrace sharp legal disjunctions.[162] One basis for these canons may be the generous—indeed, perhaps disingenuous—

160. *See* HART & SACKS, *supra* note 35, at 1374-80.
161. *See supra* text accompanying notes 57-59.
162. *See* Shapiro, *supra* note 136.

assumption that legislators are "reasonable" members of the overall American lawmaking community and, absent evidence to the contrary, prefer coherent, incremental change to dramatic legal shifts and starts. Whatever might be said about legislators individually and the legislature as an institution on that question, it seems clear that there is no empirical reason at all to indulge in this assumption about individual voters and the electorate as a body. After all, the impetus for direct democracy was to create an institution capable of end-running the bulky, slow, and incremental legislative process.

The coherence and continuity canons identified by Shapiro might be defended on a more normative basis as providing better overall legal outcomes based on legal-process assumptions. This understanding of these canons has merit, but by what authority may judges impose those assumptions upon an unsuspecting electorate that cannot, unlike a legislature, promptly reconvene to override the "ameliorative" judicial interpretation? The coherence and continuity canons may have many factors supporting them when they are applied in the ongoing, frequently played game of court/legislature interactions, but embracing them in the seemingly sporadic, one-shot games of court/ballot proposition interactions is more questionable. Thus, although all ballot propositions should arguably be subject to the otherwise outmoded continuity canon that statutes in derogation of the common law or other pre-existing law should be narrowly construed[163]—I presume that this approach would capture all ballot measures, which by nature are designed to change the status quo—that canon may seem inconsistent with the general purpose of direct democracy and with the capacity of the institution of direct democracy (the voters) to respond in any way. Direct democracy is by its nature a discontinuous, non-institutional, non-interactive lawmaking event; it is not a part of a continuous, institutionally interactive lawmaking process.[164] Third, it is not simply the legislature-centric, but also the federal-centric, aspects of statutory interpretation theory that create problems of translation of method. Ballot propositions are ordinarily reviewed by state, not federal, judges. These state judges very often lack life tenure and must stand for periodic re-election.[165] When reviewing a controversial and highly visible ballot proposition, these judges are undoubtedly politi-

163. *See* J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 344-45 (1992).

164. In the end, however, I reject the importance of these factors and propose a continuity canon somewhat along the lines suggested in the text. *See infra* text accompanying notes 180-96.

165. *See supra* note 31 and accompanying text.

cally situated far differently than are federal judges with life tenure considering arcane nondelegation questions or even more politically salient federalism issues.

Positive political theory—as well as common sense in the realist tradition—posits that lawmaking institutions, including courts as well as legislatures, are "rational, self-interested, interdependent, and affected by the sequence of institutional interaction."[166] The resulting law can be seen as "an equilibrium, a state of balance among competing forces or institutions."[167] When the same entity both enacts the law and periodically elects the judges, however, judges are not only subject to after-the-fact discipline or replacement for their interpretations, but also are likely to be unusually deferential in the first place.[168] In fact, this merger of the law-enacting and judicial-selection functions is so foreign to usual conceptions of American public law that, when it is encountered at all, it may seem to be a gross violation of the separation of powers threatening to trammel judicial independence so substantially as to endanger the rule of law itself. Indeed, a major issue in federal Indian law is whether tribal constitutions that lack a separation of powers should be amended to insulate tribal courts from tribal councils.[169] Yet the same problem arises much more routinely in American law in half the states, where the electorate both enacts legislation and elects the judiciary.[170]

The anecdotal evidence concerning this problem is not encouraging. Julian Eule reports a variety of instances in which elected judges have admitted considerations of re-election may have influenced the outcomes of cases.[171] In a particularly vivid example that arose after Eule completed his major study, the Supreme Court of Oregon upheld a death penalty scheme that, on its face, was clearly inconsistent with federal Supreme Court precedent, by adopting a construction of it that was different from the version voted on at the polls.[172] Although Justice Linde's scathing dissent did not directly accuse the majority of ignoring the rule of law and simply bowing to the evident desires of Oregonians that, by hook or by crook, there be a death penalty in the

166. Eskridge & Frickey, *supra* note 39, at 28.
167. *Id.*
168. *See* Eule, *supra* note 4, at 1580-83.
169. *See, e.g.*, Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1984-85, 1988-89 (1996) (review essay).
170. *See supra* notes 4 and 31 and accompanying text.
171. *See* Eule, *supra* note 4, at 1579-84; Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 738-39 (1994).
172. *See* State v. Wagner, 786 P.2d 93 (Ore. 1990).

state,[173] it is a fair inference that both Linde and more uninvolved observers could rationally come to such a conclusion. In this instance, the very idea of quasi-constitutional interpretation may well have been stood on its head: the highest court of a state, elected by the people, may have used interpretive techniques to save an unconstitutional statute not to protect constitutional values of lawmaking structure (republicanism) or the individual rights of criminal defendants (avoiding cruel and unusual punishment, ex post facto applications, due process), but to fill a gap by effectively legislating a death penalty in deference to perceived public opinion although the capital punishment statute adopted by the electorate was defective. The motivation may have been crass (judicial re-election anxieties) or arguably more noble (the promotion of direct democracy and deference to "the people"), but, whatever it was, it seemingly trumped the actual constitutional norms of republican structure and individual rights.

Thus, despite first appearances to the contrary, there may be difficult problems in applying quasi-constitutional canons and general interpretive techniques in the context of direct democracy. Accordingly, it seems essential to attempt to articulate a theoretical approach to the problem and, if only tentatively, examine how it seems to stack up against judicial practice.

### *3. The Theory and Practice of Quasi-Constitutional Limitations upon Direct Democracy: A Preliminary Inquiry*

The quasi-constitutional interpretive approach is designed to protect public values, especially underenforced constitutional norms. In the circumstance of direct democracy, implementing this approach seems to run up against the many institutional and practical barriers discussed earlier. In addition, carrying out the quasi-constitutional approach vigorously despite these concerns would appear to interfere with another norm: the very legitimacy of direct democracy. Judicial consideration of that legitimacy, in turn, remains skewed by *Pacific States*. Federal judges are incapable of assessing, on first principles, whether direct democracy collides with republican values.[174] Because state constitutions make direct democracy a right of the people, state judges are equally unable to turn to their own constitutions and make a similar assessment.[175]

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173. Justice Linde came close, though. *See id.* at 110.

174. *See supra* notes 29-30 and accompanying text.

175. Indeed, at least some state judges may consider direct democracy a rather sacred instrument within their local constitutional cultures, such that ballot measures should be liberally construed. The tension between treating ballot propositions no

As a normative matter, then, constitutional and statutory interpretation of ballot measures should attempt to achieve two goals sometimes in tension: respect for public values—especially constitutional values, including the republican value of representative government; and respect for direct democracy as an institution and for the people as lawmakers. As a descriptive matter, we might expect that judges are best able to mediate these concerns when the issue under consideration is unlikely to produce concerns about re-election or other popular retaliation. Accordingly, as Eule suggests, we might expect federal judges, with life tenure, to be more effective than their elected state colleagues in addressing public values.[176] When the issue is seen as a federal constitutional one, this expectation may not result in much mischief. It does suggest, however, that state constitutional constraints are unlikely to have much play in judicial review of direct democracy. More important for present purposes, it makes it especially difficult to apply quasi-constitutional statutory interpretive techniques because the only judges who can engage in authoritative interpretation of state legislation—state judges—may be less likely to embrace the quasi-constitutional techniques designed to mediate constitutional values and statutory meaning.

If this judicial consideration of the tensions between republican values and direct democracy is to be a true mediation rather than a capitulation of the former to the latter, judges must fully understand the precarious doctrinal and practical contexts in which they are operating. State statutes adopted through direct democracy avoid legislative scrutiny—bicameral review in all states but Nebraska—and the threat of executive veto. State constitutional amendments adopted through direct democracy become entrenched as a matter of state law, since they are immune from legislative amendment or repeal. If adopted through appropriate procedures, they also avoid invalidation

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differently from other law and providing them some special status as flowing from "the people" is demonstrated by a passage from the California Supreme Court. The court remarked: "[A]lthough the initiative power must be construed liberally to promote the democratic process when utilized to enact statutes, those statutes are subject to the same constitutional limitations and rules of construction as are other statutes." Legislature v. Deukmejian, 669 P.2d 17, 27 (Cal. 1983) (en banc) (internal citation omitted).

My summary at this point should be supplemented by the intriguing contention of Justice Linde. He argues that, although federal judges are prohibited from entertaining the argument that direct democracy at the state level violates the republican form of government clause, state courts may hear and decide such issues. *See supra* note 30.

176. *See* Eule, *supra* note 4, at 1579-84.

as inconsistent with the state constitution.[177] Federal constitutional scrutiny of these measures is inhibited by nonjusticiability concerns and, when undertaken by state judges, re-election concerns as well. The fall-back approach of quasi-constitutional interpretive techniques is underdeveloped theoretically and perhaps not easily transportable from the context of its formulation—the legislative process—to direct democracy.

Nonetheless, as I explain, there is reason to hope that federal and state courts can mediate constitutional values and lawmaking by ballot. Any ameliorative approach will have both procedural and substantive dimensions.

*a. Procedural dimension: the avoidance canon*

The application of the canon counseling that, if plausible, statutes should be interpreted to avoid constitutional invalidation potentially plays an important procedural role in the process of review of the products of direct democracy. Recall that in *Evans v. Romer* the Colorado Supreme Court declined the suggestion of the state attorney general to place a narrow construction on the anti-gay ballot measure in question.[178] In light of the ballot proposition's "immediate objective, its ultimate effect, its historical context, and the conditions existing prior to its enactment,"[179] the Colorado court concluded that the measure had wide-ranging effects removing existing protections against discrimination on the basis of sexual preference and constructing barriers to the use of ordinary political channels to reinstate such protections. Similarly, in the Arizona case concerning English as the official language, the Ninth Circuit went so far as to refuse to follow a formal state attorney general opinion radically narrowing the apparent reach of the "English-only" ballot measure at issue there.[180] Because that opinion was not binding on the state courts, it was not an authoritative construction of state law to which federal courts must defer. More important for the current analysis, the Ninth Circuit concluded the narrow reading was untenable because it was "completely at odds with [the] plain language" of the measure.[181]

The canon proposing that courts construe statutes to avoid constitutional invalidity is subject to various formulations. The broadest, at

177. It is unsurprising, then, that advocates of ballot propositions prefer to make their proposals in the form of state constitutional amendments rather than statutes. *See* Magleby, *supra* note 21, at 25.
178. *See supra* text accompanying notes 107-10.
179. *Evans*, 854 P.2d at 1284.
180. *See supra* text accompanying notes 114-15.
181. *Yniguez*, 69 F.3d at 929.

least in recent times, comes from *National Labor Relations Board v. Catholic Bishop of Chicago*,[182] in which the Supreme Court concluded that it should avoid "serious constitutional questions" unless compelled to do so by an "affirmative intention of the Congress [that is] clearly expressed."[183]

This approach seems to require courts to avoid a serious constitutional question unless either clear statutory text or crystal-clear legislative history stands in the way. As phrased, this canon is insupportable even in the context of judicial review of legislatively created law because it radically expands the practical sweep of the Constitution while pretending to avoid interpreting it.[184] In the context of direct democracy, the canon—as phrased—would amount to a strong clear-statement requirement concerning the *text* of ballot propositions, because it is unimaginable that the voters could have anything amounting to a *clearly* expressed *affirmative* intention anywhere else. The application of such a powerful canon would allow courts, often upon the suggestion of the state attorney general, to adopt strained understandings plainly at odds with the basic objectives of ballot propositions. Such an approach does not help to mediate the tensions between republican values and direct democracy. By dismissing the evident wishes of the electorate—measured rather objectively by both the fair meaning of language chosen in the ballot proposition and the tenor of the times in which the electorate voted—the application of the canon disserves direct democracy while hardly promoting anything approximating the rule of law. The better approach, followed by the Supreme Court of the United States and by the Colorado Supreme Court in *Evans* and by the Ninth Circuit in the Arizona case, is to give the people their due and then fairly assess whether the policy in question is constitutional.

Thus, mediating republican values and direct democracy requires a more nuanced approach to the canon in question than does the *Catholic Bishop* approach or that proposed by Schacter—who, it will be recalled, proposes construing constitutionally controversial ballot propositions broadly when they are under constitutional attack but narrowly if the only issue is one of statutory interpretation.[185] The *Catholic Bishop* approach would allow courts to avoid addressing constitutional issues in the majority of cases—namely, those cases in

182. 440 U.S. 490 (1979).
183. *Id.* at 501.
184. For a critique of even narrower formulations of the canon, see Schauer, *supra* note 123.
185. *See supra* text accompanying notes 100-02.

which the fair import of the statutory text and evident purposes raise constitutional issues, but do not present them clearly enough to satisfy the heightened requirements of the *Catholic Bishop* approach. Schacter's proposal would stretch the evident meaning of a controversial ballot proposition in order to find it unconstitutional, but contract that meaning to limit the damage to public values if the measure must be applied. However, neither the *Catholic Bishop* nor the Schacter approach gives sufficient respect to the voters. In addition, Schacter's approach does not reflect the ordinary course of public-law litigation, in which the court typically has before it both constitutional and statutory interpretative issues and must determine how to proceed in an integrated way.

Respect for direct democracy requires giving the voters their due. When a ballot proposition has clear purposes and effects, such as the wide-ranging anti-gay measure in *Evans v. Romer* or the broadly worded "English-only" measure from Arizona, it is judicial willfulness, not the pursuit of public values, to ignore the proposition's evident meaning in preference for some kinder, gentler interpretation. By giving the measure its due and striking it down as unconstitutional if necessary, courts candidly acknowledge precisely what the legal problem is and who is responsible for the outcome.

Moreover, a more deceptive approach is likely to fool no one. In contrast to the relatively surreptitious passage of many legislatively adopted laws, when a highly publicized and controversial ballot measure is considered, the public at large is acutely aware of the larger objectives with which it is associated. To construe the ballot measures in *Evans v. Romer* and the "official English" case hyper-narrowly would insult the intelligence of the citizenries of Colorado and Arizona and bring the fundamental role of the judiciary into question. Thus, although Schacter's approach might make sense from the narrow perspective of protecting subordinated groups, it cannot be sustained if a broader perspective, under which direct democracy deserves respect, is countenanced. Similarly, although the *Catholic Bishop* approach purports to further the legal-process objective of avoiding unnecessary constitutional lawmaking, such lawmaking is nonetheless employed under the guise of statutory interpretation.

In other situations, however, while the broad objectives of the ballot proposition may be clear, public preferences may enable a narrower construction on important subsidiary issues without unduly encroaching upon direct democracy. For example, a complex ballot measure aimed at substantially lowering insurance rates might be upheld on its face as constitutional, but only with the understanding that

the insurance companies are provided with an administrative avenue to raise procedural and substantive constitutional claims.[186] Similarly, a proposition enacted by the voters designed to remedy a perceived imbalance in criminal procedure unduly favoring defendants cannot be transmogrified into new protections for criminal defendants; it might nonetheless be susceptible to a principled interpretation under which defendants receive procedural rights parallel to those newly granted to the prosecutors.[187] In such circumstances, although the apparent purposes of the ballot propositions were to reduce insurance rates and to help put criminals in jail, no compelling reason exists to interpret the measures as undiluted mandates to soak insurance companies and disadvantage criminal defendants. In cases such as these, the text of neither ballot proposition answered the questions before the court, and the judges therefore understandably attempted to mediate the values associated with the rule of law and direct democracy, rather than cynically assuming that the voters intended to jettison the former.

As the California Court of Appeals said in the criminal procedure example, "[any] other conclusion would work an unfairness and a lack of balance in the criminal process, which we will not attribute to the voters."[188] This approach avoids the assumption that the voters, like the legislators in legal-process interpretive theory, are "reasonable [people] pursuing reasonable purposes reasonably."[189] Instead, it simply states that although the voters must be given their due, the many ambiguities arising when ballot propositions are applied in the real world are subject to some ameliorative, yet respectful, interpretive moves in light of the rule of law. This approach is based on the absence of evident voter imperatives to the contrary, rather than judicially constructed, fictional voter mandates to pursue reasonable purposes consistent with the rule of law.[190] In contrast, had there been an obvious voter desire to create a wholly one-sided criminal justice system biased toward prosecutors, the court should have given the ballot proposition that meaning and then considered striking it down as unconstitutional, rather than gutting it through statutory interpretation.

If the *Catholic Bishop* formulation is unacceptable because it impinges too much on the lawmaking prerogatives of the electorate, it is surely much too broad to apply to statutes enacted through the republi-

186. *See* Calfarm Ins. Co. v. Deukmejian, 771 P.2d 1247 (1989), discussed in Eule, *supra* note 4, at 1569-73.

187. *See* Nienhouse v. Superior Court, 49 Cal. Rptr. 2d 573 (Cal. App. 1996).

188. *See id.* at 578.

189. HART & SACKS, *supra* note 35, at 1378.

190. *See* Schacter, *supra* note 20, at 158-59 (a similar argument concerning the interpretation of long, complicated ballot measures involving criminal sanctions).

can (legislative) lawmaking process. What remains to be done is to formulate the constitutional-issues-avoidance canon in a manner sensitive to legislative supremacy and respectful of direct democracy, while providing appropriate protection to public values.

Legislatures have the institutional capacity to deliberate over constitutional values. That legislators often fail to do so is one reason the courts, through the avoidance canon, may "remand" a sensitive constitutional issue back to the legislature from whence it came. Cutting against the application of the canon is the notion that a broad trigger for it creates a constitutional penumbra in which statutes, although constitutional, are interpreted to mean something other than their most plausible reading. For example, the mere presence of a serious constitutional question, regardless of whether the statute would almost certainly be held constitutional under thorough analysis, might trigger the canon's application, leading to a distorted outcome. Accordingly, in the context of legislatively enacted laws, the triggering question should be limited to whether a highly plausible interpretation of the statute raises serious constitutional *doubts*. If it does, then the court should search for another plausible interpretation that avoids such problems.[191]

Should this formulation differ in the context of ballot propositions? In such a situation, the electorate cannot deliberate on constitutional issues. Nonetheless, there is legal-process value in avoiding unnecessary constitutional rulings. Moreover, although respect for direct democracy as an institution requires giving the electorate its due, and the ballot proposition should be interpreted, at a minimum, to comport with the plain meaning of its text and the evident purposes of the electorate's demands, the degree of judicial deference to ballot propositions as an interpretive matter need not rise to the level applied to legislatively adopted laws.

A satisfactory resolution for application of the avoidance canon would be to formulate it identically in the contexts of both legislatively enacted law and ballot propositions, while recognizing that the application of the elements of the formulation may well be subtly different. The relevant inquiry should be whether there are serious con-

191. For someone who believes, as I do, that statutory interpretation is an eclectic process in which many factors are balanced, including public values, see, e.g., Frickey, *supra* note 57, in the great run of interesting cases there will usually be more than one "plausible" interpretation of a statute. Under my scheme of statutory interpretation, the presence of a serious constitutional doubt is relevant not only to the application of the avoidance canon, but also influences the basic interpretation of the statute.

stitutional doubts about the law in question. In some circumstances, the outcome of that inquiry may vary depending upon whether the law is the product of republican processes or direct democracy. For example, a facially neutral law with a strong racially disparate impact and a racially gerrymandered quality might be less dubious if adopted by a legislature rather than by the people themselves.[192] Similarly, the presence of a rational basis for legislation might be more easily presumed for legislative rather than direct laws.[193] If a serious constitutional doubt is raised by one understanding of a law, then the question should be whether an alternative plausible interpretation is available that avoids the question. Respect for *legislative* supremacy probably requires the court to limit the category of plausible alternative constructions to meanings derived from the plausible organizing purposes of the statute, as determined under the assumptions of legislative rationality and of statutory law as purposive law. As vast as this set may seem, it is probably narrower in many circumstances than the alternative constructions possible for ballot propositions. Respect for direct democracy requires only that the plain meaning of the text and the core, evident purposes of the electorate be given effect. In the majority of cases, a range of interpretations will not violate either plain text or core purposes and will otherwise be legitimated by considering sources such as established canons of interpretation and public values.

*b. Integrating nonrepublican measures into existing law*

In many situations, ballot propositions, like any other enacted law, will run up against the stock working assumptions of public law. Many of these assumptions are captured in Shapiro's analysis of canons that seek to promote continuity rather than discontinuity.[194] These canons may seem out of synch with direct democracy, which by its nature is designed to provide a discontinuous end-run around the ordinary course of things.[195] In truth, however, questions of continuity are endemic to all public law and easily addressed in statutory drafting. Moreover, a preference for republican lawmaking should suggest that statutes in derogation of republican processes—both because they were adopted as ballot propositions and because they might displace existing laws adopted through representative channels—should not be broadly construed.

192. *See* Eule, *supra* note 4, at 1562-67.

193. *See id.* at 1568-73.

194. *See* Shapiro, *supra* note 136.

195. *See supra* text accompanying notes 162-64.

For example, if a ballot proposition in arguable tension with a prior statute fails to contain an express repealer or an express savings clause, is there any harm in simply applying the canon that implied repeals are disfavored? A significant problem might arise only when the prior statute in doubt is evidently inconsistent with the most basic objectives of the voters, but in that case the situation fits an established exception to the implied repeal canon in any event.[196]

To take another example, consider the California ballot initiative at issue in *Evangelatos v. Superior Court*.[197] If a ballot proposition clearly abolishes joint and several liability for certain kinds of tort damages, but fails to indicate whether it applies to pending cases,[198] is there any harm in applying the canon disfavoring retroactive application of changes in positive law?[199] The proponents of the measure could have easily addressed this question when they drafted it. Applying the changes retroactively would amount to deferring to some supposed, but unproven, overwhelming desire of the people to solve the tort crisis preemptively. Furthermore, retroactive application would disadvantage litigants in pending cases whose attorneys relied upon the prior state of the law and would create a potential windfall for the insurance companies that drafted and promoted the measure.[200] In this instance, the people may have been clear that they wanted lower insurance rates, but beyond that, any attribution of overall objectives to the measure based on the understanding of the voters seems farfetched. Furthermore, because the insurance companies drafted and promoted the measure, it seems fair to construe its ambiguities against them, particularly on issues where one interpretation would result in their receiving a windfall.

In cases such as *Evangelatos*, the standard presumption of prospectivity serves a number of rule-of-law values, including encouraging careful drafting. Application of the canon may be especially important because despite the harsh impact of retroactive application upon reasonable reliance interests, courts today would ordinarily find no

196. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 549-50 (1974) (for implied repeal to be found, intent to repeal must be manifest).

197. 753 P.2d 585 (Cal. 1988).

198. *See* Fair Responsibility Act of 1986, CAL. CIV. CODE §§ 1431-1435.5 (West 1996) (popularly known as Proposition 51).

199. *See* 753 P.2d at 611.

200. *See id.* at 600-07 (in absence of express declaration of retroactivity, avoiding unfairness to litigants in pending cases and windfall for insurance companies counsels in favor of applying a presumption of prospectivity to the ballot initiative).

federal constitutional due process violation.[201] The presumption against retroactive changes in positive law is, therefore, a canon that, like several others already mentioned,[202] protects underenforced constitutional norms by attempting to shift the burden to the lawmaker—the voters in form, but the proponents of the ballot measure in reality—to address such issues of fairness. If it is to have any meaningful role in the context of direct democracy, it should be applied rather strictly, given both the ease with which the problem can be foreseen and corrected by clear drafting and the difficulty of expecting the electorate to identify, much less deliberate on, the fairness of the matter.

Indeed, the tort-reform example may illustrate a larger truth about the real institutional relationships at work in direct democracy today. To be sure, the electorate is not an ongoing institution capable of reaction and dialogue, but it also does not control the drafting and circulation of proposed ballot measures. In at least a few states, there is now a well-established "initiative industry" that can surely be expected to follow judicial decisions closely and react in light of them.[203] Moreover, on some issues—legislative term limits, for example—one or more national organizations trumpet ballot propositions across many states.[204] By the nature of the process, proponents of ballot measures must be well organized and well funded. Unlike the electorate as a whole, many of the active participants (such as trial lawyers and insurance companies on tort-reform issues) are frequent "players" in the repeat game of direct democracy. In such circumstances, it may be fair for judges to impose on such entities an interpretive regime similar to that used for legislatively adopted statutes. Indeed, it is much too simplistic to view direct democracy as simply a lawmaking process that replaces the legislature. Direct democracy consists of two separate processes: proposal by well-organized interests and ratification by the electorate. Although the second half of that process can in no way satisfy republican values, as traditionally understood to include structurally induced opportunities for deliberation, the proposing interests in the first portion of the process are surely capable of engaging in sophisticated relationships with governmental institu-

201. *See* United States v. Carlton, 114 S. Ct. 2018 (1994) (essentially abandoning judicial review under the due process clause of retroactive changes in statutory law). Of course, a state court might find a violation of the state constitution in such circumstances, but if the ballot proposition were an amendment to the state constitution, this avenue would presumably be precluded.

202. *See supra* text accompanying notes 133-47.

203. *See supra* note 20.

204. *See, e.g.*, Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623 (1996).

tions that have interpretive responsibility concerning the application of ballot propositions in the real world.

Sometimes, instead of being in tension with particular constitutional values such as due process, ballot propositions will jeopardize more general republican values. For example, suppose a ballot measure pushes the envelope on the established positive-law borderline—usually, in a state constitution—between legislative and popular power to make laws on certain subjects. In such instances, the collision between the republican values of representative lawmaking and the desire to give the people their due will be patent, because republicanism is clearly entrenched. In such circumstances, republican values surely deserve heightened respect because they flow not simply from the federal Republican Form of Government Clause and general public law principles, but from more explicit and enforceable positive state constitutional law.

Consider a ballot measure seeking to force a legislature to do a uniquely legislative task. For example, many state constitutions limit the use of direct democracy to appropriate public funds.[205] If a ballot proposition seems to create an entitlement to some public benefit, is it susceptible to constitutional attack as well as perhaps amenable to a narrowing interpretation that avoids the issue?[206] Unless the measure clearly requires the appropriation of funds, it would seem better to give the people their due on the issue—to say the public policy of the jurisdiction now recognizes the importance of the interest in question—while reserving for the legislature the responsibility of mediating the voters' desires with fiscal responsibility. This result could be accomplished by a strong clear-statement rule under which a ballot proposition will not be assumed to force the legislative hand on appropriations unless it clearly states so in the text.

Another example of a ballot proposition directly attacking the republican structure concerns the use of direct democracy to attempt to force a state legislature to request Congress to call a federal constitutional convention. In *American Federation of Labor-Congress of Industrial Organizations v. Eu*,[207] the California Supreme Court considered such a measure, under which, if the state legislature failed to comply, legislators would lose their salaries and the state Secretary of State would be compelled to inform the United States Congress that the California electorate requested a convention. The court concluded

205. *See, e.g.*, MAGLEBY, *supra* note 6, at 45.

206. *See, e.g.*, District of Columbia Bd. of Elections and Ethics v. District of Columbia, 520 A.2d 671 (D.C. 1986).

207. 686 P.2d 609 (Cal. 1984).

that, under the clear text of Article V of the Federal Constitution, only a state legislature could request a convention. Viewing the purpose of this requirement as the promotion of republican deliberation on such an important question, the court held that a ballot proposition could not attempt to coerce legislators to act on the issue.[208] Nor could the measure be upheld simply as a nonbinding resolution of the electorate asking the legislature to call a convention. Under the California Constitution, "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them"[209]—the power only to make binding law on a subject within the lawmaking purview of the people.[210]

In the final analysis, judicial consideration of ballot propositions should have two distinct goals: to give the electorate their due and to protect public values. Sometimes, the collision between these two goals will be so obvious that the issue must be resolved as a matter of constitutional law. In other cases, the issue under consideration deals

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208. *See id.* The court stated:

> [The drafters of the federal Constitution] deliberately chose to vest the power of proposal and ratification in state legislatures instead of the people. The framers were, of course, aware of the difference between a representative body and the electorate as a whole; they knew that a legislature is a deliberative body, empowered to conduct hearings, examine evidence, and debate propositions. Its members may be assumed generally to hold views reflecting the popular will, but no one expects legislators to agree with their constituents on every measure coming before that body. Yet, although undoubtedly aware that the views of a deliberating body concerning a proposed amendment might depart from those of a majority of the voters, the framers of the Constitution chose to give the voters no direct role in the amending process; legislatures alone received the power to apply for a national convention, and legislatures or conventions, as Congress chose, the power to ratify amendments.
>
> The only conclusion we can draw from this fact is that the drafters wanted the amending process in the hands of a body with the power to deliberate upon a proposed amendment and, after considering not only the views of the people but the merits of the proposition, to render a considered judgment. A rubber stamp legislature could not fulfill its function under Article V of the Constitution.

*Id.* at 620-21.

209. CAL. CONST. art. II, § 8(a).

210. Similarly, courts in California and Massachusetts have invalidated ballot propositions that attacked republican structures by attempting to mandate important changes in internal legislative procedures. *See* People's Advocate, Inc. v. Superior Court, 226 Cal. Rptr. 640 (Cal. App. 1986); Paisner v. Attorney Gen., 458 N.E.2d 734 (Mass. 1983). Such proposals were not "laws" because they had no effect outside the legislative branch, *cf.* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), and could not bind the legislature in any event because, under express state constitutional text, as well as more general principles of the separation of powers, the legislature is the sole governor of its internal rules and proceedings.

not with the overarching and evident objectives of the electorate, but with subsidiary questions of the application of ambiguous language to circumstances not clearly encompassed within the core purposes of the measure. In those instances, the subconstitutional, canonical approach to statutory interpretation may be sufficient to mediate the tensions. Although the electorate is hardly an institution capable of engaging in a repeat game based on a judicially imposed interpretive regime, the canonical approach is nonetheless justifiable in the context of direct democracy. The canonical approach promotes the protection of public values while placing the responsibility of careful drafting and deliberation upon an entity—the well-organized interests that control the process by which ballot measures are proposed—that is well-situated to protect itself.

In summary, it seems justified to propose a three-part canonical inquiry to interpreting ballot propositions. The first step is procedural: are there serious constitutional doubts that may be avoided by an alternative, plausible interpretation? As I have explained, the practical application of this canon may result in subtle differences from what would occur had the law in question been adopted through republican processes.[211]

The second step is substantive, but generalized: because ballot propositions are in derogation of republican government, there should be a general working presumption in favor of narrow construction when directly adopted laws are in tension with pre-existing law. Under this approach, the pre-existing law is displaced by the ballot proposition only when the clear text or evident, core purposes of the electorate so require. By a method of narrow construction, I do not mean an excuse for judicial willfulness in gutting a ballot measure of its obvious meaning within the cultural context in which it was adopted. Rather, I am simply suggesting that the prior-law-displacing-effects of ballot propositions should be presumptively viewed as less forceful than those of laws adopted by representative government. This second step is a product of the combination of two canonical schemes: the established canons promoting continuity, as bolstered by a quasi-constitutional structural canon protecting the underenforced constitutional norm of republicanism.

The third step is substantive, but particularized: to the extent a ballot proposition runs up against specialized substantive canons, such as the rule of lenity, those canons should have somewhat more force than they would in the context of a legislatively adopted law. This

211. *See supra* text accompanying notes 191-93.

proposal results from the bolstering effects that the general republicanism canon may have upon specific substantive canons.

None of these approaches seems insufficiently respectful of direct democracy because, under each of them, the core purposes of the electorate are protected. Moreover, under this three-step proposal, proponents of a ballot measure are on notice that if they wish their proposal to have legal effects beyond its evident, core purposes, they must draft the proposition so those consequences are clear. This allocation of responsibility should foster more robust public consideration of the ramifications of direct legislation and should limit strategic drafting and manipulation.

Two examples based on recent ballot propositions may serve to illustrate some of the features of this approach. First, consider a recent Colorado proposition that failed to receive majority voter support in the November 1996 election.[212] Under that proposition the state constitution would have been amended to provide parents with an "inalienable right . . . to direct and control the upbringing, education, values, and discipline of their children."[213] Because this amendment would have been inserted into a provision already recognizing that all persons have inalienable rights, it obviously would have created an internal conflict within the provision concerning the potentially conflicting rights of parents and their children. More important, the amendment had the potential effect of displacing extraordinary amounts of existing Colorado law concerning the authority of school boards to control the curriculum of public schools, the obligations of school teachers and others to report potential child abuse and neglect, the responsibilities of social workers, and so on. The amendment also would have potentially conflicted with federal constitutional principles in a variety of areas, including separation of church and state and the constitutional rights of children.

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212. *See* Robert Kowalski, *The Amendment Wars: Opponents' Campaigns Effective*, DENVER POST, Nov. 7, 1996, at AA04, *available in* 1996 WL 12635952.

213. The ballot proposition read in full (existing constitutional language in regular type, language to be omitted struck out, new language in CAPITAL LETTERS):

> Be it Enacted by the People of the State of Colorado:
>
> Article II, section 3 of the Colorado constitution is amended to read:
>
> (3) INALIENABLE RIGHTS. All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; of seeking and obtaining their safety and happiness; AND OF PARENTS TO DIRECT AND CONTROL THE UPBRINGING, EDUCATION, VALUES, AND DISCIPLINE OF THEIR CHILDREN.

The preference for legislative changes in law built into my approach would have had several virtues in the Colorado situation. For instance, it seems inconceivable that a legislature would have enacted, or proposed to the people for ratification, such a vague measure with such potentially wide-ranging effects, many of which are inconsistent with well-settled approaches to school curriculum, child welfare, and other areas of core state responsibility. The interests that would have been regulated by this measure, as well as others purporting to advocate the unorganized public interest, would have strongly represented themselves in the legislative process and, if not successful in defeating the measure, would have surely extracted amending language with more limited and specific coverage. In short, the legislative process would have provided more careful deliberation based on opportunities for affected interests to be heard, all toward the end of eliminating or more carefully crafting the measure. The filtering process of legislation might well have cured many, if not all, of the constitutional and policy problems arising from the measure as originally drafted.

In contrast, once this ballot proposition was drafted and circulation for signatures had begun, there was no method of providing public consideration and refinement. Had the proposition been adopted by Coloradans at the polls, it should have displaced existing law only to the extent required by its plain meaning (if any) and core purposes evident to any Coloradan paying attention to the ballot campaign. If proponents had wanted the measure to apply more broadly, it would have been simple enough to draft the measure with greater particularity. Of course, had that been done in the first place, the rhetoric and debate about the measure might have been far more focused—another virtue of the narrow-interpretation canonical approach.

A second example is the anti-affirmative-action measure approved by California voters in the November 1996 election. Proposition 209 is considerably more detailed than the Colorado parental-rights proposal.[214] Nonetheless, the California measure leaves its key

214. It provided that a new provision be added to the California Constitution, as follows:

> SEC. 31. (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (b) This section shall apply only to action taken after the section's effective date.
>
> (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

terms undefined. What, precisely, is the grant of "preferential treatment to" any person, on the basis of certain criteria, "in the operation of" public employment, education, or contracting?

Presumably—although I was not there and can claim no expertise—the core purposes of this measure, evident to all Californians following the ballot campaign, were to eliminate racial quotas and *Bakke*-style "plus factors" in such areas as hiring and promotion of state employees, admissions to state universities, and awarding of state contracts. Giving the people their due requires respect for such evident objectives. But how much more broadly should the measure sweep?

For instance, should Proposition 209 invalidate longstanding educational recruitment practices—in place long before more targeted and controversial methods were implemented to assure, for example, that people of color would be present in the classroom—that target underrepresented groups, advertise the attractiveness of the university, and especially urge members of those groups to apply for admission? Arguably, targeted recruitment is providing "preferential treatment to" someone on the basis of prohibited criteria "in the operation of" public education. But if this measure was intended to have such a comprehensive impact in displacing longstanding and uncontroversial education operations that do not result in any actual preferential treatment in admissions decisions themselves—and therefore not only do not create obvious harm-in-fact to non-minorities, but also hardly produce the hostility and stigmatic concerns to such persons that have made "affirmative action" so controversial—the proponents of the measure

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(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured person's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

should have drafted it more clearly to do so. The measure does not, after all, say anything specific about recruitment of employees, students, or contractors. More generally, the measure does not say the state "shall never consider" certain criteria in any of its operations.[215]

Again, a preference for representative lawmaking on this subject would have potentially produced amendments lending needed specificity to the measure and would certainly have ensured a more nuanced implementation of it. For example, the proposition in many ways simply duplicates the recent decision of the Board of Regents of the University of California system to abolish affirmative action.[216] The Regents are far better situated than the voters to assess precisely where to draw the line on prohibited measures. Moreover, university administrators and Regents are well situated to engage in an ongoing dialogue about the meaning and implementation of the prohibition. The issue of targeted recruitment would thus be dealt with in a careful manner that focuses on the pros and cons of that practice, free from the baggage of the controversies surrounding more aggressive considerations of sensitive criteria.

## III
## CANONICAL INTERPRETATION AND OTHER PARADIGMS OF THE RELATIONSHIP OF "THE PEOPLE" AND THE CONSTITUTION

Parts I and II considered quasi-constitutional interpretive techniques within the prevailing paradigm, under which direct democracy is often viewed as in tension with federal constitutional values. This paradigm assumes, consistent with republican theory, that "We the People" exercise whatever authority we have through the mediating influences of representative governmental structures. As explained in this Part, several prominent constitutional scholars have recently challenged this understanding of the place of the people in our constitutional scheme. This essay is hardly the place to survey these arguments, much less integrate them into the context of direct democracy in the states today. Nonetheless, these competing conceptions of the role of the people in our polity deserve some consideration. In the

215. In this brief discussion, I have not considered whether there are any serious federal constitutional doubts about this measure, either on its face or as applied. Under my approach, of course, if good arguments along these lines emerge, that, too, may counsel for narrow construction.

216. *See, e.g.*, Amy Wallace and Dave Lesher, *UC Regents, in Historic Vote, Wipe Out Affirmative Action Diversity*, L.A. TIMES, July 21, 1995, at 1.

interests of conserving space and reader patience, I shall be brief and quite summary, providing less citational support than commonplace in law reviews.

First, I should emphasize that my use of "republicanism" in this essay has been limited. I do not mean to embrace all the interesting and provocative ideas associated with the republican revival in constitutional theory. In fact, I agree with critics that republicanism is a gauzy label capacious enough to embody many differing conceptions of constitutional law in general and the role of popular sovereignty in particular.[217]

My point is a more basic one. By its text, the Constitution establishes a representative form of government, not a direct democracy. The Republican Form of Government Clause, when read in light of the many discussions of the virtues of representative government found in *The Federalist Papers*, clearly embraces the notion that the governments of the states are not simply to avoid monarchy, but are to be structured in the ways of representative government.[218] Indeed, according to a prominent Progressive historian critical of the antipopulist values of the framers, "they would have looked upon such a scheme [of direct democracy] with a feeling akin to horror . . . no one has any warrant for assuming that the founders of our federal system would have shown the slightest countenance to a system of initiative and referendum applied either to state or national affairs."[219]

In light of these factors, legislation or state constitutional amendment by ballot is an innovation in tension with the text of the Constitution and the values of the founding generation.[220] This point is not solely relevant to constitutional originalists. There is no reason to think our context or values are radically different today, in light of the realities of direct democracy—the sources of ballot measures, the electorate's limited understanding of them, and their seemingly frequent use to jeopardize public values.

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217. *See, e.g.*, Richard Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1697 (1989).

218. *See supra* text accompanying notes 11-12.

219. CHARLES A. BEARD & BIRL E. SHULTZ, DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM, AND RECALL 28-29 (1912).

220. Although it might be suggested that our tradition of New England town meetings undercuts this generalization, in my view those gatherings have little relevance to modern-day considerations of direct democracy. It seems specious to compare a statewide initiative or even a local initiative in a large, diverse community in which organized interests are active—situations in which the citizenry never gathers for public discussion and deliberation—to a gathering of citizens in a small, homogenous community in a meeting "characterized by political equality, popular sovereignty, and open and frank discussion." MAGLEBY, *supra* note 6, at 22.

A basic complaint about this perspective is that it denigrates the sovereignty of the people. The authority of the Constitution purports to flow from "We the People," not from their republican representatives or the then-sovereign and independent states. Indeed, the constitutional framers used recourse to special ratifying conventions in each state so that the Constitution could claim direct linkage to popular sovereignty. Over time, according to Bruce Ackerman, the evolution of our "higher law" of constitutionalism has occurred because of "constitutional moments" in which the people themselves exercised extraordinary revisionist authority.[221] In short, under this picture, direct democracy at the state and local level today may not be in tension with republican values. Akhil Amar puts it most boldly when he asserts that "[t]he central pillar of Republican Government . . . is popular sovereignty. In a Republican Government, the people rule."[222] For Amar, the supposed tension between the Republican Form of Government Clause and direct democracy in the states is based on mere "'law office history.'"[223]

To these claims, a traditional republican theorist—one focusing on representative structure without concern for the broader theoretical claims made by republican revivalists—might respond: "A common fallacy confuses the framers' principle of popular sovereignty, the principle that legitimate power must be derived from the governed, with its exercise through unmediated direct lawmaking."[224] After all, the framers did not put the Constitution up to a vote of the people themselves, but to representatives chosen by some segment of the American citizenry and assembled into ratification conventions. To be sure, this recourse to the sovereignty of the people was more democratic than any prior step in American constitutionalism, but it nonetheless used a republican structure—one of representatives situated such that they might deliberate in the public interest—to effectuate the linkage between the Constitution and the people. Despite innovative and interesting arguments to the contrary,[225] I would speculate that

221. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266-94 (1991).

222. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994).

223. *Id.* at 756.

224. Linde, *supra* note 30, at 719. For an elaboration, by an historian, of the argument that Amar mistakenly collapses the republican concept of sovereignty in the people into "popular sovereignty," rather than conjoining the concept with the essential republican component of representative government, see G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787 (1994).

225. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadel-*

few scholars—and essentially no judges or political leaders—believe the federal Constitution may be formally amended by "the people" except when that popular sovereignty is channeled through the procedures specified in Article V.[226] Indeed, it has been through that formal amendment process,[227] coupled with voting-rights reforms adopted through constitutionally sanctioned congressional authority[228] and some judicial decisions recognizing a federal constitutional right to vote free from certain barriers,[229] that popular sovereignty has been legitimately expanded throughout our system.

As practiced today in the states, direct democracy hardly resembles Ackerman's vision of "higher lawmaking"—rare instances of extraordinary and principled popular political upheaval widely separated by long, intervening periods in which the only politics is that of the ordinary. Direct democracy is a routine event at every election in California and many other states. The electorate cannot plausibly be expected to understand much of the details of what is on the ballot. The many proposals range from the highminded to the mundane and the vulgar. The process is driven by a well-organized initiative industry and by single-issue politics. Fortunes are spent on media advertising. About all that holds the system together is a refusal to capitulate to legislative outcomes and a vague and at least potentially demagogic rhetoric about power to the people.[230]

In my view, Ackerman's work comes into play here not as a counterweight to republican suspicions about direct democracy, but as a lens through which the rise of direct democracy and the potential judicial response to it might be assessed. In my judgment, a major

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*phia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

226. *See, e.g.*, Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1305 n.34 (1995) (book review) (describing Amar's argument as "neat. But not, standing without more, remotely persuasive to the great bulk of present-day American lawyers.") (citing Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1290 (1995), who called Amar's argument "creative," "unconvincing," and "bizarre").

227. *See* U.S. CONST. amends. XV, XIX, XXIV and XXVI.

228. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)), the constitutionality of which was upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966), and City of Rome v. United States, 446 U.S. 156 (1980).

229. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (residency requirement); Reynolds v. Sims, 377 U.S. 533 (1964) (one person, one vote).

230. For these reasons, direct democracy as practiced today also cannot satisfy the desires of populist scholars, who decry the notion of constitutional law as "higher lawmaking" and view the essence of democracy as the empowerment of the people. *See, e.g.*, PARKER, *supra* note 20.

contribution of Ackerman's work is to remind us that the Constitution has meant something much different at various times in our history, and that sometimes those differences in meaning cannot easily be explained by recourse to the formal amendment process. In particular, he forces us to recognize that the many changes in constitutional meaning wrought by the New Deal came about without the adoption of any changes in constitutional text.[231]

His notion that the New Deal is a "constitutional moment" of higher lawmaking that is difficult to justify theoretically because no Article V process occurred, strikes me as a fine question for constitutional theorists to take up. If we do, we might also think about the rise of direct democracy during the Progressive Era a few decades before the New Deal. The election of 1896 resulted in the crushing of the Populist alliance at the federal level.[232] Nonetheless, Progressive reforms spread throughout state and local governments, particularly in the western United States.[233] In 1912, in *Pacific States*, the Supreme Court in effect "punted" on the federal constitutionality of some of the most important of the structural progressive reforms: the initiative and referendum. Since that time, it has been taken for granted that direct democracy may be used in the states and localities, despite its formal tension with the Republican Form of Government Clause.

Is not this story reminiscent of the changes wrought by the New Deal? Without any constitutional amendment, and with significant intrusion upon the local police power, the Supreme Court abandoned any serious attempt to cabin congressional authority to regulate "commerce among the states" or to otherwise police the boundary between congressional power and state sovereignty.[234] Similarly, the Court abandoned enforcement of strict separation of powers notions, putting the nondelegation doctrine to rest and allowing the administrative state to flourish.[235]

Like the expansion of congressional authority versus the states and the abandonment of a stringent approach to separation of powers,

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231. In his other two constitutional moments—the Founding and Reconstruction—fundamental constitutional change was, of course, embodied in constitutional text. *See* ACKERMAN, *supra* note 221, at 40 (identifying his three "constitutional moments").

232. *See, e.g.*, *id.* at 101, 111.

233. *See, e.g.*, CRONIN, *supra* note 4, at 50-59; Charles M. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243 (1975).

234. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

235. *See* Yakus v. United States, 321 U.S. 414 (1944).

direct democracy happened as the result of the confluence of powerful political currents rather than formal constitutional amendment. It was constitutionally legitimated only backhandedly, by judicial abandonment of meaningful judicial review for prudential rather than substantive reasons. Although the Progressive Era fails to satisfy Ackerman's definition of a "constitutional moment,"[236] it did work a fundamental

236. Ackerman argues that a constitutional moment that legitimately results in informal constitutional change (change not incorporated into a modification of constitutional text) must be the product of a broad and deliberated movement of the citizenry that produces a seismic and longstanding shift in the national political branches. *See* ACKERMAN, *supra* note 221, at 266-94. Thus, for him the election of 1896, in which the populist revolt was repudiated at the federal level, was a "failed constitutional moment." *Id.* at 84. Subsequent Progressive developments occurred only in the states.

Moreover, under Ackerman's approach, the Supreme Court must be involved as well if an informal constitutional moment is to arise. Because an informal constitutional moment does not result in a constitutional amendment crystallizing the changes, the meaning of the moment must be revealed through a process of synthetic interpretation by the Supreme Court over a period of time. *See id.* at 283-85. Presidential appointments (with Senate confirmations, of course) of Justices to the Court may contribute to, or defeat, the "constitutional momentness" of a period. *See id.* at 50-56, 269.

Now, all of this may appear to be a bit too tidy. *See generally* Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992) (reviewing ACKERMAN, *supra* note 221). It fits the New Deal like hand in glove, just as the rejection of the Bork nomination undercuts the argument, from Ackermanian principles, that the Reagan Revolution, as momentous as it was, had a constitutional momentness about it as well. *See* ACKERMAN, *supra* note 221, at 50-56, 269.

A broader and perhaps less tailored inquiry along these lines might suggest that what is really going on is a fascinating and rather unexplored tale of the relationship of the Supreme Court and other governmental institutions within the cycle of "critical elections" in American history. To specify what I mean very briefly: political scientists tell us that certain federal elections—there is some definitional disagreement, but consensus holds for the election periods of 1824-28, 1860, 1896 (which crushed the Populist alliance at the federal level), and 1928-32 (Ackerman's informal moment)—were "critical elections" resulting in a massive and longstanding realignment of the American electorate and, consequently, in the Congress and Presidency as well. The decay of the once-dominant coalition and the rise of a realigning coalition have markedly affected America in each of these eras. The Supreme Court has lagged behind each of these critical realignments, only to be brought within them, ultimately, by conformance to public expectations and by the inexorable passage of time, in which Justices of the former era are replaced by ones in tune with the current dominant coalition. (For a discussion of critical elections and their relationship to Supreme Court doctrine, see, e.g, David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790; Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 803-08 (1975)).

The ultimate movement of the Court to incorporate the new into the old law is, I would suggest, at least as much a pragmatic or legal-realist exercise as a synthetic one. *See infra* note 237. My point here is descriptive, not normative. I happen to think that there are ways to defend my perspective on normative as well as empirical grounds, but that is, as we all say in footnotes that are tantalizingly tangential, the subject for another article.

change in the relationship of federal constitutional republican values and popular sovereignty throughout the states—all without any federal constitutional amendment—that was ultimately entrenched as a matter of federal constitutional law by judicial avoidance of the ultimate constitutional questions.[237]

A final parallel is intriguing. Since the New Deal the federal courts have largely refused, as a matter of constitutional law, to referee disputes of structural constitutionalism concerning federalism and nondelegation. Since the Progressive Era, the same can be said about republican form of government.[238] It is not fully accurate to conclude that the Constitution changed meaning in these three areas as a result of one or more informal "constitutional moments"—the constitutional values of federalism, separation of powers, and republican form did not evaporate for eternity through some judicial magic trick that was the functional equivalent of a repealing constitutional amendment. Instead, the courts began to abstain prudentially from exercising judicial

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237. Indeed, a useful counter-theory of informal constitutional change to those of Amar and Ackerman is what Frank Michelman has called a "realist" perspective, under which "higher legal meaning can change out of sight of official higher lawmaking" through "official interpretations of the expressly given text, whether done explicitly by judges deciding cases . . . or implicitly by legislative and executive officeholders enacting and enforcing statutes . . . , in either case with the kind of eventual acceptance from the other branches and the public that turns the interpreted meaning into effective law." Michelman, *supra* note 226, at 1328 (referring to essays contributed by Sanford Levinson and Stephen Griffin to RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)). Is this not at least as plausible a description of the New Deal as Ackerman's notion of constitutional moments, and does it not better reflect the actual institutional dynamics over time that occurred? Is it not also a persuasive understanding of the use of quasi-constitutional interpretive techniques to construct an interpretive regime at the subconstitutional rather than constitutional level? To be sure, this is a descriptive, not normative, account.

238. Indeed, at the beginning of the Progressive Era the Court had seemingly viewed the Republican Form of Government Clause as a potential source of authority to invalidate "the sudden impulses of mere majorities":

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

*In re* Duncan, 139 U.S. 449, 461 (1891). For an overview of other Progressive Era cases, prior to *Pacific States*, in which federal and state courts adjudicated controversies under the Republican Form of Government Clause, see WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 247-64 (1972).

review to enforce those values, for the issues associated with them became increasingly difficult to resolve through manageable standards of judicial review in light of changing political and social circumstances. For the two structural values associated with the New Deal, in place of the thumbs up/thumbs down of *Marbury v. Madison*, the Court substituted the thumb-on-the-interpretive scale of quasi-constitutional methods to mediate these constitutional values and prudential concerns. The temptation remains to apply the quasi-constitutional technique to the third category, direct democracy, as well. The theoretical barriers to doing so that may have seemed so formidable at first glance[239] may turn out to be largely illusory. Practical political dynamics may prove more formidable.

## CONCLUSION

Frank Michelman has written that "[p]opular sovereignty is surely in some part a mythic idea, one whose function is as much evocative or expressive as it is descriptive."[240] Never is the truth of this comment more obvious than in the consideration of direct democracy in the states today. Our federal constitutional tradition, based on an uneasy mediation of the somewhat inharmonious concepts of higher law, representative government, and popular sovereignty,[241] cannot easily come to grips with legislation by ballot. Direct democracy simultaneously evokes some of our highest normative hopes while undercutting republican structures and, at least occasionally, endangering specific guarantees entrenched in our Constitution. It is, therefore, unsurprising that courts approach ballot propositions gingerly. Expanding the interpretive possibilities beyond judicial review to include related quasi-constitutional interpretive techniques may provide enhanced judicial flexibility to mediate the challenging cluster of competing considerations in this area. To be sure, it also increases the evident opportunities for judicial willfulness. Indeed, one might suggest that higher law/ representative government/popular sovereignty—as well as interpretive legitimacy/willfulness/abdication—are all concepts and distinctions we may need simultaneously to structure our analysis while never definitively resolving it in a fully theoretically

239. *See supra* Part II(c)(2).

240. Frank I. Michelman, *Always Under Law?*, 12 CONST. COMMENT. 227, 231 (1995).

241. *See id.*

satisfying way.[242] At a minimum, that conclusion seems apt for the problems of interpretation that arise from our commitment to popular sovereignty within a republican form of government.

242. *Cf.* Michelman, *supra* note 226, at 1330 (discussing analysis of Sanford Levinson, which in turn borrows from J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990)).